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Ms Fiona Marshall
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UN Economic Commission for Europe
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Palais des Nations
CH-1211 Geneva 10
Switzerland

29 December 2014

Dear Ms Marshall

Re: Decision V/9n concerning compliance by the United Kingdom with its obligations under the Aarhus Convention

1. In accordance with paragraph 11 of decision V/9n, the United Kingdom provides the Compliance Committee with an update regarding the recommendations included in paragraphs 8 and 9 of the decision below.

8(a): Further review its system for allocating costs in all court procedures subject to article 9, and undertake practical and legislative measures to ensure that the allocation of costs in all such cases is fair and equitable and not prohibitively expensive

8(b): Further consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice

8(d): 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

2. New rules providing for cost protection for claimants in cases under the Aarhus Convention were adopted throughout the United Kingdom in April 2013. Details of these rules were provided to the Committee in update reports on decision IV/9i. As the Committee is aware, judgments given in cases since the rules were adopted[1] have led the United Kingdom Government and the devolved administrations to review the rules adopted in 2013.

[1] In particular, judgments given by the Court of Justice of the EU in *European Commission* v *United Kingdom* (Case C-530/11) and *Edwards* v *Environment Agency* (Case C-260/11) and by the UK Supreme Court in *R (Edwards)* v *Environment Agency* (No. 2) [2013] UKSC 78.

England and Wales

3. The Government committed to reviewing the costs regime for Aarhus Convention cases following the Court of Justice of the EU's judgment in *European Commission* v *United Kingdom* (Case C-530/11) in February of this year.

4. In the light of that judgment and other recent case law, the Government has been reviewing the current costs regime for Aarhus Convention cases in England and Wales, contained in the Civil Procedure Rules. This is a cross-government exercise, with a view to determining whether, and if so to what extent, changes could be made to improve the current regime.

5. As part of the review, consideration is being given to whether the current costs regime should make provision for relevant cases brought by way of statutory review proceedings and whether there is scope to amend the levels of the current costs caps — which for claimants are currently set at £5,000 for individuals and £10,000 for organisations. The review is also considering whether the principles for determining the level of costs which would be 'prohibitively expensive' in a particular case, as set out in *Edwards v Environment Agency* (Case C-260/11) (and reiterated by the UK Supreme Court in *R (Edwards) v Environment Agency (No. 2)* [2013] UKSC 78) could be incorporated into the costs regime.

6. A further update on the review can be provided to the Committee in due course once it has been finalised.

Scotland

7. The Scottish Government are in the process of modernising and enhancing the efficiency of the civil justice system through a number of reforms. As part of these reforms, relevant legislative measures have been and are to be adopted.

8. The Courts Reform (Scotland) Act 2014 received Royal Assent on 10 November 2014. The Act is gradually being brought into force with the first steps of implementation being taken in early 2015. The overarching aim of the Act is to modernise the structure and operation of the courts to ensure that the right cases are heard in the right courts at the right cost. The reforms will change the procedures and processes in our courts. Not all of the changes are relevant but new procedures for judicial review (see response to paragraph 8(c) of decision V/9n below) are relevant to certain environmental appeals.

9. In addition, the issue of expenses (costs) recoverable in litigation was considered by an independent review, the Review of Expenses and Funding of Civil Litigation in Scotland, led by Sheriff Principal Taylor. The Taylor Review reported in September 2013[2] and in its response of June 2014, the Scottish Government agreed with the review's comments "that the unpredictability of the costs of civil litigation represents a barrier to access to justice".[3] The Scottish Government commended the

[2] http://www.scotland.gov.uk/About/Review/taylor-review
[3] http://www.scotland.gov.uk/Resource/0045/00451822.pdf

conclusions of the Taylor review, adding that the recommendations "will go a long way to changing that situation".

10. The Scottish Government proposes to implement the changes recommended by this review incrementally, in conjunction with partners in the civil justice sector, such as the new Scottish Civil Justice Council, who have responsibility for some of the areas of proposed change.

11. However, these changes will not affect the usual expenses regime; namely, that an applicant who unsuccessfully brings a claim will generally be expected to pay the reasonable expenses of the defender, unless the applicant has been awarded a "protective expenses order" (PEO), which is the Scottish equivalent of a protective costs order in England and Wales.

12. A PEO regulates the liability for expenses in the proceedings (including future expenses) of all or any of the parties to them, with the overall aim of ensuring that proceedings are not prohibitively expensive for the applicant.

