

An application to the Aarhus Convention Compliance Committee

ALYSON AUSTIN

Communicant

and

UNITED KINGDOM

Member State

**COMMUNICATION ON ALLEGED NON-COMPLIANCE
WITH ARTICLE 9 OF THE AARHUS CONVENTION**

I Information on the communicant

1. This is a communication by Alyson Austin, an individual, living in Merthyr Tydfil, South Wales. Mrs Austin's correspondence details are:

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2. Alyson Austin authorises Richard Buxton Solicitors to act on her behalf and signs this submission accordingly at Section X below.

II Party concerned

3. The state concerned is the United Kingdom (UK).

III Outline facts of the communication

4. The communicant has since 2008, acting by herself and with others, raised concerns of continuing and excessive noise and dust deposition emanating from opencast coal mining operations located within 500 metres from her home. The levels of dust and noise along with their frequency, intensity, duration and nature are such that they may reasonably be argued to constitute a nuisance at common law in the UK¹. The communicant has sought to resolve the nuisance through correspondence and attempted negotiation with the opencast operator,

Miller Argent (South Wales) Ltd (the operator). She has also raised concerns the environmental regulator, Merthyr Tydfil County Borough Council, which has not itself taken any action against the operator.

5. The communicant has attempted to prevent the nuisance by, among other things, issuing legal proceedings in the High Court. To date this has been unsuccessful. In June 2010 the communicant and 491 other residents applied for a pre-action group litigation order (GLO) in order to manage a large number of proposed claimants in one legal claim. On 11.11.10, the High Court dismissed the GLO application due to uncertainty as to the proposed claimants' funding provisions. On 2.12.10 the operator sought payment of £257,104 for its pre-action legal costs. The High Court order of 11.11.10 was appealed. On 29.7.11 the Court of Appeal dismissed an appeal against the 11.11.10 decision. The consequence of the appeal judgment was that residents were, in practical terms, prevented from pursuing the claim further due to the costs risks².
6. After the appeal hearing of July 2011, the communicant sought to resolve the problems as an individual, seeking to reach an informal negotiated solution with the operator. This failed and on 1.11.12 the communicant issued a further pre-action application to the High Court; this time asking for costs protection consistent with Articles 9(3) and (4) of the Aarhus Convention in order that she may once again seek a legal remedy.
7. To help ensure that the preliminary pre-action costs protection hearing could proceed without risk of another £0.25 million costs bill, the communicant proposed that it be heard on the basis of either 'no order for costs' or 'each party pay their own costs'. This would mean that, while the hearing would not be without cost (there would e.g. be travel expenses and court fees) the communicant would not be exposed to the operator's costs if the application was unsuccessful. The communicant's own legal fees would be affordable by instructing legal representatives on a conditional fee agreement (CFA) basis. The communicant submitted that in all the circumstances, including the financial means of the parties, the proposed order would be fair and equitable.

¹ See the evidence in support of the claim provide in support of the detailed submissions.

² This is further explain in the detailed submissions at Annex 1.

8. On 31.1.13 the High Court refused to direct that the one day pre-action costs protection hearing should be on an 'each party pays their own costs' but that instead it should be on the basis of 'costs in the application'. This left the communicant exposed to considerable costs risk. In the light of the operator's previous costs claim the potential costs exposure for the pre-action costs hearing was likely to be significant. And, while the communicant was advised that some form of costs protection be provided by the High Court, this was not an inevitable outcome. This is particularly so in view of the very latest amendments to the UK's Civil Procedure Rules and the failure of the UK government and judiciary to recognise in clear terms that private nuisance proceedings fell within the Aarhus Convention³.
9. The High Court order of the 31.1.13 and the consequent costs exposure has prevented the communicant from proceeding with the one day costs protection hearing and has applied to stay the proceedings. The communicant has appealed the High Court decision. However, having attempted to progress the underlying nuisance matter through appeal once already, it is likely that there will be further prolonged delay as part of that appeal⁴. Meanwhile the noise and dust continues.
10. In summary, the legal justice system in the UK is failing the communicant (and others) and is preventing access to justice. The detailed facts, background and evidence are set out at Annex 1.

IV Nature of alleged non-compliance

11. Having regard to Decision IV/9i of the UNECE Council of July 2011 and, in particular the endorsements of communications: (1) ACCC/C/2008/23 in relation to unfairness of apportioning costs; (2) ACCC/2008/27 in relation to prohibitive expense in the quantum and allocation of costs; and (3) ACCC/2008/33 relating to (a) the absence of clear legally binding directions from the legislature or judiciary, (b) the failure to remove or reduce financial burden under Article 9(5), (c) the failure to provide clear time limits, and (d) the failure to provide a clear, transparent and

³ The Civil Procedure (Amendment) Rules 2013

⁴ See e.g. the approach of the Court of Appeal in the recent PCO application of *R (Eaton) v Natural England* C1/2012/2323 of 20.2.13 [7.672-673]

consistent framework; the communicant submits that the UK is still further failing to comply with the Aarhus Convention.

12. The further non-compliance is the failure to ensure that members of the public have access to judicial procedures to challenge the acts and omissions of private parties under Article 9(3) by:
 - 1) failing to ensure that the courts are not preventing members of the public from exercising their rights under Article 9(3) and that judicial procedures (including private nuisance proceedings) are fair, equitable, timely and not prohibitively expensive under Art. 9(4); and
 - 2) failing to recognise that, contrary to proposed Rule 45.41(2) of the Civil Procedure Rules⁵, an “Aarhus Convention claim” should not be limited to claims for judicial review and should include, for instance, a private nuisance claim such as the present case⁶.
13. In the present case, the order of 31.1.13 means that the communicant is unable to access the judicial procedures available in the UK to resolve continuing environmental harm in an affordable and timely: see Annex 1.

V Convention provisions relevant for the communication

14. The relevant Convention provisions are Articles 9(3) and (4).
15. There is also a further supplementary concern that the UK may have breached Article 9(2) of the Convention arising from the opencast operations permission procedures being subject to the EIA Directive and that the opencast permission requires that the operations be carried out in accordance with an environmental statement in support of the planning application. This is discussed in Annex 1.

VI Use of domestic remedies or other procedures

16. The communicant has appeal the order of 31.1.13. However, for the reasons given above (and found in Annex 1), the judicial appeal process

⁵ As amended by the Civil Procedure (Amendment) Rules 2013 that enter into force on 1.4.13.

⁶ This is consistent with §45 of the findings ACCC/23 and §44 of *Morgan & Baker v Hinton Organics (Wessex) Ltd* [2009].

is unlikely to provide a remedy that is compliant with Article 9(4) in that it will not be timely in circumstances where noise and dust pollution are continuing.

VII Confidentiality

15. Not applicable.

VIII Supporting documentation

16. The supporting documentation includes the following Annexes to this communication notice:

1. Detailed submissions
2. Chronology for Ffos-y-fran opencast coal mine
3. Orders and judgments relating to this case
4. The communicant's application for costs protection to the High Court
5. Operator's argument and evidence in reply
6. Relevant authorities, legislation & case law

IX Summary

17. A summary of the relevant facts of the communication is provided at the beginning of the document entitled Annex 1: detailed facts and alleged non-compliance.

X Signature

Richard Buxton Solicitors is authorised to represent the communication.

Signed: Alyson Austin
Alyson Austin

Signed: [Signature]
Richard Buxton Environmental & Public Law

Date: 28.2.13