Format for communications to the Aarhus Convention Compliance Committee

I. Information on correspondent submitting the communication

Full name of organization or person(s) submitting the communication:
John Alexander Melvin Hemming
Permanent address: [address redacted] Birmingham
Address for correspondence on this matter, if different from permanent address:
Telephone: [telephone redacted]
E-mail: [email redacted]

II. Party concerned

Name of the Party concerned by the communication: The United Kingdom and particularly England and the jurisdiction of England and Wales.

III. Length of the communication

The communication should be no more than **ten A4 pages**. If in an exceptionally complex case more than ten pages are required, in no circumstances should the communication be longer than twenty A4 pages.

IV. Facts of the communication

Detail the facts and circumstances of the alleged non-compliance. Include all matters of relevance to the assessment and consideration of your communication. Explain how you consider that the facts and circumstances described represent a lack of compliance with the provisions the Convention.

1. In the year 2014 I was the Member of Parliament for the constituency of Birmingham, Yardley. The City Council, which is the litter authority for the area, decided to change its policy in terms of the handling of garden waste which it had previously removed for recycling by bringing in a charge of £35 for collection services.

2. The Local Authority recognised that as a consequence of the charge there would be an element of fly tipping. It decided that it would respond to this by deliberately leaving the fly tipping until such a stage as no more material was being fly tipped.

3. Unsurprisingly the residents of my constituency the vast majority of whom had not been flytipping were unhappy that rubbish was being left outside their property by the body which had a statutory duty under S89 of the Environmental Protection Action 1990 (“the act”) to clear it up. There were many hundreds of sites of fly tipped rubbish.

4. I communicated on a number of occasions with the local authority requesting that they clear up the rubbish. Initially they did respond by acting and indicating to me what they were doing, but they then ceased to do this. I gave them a number of warnings under S91 of The Act that I was considering taking legal action to force them to clear up the rubbish. They said they would meet to discuss the policy, but I said there was no need as I fully understood what they were doing any why they were doing it.

5. On 15th May I, therefore, made an application for a Litter Abatement Order under Section 91 of The Act to force them to clear this up. I followed the correct procedures for this including giving them more than 5 days notice before making an application to court.

6. Two days after I made the application to court (on 17th May) the local authority did what it calls a blitz of clearing up a large proportion of the rubbish. Unsurprisingly it failed to clear it all up. When the case came to court, therefore, I narrowed the case down to a number of sites which were not cleared up.

7. The hearing into the application under S91 of the Act was On October 10th 2014. By mid September 2014 all of those sites had been cleared and in the days before the hearing the local authority sent out their employees to clear up other sites that I had informed them about.

8. On the day of the hearing, of course, it is not surprising to know that the rubbish had been cleared up. I could not, therefore, obtain an order to clean the rubbish up as it had already been cleared. However, Section 91 of the Act is drafted to enable me to get my costs and not to have to pay the local authority's costs if I had "reasonable grounds" to issue the proceedings in the first instance.

9. The District Judge decided that because I had not asked for a meeting with the council before issuing proceedings that I did not have reasonable grounds and that I, therefore, should pay the Council's costs of £13,101.56. My view was that the meeting was irrelevant and in any event the legal action was the reason why the rubbish that it was particularly referring to (which was not all green waste, but included other things) was cleared up.

10. The Council had said that had we had a meeting they would have told me in confidence that they would clear it up at some stage. I had previously been told by them on the phone and via email that they wouldn't leave it for ever. They did not, however, inform the District Judge that they would have told me the date on which the rubbish was to be cleared, but the District Judge decided without evidence that they did.

11. I appealed this to the High Court. This was a two stage process where first I had to ask for the judgment to be modified to include the fact that it was only because I took legal action that certain specified rubbish was cleared up. This was considered irrelevant by the High Court judge and he refused that. He then refused an opportunity for appeal on the basis that my barrister had said that I was of a view that such a change to the facts in the judgment was necessary for an appeal to succeed. This is to be found in the judgment from the high court.

12. I appealed to the Court of Appeal on three general grounds. Firstly, that the original decision was absurd, secondly that I had not had an appeal as I had not been given the opportunity to consider my position following the decision on the application to vary the stated case and

thirdly that under the Aarhus convention I had to have a reasonably priced and fair basis upon which to challenge the failures of public authorities on environmental issues (which litter, of course is).

13. This appeal was lost on 19th July 2016 and I now face having to pay £13,101.56 costs for the original hearing, around £4,687 for the second hearing, about £3,000 (estimated) for the third hearing having also paid for a barrister sums of £600 on 27/11/14, £2100 on 8/1/15 and £4,800 on 25/2/15 (a total of £7,500) and court costs of £210 for the first hearing, £240 for the first appeal and £265 for the second. The Local Authority have taken the view that they will not ask for their costs for the second appeal. However, their costs total £17,788.56 that I have now paid. My costs are around £8,000. The point I make is that the application was necessary to get the litter authority to clear up the rubbish and it would have been left outside people's houses had I not taken the action. Hence I won and they should pay me not me them. Failing that I should not have to pay so much.