13. PEOs are available at common law in both judicial review cases and statutory appeals, as well as being codified in Chapter 58A of the Rules of the Court of Session. An applicant for a PEO must be an individual or non-governmental organisation promoting environmental protection. Scottish case law since Chapter 58A was inserted into the Rules demonstrates that groups are taking advantage of the availability of PEOs both at common law and under statute.[4]

14. The Scottish Government continues to monitor developments in England and Wales and Northern Ireland but with the Scottish regime in mind. Expenses protection rules in Scotland include statutory appeals; and environmental NGOs are expressly eligible to apply for a PEO in either a statutory appeal or a judicial review. Nonetheless, as part of the programme of wider civil justice reforms, the Scottish Government is also considering whether any amendments might still be made to the current expenses regime in Scotland.

Northern Ireland

15. The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 provide cost protection for applicants in judicial reviews and statutory reviews to the High Court in Northern Ireland of decisions within the scope of the Aarhus Convention. They limit the costs recoverable in these cases to £5,000 from an applicant who is an individual and £10,000 in all other cases. The costs recoverable from a respondent are limited to £35,000. The Regulations also clarify the factors the court must take into consideration when a cross-undertaking in damages is required when an injunction is sought in these cases. In addition, the Regulations empower the court to make costs orders for payment to a charity promoting *pro bono* representation when the applicant is represented *pro bono*.

[4] Examples include *Newton Mearns Residents Flood Prevention Group* v *East Renfrewshire Council* [2013] CSIH 70; *Carroll* v *Scottish Borders Council* [2014] CSOH 30; *Sustainable Shetland* v *Scottish Ministers* [2014] CSIH 60; *Friends of Loch Etive, petitioner* [2014] CSOH 116; *John Muir Trust, petitioner* [2014] CSOH 172A.

16. In light of recent case law, Northern Ireland is reviewing the cost scheme for Aarhus cases sets out in the Regulations. Consideration is, in particular, being given to whether to amend them to reflect the principles enunciated in the *Edwards* Judgment. The Regulations already apply to statutory reviews to the High Court in Northern Ireland of decisions within the scope of the Aarhus Convention.

Article 9(5)

17. With regard to the recommendation included in paragraph 8(b) of decision V/9n, we draw the Committee's attention to paragraph 34(o) of the Report of the 5th session of the Meeting of the Parties to the Convention:

> "[The Meeting of the Parties provisionally adopted] Decision V/9n on compliance by the United Kingdom (ECE/MP.PP/2014/CRP.6/Rev.1), concluding upon the proposal of the Chair of the Meeting of the Parties that footnotes 2, 3 and 4 of the draft decision as agreed by the Working Group of the Parties at its eighteenth meeting (ECE/MP.PP/2014/CRP.6) would be removed from the text of the decision and reflected instead in the present report. To that end, the Chair of the Meeting of the Parties, with the United Kingdom's agreement, asked to record that the United Kingdom's position with respect to paragraphs 2 (b) and 8 (b) of the draft decision was set out in the United Kingdom's letter of 21 March 2014, and that the United Kingdom's position with respect to paragraph 3 was set out in its letter of 5 March 2014. The United Kingdom also expressed concerns regarding the reopening of text in the draft decision already agreed by the Working Group of the Parties."

18. We also draw the Committee's attention to the United Kingdom's statement of 30 June 2014 at the 5th session of the meeting of the Meeting of the Parties under agenda item 5(b).[5]

19. The footnotes included in the draft decision agreed by the Working Group of the Parties relevant to paragraph 8(b), in what was subsequently adopted as decision V/9n, refer to the United Kingdom's letter to the secretariat of 21 March 2014.[6] This letter sets out the United Kingdom's views on what is required by article 9(5) of the Convention and that these requirements had already been met in the context of the allegations of non-compliance originally considered by the Committee.

20. The United Kingdom's position remains the same.

8(c): Further review 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

England and Wales

21. As set out in our previous response to the Committee, the issue of whether or not time limits for judicial reviews generally should be clarified was not taken forward as

[5] http://www.unece.org/fileadmin/DAM/env/pp/mop5/Statements/MOP5-_5b_-_UK_statement_on_item_5_b_.pdf and appended as an Annex.

[6] http://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP4decisions/United_Kingdom/frUK_21.03.2014.pdf

part of the wider forms of judicial review in England and Wales by the United Kingdom Government.

