



# Economic and Social Council

Distr.: General  
24 August 2011

Original: English

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## Economic Commission for Europe

Meeting of the Parties to the Convention on  
Access to Information, Public Participation  
in Decision-making and Access to Justice  
in Environmental Matters

### Compliance Committee

#### Twenty-ninth meeting

Geneva, 21–24 September 2010

## Report of the Compliance Committee on its Twenty-Ninth meeting

### Addendum

### Findings and recommendations with regard to communication ACCC/C/2008/23 concerning compliance by the United Kingdom of Great Britain and Northern Ireland

Adopted by the Compliance Committee on 24 September 2010

## I. Background

1. On 21 February 2008, Mr. Morgan and Mrs. Baker of Keynsham, United Kingdom, (hereinafter “the communicants”), represented by Mr. Paul Stookes of Richard Buxton Environmental & Public Law, submitted a communication to the Committee, alleging non-compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under article 9, paragraph 4, of the Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (hereinafter “the Aarhus Convention” or “the Convention”).

2. The communicants alleged that the Party concerned failed to ensure the availability of fair, equitable, timely and not prohibitively expensive review procedures in their private nuisance proceedings against Hinton Organics (Wessex) Ltd (hereinafter, “the operator”) seeking an injunction to prohibit offensive odours arising from the operator’s waste composting site near the communicants’ homes. Following the discharge (cancellation) of an interim injunction in respect of the offensive odours, the communicants were ordered to

pay the costs of the operator and added parties (the Environment Agency and Bath & North East Somerset Council) amounting to approximately £25,000.

3. At its nineteenth meeting (5–7 March 2008), the Committee determined on a preliminary basis that the communication was admissible, subject to review following any comments from the Party concerned.

4. The communication was forwarded to the Party concerned on 17 April 2008, together with a number of questions from the Committee. Also on 17 April 2008, the Committee wrote to the communicants seeking further background information regarding its communication.

5. By letter dated 7 July 2008, the Party concerned requested the Committee to extend the five-month deadline for its response until the Court of Appeal delivered its judgement regarding an appeal of the costs order by the communicants.

6. On 26 September 2008, the Committee wrote to the Party concerned indicating that, in light of the fact that the request related to some of the issues addressed in the communication which were currently subject to review by the Court of Appeal and that the communicant did not have objections to the extension of the time limit for the Party's response, the Committee had agreed to postpone the deadline. At the same time, the Committee requested that the Party concerned provide to it by 31 October 2008 an initial response dealing with some of the questions posed in the Committee's letter of 17 April 2008.

7. By letter dated 29 September 2008, the communicants provided their response to the Committee's questions of 17 April 2008.

8. On 30 October 2008, the Party concerned provided its initial response, including its answers to the questions posed by the Committee on 17 April 2008. Due to further postponement of the hearing of the communicants' appeal in the Court of Appeal, the response of the Party concerned was provided before the matter of costs had been resolved in the national courts. On 22 May 2009, the Party concerned provided an amended version of its letter of 30 October 2008.

9. On 24 March 2009, the communicants sent a further letter enclosing the judgement of the Court of Appeal dated 2 March 2009 regarding the communicants' appeal of the costs order against them. By letter dated 26 March 2009, the Party concerned asked the Committee to close the case, on the grounds that the interim costs order complained of in the communication had been quashed by the judgement of the Court of Appeal and substituted with one which reserved the question of the operator's costs until the end of the trial, and that the communicants' remaining liability to pay the costs of the Environment Agency and Bath & North East Somerset Council in the amount of £5,130 had no deterrent effect. The communicants, by letter of 27 March 2009, objected to the request of the Party concerned and asked the Committee to proceed with the case.

10. At its twenty-third meeting (31 March–3 April 2009), the Committee decided to proceed with the case and to discuss the substance of the communication together with communication ACCC/C/2008/27, which also concerned compliance by the United Kingdom with the provisions of article 9 of the Convention, at its twenty-fourth meeting (30 June–3 July 2009). Both the Party concerned and the communicants were informed of the Committee's decision.

