

15 February 2008

Mr. Jeremy Wates, secretary

Comments to “Draft findings and recommendations” ACCC/C/2006/18
carrying the following title:

With regard to compliance by Denmark with its obligations under the Aarhus Convention in the case concerning access to justice to challenge decisions to cull certain bird species in alleged violation of European Community legislation (Communication ACCC/C/2006/18 by Mr. Søren Wium-Andersen (Denmark))

Dear Mr. Jeremy Wates

Thank you very much for the email received 1st February 2008. I have the following comments to the **Draft findings and recommendations ACCC/C/2006/18**.

Ad 20

In 20 you mention that

.....the Agency representatives agreed that it would have been an act of good governance on behalf of the Agency to react to the letter of the communicant.

None of the authorities I contacted did provide any assistance or guidance with regard to my search for access to justice as stated in the Aarhus Convention Article 3.2 .

Ad 22

In 22 it is stated:

No other member of the public, individuals or non-governmental organizations, attempted to challenge the acts of culling through any administrative or judicial procedures.

I regret to inform you that this statement is not correct. The local branch of the Danish Ornithological Society has written at least one letter and two mails to the technical department in the municipality dated 3, 5 and 18 May 2006 and a letter to the editor for the local newspaper concerning the culling of rooks stressing the lack of compliance between the statutory order and the Bird Directive. Copies of the letter and the two mails and the letter to the editor are attached to this letter as attachments 1 - 4.

Ad 23, 37, 39, 43, 44 and 45

The Compliance Committee is referring several times to a case from the Danish Western Court in 2001. The case is mentioned in 23, 37, 39, 43 and again in the recommendations 44 and 45. The case in the Western Court is in 43 used to avoid declaring that Denmark is not in a state of non-compliance.

The case in the Danish Western Court was introduced in the discussions with the Compliance Committee through the study by Milieu Ltd "On access to justice in environmental matters in Denmark (Article(9.3)), Country report for Denmark" forwarded to me by the Compliance Committee. I already disputed the quality of the study by Mileu Ltd during the meeting in Geneva. The quality is also discussed in the expert opinion from professor Peter Pagh forwarded to the secretariat on the 8 January 2008. Peter Pagh argues that the study from Mileu Ltd. is subject to both analytical and substantive errors and in his opinion Denmark is not in compliance with the Aarhus Convention. The opinion is attached for easy reference as attachment no: 5.

It is not clear to me why the Committee did not in detail discuss the arguments presented in professor Pagh's opinion concerning the implementation of article 9.3. of the legal system in Denmark.

I have discussed your "Draft findings and recommendations" with professor Pagh and in his opinion the Western Court case is irrelevant! I share his view. Professor Peter Pagh has forwarded the following information to me:

"The CC has misinterpreted the Vestre Landsret case from 2001 because that case falls under article 9(2) of the convention and not article 9(3). The matter of that case was whether a permit to introduce beaver was in conflict with the habitat directive article 6(3), which is a matter falling under the Aarhus Convention article 9(2) - and not under article 9(3) which concerns ongoing offences of environmental law. The CC is wrong in assuming that there is any access of citizens to administrative or judicial procedures meeting the requirement under article 9(4) of the convention in case of landowners acting in conflict with the protection of endangered birds under the bird directive.

I certainly agree with CC that the complaint to the police doesn't meet the requirement under article 9(3) and 9(4). Moreover, the fact that a citizen could ask the Skov- og Naturstyrelsen (Danish Forest and Nature Agency) to take action in case of an offence, doesn't mean that the citizen has access to an administrative procedure - because under Danish Law he can only ask the agency to take action. Whether the Agency will do so, or not do so, is not in any way subject to an administrative procedure. The fact is that if an endangered eagle is killed by a landowner neither NGO's nor private citizens have any access to administrative or judicial procedure under Danish law. In fact, it isn't possible to identify just one single case in Denmark, which gives individuals or NGO's access to administrative or judicial procedures in case of landowners damaging endangered and protected species if the case is not related to an application for a permit or dispensation. And article 9(3) of the Aarhus Convention isn't limited to offences related to applications for permits.

The fact that the legislation was later changed is not relevant for the matter presented to the CC

I would therefore suggest to recommend that the CC review the draft findings and if the CC has doubt at least should be able to identify one case which demonstrates that citizens or NGOs have access to administrative or judicial procedures in case of landowners or other private or public bodies offending the nature protection legislation on the protection of endangered species."

If the Compliance Committee agrees that the case from the Western Court was related to article 9.2 in the Aarhus Convention and not to article 9.3 I expect the main findings in 43 will be changed to non-compliance and that the recommendations, 44 and 45, and the text in 23, 37, 39 must be rewritten.

In 45 the Compliance Committee has proposed the Party to consider access to a judicial procedure for non-governmental organisations. Why have individual citizens been omitted in your consideration?

From the arguments mentioned above I am convinced that Denmark is and has been in non compliance with Article 9.3 and 9.4 of the Aarhus Convention. I therefore propose the Committee to reconsider its decision.

Yours sincerely

Søren Wium-Andersen
digitally signed

Five attachments:

1. Letter for the Technical Department in Hilleroed dated 3 May 2006 as a .pdf file
2. Mail for the Technical Department in Hilleroed dated 5 May 2006 as a .pdf file
3. Mail for the Technical Department in Hilleroed dated 18 May 2006 as a .pdf file
4. Letter to the editor dated 9 June 2006 as a .pdf file
5. Peter Pagh: Comment to report on EU Member States' measures on access to justice in environmental matters - regarding Denmark, 5 December 2007