



Economic and Social Council

Distr.: General
2 August 2017

Original: English

Economic Commission for Europe

Meeting of the Parties to the Convention on
Access to Information, Public Participation
in Decision-making and Access to Justice
in Environmental Matters

Sixth session

Budva, Montenegro, 11 – 13 September 2017

Item 7 (b) of the provisional agenda

**Procedures and mechanisms facilitating the implementation of the Convention:
Compliance mechanism**

Report of the Compliance Committee*

Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention

Summary

This document is prepared by the Compliance Committee pursuant to the request set out in paragraph 19 of decision V/9 of the Meeting of the Parties (ECE/MP.PP/2014/2/Add.1) and in accordance with the Committee's mandate set out in paragraph 35 of the annex to decision I/7 of the Meeting of the Parties on review of compliance (ECE/MP.PP/2/Add.8).

* The present document is being issued without formal editing.



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I. Introduction

1. At its fifth session (Maastricht, 30 June–1 July 2014), the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) adopted decision V/9n on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention (see ECE/MP.PP/2014/2/Add.1).

II. Summary of follow-up

2. The Party concerned provided its first progress report on the implementation of decision V/9n on 29 December 2014.

3. Comments on the first progress report of the Party concerned were received from the communicants of communications ACCC/C/2012/68 and an observer (Coalition for Access to Justice for the Environment) on 22 January 2015; from the communicant of communication ACCC/C/2010/53, a communicant of communication ACCC/C/2008/33 (Client Earth) and two observers (law firm, Richard Buxton Environmental and Public Law, and also an observer whose name was withheld on request) on 23 January 2015; and from a communicant of communication ACCC/C/2008/33 (Mr. Robert Latimer) on 5, 23, 25 and 28 January 2015.

4. On 20 October 2015, the secretariat sent the Committee's first progress review on the implementation of decision V/9n to the Party concerned.

5. On 13 November 2015 the Party concerned provided its second progress report.

6. Comments on the second progress report were received from the communicants of communications ACCC/C/2010/53 on 8 December 2015, the communicants of communication ACCC/C/2008/33 (Mr. Robert Latimer and Client Earth) on 18 December 2015 and the communicants of communication ACCC/C/2012/68 on 12 January 2016. Comments were also received from observers, Royal Society for the Protection of Birds (RSPB), Friends of the Earth, Friends of the Earth (Scotland) and C & J Black Solicitors on 17 December 2015 and Richard Buxton Environmental and Public Law on 18 December 2015.

7. At its fifty-second meeting (Geneva, 8-11 March 2016), the Committee reviewed the implementation of decision V/9n in open session with the participation of the Party concerned, communicants and observers by audio-conference. On 9 March 2016, the observers, RSPB and Friends of the Earth, provided their statement to the meeting in writing.

8. By letter of 13 April 2016, the secretariat invited the Party concerned to submit the comments it had made during the open session at the Committee's fifty-second meeting in writing, together with its response to the questions posed during the session, by 27 April 2016. The Party concerned provided its reply on 29 April 2016.

9. Comments on the reply of the Party concerned of 29 April 2016 were received from the communicant of communications ACCC/C/2011/64 and ACCC/C/2011/65 on 6 May 2016, the communicant of communication ACCC/C/2012/68 on 7 and 16 May 2016 and observers, RSPB, Friends of the Earth, Friends of the Earth (Scotland) and C & J Black Solicitors, on 6 May 2016.

10. On 24 February 2017, the secretariat sent the Committee's second progress review on the implementation of decision V/9n to the Party concerned.

11. At its fifty-sixth meeting (Geneva, 28 February – 3 March 2017), the Committee reviewed the implementation of decision V/9n in open session with the participation of the Party concerned, communicants and observers by audio-conference. In advance of this session, the Committee received statements from a communicant of communication ACCC/C/2008/33 (ClientEarth) on 21 February 2017 and from an observer (RSPB) on 27 February 2017.

12. Following the meeting, written statements were received from the observer, Richard Buxton Environmental and Public Law, representing the communicants of communications ACCC/C/2008/23 and ACCC/C/2013/86, as well as the communicant of communication ACCC/C/2008/33 (Mr. Latimer) on 6 March 2017. Statements were received from the communicant of communication ACCC/C/2008/33 (Client Earth) and the observers, RSPB and Friends of the Earth, on 7 March 2017, from the observer, John Muir Trust, on 1 April 2017 and from the communicant of communication ACCC/C/2012/68 (Ms. Metcalfe) on 2 April 2017.

13. The Party concerned provided its third progress report on 3 April 2017 and a brief clarification on 11 April 2017.

14. Comments on the third progress report of the Party concerned were received on 24 April 2017 from a communicant of communication ACCC/C/2008/33 (ClientEarth) together with observers, Friends of the Earth, RSPB and C&J Black Solicitors. Comments were also received on that date from an observer, Ms. Crosthwaite. On 25 April 2017, further comments were received from ClientEarth and from the communicant of communication ACCC/C/2012/68 (Ms. Metcalfe), the latter supplemented on 7 May 2017. The Committee also received comments from the communicant of communication ACCC/C/2008/33 (Mr. Latimer) on 21 and 28 April 2017 and from the observer, John Muir Trust, on 26 May 2017.

15. On 15 June 2017, the Party concerned provided its reply to the questions raised by the communicant of communication ACCC/C/2008/33 (ClientEarth) and observers (RSPB and Friends of the Earth) at the Committee's fifty-sixth meeting.

16. On 17 and 21 June 2017, the communicants of communication ACCC/C/2008/33 (Mr. Latimer and ClientEarth, the latter together with observers, RSPB and Friends of the Earth) provided comments to the reply of the Party concerned of 15 June 2017.

17. The Committee adopted its report to the sixth session of the Meeting of the Parties on decision V/9n through its electronic decision-making procedure on 25 July 2017, and requested the secretariat to send it to the Party concerned, the communicants and observers.

III. Considerations and evaluation by the Committee

18. In order to fulfil decision V/9n, the Party concerned would need to provide evidence that:

(a) It has further reviewed its system for allocating costs in all court procedures subject to article 9 of the Convention, and has undertaken practical and legislative measures to ensure that the allocation of costs in all such cases is fair and equitable and not prohibitively expensive;¹

¹ Decision V/9n, para. 8 (a).

(b) It has further considered the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice;²

(c) It has further reviewed its rules regarding the time frame for the bringing of applications for judicial review to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework;³

(d) It has put in place the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement article 9, paragraph 4, of the Convention;⁴ and

(e) Plans and programmes similar in nature to national renewable energy action plans are submitted to public participation as required by article 7, in conjunction with the relevant paragraphs of article 6, of the Convention.⁵

19. The Committee welcomes the three progress reports received from the Party concerned, as well as the further information provided on 29 April 2016 and 11 April and 15 June 2017. The Committee also welcomes the comments and information provided by communicants and observers (see paras. 3 – 16 above).

20. As a preliminary matter, the Committee notes the exceptional engagement of the communicants and an unusually high number of observers in the follow-up on this decision. The Committee welcomes this active engagement in the follow-up and considers this an indication of the significance of the issues addressed in the decision.