11. By letter dated 12 May 2009, the Party concerned asked to postpone the planned discussion of communications ACCC/C/2008/23 and ACCC/C/2008/27 and to consider them later on, jointly with communication ACCC/C/2008/33. By letter of 14 May 2009, the communicants opposed the proposal to postpone the consideration of the communications. After considering the views of both parties and consulting with members of the Committee,

the Chair of the Committee decided to hold the discussions of the communications ACCC/C/2008/23 and ACCC/C/2008/27 at the twenty-fourth meeting. The Chair indicated that, in reaching this decision, he had been guided by the need to strike a balance between making progress in the processing of communications received some time ago and, on the other, the desire to group together discussions on different communications that dealt with common issues.

12. On 22 May 2009, the Party concerned submitted a revised version of its letter of 30 October 2008.

13. Also on 22 May 2009, the Committee received written submissions in respect of ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33 from an observer, Coalition for Access to Justice for the Environment, a coalition of six environmental non-governmental organizations from the United Kingdom.<sup>1</sup>

14. On 23 June 2009, the communicants presented written submissions clarifying the allegations set out in their communication. By letter of 23 June 2009, the Party concerned also provided additional written submissions for consideration by the Committee, setting out its view.

15. The Committee discussed the communication at its twenty-fourth meeting, with the participation of representatives of both the Party concerned and the communicants. At the beginning of the discussion, the Committee confirmed the admissibility of the communication.

16. After the discussion, additional information was provided by an agreed statement of the communicants and the Party concerned dated 22 July 2009. The communicants and the Party concerned provided further clarification on certain aspects of the case by letters of 23 and 30 July 2009, respectively.

17. By letter dated 22 July 2009, the United Kingdom alleged that a member of the Committee had a conflict of interest with respect to communications ACCC/C/2008/23 and ACCC/C/2008/27. The Committee member concerned did not participate in the deliberations on the findings in this case. Further details regarding the United Kingdom's allegation, the Committee's response and the views of the communicants are set out in paragraphs 6–11 of the report of the twenty-fifth meeting of the Committee (22–25 September 2009).<sup>2</sup>

18. The Committee began its deliberations on draft findings at its twenty-fifth meeting, following a very preliminary discussion at its twenty-fourth meeting, and continued its deliberations at its twenty-sixth meeting. By letter dated 9 March 2010, the Committee sought further clarification from the parties. The communicants provided the requested clarification on 12 and 13 April 2010, respectively. Following receipt of these clarifications, the Committee completed the preparation of draft findings. In accordance with paragraph 34 of the annex to decision 1/7, the draft findings were then forwarded for comments to the Party concerned and to the communicants on 7 June 2010. Both were invited to provide any comments by 4 July 2010.

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<sup>1</sup> The six members of the coalition are Friends of the Earth, WWF-UK, Greenpeace, the Royal Society for the Protection of Birds, Capacity Global and the Environmental Law Foundation.

<sup>2</sup> Statements by the Committee, the Party concerned and the communicant are annexed to the report of the twenty-fifth meeting (ECE/MP.PP/C.1/2009/6) and can also be accessed at <http://www.unece.org/env/pp/compliance/Compliance%20Committee/33TableUK.htm>.

19. The communicants and the Party concerned provided their comments on the draft findings on 11 and 18 June 2010, respectively. The communicants provided additional comments by letter of 22 June 2010.

20. At its twenty-ninth meeting (21–24 September 2010), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings and agreed that they should be published as an addendum to the report. It requested the secretariat to send the findings to the Party concerned and the communicants.

## II. Summary of facts, evidence and issues<sup>3</sup>

21. The communication concerns a costs order awarded against the communicants upon the discharge of an interim injunction they had earlier been granted in respect of offensive odours emanating from the operator's waste composting site near their homes. The communicants allege that they were subjected to unfair, inequitable and prohibitively expensive procedures in their private nuisance proceedings against the operator of the waste composting site contrary to the standards required by article 9, paragraph 4, of the Convention. In addition, the communicants allege that the demands from the Bath & North East Somerset Council and the Environment Agency for their costs to be paid forthwith and not to await the outcome of the trial amounted to non-compliance of the Party concerned with article 3, paragraph 8, of the Convention, which requires that persons exercising their rights in conformity with the Convention are not to be penalized in any way for their involvement.

