

ACCC 60th Meeting (12-15 March 2018)

Open session on Decision VI/8k

In the matter of non-compliance of Art. 9, Aarhus Convention by the UK

**Joint Note for the open session follow-up meeting on Decision VI/8k
on behalf of the Communicants in ACCC/C/2013/85 & 86, 15.3.18**

1. This joint note is prepared for the Aarhus Convention Compliance Committee (ACCC) open session meeting on the follow-up of Decision VI/8k, including regarding the UK's first progress report due on 1 October 2018.
2. ACCC members will be aware of the continuing and substantive areas of non-compliance by the UK since at least 2008 and noted for example in Communication ACCC/C/2008/23, in a number of communications thereafter and also in Decisions IV/9i (2001) and V/9n (2004) of the Convention Meeting of the Parties.
3. ACCC members will also be aware that the UK has since 2013 taken measures to restrict access to justice in environmental matters contrary to the general obligation under Article 9(5) of the Aarhus Convention including in public and private law, including for example revising aspects of the Civil Procedure Rules (CPR) to make access to justice more difficult in environmental matters.
4. The Communicants make three short joint submissions:
 - 1) That the UK government has been presented with a very simple, workable, option to resolve the continuing non-compliance problems in relation to private nuisance claims. This includes a revision to the Civil Procedure Rules CPR 44.13 so that qualified one way costs shifting (QUOCS) is available in respect of environmental nuisance claims that fall within the scope of the Aarhus Convention: see Annex 1.

- 2) The Communicants have together taken a series of positive steps to remedy the non-compliance, including for example meeting the relevant UK government departments on a number of occasions. The last occasion was on 8 March 2017 in which the Communicants presented practical options to remedy the non-compliance. Communicant C-85 has subsequently consulted its membership of specialist environmental lawyers and found wide support for the proposals mentioned in (1) above. This support by experienced legal practitioners has also been made known to the UK government departments.
- 3) The problems of restricted access to justice in environmental matters, particularly in environmental pollution and nuisance, is getting worse not better due to, among other things, Government changes to the CPR, the high costs of court fees alone and continued cuts in public spending on environmental protection.

1. Amendment to CPR 44.13

5. The proposal to amend CPR 44.13 was presented to the UK Government during 2017 at meetings and in subsequent correspondence. It was also explained in a note to Convention's Meeting of the Parties in August 2017 in which support of the proposal was made clear to the UK and to Meeting of the Parties. This refers to an option made clear as early as 2009 that QUOCS 'could be introduced for private nuisance claims': para 4.2, p. 318, Civil Costs Reforms (TSO, 2009).
6. As noted above, the changes to the CPR to ensure compliance with the Convention will be relatively straightforward. Moreover, such amendments are not procedurally or politically complex; they do not, for instance, take up any Parliamentary debating or scrutiny time, unlike changes to legislation.
7. Instead, changes to the CPR involve simply the relevant departments (Defra and the Ministry of Justice) asking the Civil Procedure Rules Committee to consider the proposed changes, advising upon them and then referring them to the relevant Secretary of State for approval. This is

a procedure routinely carried on several times a year and results in regular amendment and updating of the CPR,.

8. In short, amendment to the CPR is relatively simple, swift and would be effective; there is no justification for continuing non-compliance with the Aarhus Convention 1998 in these circumstances.

2. Continuing cooperation with the UK Government

9. While the Communicants welcome any further cooperation and meetings with the UK Government Departments after over 13 years of non-compliance since ratification by the UK; it is clear beyond peradventure that offering and attending meetings appears to be a hollow gesture by the UK.
10. The reality is that while the UK government offers the opportunity to discuss continuing problems and has e.g. met with representatives of C85 & 86, there is no progress whatsoever on any positive proposals suggested to the UK. It is simply ignoring positive proposals and delaying any progress. Without any good reason, any consultation on environmental costs that has been carried on e.g. in 2012 and 2015 expressly excluded the discussion or consultation on environmental nuisance cases.