Paragraph 3 of decision V/9n –raw data

21. In its first progress review, the Committee noted that a representative of the communicant of communication ACCC/C/2010/53, though expressing concern regarding other environmental developments in his location, confirmed that the Party concerned continued to release the requested raw data to the public in accordance with article 4, paragraph 1, of the Convention.⁶ The Committee has not subsequently received any information to contradict this assessment and presumes that, in the absence of information to the contrary, the Party concerned continues to release raw data to the public in accordance with article 4, paragraph 1, of the Convention.

Paragraphs 8 (a), (b) and (d) of decision V/9n – cost of review procedures under article 9 of the Convention

22. The Committee notes that the Party concerned has introduced a number of amendments to the legislation assessed in its report to the fifth session of the Meeting of the Parties.⁷ The Committee examines below the extent to which the law currently in force in England and Wales, Scotland and Northern Ireland fulfils paragraphs 8 (a), (b) and (d) of decision V/9n.

23. As an initial point, the Committee makes clear that “when assessing the costs related to procedures for access to justice in the light of the standard set by article 9, paragraph 4,

² Ibid., para. 8 (b).

³ Ibid., para. 8 (c).

⁴ Ibid., para. 8 (d).

⁵ Ibid., para. 9.

⁶ Committee’s first progress review, para. 21.

⁷ ECE/MP.PP/2014/23.

of the Convention, the Committee considers the cost system as a whole and in a systemic manner”.⁸

(a) England and Wales

Protective costs orders under the Civil Procedure Rules

24. Since 1 April 2013, Practice Direction 45 to the Civil Procedure Rules (CPR) provides for a protective costs order (PCO) in an “Aarhus Convention claim” of £5,000 for an individual claimant and £10,000 for NGOs, with a “cross cap” on a defendant’s liability for a successful claimant’s costs of £35,000.⁹

25. In its second progress review, the Committee welcomed the information provided by the Party concerned about proposals to amend the costs protection regime regarding Aarhus Convention cases following the judgment of the Court of Justice of the European Union in *European Commission v. United Kingdom* (Case C-530/11),¹⁰ and the communicants and observers’ comments on these proposals.¹¹

26. In its third progress report, the Party concerned informed the Committee that, following the conclusion of the public consultations on the proposals, some of the proposed amendments had entered into force on 28 February 2017¹² as the Civil Procedure (Amendment) Rules (SI 2017/95).¹³ The Committee examines below the extent to which these amendments (the 2017 amendments) fulfil paragraphs 8 (a), (b) and (d) of decision V/9n.

Types of claims covered

27. The 2017 amendments to the CPR changed the definition of “Aarhus Convention claim” to apply, in addition to judicial review of any decision, act and omission of a body exercising public functions within the scope of article 9 of the Convention, to statutory reviews within the scope of article 9, paragraphs 1 and 2, of the Convention (rule 45.41, paragraph (2) (a) as amended).¹⁴ The cost protection regime was accordingly extended to statutory reviews falling within the scope of article 9, paragraphs 1 and 2 of the Convention, but, still does not apply to statutory reviews within the scope of article 9, paragraph 3, of the Convention nor to private law claims.

28. The Committee considers that the extension of the costs protection regime to statutory reviews falling within article 9, paragraphs 1 and 2, of the Convention constitutes a positive step towards fulfilling paragraphs 8 (a), (b) and (d) of decision V/9n. However, as the Committee pointed out at paragraph 44 of its report on decision IV/9i to the fifth session,¹⁵ the requirement in article 9, paragraph 4, of the Convention that procedures not be prohibitively expensive applies to all procedures within the scope of paragraphs 1, 2 and 3 of that article. Therefore, while a step forward, the Committee finds that the above amendment is not sufficient to meet paragraphs 8 (a), (b) and (d) of decision V/9n concerning England and Wales.

⁸ ECE/MP.PP/C.1/2010/6/Add.3, para. 128.

⁹ See <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs/practice-direction-45-fixed-costs>.

¹⁰ ECLI:EU:C:2014:67.

¹¹ Committee’s second progress review, para. 74.

¹² Third progress report, para. 3.

¹³ <http://www.legislation.gov.uk/uksi/2017/95/article/8/made>.

¹⁴ Third progress report, para. 5 (b).

¹⁵ ECE/MP.PP/2014/23.

Eligibility for costs protection

29. Under the 2017 amendments, an Aarhus claim may be brought by “one or more members of the public” (rule 45.41, para. 2 (a)). According to paragraph 2 (b) of rule 45.41, references in the CPR to “a member or members of the public are to be construed in accordance with the Convention”.

30. The Committee welcomes the above amendments as an improvement on the proposed amendment examined in its second progress review, which would have applied to claims brought by “a member of the public”. In its second progress review, the Committee noted the concerns of communicants and observers that such a provision could be interpreted restrictively, so that only single individuals (natural persons), but not legal persons (e.g. NGOs) or groups (multiple claimants) would be eligible for the cost protection. The Committee had pointed out that such an interpretation would not be in compliance with the Convention.¹⁶

31. In its third progress report, the Party concerned submitted that since the term “members of the public” in the CPR as amended is to be interpreted in line with the Aarhus Convention, it will therefore include NGOs as well as one or more private individuals.¹⁷ In light of the phrasing of rule 45.41, paragraph (2) (b), the Committee has no reason to doubt that assertion.

32. In light of the foregoing, the Committee finds that rule 45.41, paragraph 2, is not inconsistent with paragraphs 8 (a), (b) and (d) of decision V/9n as regards who may be eligible for cost protection in England and Wales.

Levels of the costs caps

33. The 2013 Civil Procedure Rules established a fixed costs cap for “Aarhus claims” of £5,000 for individual claimants and £10,000 for all other claimants. Rule 45.44, paragraph (1) of the CPR as amended allows the courts, upon the application by a party to the proceedings or at their own discretion, to vary the default level of cost protection, including the possibility of complete removal of the cap. Under rule 45.44, paragraphs (2) and (3) as amended, the courts are required to ensure that any such variation would not make the costs prohibitively expensive for the claimant because of either exceeding the financial resources of the claimant or being “objectively unreasonable having regard to:

- (i) the situation of the parties;
- (ii) whether the claimant has a reasonable prospect of success;
- (iii) the importance of what is at stake for the claimant;
- (iv) the importance of what is at stake for the environment;
- (v) the complexity of the relevant law and procedure; and
- (vi) whether the claim is frivolous.”¹⁸

34. In its report on decision IV/9i to the fifth session, the Committee expressed concern that the (then fixed) cost caps of £5000 and £10,000 may be prohibitively expensive for many individuals and organizations.¹⁹ The Committee accordingly considers that the possibility of the court to lower a claimant’s costs cap below the default level, based on the

¹⁶ Committee’s second progress review, para. 79.

¹⁷ Third progress report, paras. 5 (a) and 8.

¹⁸ CPR, rule 45.44, para. (3) as amended.

¹⁹ ECE/MP.PP/2014/23, para. 47.

specific circumstances including the claimant's financial resources, would therefore contribute to fulfilling paragraphs 8 (a), (b) and (d) of decision V/9n.

35. However, in its second progress review the Committee noted that paragraph 39 of the 2015 consultation paper by the Party concerned on the proposed amendments stated that it would be exceptional for claimants to require more costs protection than the default costs caps.²⁰ In the light of this statement, the Committee considers that the amendment may be more often used to increase, rather than decrease, the caps.