22. According to both the communicants and the Party concerned, there are other procedural routes in the United Kingdom enabling members of the public to challenge odour nuisance other than private nuisance proceedings. In respect of the case presented by the communicants, they include, inter alia, the following:

(a) Summary proceedings by persons aggrieved by statutory nuisances under section 82 of the Environmental Protection Act 1990;

(b) A complaint to the Parliamentary Ombudsman or Local Government Ombudsman about the Environment Agency or the Council, respectively;

(c) An application for judicial review to challenge administrative actions or failure to take such actions by the Environment Agency or the Council; and

(d) A private prosecution (this right is preserved by section 6 (1) of the Prosecution of Offences Act of 1985).

23. According to the communicants, a private nuisance action was considered the most effective course of action in this case, inter alia, because they had legal expenses insurance for it.

24. The operator's recycling and composting site is located near a residential road and a few hundred meters from the communicants' homes. A planning permission was granted for this site by the Council in 1999 and was to expire in April 2010. A waste management licence was issued in January 2001 by the Environment Agency. The Agency and the Council are the two primary environmental regulators of the site.

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<sup>3</sup> This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

25. During recent years, the activities of the operator were the subject of numerous complaints by residents to the Agency and Council, especially in respect of odours emanating from the composting processes. In response to such complaints, a number of enforcement actions have been taken by the regulators, including compliance notices, warning letters and cautions. The Agency also brought proceedings against the operator in the Magistrates' Court, resulting in fines being imposed on the operator by the Court on two occasions (£4,000 plus costs of £1,200 in January 2005 and £3,000 plus costs of £2,960 in March 2009). There is disagreement between the parties as to whether the enforcement actions taken by the regulators with regard to the operator have been adequate. In the communicants' view, the Agency and the Council have failed to protect local residents and to properly regulate the site, while the position of the Party concerned is that the regulators have taken enforcement action against the operator where, in their judgement, it was proportionate and appropriate to do so.

26. In July 2006, the communicants began their own private nuisance proceedings for an injunction and damages. On 9 November 2007, an interim injunction was granted by the High Court. The terms of the injunction prohibited the defendant from "causing odours" in the vicinity of the claimants' properties "at levels that are likely to cause pollution of the environment or harm to human health or serious detriment to the amenity of the locality outside the boundary, as perceived by an authorized officer of [either the Agency or the Council]."

27. The above formulation of the injunction followed substantially the wording of the condition in paragraph 5.2.2 of the operator's waste management licence, but made it specific to odours on the properties owned and occupied by the communicants. Also, it specified that whether such odours caused pollution of the environment, harm to human health or serious detriment to amenity was to be perceived by an authorized officer of the Agency and the Council. The Agency and Council were not consulted before the interim injunction order was made. While the operator opposed the granting of an order for an injunction, there is no evidence before the Committee that the operator objected to the Agency and the Council being named in the order.

28. Upon being informed by the communicants and the operator of the terms of the interim injunction, the Agency and Council wrote to the Court expressing concerns about the possible conflict between their statutory functions as regulators and their position as "de facto arbiters" of breaches of the injunction in the private dispute between the communicants and the operator of the site. They invited the parties to the dispute to agree to amend the order of 9 November 2007, by deleting the reference to them in the formulation of the injunction, and suggested as an alternative to substitute it by a reference to independent experts agreed upon by the operator and the communicants. In correspondence labelled as "without prejudice", the communicants invited the operator to nominate experts, but the operator rejected this proposal as unworkable. Being "without prejudice" that correspondence was not put before the High Court. By a judgement dated 21 December 2007, the High Court discharged the interim injunction on the ground that it would be unworkable without some objective means of assessment. In respect of the suggestion that the reference to the Council and Agency could be replaced by a reference to an independent expert, the High Court commented: "That in my view would be appropriate if, but only if, there was an agreement between the claimants and the defendant as to the identity of such a person. That is not the position...."

29. Following the discharge of the interim injunction, in an order dated 21 December 2007, the Court ordered the communicants to pay the costs of the added parties (the Agency and Council) in the amount of £5,130 and the defendant's costs as assessed on the standard basis. The defendant's costs were estimated to be £19,190.

30. The communicants sought leave to appeal the costs order of 21 December 2007 on the grounds, inter alia, that the order was “unfair and prohibitively expensive” and therefore contrary to article 9, paragraph 4, of the Aarhus Convention. Initially the communicants sought leave to appeal the costs order in favour of both the operator and the Agency and Council. Subsequently, the communicants narrowed the ground of their appeal so as to seek the dismissal of the costs order in favour of the operator in its entirety, and the costs order in favour of the Agency and Council regarding liability, but not regarding quantum.

