

**FORTY FOURTH MEETING OF THE UNECE AARHUS CONVENTION
COMPLIANCE COMMITTEE**

**Communication ACCC/C/2013/86 by Alyson Austin concerning compliance by the
United Kingdom with Article 9 of the Convention in connection with the costs of
her claim for nuisance against Miller Argent (South Wales) Limited**

**NOTE OF THE ORAL PRESENTATION
by Charles Banner to the Committee
on 26 March 2014 on behalf of
THE GOVERNMENT OF THE UNITED KINGDOM**

- PART 2: THE SUBSTANCE OF THE COMMUNICATION -

Introduction

1. The communicant alleges that the United Kingdom has breached Article 9, paragraphs (2), (3) and (4) of the Convention because she cannot bring a private law claim for nuisance against Miller Argent (South Wales) Ltd ("**Miller Argent**") in respect of its operations in the vicinity of her home, due to those proceedings being "*prohibitively expensive*". The United Kingdom refutes this allegation.

2. There is a degree of overlap between this communication and ACCC/C/85/2013 ("C/85") which alleges that the effect of s.46 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 ("**LASPOA**") is to render private nuisance claims "*prohibitively expensive*" because a successful claimant who has taken out a costs insurance policy (i.e. what is known as 'after the event' insurance against their potential liability to pay the other side's costs if they lose) may no longer obtain an order requiring the defendant to pay the pay the premium of that policy. The Committee is referred to the United Kingdom's oral presentation delivered this morning in response to C/85 and to the accompanying written note. The Committee is also asked to refer to the letter dated 20 December 2013 from the Department for Environment, Food & Rural Affairs ("**DEFRA**") which sets out its case in detail in response to this communication and C/86.

3. The purpose of this oral presentation is to highlight the core points relating to this communication (without prejudice to the United Kingdom's primary contention that the communication should be declared inadmissible or adjourned due to the non-exhaustion of domestic remedies).

Article 9, paragraph (2) of the Convention

4. There is no merit in the communicant's suggestion that her private law nuisance claim against Miller Argent is within the scope of Article 9, paragraph (2) of the Convention. That paragraph is concerned with challenges to decisions of public authorities which are subject to Article 6 of the Convention or, where provided for national law, which are subject to other provisions of the Convention (e.g. Article 7). Challenges to the acts and omissions of private persons fall within the scope of Article 9, paragraph (3).

Article 9, paragraphs (3)-(4) of the Convention

5. The requirement in Article 9, paragraph (3) is that each Party *"shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment"*. Article 9, paragraph (4) requires that such procedures should not be *"prohibitively expensive"*.
6. As explained in detail in the United Kingdom's oral presentation in relation to C/85 earlier today, Article 9, paragraph (3) is not prescriptive. Administrative or judicial procedures may be made available in order for members of the public to challenge acts and omissions within its scope. No particular kind of procedure is mandated.¹ Nor is there any attempt to prescribe what the *"provisions of national law relating to the environment"* for this purpose should contain.
7. Instead, in assessing compliance with Article 9, paragraph (3), a holistic view needs to be taken. The key question is: do members of the public in the United Kingdom have access to administrative or judicial procedures to challenge acts and omissions which contravene provisions of national law relating to the

¹ Contrast this with Article 9, paragraph (2) which requires access to a procedure before a court of law or independent body for reviewing the substantive and procedural legality of the decisions, acts and omissions within the scope of that paragraph.

environment? And for Article 9, paragraph (4) the question is: can they do so without prohibitive expense?

8. As explained in the C/85 presentation, there is a wide range of administrative and judicial procedures available to members of the public in the United Kingdom to challenge acts and omissions that contravene provisions of national law relating to the environment. None of these are prohibitively expensive. The complaints of the communicant and the C/85 communicant about the breadth of the court's jurisdiction in reviewing the administrative procedures and about the scope of prohibited activities under the relevant national legislation (the Environmental Protection Act 1990) do not indicate any non-compliance with the Convention. This is because Article 9, paragraph (3) is not prescriptive either as to the kind of judicial or administrative procedures to be provided or as to contents of the provisions of national law relating to the environment.
9. The proper conclusion, therefore, is that the various administrative and judicial procedures referred to in the C/85 presentation and in more detail in DEFRA's 20 December letter give effect to the United Kingdom's obligations under Article 9, paragraph (3) of the Convention and that they also comply with Article 9, paragraph (4).
10. The law of private nuisance is therefore not a necessary plank of the United Kingdom's compliance with Article 9, paragraph (3). Moreover, it does not in any event constitute "*provisions of national law relating to the environment*". The tort of nuisance is a cause of action focused on enabling those with interests in land to protect their private property rights rather than enabling members of the public to challenge environmentally deleterious acts. The latter function is performed in particular by the Environmental Protection Act, which entitles a successful complainant to an order requiring the environmentally harmful activities to stop (unlike nuisance proceedings which can often only result in an award of damages to compensate the harm to the claimant's property rights, with the activity in question being allowed to continue).
11. On the occasions where a private law claim in nuisance relates to actions which do not merely harm the claimant's private property rights but also contravene provisions of national law relating to the environment, the judicial and

administrative procedures mentioned above may be relied upon by members of the public.

12. There could only be a conceivable breach of Article 9, paragraphs (3) and (4) if it could be shown that in a particular case:
 - a. a member of the public has sought to rely upon the administrative and judicial procedures referred to above to challenge an act or omission which contravenes provisions of national law relating to the environment, but those procedures have been inaccessible, ineffective or prohibitively expensive; and
 - b. that member of the public would have been able to obtain an order requiring the cessation of the act or omission which contravenes provisions of national law relating to the environment by bringing a nuisance claim; but
 - c. bringing that nuisance claim would be prohibitively expensive.
13. In the present case, this has not been shown.
14. The communicant's complaint that Miller Argent's operations have not been carried out in breach of a planning condition requiring compliance with the 2003 environmental statement² is a matter which could be drawn to the attention to the local planning authority. If the local planning authority refuses to take action, a claim for judicial review could be made to challenge that refusal. If the court considered that the local planning authority's refusal to take action was influenced, or appeared to be influenced, by the fact that it receives £1 for every tonne of coal sold,³ the judicial review claim would be successful since actual or apparent bias are well established grounds upon which the High Court may quash administrative decisions.
15. There is also no evidence of any attempt by the complainant to avail herself of the other administrative and judicial procedures available to members of the public in the United Kingdom to challenge acts and omissions which contravene

² See paras. 48-52 of Annex I to the communication (Detailed Submissions).

³ As appears to be alleged at para. 34 of Annex I to the Communication.

national law provisions relating to the environment. It cannot, therefore, be concluded that these procedures have proved ineffective in her case.

16. Further, it has not been shown that bringing her private law nuisance claim against Miller Argent would be prohibitively expensive. The communicant herself acknowledges that they would not be prohibitively expensive if she were to be granted a protective costs order.⁴ The question of whether she should be granted a protective costs order is the subject of her pending appeal on 25/26 June 2014 before the Court of Appeal.

Conclusions

17. For all these reasons, together with the United Kingdom's written response to the communication, it is contended that the Committee should hold that the communication has not established a breach of Article 9 of the Convention by the United Kingdom.

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⁴ See para. 88 of Annex I to the communication.