36. The Committee further considers that the uncertainty concerning the actual level of the cap in any particular case due to the possibility of variation may also be contrary to the requirement in article 3, paragraph 1, of the Convention to establish a clear, transparent and consistent framework to implement the Convention, including article 9, paragraph 4. The Committee notes with concern that the cost cap amount can be subject to change and even complete removal by the court until the very end of the proceedings, thus increasing uncertainty for claimants. The Committee also notes the observers' statements that the courts would be able to vary the cost cap more than once within one stage of the proceedings and that applicants would not be able to withdraw their case at the point when they learn of an increased cost cap against them or after their opponent has already incurred costs exceeding the default cap.²¹

37. The Committee notes that in the calculation of what is to be considered "prohibitively expensive", the courts will not consider the costs incurred by the claimant but only the costs of the opposing party. The Committee considers that the possibility to vary the caps will likely increase the likelihood of satellite litigation seeking such a variation, and these satellite proceedings would potentially result in further costs and uncertainty for claimants, a concern also raised by several communicants and observers.

38. Based on the above, while welcoming the possibility to decrease the cap and increase the costs-cap and the criteria in paragraph 3 of rule 45.44 to assess what would be prohibitively expensive for that purpose, the Committee considers that the aspects examined above take the Party concerned further away from fulfilling paragraphs 8 (a), (b) and (d) of decision V/9n regarding England and Wales.

Costs for procedures with multiple claimants

39. The Committee notes with concern the statement of the Party concerned that in proceedings with multiple claimants the CPR as amended provides for a separate costs cap for each claimant. The Committee can see no basis for this amendment. The Committee has seen no evidence that one additional claimant doubles the cost of the proceeding for the defendant; two additional claimants triples the cost etc. Rather, it removes an important possibility for members of the public to defray the cost of proceedings by sharing the cost burden with other concerned members of the public. Moreover, the Committee considers that establishing separate cost caps for each individual claimant substantially increases the likelihood of extensive satellite litigation to determine the costs cap per claimant, further increasing uncertainty. The Committee therefore finds that this amendment moves the Party concerned further away from fulfilling paragraphs 8 (a), (b) and (d) of decision V/9n concerning England and Wales.

²⁰ See Committee's second progress review, para. 82.

²¹ Statement for the Committee's fifty-sixth meeting by observers, RSPB and FoE, 2 March 2017, pp. 1-2 and comments on the reply by the Party concerned from the communicant of communication ACCC/C/2008/33 (Client Earth) and observers (RSPB and Friends of the Earth), 21 June 2017, p. 3-4.

Cost protection on appeal

40. In its report on decision IV/9i to the fifth session, the Committee noted with concern rule 52.9A of the CPR, which stated that the court may make an order that the recoverable costs of the appeal will be limited to the extent which the court specifies having regard to (a) the means of both parties; (b) all the circumstances of the case; and (c) the need to facilitate access to justice.²² The Committee noted that this provision did not provide for guidance as to the potential level of the cap on appeal and expressed particular concern regarding the statement in rule 52.9A, paragraph (3) that “if the appeal raises an issue of principle or practice upon which substantial sums may turn, it may not be appropriate to make an order.”²³

41. The 2017 amendments introduced rule 52.19A, paragraph (2), which requires the court to make an order limiting the recoverable costs to the extent that this is necessary to prevent that the costs of proceedings will be prohibitively expensive for the claimant. Pursuant to rule 52.19A, paragraph (3), the court must have regard to any financial support that a person has received or is likely to receive.

42. The Committee welcomes that rule 52.19A implicitly recognizes that the requirement not to be prohibitively expensive applies to the procedure as a whole encompassing all stages of the proceedings subject to article 9 of the Convention, including the appeal stage. However, while the amended rule does introduce some clarity as to the factors to be considered by the courts when deciding on cost protection on appeal, the Committee expresses concern that rule 52.19A still does not set any maximum caps with regard to the costs to be ordered, thus leaving claimants with considerable uncertainty. The Committee accordingly finds that, while a positive step, rule 52.19A does not ensure sufficient clarity or cost protection for claimants in appeals regarding Aarhus Convention claims and that the Party concerned consequently does not yet fulfil paragraphs 8 (a), (b) and (d) of decision V/9n in England and Wales.

Schedule of claimant's financial resources

43. In accordance with rule 45.42, paragraph (1) (b), of the CPR as amended, to be eligible for cost protection a claimant needs to provide the court with “a schedule of financial resources”. In addition to personal financial resources, which observers point out are not explicitly limited to those available to finance litigation,²⁴ rule 45.42 requires that the schedule of financial resources includes any financial support which third parties have provided to the claimant or are likely to provide in the future.

44. The observers and communicants submitted inter alia that these amendments have introduced considerable uncertainty,²⁵ raise concerns over privacy²⁶ and will have a chilling effect on public interest litigation.²⁷

²² ECE/MP.PP/2014/23, para. 52.

²³ Ibid.

²⁴ See in that regard comments on the third progress report from the communicant of communication ACCC/C/2008/33 (ClientEarth) and observers (FoE, RSPB, C&J Black Solicitors), 24 April 2017, pp. 2-3.

²⁵ Statement following the Committee's 56th meeting by the communicant of communication ACCC/C/2008/33 (Client Earth) and observers (RSPB and FoE), 7 March 2017, pp. 1-2

²⁶ Ibid.

²⁷ Comments on the third progress report from the communicant of communication ACCC/C/2008/33 (ClientEarth) and observers (FoE, RSPB, C&J Black Solicitors), 24 April 2017, p. 2, and comments on third progress report from the communicant of communication ACCC/C/2008/33 (ClientEarth), 25 April 2017, para. 20.

45. The Party concerned acknowledged that certain claimants may be dissuaded from bringing a claim if they find it intrusive to disclose their financial information but submits that there is no evidence that this requirement in itself would encourage satellite litigation.²⁸ With regard to the latter point, several observers submitted that the experience of Scotland shows that a disproportionate amount of time and resources is devoted to ascertaining the level of the cost caps.²⁹

46. The communicant and observers further submitted that they anticipate significant satellite litigation around the issues of:

(a) The precise meaning of “significant assets, liabilities, income and expenditure”, including whether this applies only to funding available for litigation or also more generally;

(b) Whether or not sufficient information has been supplied in order to qualify for costs protection at all;

(c) The nature and extent of information required as regards third party support, with particular regard for crowd funding and major donors; and

(d) The correct course of action following a change in the claimant’s financial position part-way through the proceedings.³⁰

47. The Committee shares the concerns raised by the communicant and observers and notes that the requirement for any financial support from a third party to be disclosed may further limit the financial resources available to members of the public, as not all persons who may have otherwise been willing to provide financial support to the claimant’s claim may wish to have either the fact of their support, or the amount of that support, declared publicly. The Committee also notes that the phrase “support likely to be provided in the future” is vague and ambiguous. The Committee therefore considers that the requirements to provide financial information introduces considerable uncertainty and, contrary to the submission of the Party concerned, may indeed spur further satellite litigation.

48. The Committee thus finds that this amendment adds a further financial barrier to claimants seeking to bring claims within the scope of article 9, and thus moves the Party concerned further away from meeting paragraphs 8 (a), (b) and (d) of decision V/9n.