31. The communicants allege that they chose not to challenge the quantum aspect of the costs order in favour of the Agency and Council following correspondence from the Agency in which the latter indicated that it would be seeking further costs if it had to appear before the Court of Appeal.

32. The communicants were initially refused leave to appeal the costs order but this was ultimately granted and their appeal was heard, together with an appeal by the operator on an issue not within the scope of the Convention, on 2 and 3 February 2009.

33. In its judgement of 2 March 2009, the Court of Appeal set aside the costs order requiring the communicants to pay the defendants’ costs. In making its decision, it noted that the High Court judge had found that the balance of convenience lay in some form of interim protection, damages not being an adequate remedy. It also noted that the communicants had been willing to agree to replace the regulators in the interim injunction with independent experts, and had invited names from the operator, who had rejected the proposal out of hand as unworkable. The Court of Appeal held that, in a case of this kind, where the merits of the interim application were so closely tied up with the merits of the case overall, “the correct order would have been to reserve the defendant’s costs of the interim application (including the costs of the hearings on 9th November and 21st December 2007) to the trial judge”. The Court made some general observations on the application of the Convention in the United Kingdom which had been raised by the communicants, although it did not use the Convention as a basis for its decision as the Convention had not been raised before the judge in the High Court.

34. In paragraph 17 of the judgement, the Court of Appeal noted that the communicants had asked it to consider whether it was outside the Court’s proper discretion to order the Claimant to pay the costs of the authorities. However, the judgement itself did not address the issue of liability for the Agency and Council’s costs at length, but rather noted in paragraph 53:

For reasons we have explained, the order in favour of the two authorities has not been the subject of argument, but in any event we would find it hard to see any objection to it. There being no appeal from the judge’s decision that they were wrongly included in the order, they were entitled to their costs on ordinary principles. Since they would be no longer involved as parties to the case, it was obviously appropriate to deal with them then and there.

35. The Court of Appeal allowed both the communicants’ and the operator’s appeals.<sup>4</sup> The Court of Appeal order dated 2 March 2009, which accompanied the Court of Appeal’s judgement, stated in paragraph 3: “The interim costs order made by His Honour Judge Seymour QC on 21<sup>st</sup> December 2007 is set aside and replaced by an order that costs be reserved to the trial judge.”

36. By letter dated 5 March 2009, the Agency and Council wrote to the registry of the Court of Appeal asking that paragraph 3 of the Court Order of 2 March 2009 be amended to

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<sup>4</sup> As noted at paragraph 32 above, the operator’s appeal is not within the scope of the Convention.

reflect paragraph 74 of the Court of Appeal's judgement which stated that: "Both appeals are accordingly allowed. For the interim costs order there will be substituted an order reserving the costs of the defendant to the trial judge."

37. The communicants objected to the Agency and Council's request, indicating that their view was that the Order was correct as it stood, i.e., that the costs order regarding both the operator and the authorities was set aside and reserved to trial.

38. On 19 March 2009, the Court of Appeal amended paragraph 3 of the Court Order of 2 March 2009 (set out in para. 35 above) to reflect paragraph 74 of the judgement of 2 March 2009, so that paragraph 3 of the amended Court Order stated: "Paragraph 3 of the interim costs order made by His Honour Judge Seymour QC on 21<sup>st</sup> December 2007 is set aside and replaced by an order that the costs of the Defendant be reserved to the trial judge."

39. On 2 April 2009, the communicants, through their solicitor, wrote to the Agency and the Council, enclosing payment of £5,130 plus interest in accordance with the order of 21 December 2007.

40. The communicants allege that the conduct of the Agency and Council, in pursuing the communicants for the costs of their participation in the proceedings regarding the discharge of the injunction on 21 December 2007, instead of awaiting the outcome of the main trial, constitutes a breach of article 3, paragraph 8, of the Convention. The communicants assert that by doing so the public authorities have penalized the communicants for seeking to exercise their rights under the Convention.

41. The communicants also allege that they were subjected to unfair, inequitable and prohibitively expensive procedures in their private nuisance proceedings in contravention of the United Kingdom's obligations under article 9, paragraph 4 of the Convention. The Committee notes that at the discussion in open session at its twenty-fourth meeting, the communicants' representative acknowledged that the order of £5,130 plus interest was not in fact prohibitively expensive in this case, while observing that a similar order might be prohibitively expensive in other circumstances.

