

Aarhus Convention – Fifth Meeting of the Task Force on Access to Justice, 13-14 June 2012

MOP Decisions on Remedies and Costs (Article 9, paragraphs 4 and 5)

Brief summary of CC decisions referred to in the presentation

1. C/2004/6 (Kazakhstan)

- a) Non-compliance with Article 9 (4) related to some court hearings
- b) Non-compliance
 - since the court hearings took place without proper notification of the parties involved they were not fair
 - failure to communicate the court decision to the parties constituted lack of fairness and timeliness
 - the review procedures failed in practice to provide adequate and effective remedies, because the court failed to consider the claim related to Article 9 (3)

2. C/2004/8 (Armenia)

- a) The case concerned the modification of land-use designation and zoning and on the leasing of certain plots in an agricultural area as well as availability of appropriate appeal procedures
- b) Non-compliance
 - the CC found that by failing to ensure that members of the public concerned had access to a review procedure and to provide adequate and effective remedies the Party was not in compliance with Article 9 (2)-(4)

3. C/2008/23 (UK)

- a) In 2007 an interim injunction under the UK's law of private nuisance was granted the communicants by the High Court prohibiting the operator of a waste management site from causing odours in the vicinity of their properties at unacceptable levels as perceived by an authorized officer of the relevant authorities
 - the authorities refused to do that, and the operator did not accept a proposal to identify in agreement with the communicants an independent expert
 - therefore, the High Court discharged the interim injunction and ordered the communicants to pay the costs of the authorities in the amount of appr. 5.000 £

b) Non-compliance

- since Article 9 (3) was applicable also Article 9 (4) had to be complied with, and
- since it was the operator's refusal to cooperate in naming an expert that incurred the legal costs of the authorities and the order that the communicants pay the whole of the costs, the order was unfair and inequitable constituting non-compliance with Article 9 (4)

4. C/2008/24 (Spain)

a) The case concerned, *inter alia*, non-compliance with Articles 6 and 9 in relationship with an urbanization project, and is interesting, in particular, because of what happened when the CC decision was discussed at MOP 4 (as explained in the presentation)

b) Non-compliance

- the communicants had tried to get some decisions suspended, but first the court held that the request was too early and later that the request was too late, which indicated that while injunctive relief was theoretically available it was not available in practice thus constituting non-compliance with the requirements of adequate and effective remedies including injunctive relief
- in the same vain the CC also found that since it had only been possible to obtain a court decision on whether to grant suspension after construction had already started no timely, adequate or effective remedies were available

5. C/2008/27 (UK)

a) This case related to a decision to expand Belfast City Airport operations and the order of the High Court dismissing an application, *inter alia*, to squash a determination of the Department of the Environment, to the communicants to pay the full fees and outlay of the Department, nearly 40.000 £

b) Non-compliance

- the CC found that the quantum of costs awarded in the case was prohibitively expensive within the meaning of Article 9 (4), and that the manner of allocating the costs was unfair, and thus, amounted to non-compliance
- stressing that fairness in this provision refers to what is fair for the claimant, not the defendant being a public body
- and that fairness in cases of judicial review where a member of the public is pursuing environmental concerns that involve the public interest and loses the case, the fact that the public interest is at stake should be accounted for in allocating costs

6. C/2008/33 (UK)

a) The case, relating to the general implementation of Article 9 (3), (4) and (5) by the UK, concerned, *inter alia*, allegations on

- prohibitively expensive access to justice, and

- uncertain, unfair and overly restrictive time limits for bringing an application for judicial review

b) Non-compliance

- the CC found that the UK has not adequately implemented its obligations in Article 9 (4) to ensure that the procedures are not prohibitively expensive, and that the system as a whole is such as “to remove or reduce financial barriers to access to justice” as Article 9 (5) requires Parties to consider and
- that in the interest of fairness and legal certainty it is necessary to set a clear minimum time limit within which a claim should be brought, and that time limits should start to run from the date on which a claimant knew, or ought to have known of the act or omission at stake

7. C/2009/36 (Spain)

a) The case concerns, *inter alia*, Article 9 (5) related to the requirements of the Spanish legislation that in order receive legal aid NGOs must have e.g. adequate staff, equipment and organization to ensure compliance with their objectives

b) Non-compliance

- the CC found that instituting a system of legal aid excluding small NGOs from receiving legal aid did provide sufficient evidence to conclude non-compliance with Article 9 (5) due to the inherent purpose of the provision: to facilitate access to justice for the financially weaker and
- that this also constituted non-compliance with Article 9 (4) on fair and equitable remedies.

8. C/2010/48 (Austria)

a) According to the Austrian law on access to information a refusal of a request for information or lack of an answer to an information request within two months cannot be appealed immediately. A further request involving some delays is necessary to obtain the official notification, enabling the applicant to seek remedies, which may result in a delay of more than one year after the initial request for information until review procedures are accessible.

b) Non-compliance

- the CC considered the requirement for a separate official notification as a precondition for access to review procedures to be non-compliant with Article 9 (4)

9. C/2011/57 (Denmark)

a) Recently a fee of approximately 400 Euro was introduced in Denmark for appeals by NGOs, enterprises and public authorities of environmental decisions to the Danish Nature and Environmental Appeal Board.

b) Non-compliance

- the CC considered the following aspects of the system as a whole
 - the contribution made by appeals by NGOs to improving environmental protection
 - the expected result of the introduction of the new fee on the number of appeals by NGOs to the Board (the explanatory notes to the bill states, *inter alia*, that the number of appeals is expected to decrease)
 - the fee as compared to fees for appeals of other administrative decisions of a comparable nature before similar quasi-judicial bodies (either free of charge or considerably less than 400 Euro)
- and found on this basis that the introduction of the fee was not in compliance with Article 9 (4) on non-prohibitively expensive review procedures
- it is noteworthy that the CC considered the relationship between average individual net income and NGOs financial capacity as being not clear and depending on a number of other factors. So, this relationship did not play any role
- it is noteworthy also that the CC, focusing on the current situation, made its findings in spite of the information that the Government had decided to present a bill reducing the fee to 60-70 Euro.