Costs protection prior to grant of permission to apply

49. In its report on decision IV/9i to the fifth session, the Committee welcomed the confirmation from the Party concerned that the current costs caps apply to all costs incurred up until the end of the first instance, including any costs incurred prior to the grant of permission to apply and in satellite proceedings at the first instance.³¹ In its report, the Committee further invited the Party concerned to provide a clear direction either in the CPR or the accompanying guidance to that effect.³²

50. While under the 2015 consultation paper by the Party concerned, claimants would only have received cost protection once permission to apply has been granted, this

²⁸ Reply to questions raised by the communicant of communication ACCC/C/2008/33 (Client Earth) and observers (RSPB and Friends of the Earth) by the Party concerned, 15 June 2017, p. 1.

²⁹ Comments from the communicant of communication ACCC/C/2008/33 (Client Earth) and observers (RSPB and FoE) on the reply by the Party concerned, 21 June 2017, p. 2.

³⁰ Ibid.

³¹ ECE/MP.PP/2014/23, para. 45.

³² Ibid.

amendment has not been taken over in the final version effective since 28 February 2017.³³ The Committee welcomes that the Party concerned did not proceed with these changes.

Costs relating to determination of an Aarhus claim

51. In its report on decision IV/9i to the fifth session, the Committee welcomed the inclusion in the CPR of a rule that if a defendant is not successful in challenging the claimant's assertion that the claim is an Aarhus claim, the court will normally order the defendant to pay the claimant's costs regarding that challenge on an indemnity basis.³⁴ However, under the 2017 amendments, defendants who unsuccessfully challenged the status of the claim as an Aarhus claim will now normally be ordered to pay the costs of those satellite proceedings on the standard basis only (rule 45.45, para. (3) (b)). The Committee considers that by decreasing defendants' potential costs exposure, this amendment will likely increase the likelihood of such challenges and, as a result, increase rather than decrease the potential costs and uncertainty for claimants in proceedings subject to article 9 of the Convention. The Committee thus finds this amendment moves the Party concerned further away from meeting paragraphs 8 (a), (b) and (d) of decision V/9n.

Cross-undertakings for damages

52. With respect to issuing injunctions to prevent environmental damage in Aarhus Convention claims, in its report on decision IV/9i to the fifth session, the Committee regretted that while the changes to the CPR in force since April 2013 were generally a positive step they were not sufficient to fully meet the requirement in article 3, paragraph 1, of the Convention for a clear, transparent and consistent framework to implement the Convention.³⁵ The Committee stated in particular that the provisions' reliance on judicial discretion did not provide certainty as to whether (a) the applicant will be required to give a cross-undertaking or not; (b) if a cross-undertaking is required, what the level of the undertaking will be; and (c) how the court should determine what would be "prohibitively expensive for the applicant".³⁶ The Committee further stated:

While recognizing it is ultimately for the Party concerned to decide how to implement this provision in its national law, the Committee notes that the simplest way to ensure compliance may be to provide that, when interim relief is sought in an Aarhus claim, no cross-undertaking will be required. Then the sole question for the judge is whether the injunctive relief sought is itself appropriate.³⁷

53. The 2017 amendment changed the conditions in paragraph 5.1B of Practice Direction 25A for issuing injunctions to prevent environmental damage in Aarhus Convention claims. The new paragraph 5.3, paragraph (3), of Practice Direction 25A requires the court, when assessing whether a cross-undertaking in damages would make continuing with a claim prohibitively expensive, to take into account subjective and objective criteria in line with the approach set out in the judgment of the CJEU in *Edwards*.³⁸ In addition, the court is required to have regard to any financial support which any person has provided or is likely to provide to the claimant.

54. While the above amendment provides for some greater clarity as regards (c) how the court should determine what would be "prohibitively expensive for the applicant", it does

³³ Third progress report, para. 9.

³⁴ ECE/MP.PP/2014/23, para. 46.

³⁵ ECE/MP.PP/2014/23, para. 54.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Case C-260/11, *Edwards and Pallikaropoulos v. Environment Agency et al*, ECLI:EU:C:2013:221.

not give any further clarity to applicants beforehand as to (a) whether a cross-undertaking will be required and (b) if a cross-undertaking is required, what its level will be. The Committee thus considers that this amendment does not meet the requirement in article 3, paragraph 1, of the Convention for a clear, transparent and consistent framework. The Committee accordingly finds that the Party concerned has not yet met paragraphs 8 (a), (b) and (d) of decision V/9n concerning England and Wales as regards cross-undertakings for damages.

Amendments regarding interveners and potential funders of litigation

55. According to section 87 of the Criminal Justice and Courts Act, as amended on 13 April 2015, the High Court or Court of Appeal can make a costs order against or in favour of an intervener under the Court's general discretion in relation to costs.³⁹ If a party applies to the Court asking it to order an intervener to pay that party's costs arising from the intervention, unless there are exceptional circumstances, the Court must make such an order if one of certain specified conditions are met.⁴⁰ The Committee considers that this provision may deter members of the public, including environmental NGOs, from acting as interveners in litigation concerning claims within the scope of the Convention. The Committee accordingly finds that this amendment may move the Party concerned further away from meeting paragraphs 8 (a), (b) and (d) of decision V/9n concerning England and Wales.

56. In July 2015, the Party concerned consulted on proposals to amend rules 85 and 86 of the Criminal Justice and Courts Act to require judicial review applicants to provide the court with information about the financing of the application so that the Court could consider whether to order costs to be paid by potential funders identified in that information.⁴¹ To date, the Committee has not been informed as to whether this amendment was made. The Committee considers that if such a proposal were to be adopted and applied to claims within the scope of the Convention, it may reduce the ability of potential claimants, including environmental NGOs, to gather funding for judicial review, as potential supporters may be put off doing so by the risk that they may have to subsequently pay legal costs if the case is unsuccessful. The Committee accordingly considers that if such an amendment were adopted it would move the Party concerned further away from meeting paragraphs 8 (a), (b) and (d) of decision V/9n concerning England and Wales.

Other matters

57. The Committee has received no information that the legal aid regime of the Party concerned has been amended in a manner that could help remedy the faults observed above. The Committee notes in that regard the submissions by communicants and observers that the availability of legal aid continues to be limited.⁴²

58. The Committee also notes communicants and observers' submissions that court fees have increased over time.⁴³ The Committee accordingly welcomes the explicit requirement

³⁹ <http://www.legislation.gov.uk/ukpga/2015/2/contents/enacted>.

⁴⁰ Criminal Justice and Courts Act, section 87, subsections (5)-(7).

⁴¹ https://consult.justice.gov.uk/digital-communications/reform-of-judicial-review-proposals-for-the-provis/supporting_documents/reformofjudicialreview.pdf.

⁴² E.g. comments on the third progress report from the communicant of communication ACCC/C/2008/33 (ClientEarth) and observers (FoE, RSPB, C&J Black Solicitors), 24 April 2017, p. 5.

⁴³ E.g. statement for the Committee's fifty-sixth meeting by the observers, RSPB and FoE, 2 March 2017, p. 3, and comments on third progress report by the communicant of communication ACCC/C/2008/33 (ClientEarth), 25 April 2017, para. 24.

in rule 45.44, paragraph (3), that the court fees payable by the claimant are to be taken into account when assessing whether proceedings within the scope of the article 9 of the Convention are prohibitively expensive.