### **III. Consideration and evaluation by the Committee**

#### **General considerations**

42. The United Kingdom deposited its instrument of ratification of the Convention on 23 February 2005. The Convention entered into force for the United Kingdom on 24 May 2005.

#### **Private nuisance proceedings — article 9, paragraph 3**

43. Before the Committee is able to consider whether the Party concerned has complied with the requirements of article 9, paragraph 4, of the Convention, it must establish that the procedures referred to in the communication fall within the scope of article 9, paragraph 3, of the Convention.

44. Article 9, paragraph 3, of the Convention requires each Party to 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. In their legal proceedings against the operator, the communicants allege

that the operator is in breach of the United Kingdom's private nuisance law. The question for the Committee is whether a breach of the United Kingdom's law of private nuisance should be considered a contravention of provisions of its national law relating to the environment.

45. Private nuisance is a tort (civil wrong) under the United Kingdom's common law system. A private nuisance is defined as an act or omission generally connected with the use or occupation of land which causes damage to another person in connection with that other's use of land or interference with the enjoyment of land or of some right connected with the land. The Committee finds that in the context of the present case, the law of private nuisance is part of the law relating to the environment of the Party concerned, and therefore within the scope of article 9, paragraph 3, of the Convention.

46. The Committee, having found that article 9, paragraph 3, of the Convention is applicable to the law of private nuisance in the context of the present case, also finds that article 9, paragraph 4, requiring that the procedures referred to in paragraph 3 shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive, is thereby also applicable.

47. The Committee notes that the Party concerned acknowledges that private nuisance proceedings in the context of the present case are within the scope of article 9, paragraph 4, of the Convention.

#### **Costs order of 21 December 2007 — article 9, paragraph 4**

48. The communicants allege that, in their case, the judicial procedures for private nuisance were unfair, inequitable and prohibitively expensive, in breach of article 9, paragraph 4, of the Convention. In this regard, they point to:

(a) The costs order of 21 December 2007, under which the communicants were held to be liable for £5,130, representing the costs of the Agency and the Council as added parties;

(b) The fact that the costs order of 21 December 2007 ordered the communicants to pay the whole of the Council and Agency's claimed costs, while the operator was not ordered to contribute at all; and

(c) The fact that the Council and Agency demanded that their costs be paid forthwith, rather than awaiting the outcome of the main trial.

49. With respect to the communicants' allegations that the costs order of 21 December 2007 of £5,130 plus interest was prohibitively expensive under article 9, paragraph 4, the Committee finds that the quantum of the order was not prohibitively expensive in this case. This was also acknowledged by the representative of the communicants.

50. With regard to the communicants' allegation that the costs order of £5,130 plus interest was unfair and inequitable under article 9, paragraph 4, the Committee notes that the High Court granted the interim injunction order on 9 November 2007, having been satisfied that there was a "serious issue to be tried" as to whether odours from the defendant's premises were interfering with the claimants' enjoyment of their properties, and that damages would not be an adequate remedy. The reason that the interim injunction was discharged on 21 December 2007 was not because the communicants' case no longer contained a serious issue to be tried, but rather because the Court held that it had itself erred in naming the Council and Agency to adjudicate the terms of the injunction. In paragraph 15 of the judgement of 21 December 2007, the High Court noted:



It has been suggested that it might be possible to substitute, for the references to “an authorized officer of the Environment Agency or an authorized officer of the Council”, some independent expert. That in my judgement would be appropriate if, but only if, there was an agreement between the claimants and the defendant as to the identity of such a person. That is not the position.

51. In paragraph 11 of its judgement of 2 March 2009, the Court of Appeal comments on the events leading up to the hearing on 21 December 2007:

[The Council and Agency] wrote to the parties reiterating their concern about the potential for conflict between their statutory functions, and their position as “de facto arbiters” of breaches of the injunction. They invited the parties to agree to amend the order by deleting the reference to them, and suggested that an alternative might be to substitute a reference to an agreed independent expert. The claimants accepted this proposal in principle and wrote to the defendants inviting them to propose names of three possible experts. The defendants replied that they did not see how such an appointment would “work in practice or assist the parties generally”. They considered that the only “sensible and effective” way to resolve the issues was to proceed to trial as soon as possible.

