

Note on Decision V.9n following ACCC 2nd progress report

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For communicants re ACCC/C/2008/23, and ACCC/C/2013/86

3.3.17

1. This note is prepared for the ACCC meeting of 3.3.17. In summary, the UK's position on non-compliance of the Convention is deteriorating and access to justice in environmental matters is getting much more difficult to achieve. This is contrary to articles 9(3), 9(4) and 9(5).
2. This is of serious concern in the light of the following:
 - 1) Decisions IV/9i and V/9n of the Meeting of the Parties;
 - 2) the UK's commitment to review the question of environmental costs and the non-compliance of the Aarhus Convention in July 2014 (statement to House of Lords);
 - 3) the findings of the Court of Appeal in *Secretary of State for Communities & Local Government v Venn* [2015] 1 WLR 2328;
 - 4) the second major consultation on environmental costs in September 2015;
 - 5) the responses back to the consultation, which overwhelmingly sought in reduction in the existing financial barriers in place in environmental matters;
 - 6) the ACCC first progress report of 2016 and UK responses to that report
 - 7) the adopted findings of the ACCC in C-85 & C-86;
 - 8) the continuing concerns raised by the European Commission in relation to environmental costs;

- 9) the consideration by the European Court of Human Rights of a breach of Article 8, Article 1 of Protocol 1, and Article 13 of the ECHR in the case of *Austin v UK*, (Applic. no. 39714/15), the same applicant and facts as C-86); and
- 10) the UN Special Rapporteur expressing on human rights and hazardous substances and wastes, Baskut Tuncak, finding the need to visit the UK between 17-31 January 2017 including attending Merthyr Tydfil, South Wales (related to C-86) and expressing in his end of visit statement that.

“... the increased responsibility dealt to local authorities in combination with decreasing financial, technical and human resources due to austerity is problematic. In addition to the lack of resources, there is lack of structured cooperation between relevant authorities and limited channels of accountability and oversight. And the demands of Brexit are placing further strains on already stretched resources at DEFRA and other UK departments and agencies.

For example, a community in Merthyr Tydfil has objected to the creation and ongoing operation of the Fos y Fran opencast coalmine. Winds are alleged to blow to the community from the mine 40-60% of the time. Instead of a safe buffer zone between the mine and homes, due to legislative loopholes (the large open-cast mine is not subject to intended laws on such mines, but rather laws for “reclamation” of old mines) some residents live only a few dozen meters from the operation’s fenceline. A prevalence of childhood asthma and cancer clusters was alleged among the community. The Welsh government appears to attribute rates of disease and disability in the community to unhealthy habits, and shifts responsibility for investigation to the company and other levels of government. The community tried to enforce their rights through the planning process, repeatedly through the UK courts, through the European Parliament, and the Aarhus Convention, to which the UK is party. Meanwhile, a massive expansion of the coal mine has been proposed.

End-of-visit statement by the United Nations Special Rapporteur on human rights and hazardous substances and wastes, Baskut Tuncak on his visit to the United Kingdom, 17 – 31 January 2017
<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21131&LangID=E>

3. The reason access to justice in environmental matters is getting worse is the result of explicit Government interventions seeking to restrict the existing provisions, including:
- a) a limited form of legislative measures introduced in April 2013 by the Civil Procedure Rules, CPR 45.41-44 to limit the adverse costs risk that derive from a principle of 'the loser pays' principle, something inherently unfair in environmental matters when the applicant is likely to be an individual or an NGO with very limited resources and they will be ranged against a public body and very wealthy developers;
 - b) a Government express challenge in *SSCLG v Venn* on an early appropriate, purposive approach of the Convention and the CPR by the Courts from April 2013 to ensure that the Courts did not overstep what the Government now stated it had intended in CPR 45.41;
 - c) undue delay in attempting to rectify the problem, it is now 12 years since ratification of the Convention by the UK and 4 years since even the limited regulatory measures were introduced;
 - d) the introduction of amendments to CPR 45.41-44 which restricts access to justice rather than reduce financial burden by:
 - i) maintaining an unduly narrow interpretation of what should be considered an 'Aarhus' claim and not including the 2 key areas the urgently need cover i.e. s. 288 proceedings which involve challenging Government appeal decisions in land use planning and private nuisance proceedings relating to environmental matters.;
 - ii) by requiring financial disclosure by any applicant seeking costs protection;
 - iii) by requiring any financial support given to an applicant's to be disclosed and taken into account – thereby placing fear on potential donors or other placing pressure on an applicant's lawyers to work on a *pro bono* or limited fee basis;

iv) by significantly increasing the costs of court fees to, at present over £1,000 for a simple judicial review (public law) case; plus over £2,500 for an appeal to the Court of Appeal and over £5,000 for an appeal to the Supreme Court. For many applicants the court fees alone are prohibitively expensive, such court fees are in addition to the adverse costs risk that an applicant faces (see para 3(a) above) and an applicant's own legal costs.

4. Any aspect of the above can be explained and clarified and documentation provided in support.

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