Overall assessment: England and Wales

59. With respect to the 2017 amendments to the CPR, the Committee considers that there have been some positive improvements introduced into the rules, including the extension of “Aarhus claims” to include statutory reviews falling within article 9, paragraphs 1 and 2, of the Convention and the requirement that appeals in an Aarhus claim must also not be prohibitively expensive. The Committee however considers a number of the 2017 amendments to be very concerning, for example, the possibility to increase the cost caps and decrease the cross-caps and to even completely remove them at any time, and multiple times, during proceedings; the separate caps per claimant; the requirement to provide a schedule of financial resources, the ordering of a cost on a standard rather than an indemnity basis and the amendments regarding ordering interveners and third parties to pay the costs of proceedings.

60. In the light of the foregoing, the Committee finds that rather than moving the Party concerned towards meeting the requirements of paragraphs 8 (a), (b) and (d) of decision V/9n with respect to England and Wales, overall, the 2017 amendments appear to have moved the Party concerned further away from doing so.

(b) Scotland

61. In its third progress report, the Party concerned reported that on 16 November 2015 the Scottish Civil Justice Council (SCJC) had agreed draft rules amending the costs protection regime in Chapter 58A of the Court of Session Rules, which regulates Protective Expenses Orders (PEOs), and that the amended rules had entered into force on 11 January 2016.⁴⁴ The Party concerned further provided information on an ongoing review of the Court of Session Rules by the SCJC and that a public consultation on the proposed amendments had commenced on 28 March 2017.⁴⁵ The Committee has not to date been informed of the outcome of this review. This report accordingly assesses the extent to which the Court of Session Rules, as amended in 2016, meets paragraphs 8 (a), (b) and (d) of decision V/9n. Where relevant, the Committee also examines the extent to which the proposed 2017 amendments would, if adopted, meet these requirements.

Protective Expense Orders under the Court of Session Rules

62. Chapter 58A of the Court of Session Rules provides for a PEO of £5,000 with a cross-cap of £30,000 on the respondent’s liability to pay the costs of a successful applicant. The Court may, on cause being shown by the applicant, further lower the level of the PEO or raise the level of the cross-cap. In order to grant a PEO, the Court must be satisfied that the proceedings would be prohibitively expensive for the applicant, which is considered to be the case if the applicant could not reasonably proceed with the proceedings in the absence of a PEO.⁴⁶ The communicant of communication ACCC/C/2012/68 and the observer, John Muir Trust, referred to two cases in which these provisions have recently

⁴⁴ Third progress report, para. 18 referring to http://www.legislation.gov.uk/ssi/2015/408/pdfs/ssi_20150408_en.pdf.

⁴⁵ Ibid., paras. 21-22, referring to <http://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations/consultation-on-draft-court-rules-in-relation-to-protective-expenses-orders>.

⁴⁶ Rules 58A.1.(2), last sentence, 58A.2.(4), 58A.2A.(4)(c) and 58A.2B.4(b), of the Court of Sessions Rules.

been interpreted by the Inner House of the Court of Session (the Scottish court of appeal), namely *Gibson v. Scottish Ministers* and *John Muir Trust v. Scottish Ministers*.⁴⁷

63. In *Gibson v. Scottish Ministers*, the Court of Session held that when considering whether the proceedings would be prohibitively expensive for the applicant, the test is not the petitioner's ability to pay, but whether it is reasonable, in all the circumstances, that he or she should be required to do so.⁴⁸ In that respect, the Court mentioned as a relevant aspect the fact that, as the environment cannot defend itself, it needs to be represented by concerned citizens or organisations acting in the public interest.⁴⁹

64. In contrast, in *John Muir Trust v. Scottish Ministers* the majority of the Court of Session rejected the petitioners' submission that the Court should apply an objective test taking into account all criteria including the protection of the environment. The Court held that the "fundamental pre-requisite" for the granting of a PEO is that the expenses to be incurred would be prohibitively expensive for the applicant.⁵⁰ The Court subsequently rejected the application for a PEO because, according to its assessment, the NGO in question had sufficient funds to pay for the litigation in question.⁵¹

65. Noting the contrasting approaches of the above decisions, the Committee points out that the compliance of the Scottish costs protection system with article 9, paragraph 4, of the Convention will depend on how Chapter 58A is interpreted by the Scottish Courts and in this regard, the Committee expresses its approval of the approach taken by the Court in *Gibson v. Scottish Ministers*. Furthermore, in order to meet the requirement in article 3, paragraph 1, of the Convention, the application of the PEO regime in procedures subject to article 9, of the Convention must be clear, transparent and consistent. In keeping with this requirement, the Committee considers that the PEO default level should be the maximum amount of costs payable by a claimant in proceedings covered by article 9 of the Convention, with the possibility for the Court to lower that amount if the circumstances of the case mean that it is reasonable to do so. As the Committee stated in its second progress review, if the Party concerned were to demonstrate that its case law going forward followed the approach of the Court in *Gibson v. Scottish Ministers*, the Committee would find Chapter 58A of the Court of Session Rules to be in line with paragraphs 8 (a), (b) and (d) of decision V/9n.⁵²

66. The Committee notes, however, that the Party concerned has so far not demonstrated that the Scottish courts consistently follow the approach of *Gibson v. Scottish Ministers* and that in its third progress report, the Party concerned limited itself to describing the Court of Session Rules and the proposed amendments thereto.⁵³ The Committee also notes the submission by several observers that the application of the criteria for PEOs continues to be highly variable and typically argued at some length.⁵⁴ In light of the foregoing, the Committee finds that the Party concerned has not yet met the requirements of paragraphs 8 (a), (b) and (d) of decision V/9n concerning Scotland, with regard to when cost protection will be granted.

⁴⁷ Annex 1 to comments by the communicant of ACCC/C/2012/68 (Ms. Metcalfe), 7 May 2016, and annex 1 to the statement from the observer John Muir Trust, 1 April 2017.

⁴⁸ Ibid. (Ms. Metcalfe), para. 54.

⁴⁹ Ibid, para. 66.

⁵⁰ Annex 1 to the statement from the observer John Muir Trust, 1 April 2017, paras. 12 and 22-23.

⁵¹ Ibid, para. 28.

⁵² Committee's second progress review, 24 February 2017, para. 101.

⁵³ Third progress report, paras. 18-22.

⁵⁴ Comments on the third progress report from the communicant of communication ACCC/C/2008/33 (ClientEarth) and observers (FoE, RSPB, C&J Black Solicitors), 24 April 2017, p. 7.

Types of claims covered

67. The 2016 amendment of the Court of Session Rules extended the PEO regime from judicial review and statutory reviews within the scope of the European Union Public Participation Directive to all judicial review and statutory appeals engaging article 9, paragraphs 1, 2 and 3, of the Convention.⁵⁵ The Committee considers that this amendment moves the Party concerned closer towards fulfilling decision V/9n with respect to Scotland. However, since private law claims within the scope of the Convention are still excluded, the Committee finds that the Party concerned does not yet fully meet paragraphs 8 (a), (b) and (d) of decision V/9n concerning Scotland, as regards the types of claims covered.

Eligibility for costs protection

68. Prior to the 2016 amendment of the Court of Session Rules, the PEO regime was available only to individuals and NGOs promoting environmental protection. Since the amendment, challenges under article 9, paragraph 2, of the Convention (rule 58A.2A) are now available to members of “the public concerned” and challenges under article 9, paragraph 3, of the Convention (rule 58A.2.B.) are available to members of “the public”. Pursuant to rule 58A.1.(2), of the Court of Session Rules, the terms “the public concerned” and “the public” have the meanings set out in article 2 of the Convention. The Committee welcomes these amendments which should inter alia make cost protection available to community groups and similar bodies. The Committee accordingly finds that these amendments are a positive step by the Party concerned towards fulfilling paragraphs 8 (a), (b) and (d) of decision V/9n as regards eligibility for cost protection in Scotland.

