



# Department for Environment Food & Rural Affairs

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Ms Fiona Marshall  
Secretary to the Aarhus Convention Compliance Committee  
UN Economic Commission for Europe  
Environment Division  
Palais des Nations  
CH-1211 Geneva 10  
Switzerland

13 November 2015

Dear Ms Marshall

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

1. I set out below the United Kingdom's progress report under paragraph 11 of decision V/9n regarding the recommendations included in paragraphs 8 and 9 of the decision.

***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<sup>1</sup>

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<sup>1</sup> 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.



have led the United Kingdom Government and the devolved administrations to review the rules adopted in 2013.

### 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 last year.
4. As part of this review, on 17 September of this year, the Government launched a public consultation on proposals to adjust the costs protection regime in the Civil Procedure Rules for relevant environmental challenges in England and Wales.<sup>2</sup> Annex A of the consultation paper sets out proposed amendments to the Civil Procedure Rules which could be used to give effect to the Government's proposals. The consultation closes on 10 December 2015. The consultation seeks views from those who may be involved in or affected by environmental challenges in England and Wales falling within the scope of the implementing EU Directives and the Aarhus Convention. The outcomes of the consultation including the Government's next steps will be published following consideration of all responses to the consultation.
5. In summary, the government proposals seek to make sure the UK complies with its EU obligations and as set out in the consultation would:
6. Extend the types of case for which costs protection is available beyond judicial reviews to include statutory reviews and certain statutory appeals which engage the relevant EU Directives. This proposal entails extending the scope of the definition of "Aarhus Convention claim" in the Civil Procedure Rules. It will continue to be for the court to decide whether a case falls within the definition, if disputed by the defendant;
7. Amend the current fixed costs cap approach to costs protection (where the same caps are automatically applied in every case, regardless of the claimant's financial means), to allow courts to vary the level of costs caps in individual cases to take account of the circumstances of the case and the characteristics of the parties. It is proposed that costs would be set at a default level, but any party could apply to vary their own or another party's costs cap. The court would be required to ensure any variation would not make the costs prohibitively expensive for the claimant. When considering the concept of 'prohibitively expensive', the court would apply the approach 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);
8. Clarify the factors that the court should use to assess whether a cross-undertaking in damages for an interim injunction would make continuing with a claim prohibitively expensive for an applicant. When considering this, the court would apply the approach from the *Edwards* cases;

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<sup>2</sup> <https://www.gov.uk/government/consultations/costs-protection-in-environmental-claims>

9. Ensure a clearer alignment between the wording of the rules and the obligations arising under the relevant EU Directives and the Aarhus Convention by making it clearer that the costs protection regime applies to claimants who are "members of the public".
10. Clarify how costs caps are applied in cases with multiple claimants or multiple defendants, so it is clear that a separate cap applies to each claimant or defendant.
11. The consultation also asks respondents for views: about the level at which the default costs caps should be set; whether claimants, in line with the approach taken in non-environmental judicial reviews, should only receive costs protection once permission to apply for judicial review or statutory review has been given; and whether there could be additional types of cases to which the environmental costs protection regime should be extended.
12. A further update can be provided to the Committee once a response to the consultation is published.

#### Northern Ireland

13. Northern Ireland is reviewing its cost scheme for Aarhus cases which is set out in the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013. The regulations already provide cost protection for applicants in statutory reviews as well as judicial reviews to the High Court in Northern Ireland of decisions within the scope of the Convention. As part of the review, consideration is being given to making similar changes to the cost regime in Northern Ireland as are proposed for England and Wales. A further update can be provided to the Committee once the review has been completed (which is expected to happen soon).

#### Scotland

14. As in other jurisdictions, rules were adopted in 2013 to expressly allow for an order to provide litigants with protection from the expense of their claim (subject to a limit, known as a cap). The Committee has been provided with briefing about this type of order, known as a Protective Expenses Order (PEO). A PEO is available at common law and under specific court rules. In both cases, it is possible for an applicant to apply for expenses protection in both statutory appeals and judicial review.
15. As in other jurisdictions, the Scottish Government has reviewed the expenses protection regime. An independent body, the Scottish Civil Justice Council (SCJC), is responsible for creating and amending rules of court. The Scottish Government has put proposals to the SCJC which involve (a) extending the scope of the court rules to make it possible to apply for a PEO in judicial reviews and statutory appeals engaging Article 9(1) and 9(3) of the Aarhus Convention as well as Article 9(2); and (b) modifying the categories of person eligible to apply for such orders, and the conditions regarding standing, in line with the Convention. These proposals were submitted to the SCJC in the form of a policy paper which was considered at a meeting on 28 September 2015. The SCJC members were content with the proposed recommendations and amendments suggested by the Scottish Government. The SCJC members agreed that amendments in the form of revisals to

court rules be prepared for the following meeting in November 2015. The SCJC also agreed that a small working group be established with a remit to consider the practical operation of the rules on PEOs. That group has not yet been established.

#### Article 9(5)

16. With regard to the recommendation included in paragraph 8(b) of decision V/9n, we refer the Committee to paragraphs 17 to 20 of our letter of 29 December 2014. We have no further comments to make on this point.

**17. 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

18. As set out in our previous response to the Committee the issue of whether or not time limits should be clarified or reviewed for judicial review was not taken forward as part of the wider forms of judicial review in England and Wales by the United Kingdom Government.

19. 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.

20. In practice, following the *Uniplex* decision courts will not apply the "promptly" limit and will regard the point at which time starts to run for challenging a decision or action as being the date of the decision or action or its communication, and of a continuing omission or other continuing state of affairs as being when the claimant knew or ought to have known that there were grounds for challenge.

21. The reference to "promptly" no longer applies in relation to judicial reviews relating to decisions under planning legislation in England and Wales. Changes to 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. Similarly, the time limit for bringing a judicial review of a procurement decision was shortened to thirty days from July 2013.

#### Northern Ireland

22. On 22 June, the Department of Justice in Northern Ireland launched a consultation on a proposal to change the time limits for bringing a judicial review. In that jurisdiction, court rules provide that proceedings for judicial review must currently be brought 'promptly' and, in any event, within three months from the date of the decision which is to be reviewed. Following the *Uniplex* case, the 'promptly requirement' is now disapplied by the courts in judicial review cases brought on European Union grounds. In its consultation, the Department of Justice proposed to remove the requirement for all judicial review cases. The consultation closed on 14

September 2015 and the Department is currently considering the responses received and its proposed way forward. A further update can be provided to the Committee once a response to the consultation is published.

Scotland

- 23.14. On 22 September 2015 the new procedures for judicial review contained in section 89 of the Courts Reform (Scotland) Act 2015 entered into force. The new procedural rules (SSI 2015/228) for judicial review update the terminology and set out a new form of application for judicial review. The new procedures apply to all cases including environmental appeals. There is transitional provision until 22 December 2015 for cases whose grounds first arose before 22 September.
- 24.15. As a result of these changes there is now a three month time limit for bringing an application for judicial review in Scotland. However, there is no additional requirement that a case be brought "promptly". There is now a requirement for permission to proceed, which is intended to filter out unarguable cases. The court rules have been written to encourage cases to be dealt with swiftly.

**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**

25. With regard to the recommendation in paragraph 9, we refer to paragraph 31 of our letter of 29 December 2014.

Yours sincerely



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United Kingdom National Focal Point  
to the UNECE Aarhus Convention