



Wildlife and
Countryside



Mr Ahmed Azam
Aarhus Convention: UK National Focal Point
Department for the Environment, Food and Rural Affairs
Nobel House
17 Smith Square
London SW1P 3JR

29 June 2015

Dear Ahmed and colleagues,

Re: Eighth Meeting of the UNECE Task Force on Access to Justice in Geneva on 15th-17th June 2015

I would like to take the opportunity to thank you and your colleagues for our helpful meeting after the Task Force meeting on 16th June. I also thought it might be helpful to provide some brief feedback on behalf of the Joint Links/organisations listed at the end of this letter for you to share with colleagues in their respective administrations.

Firstly, we wanted to reiterate how grateful we are that colleagues from the Ministry of Justice (MoJ) and the Scottish Legal Directorate were able to attend the Task Force meeting. Many of the issues discussed are relevant to the formulation of policy in these Departments and beyond. The cost of sending senior civil servants to such a meeting is not inconsiderable - particularly at the present time. However, we believe that your commitment to attend will significantly improve coherence between Defra, the MoJ and the devolved administrations with respect to the UK's compliance with the provisions of Article 9 of the Convention.

We were grateful for your confirmation that the devolved administrations of the UK are reviewing the Aarhus costs rules. Naturally, in light of Lord Justice Sullivan's comments in *Venn*¹, we would support any recommendation to include statutory reviews within the scope of Civil Procedure Rule 45.43 in England and Wales. Hopefully, this would not be controversial in light of section 91 (and Schedule 16) of the Criminal Justice and Courts Act 2015, which introduces a permission stage in respect of such proceedings.

With regard to the caps on adverse costs liability, we would be vigorously opposed to any proposal to increase the present figures of £5,000 (individuals) and £10,000 (all others) in England, Wales and Northern Ireland and £5,000 (individuals and environmental NGOs) in

¹ *Secretary of State for Communities & Local Government v Sarah Louise Venn* [2014] EWCA Civ 1539, paragraphs 34 and 35





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Scotland. As explained during my presentation in Geneva, the evaluation of what is prohibitively expensive for the claimant (or petitioner) applies to their cost exposure as a *whole* – not just their adverse costs exposure². As it is, the total costs on losing a case may routinely amount to £31,000-£36,000 (comprising court fees, own costs and adverse costs) in England and Wales and often rather more in Scotland. Any further increase in this figure would be highly regrettable.

Moreover, the CJEU judgments in *Edwards* and *Commission v UK* confirm that a claimant must not be exposed to costs that are prohibitively expensive on both a subjective *and* objective basis³. Any increase in the caps would surely take the figure even more into the realms of what is objectively unreasonable. As emphasised in Geneva, our experience is that a significant number of individuals, community groups and NGOs find the present caps enough of a challenge. To increase them further would yield little economic benefit to the Government but would have a significantly adverse effect on the ground. Should the devolved administrations of the UK pursue an increase in the present caps, we would be forced to consider all available measures to ensure the UK was subject to further international scrutiny on the issue of costs.

We are grateful for your clarification that section 90 CJCA 2015 provides a mechanism to dis-apply the provisions of sections 88 and 89 of the Act to environmental cases. We urge the Government to maintain an appropriately wide definition of such cases, again as confirmed in the Court of Appeal case of *Venn*⁴. However, we would be grateful for your clarification as to how sections 85 and 86 CJCA 2015 relate to the cap on the claimant's costs liability for adverse costs under CPR 45.43. Is it envisaged, for example, that third parties may be liable for a proportion of the £5,000 or £10,000 cap – or may we assume (as the figure cannot exceed those caps) that sections 85 and 86 CJCA 2015 do not apply in environmental cases?

We are also grateful for your confirmation that the MoJ will establish a scheme to monitor the number of cases benefitting from costs protection under CPR 45.43. We urge the devolved administrations of the UK to establish similar schemes and for the Government to use the ensuing data to understand the extent to which costs protection is enabling the UK to comply with Article 9(4) of the Convention. To this extent, we hope that such a scheme will not simply serve to inform the Government about the number of cases lodged, but will provide a mechanism to truly evaluate the effectiveness of the schemes.

With regard to access to justice issues in Scotland, we welcome Paul Cackette's willingness to meet with NGOs and legal experts in Scotland to discuss this further. We note Paul's

² See Case C-530 *Commission v UK*, paragraph 44 and Case C-260/11 *Edwards and Pallikaropoulos* [2013] ECR, paragraphs 25, 26 and 28

³ *Ibid*, paragraphs 47 and 40 of the judgments respectively

⁴ *Secretary of State for Communities & Local Government v Sarah Louise Venn* [2014] EWCA Civ 1539, paragraphs 11 and 12





comments regarding the reduction in time limit for lodging an application for Judicial Review and the effect of regulation 15 of SLAB. Our colleagues will be pleased to explain our concerns about these issues in more detail at such a meeting.

We would also take the opportunity to reinforce the fact that the matters discussed in the meeting should be seen in the context of broader changes impacting adversely upon access to justice as raised in the Joint Links' Statement. This includes recent increases in court fees and the potential (via section 87 CJA 2015) to expose interveners to costs in Judicial Review.

Finally, we are disappointed that you were unable to confirm the UK's approach to the Convention under the new administration. We hope that your attendance at the Task Force meeting has underlined the importance of the issues under consideration - and the UK's pivotal role in achieving them - and that you will take these messages back to your colleagues. We look forward to an ongoing dialogue on these issues with you.

Yours sincerely,

Carol Day
Solicitor and Legal Consultant at RSPB and Vice Chair of Wildlife and Countryside Link's Legal Strategy Group

This letter is supported by the following organisations:

- Wildlife and Countryside Link:
 - Buglife – The Invertebrate Conservation Trust
 - ClientEarth
 - Friends of the Earth, England, Wales and Northern Ireland
 - John Muir Trust
 - Marine Conservation Society
 - Open Spaces Society
 - Plantlife
 - Ramblers
 - Royal Society for the Protection of Birds
 - Salmon and Trout Association
 - WWF-UK

- Northern Ireland Environment Link
- Scottish Environment Link
- Wales Environment Link



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