Level of the cost caps

69. As noted above, Chapter 58A of the Court of Session Rules provides for a PEO of £5,000 with a cross-cap of £30,000. The Committee welcomes the possibility in the amended Court of Session Rules to decrease the level of the cost cap and increase the cross-cap.⁵⁶ The Committee notes that this differs from the situation in England and Wales where both the cap and cross-cap can be either decreased or increased (see para. 33 above). The Committee considers that this amendment moves the Party concerned closer towards meeting paragraphs 8 (a), (b) and (d) of decision V/9n regarding Scotland.

Cost protection on appeal

70. Under the Court of Sessions Rules as currently in force, an applicant is required to re-apply for a PEO when filing an appeal. The Committee considers that this situation leads to uncertainty and additional satellite litigation, which itself adds further cost, at the appeal stage and accordingly is not consistent with paragraphs 8 (a), (b) and (d) of decision V/9n.

71. Under the proposed 2017 amendments, an applicant would continue to be protected on appeal (“reclaiming motion”) by a cost cap obtained at first instance, as long as the appeal was filed by the opposing party.⁵⁷ However, if the applicant appeals the first instance decision, then he or she would need to file a new application for a PEO. The Committee welcomes the proposal to automatically extend the application of the cost cap at first instance to cover an appeal filed by the opposing party and considers this would be a

⁵⁵ Court of Session Rules as amended, rule 58A.1.(1).

⁵⁶ Rule 58A.4, paragraph (2) and (4), of the Court of Session Rules as amended.

⁵⁷ Proposed rule 58A.8, see Annex E to the Consultation document on Draft Court Rules in relation to Protective Expenses Orders, published on 28 March 2017, available at <http://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations/consultation-on-draft-court-rules-in-relation-to-protective-expenses-orders>.

positive step towards meeting paragraphs 8 (a), (b) and (d) of decision V/9n. The Committee encourages the Party concerned to consider applying this approach to appeals filed by the applicant also, or at least to adopt the approach taken in Northern Ireland, where costs protection is automatically continued albeit a further cap (at the same level) is applied (see paras. 87-88 below).

Other matters

72. The Committee welcomes proposed rule 58A.9. of the proposed 2017 amendments which would limit the total costs liability of an applicant who was unsuccessful in seeking a PEO to £500,⁵⁸ a proposal also welcomed by several observers.⁵⁹ The Committee considers that this proposal if adopted would increase certainty for applicants and thus be a positive step towards fulfilling paragraphs 8 (a), (b) and (d) of decision V/9n.

73. The Committee notes with concern the submission by observers that some fees, e.g. hearing fees, have doubled in recent time.⁶⁰ In this regard, the Committee encourages the Party concerned to following the approach of England and Wales to expressly include any court fees in the assessment of what would be “prohibitively expensive”.⁶¹

74. The Committee notes that it has not received any further information from the Party concerned with regard to legal aid in Scotland and notes observers’ submission that the availability of legal aid is limited in Scotland in practice.⁶²

Overall assessment: Scotland

75. The Committee welcomes the 2016 amendments to the Scottish Court of Session Rules, in particular with respect to the type of claims covered by the costs protection system, who is eligible to apply for costs protection and the possibility to decrease the cost cap and increase the cross-cap. However, as described above, there remain several aspects of the system which do not as yet meet paragraphs 8 (a), (b) or (d) of decision V/9n, not least that private law claims are still excluded from costs protection and that claimants must re-apply for costs protection if they appeal the court’s decision at first instance.

76. With respect to proposed 2017 amendments, the Committee welcomes the proposals examined above and considers that if adopted, these would move the Party concerned closer towards fulfilling paragraphs 8 (a), (b) and (d) of decision V/9n.

77. In the light of the above, the Committee finds that the Party concerned has not yet fulfilled paragraphs 8 (a), (b) and (d) of decision V/9n with respect to Scotland, but welcomes the significant steps to date in that direction.

(c) Northern Ireland

78. With respect to Northern Ireland, in its third progress report, the Party concerned reported that on 23 January 2017 the Department of Justice in Northern Ireland adopted the Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017,

⁵⁸ Proposed rule 58A.9..

⁵⁹ Comments on the third progress report from the communicant of communication ACCC/C/2008/33 (ClientEarth) and observers (FoE, RSPB, C&J Black Solicitors), 24 April 2017, p. 7.

⁶⁰ Annex 1 to the statement for the Committee’s 56th meeting by the observers RSPB and FoE, 2 March 2017, p. 4.

⁶¹ CPR rule 45.44, para. 3, see para. 58 above.

⁶² Annex 1 to the statement for the Committee’s fifty-sixth meeting by the observers RSPB and FoE, 2 March 2017, p. 4.

which came into force on 14 February 2017.⁶³ These Regulations amend the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 assessed by the Committee in its report on decision IV/9i to the fifth session.⁶⁴

79. In accordance with regulation 3 of the Cost Protection Regulations, in an Aarhus Convention case, the court shall order that any costs recoverable from an individual applicant not exceed £5,000 and £10,000 where the applicant is a legal person or an individual applying in the name of a legal entity or unincorporated association. The defendant's liability for a successful claimant's costs is capped at £35,000, as in England and Wales.

Types of claims covered

80. In its third progress report, the Party concerned stated that the cost protection rules in Northern Ireland continue to apply to statutory and judicial reviews within the scope of the Convention.⁶⁵ It did not report on any extension of these rules to private law claims. The Committee therefore finds that, by excluding private law claims from the scope of the cost protection, the Party concerned fails to fully meet paragraphs 8 (a), (b) and (d), of decision V9n with respect to Northern Ireland.

Eligibility for cost protection

81. Regarding who is eligible for costs protection, the Party concerned stated in its third progress report that the amended Regulations make it clear that the term "members of the public" is to be interpreted in line with the Convention.⁶⁶ In this regard, the 2017 amendment to regulation 2 of the Cost Protection Regulations states "a member of the public (as defined by article 2 of the Aarhus Convention)". The Committee consider this amendment to be a useful clarification of who is eligible for cost protection and a step towards fulfilling paragraphs 8 (a), (b) and (d) of decision V/9n.

Level of cost protection

82. The Committee notes that regulation 3, paragraph 2, of the 2013 Cost Protection Regulations, which provide that costs recoverable from an applicant shall not exceed £5,000 where the applicant is an individual and £10,000 where the applicant is a legal person or an individual applying in the name of a legal entity or unincorporated association, is retained. Similarly, regulation 3, paragraph 4, continues to cap the liability of the defendant for a successful claimant's costs at £35,000 ("cross-cap").⁶⁷ However, new regulation 3, paragraphs 3 and 5, of the amended Cost Protection Regulations allows the courts, on application by the applicant, to decrease the caps specified in regulation 3, paragraphs 2 and increase the cross-cap in regulation 3, paragraph 4, "if it is satisfied that not doing so would make the costs of the proceedings prohibitively expensive for the applicant".⁶⁸

83. In its third progress report, the Party concerned stated that, in deciding whether a cap is prohibitively expensive, the courts should have regard to the *Edwards* principles and any

⁶³ Third progress report, para. 10, referring to <http://www.legislation.gov.uk/nisr/2017/27/contents/made>.