52. The above excerpt of the Court of Appeal’s judgement makes it clear that if the operator had cooperated with the communicants’ invitation (at the Council and Agency’s suggestion) to name an alternative expert, the injunction may have been varied by consent without the need for the Council and Agency to incur the costs of instructing counsel to attend the Court of Appeal hearing. Thus, it was the operator’s refusal to cooperate in naming an expert that led to the Council and Agency having to attend the hearing on 21 December 2007, incurring the £5,130 legal costs as a result. In these circumstances, the Committee considers that the Court of Appeal’s subsequent order that the communicants pay the whole of the Council and Agency’s legal costs (without the operator being ordered to contribute at all) was unfair and inequitable and constitutes *stricto sensu* non-compliance with article 9, paragraph 4, of the Convention, also given the fact that the Court could have decided to reserve the whole of the costs issue to the trial judge. The trial judge may have been in a better position to ascertain what allocation of cost would be fair and equitable given the overall proceedings of the case. However, taking into consideration that no evidence has been presented to substantiate that the non-compliance in this case was due to a systemic error, the Committee refrains from presenting any recommendations.

### **Agency and Council’s pursuit of costs — article 3, paragraph 8**

53. With regard to the communicant’s allegation under article 3, paragraph 8, the Committee has taken into consideration the events leading up to the application for the interim injunction, the order for the interim injunction dated 7 November 2008, the judgement of 21 December 2007 discharging the interim injunction, correspondence between the communicants and the Environment Agency in the period from November 2008 to January 2009, the judgement and order of the Court of Appeal dated 2 March 2009 and the correspondence between the Civil Appeals Office and the communicants and the Environment Agency of March 2009. In the light of the agreement between the communicants and the Environment Agency recorded in the correspondence of 14 and 16 January 2009, the Court of Appeal’s judgement of 2 March 2009 (notably, para. 53), and the order of the court as amended on 19 March 2009, the Committee finds that the seeking of the costs by the Environment Agency does not amount to the communicants being penalized within the meaning of article 3, paragraph 8, of the Convention in this case. The Committee does not exclude, however, that pursuing costs in certain contexts may be

unreasonable and amount to penalization or harassment within the meaning of article 3, paragraph 8.

### **Assisting the public to seek access to justice — article 3, paragraph 2**

54. Although it was not raised by the communicants, the Committee considers that the United Kingdom's compliance with article 3, paragraph 2, of the Convention warrants scrutiny in this case. Article 3, paragraph 2, states that "each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in, inter alia, seeking access to justice in environmental matters". While not going so far as to make a finding of non-compliance on this ground, the Committee has some doubts that the conduct of the Party concerned in this matter meets its obligation to endeavour to ensure that officials and authorities assist the public in seeking access to justice in environmental matters. The communication was forwarded to the Party concerned in April 2008. It was thus already aware of this case by the time the authorities sought immediate payment of the costs awarded to them rather than accepting the communicants' offer to place them in an interest-bearing account pending the outcome of the substantive proceeding. The authorities' demand for immediate payment did not assist the communicants in seeking access to justice. It was open to the Party concerned to intervene in this matter to assist the communicants, e.g., by asking the authorities to accept the costs be paid into an interest-bearing account, but there is no evidence before the Committee that they did so.

## **IV. Conclusions**

55. Having considered the above, the Committee adopts the findings set out in the following paragraphs.

56. With regard to the communicants' allegation under article 3, paragraph 8, the Committee finds that the seeking of the costs by the Environment Agency did not amount to the communicants being penalized within the meaning of article 3, paragraph 8, in this case.

57. With respect to the communicants' allegations that the costs order of 21 December 2007 of £5,130 plus interest was prohibitively expensive under article 9, paragraph 4, the Committee finds that the quantum of the order was not prohibitively expensive in this case.

58. In respect of the requirements of article 9, paragraph 4, for procedures referred to in paragraph 3 to be fair and equitable, related to the fact that in the above circumstances where the communicants were ordered to pay the whole of the costs while the operator was not ordered to contribute at all, the Committee finds that this constitutes *stricto sensu* non-compliance with article 9, paragraph 4.

59. Taking into consideration that no evidence has been presented to substantiate that the non-compliance with article 9, paragraph 4, was due to a systemic error, the Committee refrains from presenting any recommendations in the present case.