22. The position in England and Wales is that Civil Procedure Rule 54.5(1) provides that an application for permission to apply for judicial review must be made promptly and, in any event, within three months from the date when grounds for the application first arose.

23. The case of *Uniplex (UK) Ltd* v *NHS Business Service Authority* [2010] 2 CMLR 47 means that, in a wide range of areas, the requirement for a claim to be brought "promptly" is disapplied as being insufficiently certain, on the basis that the time limit should be with reference solely to a specific period of time after the claimant knew or ought to have known of the grounds giving rise to the claim.

24. The reference to "promptly" no longer applies in relation to judicial reviews relating to decisions under planning legislation in England and Wales. Changes to Civil Procedure Rule 54.4 introduced in July 2013 harmonised the time limits for planning judicial reviews with those for statutory planning appeals (six weeks) and do not include a "promptly" requirement.

25. For procurement cases, as defined in the Public Contracts Regulations 2006, the time limit has been amended so that a judicial review should be brought with 30 days of the grounds giving rise to the claim. This has brought the time limit for bringing judicial reviews into line with those for certain statutory challenges to the same decisions.

Scotland

26. Section 89 of the Courts Reform (Scotland) Act 2014 inserts new sections 27A to 27D into the Court of Session Act 1988 which governs judicial review proceedings in the Court of Session. Once in force, the key relevant provisions are as follows:

27. Section 27A provides a three month time limit for bringing an application for judicial review. There is no additional requirement that a judicial review be lodged "promptly" and the court may override this time limit if the court considers it equitable to do so.

28. Section 27B introduces a requirement for permission to proceed. This is intended to filter out unarguable cases. The applicant must have; (1) "sufficient interest" in the subject matter; and (2) a real prospect of success. The permission stage may be decided on paper, which may be cheaper than an oral hearing. Oral hearings are allowed if permission is refused. There is also provision for an appeal from an Oral Hearing.

Northern Ireland

29. Northern Ireland is currently reviewing its time limits for judicial reviews in light of the Committee's recommendations and the *Uniplex* (c-206/08) case. Any change will require amendments to the Rules of the Court of Judicature (Northern Ireland) 1980 made by the Court of Judicature Rules Committee with the allowance of the Department of Justice in Northern Ireland.

30. The Department is currently considering the various options available for reform and has sought the views of the Lord Chief Justice of Northern Ireland who chairs the Court of Judicature Rules Committee.

9: [I]n future submit plans and programmes similar in nature to NREAPs to public participation as required by article 7, in conjunction with the relevant paragraphs of article 6, of the Convention

31. In the United Kingdom's comments on the Committee's draft findings on communication ACCC/C/2012/68 dated 28th August 2013,[7] we emphasised our awareness of the obligations under article 7 and the need to act in compliance with them where they apply. We are happy to reiterate this position.

Yours sincerely

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United Kingdom National Focal Point
to the UNECE Aarhus Convention

[7] http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2012-68/Communication_with_Party/frUKC68CommentsDraftFindings.pdf

ANNEX

Aarhus Convention Meeting of the Parties - agenda item 5(b)

30 June 2014

Statement by the United Kingdom

We are very concerned about the Chair of the Meeting of the Parties' proposal to delete text from the footnote in draft decision V/9o and move this to the report of the Meeting, given that we had the same discussion and reached agreement on this point 24 hours ago. This was agreed by the Working Group of the Parties. It would set a worrying precedent to open up a decision agreed at the Working Group at the Meeting of the Parties in this way.

Our position on the content of the draft decision agreed yesterday has not changed.

We do not agree that the Compliance Committee should have made findings in communication 53.

We do not agree that a recommendation on article 9(5) is necessary.

We expressed this view very clearly in our letters of 5th and 21st March 2014 and at the Working Group of the Parties yesterday. We repeat, as we did yesterday, that the Meeting of the Parties is not and should not be a rubber stamp for the Compliance Committee or the Bureau.

If it is the decision of the Chair of the Meeting of the Parties to re-open an agreed decision and to delete the agreed compromise text the proposal is to put this in the report of the Meeting. We discussed this option yesterday. We agreed on footnotes in the decision.

In order to show willingness to compromise again we request that the secretariat closely liaise with us on the drafting of the element dealing with the United Kingdom's concerns. We also note that the Chair has indicated that the report will note the Working Group decision, the decision to open up this agreed decision again and the concerns that we have expressed today.

We also request that this is reflected in the agreed outcomes.