⁶⁴ ECE/MP.PP/2014/23, paras. 41, 43, 46 and 52.

⁶⁵ Third progress report, para. 16. See also regulation 2, para. 1, of the Cost Protection Regulations.

⁶⁶ *Ibid.*, para. 13.

⁶⁷ Previously, regulation 3, paragraph 3, of the 2013 Cost Protection Regulations.

⁶⁸ Regulation 3, paragraph 6, of the Cost Protection Regulations, as amended.

court fee that the applicant is liable to pay.⁶⁹ It submitted that this is reflected in the newly inserted regulation 6 of the Cost Protection Regulations, which provides that proceedings are to be considered prohibitively expensive “if, having regard to any court fee an applicant is liable to pay, their likely costs either:

- (a) Exceed the financial means of the applicant; or
- (b) Are objectively unreasonable having regard to—
 - (i) The situation of the parties;
 - (ii) Whether the applicant has a reasonable prospect of success;
 - (iii) The importance of what is at stake for the applicant;
 - (iv) The importance of what is at stake for the environment;
 - (v) The complexity of the relevant law and procedure; and
 - (vi) Whether the case is frivolous.”⁷⁰

84. The Committee welcomes the fact that, pursuant to the above amendment, the courts may decrease the costs to be awarded to the successful defendant and increase the cross-cap, while maintaining the maximum cap and minimum cross-cap previously included in the Cost Protection Regulations. The Committee notes that this has been welcomed by several observers⁷¹ and that it differs from the situation in England and Wales where both the cap and cross-cap can be decreased and/or increased (see para. 33 above). The Committee moreover considers that the elements included in the new regulation 6 of the Cost Protection Regulations are relevant and appropriate and, provided that they are appropriately applied in practice, set a useful framework to ascertain whether costs are to be considered prohibitively expensive for a particular applicant.

85. The Committee notes that several observers have submitted that the £35,000 cross-cap fails to comply with the Convention because fairness considerations only apply to the costs incurred by the claimant and not the opposing party.⁷² While under article 9, paragraph 4, of the Convention, “fairness” indeed refers to what is fair for the claimant and not the defendant,⁷³ the Committee does not consider that the stipulation of a cross-cap is in itself in non-compliance with the Convention, so long as the courts in practice exercise their discretion under regulation 3, paragraph 5, of the Cost Protection Regulations to increase the cross-cap when needed to ensure that proceedings are not prohibitively expensive for the claimant.

86. Based on the above, the Committee finds that the 2017 amendments to the Cost Protection Regulations move the Party concerned significantly closer towards fulfilling paragraphs 8 (a), (b) and (d) of decision V9n with respect to Northern Ireland.

Level of cost protection on appeal

87. In its third progress report, the Party concerned stated that the amended Cost Protection Regulations apply separate caps to appeals in Aarhus Convention cases, which

⁶⁹ Third progress report, para. 11.

⁷⁰ Regulation 6, of the Cost Protection Regulations, as amended.

⁷¹ Comments on the third progress report from the communicant of communication ACCC/C/2008/33 (ClientEarth) and observers (FoE, RSPB, C&J Black Solicitors), 24 April 2017, p. 6.

⁷² Ibid.

⁷³ ECE/MP.PP/C.1/2010/6/Add.3, para. 135, and ECE/MP.PP/C.1/2015/3, para. 72.

are set at the same levels as on first instance.⁷⁴ The Committee notes that the newly inserted regulation 3A of the Cost Protection Regulations apply the regulations analysed in paragraphs 82-83 above *mutatis mutandis* to appeal proceedings.

88. The Committee welcomes the above approach to cost protection on appeal which was also welcomed by several observers.⁷⁵ The Committee finds that the 2017 amendments to the Cost Protection Regulations move the Party concerned closer towards fulfilling paragraphs 8 (a), (b) and (d) of decision V9n with respect to Northern Ireland.

Cross-undertakings for damages

89. In its report on decision IV/9i to the fifth session, the Committee considered that regulation 5 of the Cost Protection Regulations did not provide adequate certainty for applicants seeking interim relief.⁷⁶ In particular, the Committee considered that the judicial discretion afforded did not provide certainty as to whether: (a) the applicant will be required to give a cross-undertaking or not; (b) if a cross-undertaking is required what the level of the undertaking will be; and (c) how the court should determine what would be “prohibitively expensive for the applicant”.⁷⁷

90. In its third progress report, the Party concerned reported that, following the 2017 amendments, the regulations now provide that, in deciding whether to require a cross-undertaking in damages in an Aarhus Convention claim, the court must have regard to the need for the cross-undertaking to not be such that it would make continuing with the case prohibitively expensive and to apply the *Edwards* principles when considering this point.⁷⁸

91. In this regard, the Committee notes that regulation 6 of the amended Cost Protection Regulations applies an almost identical test to the level of cross-undertakings as applied under paragraph 5.3, paragraph (3), of Practice Direction 25A applicable in England and Wales (see para. 53 above). In keeping with its considerations regarding paragraph 5.3, paragraph (3) of Practice Direction 25A (see para. 54 above), the Committee considers that regulation 6 likewise does not meet the requirement in article 3, paragraph 1 of the Convention for a clear, transparent and consistent framework to implement the provisions of the Convention.

92. The Committee accordingly finds that the Party concerned has not yet fulfilled paragraphs 8 (a), (b) and (d) of decision V/9n with respect to Northern Ireland.

Other matters

93. In its second progress review, the Committee noted that the Party concerned had proposed several changes to the Cost Protection Regulations in Northern Ireland similar to those proposed in England and Wales and invited the Party concerned to take its comments on the proposals for England and Wales into account when reviewing the Cost Protection Regulations in Northern Ireland.⁷⁹ In its third progress report, the Party concerned stated that the proposals relating to the disclosure of applicants’ finances, third party support and costs of proceedings with multiple claimants had not been pursued further.⁸⁰ It also reported

⁷⁴ Para. 12.

⁷⁵ Comments on the third progress report from the communicant of communication ACCC/C/2008/33 (ClientEarth) and observers (FoE, RSPB, C&J Black Solicitors), 24 April 2017, p. 6.

⁷⁶ ECE/MP.PP/2014/23., para. 54.

⁷⁷ Ibid.

⁷⁸ Third progress report, para. 14.

⁷⁹ Committee’s second progress review, para. 109.

⁸⁰ Third progress report, para. 15.

that the costs for unsuccessful challenges to the status of a claim being an Aarhus Convention claim would continue to be ordered on an indemnity basis and not, as in England and Wales, on a standard basis.⁸¹ The Committee welcomes the decision by the Party concerned not to introduce the above proposals as such changes would have run counter to paragraphs 8 (a), (b) and (d) of decision V/9n.

94. The Committee further welcomes the information provided by the Party concerned that statutory and judicial reviews within the scope of the Convention were exempted from recent increases in court fees⁸² and notes that this was also welcomed by several observers.⁸³

Overall assessment: Northern Ireland

95. The Committee welcomes the considerable progress by the Party concerned with respect to Northern Ireland. The Committee finds that the Party concerned has fulfilled paragraphs 8 (a), (b) and (d) of decision V/9n regarding Northern Ireland, except with respect to cost protection for private law claims and providing sufficient clarity for applicants as regards undertakings for injunctive relief. In light of this, while welcoming the considerable progress made to date, the Committee finds that the Party concerned has not yet fulfilled the requirements of paragraphs 8 (a), (b) and (d) of decision V/9n with respect to Northern Ireland.