3. Non-compliance is exacerbating access to environmental justice

11. The continuing public sector financial cuts in the UK are resulting in weaker public sector environmental protection. The consequence of this is that pressure is increasingly being placed on individuals and communities to protect their environment but the means to do so is being denied see e.g. paragraphs 3-12 of the Special Rapporteur's Report to the UN Human Rights Council of 5 September 2017 (Annex 2), including:

... 11. The impact of austerity measures initiated in 2010 has meant a radical lack of resources and reduction in public grants for the main environmental regulators across the United Kingdom. Between May 2015 and May 2016, the Department for Environment, Food and Rural Affairs and its agencies agreed to 500 voluntary exit packages, while the environment department,

which is operating with a third of its core staff compared with just 10 years ago, must further trim its budget by 15 per cent by 2019 or 2020. Coupled with increased responsibilities for environmental matters given to the devolved authorities, the decreasing financial, technical and human resources due to austerity have created serious governance gaps. ...

12. In relation to access to justice, the UN Report said this:

... 76. Seeking remedy in the United Kingdom can be extremely challenging for victims. The Special Rapporteur heard substantial evidence on the range of obstacles that obstruct access to remedies for victims of human rights abuses by companies related to exposures to toxic substances. These include changes to limit legal aid provision, limits on the recovery of legal costs, increases in fees and the otherwise high costs of civil action. In addition, court procedures have made it increasingly difficult to obtain access to corporate documents. In addition to severe difficulties in accessing information and the challenge of establishing legal causation, cuts in legal aid, limits on the recovery of legal costs and increases in court and tribunal fees in England and Wales have made it even more difficult for victims of pollution and contamination to seek remedy. Furthermore, austerity measures have driven many local councils to withdraw funding from welfare rights services and law centres, often to be replaced by only a helpline or website. Victims abroad face even greater hurdles, confronted with the burden of proving that their claim falls within the jurisdiction of the United Kingdom. ...

13. Representatives of the Communicants are continuing to experience many instances of restricted access to justice in environmental matters whereby prospective or potential claimants are advised that the prospects of success are otherwise reasonable, are nevertheless unable to pursue legal proceedings due to the costs of legal proceedings. This is a concern that is not limited to nuisance cases but extends to all forms of environmental claims.
14. Also, claimants are finding that reliance upon 'alternatives' to private nuisance suggested by the UK such as statutory nuisance are proving inadequate both in respect of the defence of best practicable means and in respect of the risk of a substantial adverse award of costs in respect of an appeal against the statutory nuisance proceedings.
15. The ACCC will be aware that there are also continuing concerns in the field of public law including, e.g. the increasing financial burden placed

upon claimants by revisions to the Civil Procedure Rules, CPR 45.41-44 in February 2017 including e.g. by failing to ensure that challenges against national government bodies such as the Planning Inspectorate (in e.g. s. 288 proceedings) fall outside the scope of the Aarhus Convention provisions (without good reason).

16. It is hoped that the above adequately clarifies the concern of continued non-compliance with the Convention and that the brevity does not leave significant gaps in analysis. Any aspect of the above can be explained and clarified and documentation provided in support.

Stephen Tromans QC
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13.3.18

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ANNEX 1

Proposal for reform: amendment to CPR 44.13

Qualified one-way costs shifting: scope and interpretation

44.13

(1) This Section applies to proceedings which include a claim for damages –

(a) for personal injuries;

(b) under the Fatal Accidents Act 1976⁷; or

(c) which arises out of death or personal injury and survives for the benefit of an estate by virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934⁸, or

(d) for damages and/or other relief for private nuisance brought by one or more natural persons which relates to the environment where such claim arises out of the act, omission or decision of one or more legal persons in the course of undertaking a business or profession, and for the purpose of this section an act, omission or decision relates to the environment if information about it would be environmental information within the meaning of Article 2(3) of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998 ("the Aarhus Convention").

but does not apply to applications pursuant to section 33 of the Senior Courts Act 1981⁹ or section 52 of the County Courts Act 1984¹⁰ (applications for pre-action disclosure), or where rule 44.17 applies.

(2) In this Section, 'claimant' means a person bringing a claim to which this Section applies or an estate on behalf of which such a claim is brought, and includes a person making a counterclaim or an additional

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ANNEX 2

UN Human Rights Council, Special Rapporteur's report of 5 September 2017