Paragraphs 8 (c) and (d) of decision V/9n – time limits

96. The Committee notes that the requirement to apply for judicial review “promptly” is no longer part of Scottish law⁸⁴ or a requirement for judicial reviews under planning legislation in England and Wales.⁸⁵ The Committee further notes that for other judicial review procedures in England and Wales, following the *Uniplex* decision, the courts no longer apply the “promptly” requirement.⁸⁶ Likewise, following *Uniplex*, the “promptly requirement” is no longer applied by the courts in Northern Ireland in judicial review cases brought on the basis of European Union legislation.⁸⁷

97. At paragraph 30 of its first progress review, the Committee considered that neither the “promptly” requirement of the Northern Ireland time limit nor the manner in which that requirement is being applied in practice are fair or amount to a clear and transparent framework. In its first and second progress reviews, the Committee invited the Party concerned to report on its proposed actions, together with a timeline for their implementation, to abolish the “promptly” requirement for all cases within article 9, of the Convention in Northern Ireland.⁸⁸

98. In its third progress report, the Party concerned reported that, in a consultation issued on 22 June 2015, the Department of Justice in Northern Ireland had proposed the deletion of this requirement, and that a proposal had been agreed by the Northern Ireland Executive on 24 March 2016. The Party concerned further reported that, in September

⁸¹ Ibid.

⁸² Ibid, para. 17.

⁸³ Comments on the third progress report from the communicant of communication ACCC/C/2008/33 (ClientEarth) and observers (FoE, RSPB, C&J Black Solicitors), 24 April 2017, p. 6.

⁸⁴ Second progress report of the Party concerned, paras. 23-24 referring to section 89 of the Courts Reform (Scotland) Act 2015.

⁸⁵ Ibid, para. 21.

⁸⁶ Ibid, para. 20.

⁸⁷ Ibid, para. 22.

⁸⁸ Committee’s first progress review, para. 30 and second progress review, 24 February 2017, para. 113.

2016, the Civil and Family Justice Review Group had been established, which *inter alia* was tasked with reviewing procedures pertaining to judicial review, and that this Group had also recommended in its preliminary report published in October 2016 that the “promptly” requirement be removed. The Party concerned stated that, subject to the outcome of the final report and the views of incoming ministers following the recent Assembly elections, the Court of Judicature Rules Committee would be invited to consider the matter.⁸⁹ The Party concerned has not provided the Committee with any information regarding the above since its third progress report.

99. With respect to the submissions by observers (RSPB, Friends of the Earth, Friends of the Earth Scotland, C&J Black Solicitors) regarding the introduction in England, Wales and Northern Ireland of a six week time limit for bringing an application for judicial review under planning legislation and 30 days for procurement decisions, the Committee considers that these developments are outside the scope of decision V/9n and it thus will not examine the extent to which these timeframes comply with the Convention in the context of its review of decision V/9n.

100. In the light of the foregoing, the Committee finds that the Party concerned has fulfilled paragraphs 8 (c) and (d) with respect to time limits for judicial review in England and Wales and Scotland. While welcoming the steps taken, the Committee finds that the Party concerned has not yet fulfilled paragraphs 8 (c) and (d) of decision V/9n with respect to time limits for judicial review in Northern Ireland.

Paragraph 9 of decision V/9n

101. With respect to paragraph 9 of decision V/9n, in its third progress report, the Party concerned simply referred back to paragraph 31 of its first progress report, in which it stated its “awareness of the obligations under article 7 and the need to act in compliance with them where they apply”.⁹⁰ The Committee has not been provided with any evidence that would demonstrate either that, in this intersessional period, the Party concerned indeed submitted plans and programmes similar in nature to national renewable energy action plans (NREAPs) to public participation as required by article 7, of the Convention or alternatively, if no such plans or programmes were prepared during this intersessional period, it took measures to ensure that any prepared in the future would be subject to public participation in accordance with article 7. The Committee therefore has no evidence before it on which it could find that the Party concerned has fulfilled paragraph 9 of decision V/9n.

102. In the light of the above, the Committee finds that the Party concerned has not yet met paragraph 9 of decision V/9n and expresses its concern at the lack of progress by the Party concerned during the intersessional period in that regard.

IV. Conclusions

103. Regarding paragraphs 8 (a), (b) and (d) of decision V/9n, the Committee finds that:

(a) With respect to England and Wales, while the 2017 amendments to the costs protection system in England and Wales introduced some positive improvements, the 2017 amendments overall appear to have moved the Party concerned further away from meeting the requirements of paragraphs 8 (a), (b) and (d) of decision V/9n;

⁸⁹ Third progress report, para. 25.

⁹⁰ *Ibid.*, para. 26.

(b) Concerning Scotland, the Party concerned has not yet fulfilled the requirements paragraphs 8 (a), (b) and (d) of decision V/9n, though the Committee welcomes the significant steps taken by the Party concerned to date in that direction;

(c) With regard to Northern Ireland, the Party concerned has not yet fulfilled the requirements of paragraphs 8 (a), (b) and (d) of decision V/9n, though the Committee welcomes the considerable progress made by the Party concerned to date in that direction;

and in the light of its above findings, expresses its concern at the overall slow progress by the Party concerned in establishing a costs system which, as a whole, meets the requirements of paragraphs 8 (a), (b) and (d) of decision V/n.

104. The Committee finds that the Party concerned has fulfilled the requirements of paragraphs 8 (c) and (d) of decision V/9n with respect to time limits for judicial review in England and Wales and Scotland. While welcoming the steps taken, the Committee finds that the Party concerned has not yet fulfilled the requirements of paragraphs 8 (c) and (d) of decision V/9n with respect to time limits for judicial review in Northern Ireland.

105. The Committee finds that the Party concerned has not yet met the requirements of paragraph 9 of decision V/9n and expresses its concern at the lack of progress by the Party concerned during the intersessional period in that regard.

106. The Committee recommends to the Meeting of the Parties that it reaffirm its decision V/9n and requests the Party concerned:

(a) To, as a matter of urgency, take the necessary legislative, regulatory, administrative and practical measures to:

(i) Ensure that the allocation of costs in all court procedures subject to article 9 is fair and equitable and not prohibitively expensive;

(ii) Further consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice;

(iii) Further review its rules regarding the time frame for the bringing of applications for judicial review in Northern Ireland to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework;

(iv) Establish a clear, transparent and consistent framework to implement article 9, paragraph 4, of the Convention;

(v) Ensure that in future plans and programmes similar in nature to NREAPs are submitted to public participation as required by article 7, in conjunction with the relevant paragraphs of article 6, of the Convention;

(b) To provide detailed progress reports to the Committee by 1 October 2018, 1 October 2019 and 1 October 2020 on the measures taken and the results achieved in the implementation of the above recommendations;

(c) To provide such further information as the Committee may request in order to assist it to review the progress of the Party concerned in implementing the above recommendations;

(d) To participate (either in person or by audio conference) in the meetings of the Committee, at which the progress of the Party concerned in implementing the above recommendations is to be considered.