14. All of the details are in the attachments which will be sent either with this or separately because of the volume of data. I am applying to get the judgment from 19th July 2016.

V. Provisions of the Convention alleged to be in non-compliance

The English and Welsh Jurisdiction has trampled over Article 9 of the Aarhus Convention.

VI. Nature of alleged non-compliance

Section 1 – is not relevant.

Section 2 and/or Section 3 – cover the complaint to the extent that a process is required to challenge the failure of Birmingham City Council, a public Authority, to fulfil its statutory duty under the 1990 Environmental Protection Act to clean up litter. There is a detailed set of statutory guidance, but there is no need for subtlety for this case as the litter is an awful mess as can be seen from the attachments. In a sense it is Section 3 that is key.

Section 4 states:
4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

Section 4 is contravened.

The Environmental Protection Act 1990 places a statutory duty on litter authorities (Birmingham City Council is one of these) to keep certain locations clean. The details of this are in Section 89. Subsection 1 states:
89 Duty to keep land and highways clear of litter etc.

(1)It shall be the duty of—

(a)each local authority, as respects any relevant highway or, in Scotland, relevant road for which it is responsible,

(b)the Secretary of State, as respects any trunk road which is a special road and any relevant highway or relevant road for which he is responsible,

(c)each principal litter authority, as respects its relevant land,

(d)the appropriate Crown authority, as respects its relevant Crown land,

(e)each designated statutory undertaker, as respects its relevant land, [F1and]

(f)the governing body of each designated educational institution or in Scotland such body or, as the case may be, the education authority responsible for the management of the institution, as respects its relevant land, [F2and

(g)the occupier of any relevant land within a litter control area of a local authority,]

to ensure that the land is, so far as is practicable, kept clear of litter and refuse.

There is a statutory code of conduct which makes it clear that flytipped refuse should not be left, but should be cleared up.

Section 91 of the Environmental Protection Act 1990 provides a procedure whereby members of the public can make an application to get a court order to require litter and rubbish to be cleared.

This is the entirety of S91:
91 Summary proceedings by persons aggrieved by litter.

(1)A magistrates' court may act under this section on a complaint made by any person on the ground that he is aggrieved by the defacement, by litter or refuse, of—

(a)any relevant highway;

(b)any trunk road which is a special road;

(c)any relevant land of a principal litter authority;

(d)any relevant Crown land;

(e)any relevant land of a designated statutory undertaker; [F1or]

(f)any relevant land of a designated educational institution; [F2or

(g)any relevant land within a litter control area of a local authority.]

(2)A magistrates' court may also act under this section on a complaint made by any person on the ground that he is aggrieved by the want of cleanliness of any relevant highway or any trunk road which is a special road.

(3)A principal litter authority shall not be treated as a person aggrieved for the purposes of proceedings under this section.

(4)Proceedings under this section shall be brought against the person who has the duty to keep the land clear under section 89(1) above or to keep the highway clean under section 89(2) above, as the case may be.

(5)Before instituting proceedings under this section against any person, the complainant shall give to the person not less than five days written notice of his intention to make the complaint and the notice shall specify the matter complained of.

(6)If the magistrates' court is satisfied that the highway or land in question is defaced by litter or refuse or, in the case of a highway, is wanting in cleanliness, the court may, subject to subsections (7) and (8) below, make an order ("a litter abatement order") requiring the defendant to clear the litter or refuse away or, as the case may be, clean the highway within a time specified in the order.

(7)The magistrates' court shall not make a litter abatement order if the defendant proves that he has complied, as respects the highway or land in question, with his duty under section 89(1) and (2) above.

(8)The magistrates' court shall not make a litter abatement order where it appears that the matter complained of is the result of directions given to the local authority under section 89(6) above by the highway authority.

(9)A person who, without reasonable excuse, fails to comply with a litter abatement order shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 4 on the standard scale together with a further fine of an amount equal to one-twentieth of that level for each day on which the offence continues after the conviction.

(10)In any proceedings for an offence under subsection (9) above it shall be a defence for the defendant to prove that he has complied, as respects the highway or land in question, with his duty under section 89(1) and (2) above.

(11)A

[F3(a)direction under section 89(6A); or]

[F4(b)] code of practice under section 89(7)

shall be admissible in evidence in any proceedings under this section and if any provision of such a [F5direction or] code appears to the court to be relevant to any question in the proceedings it shall be taken into account in determining that question.

(12)Where a magistrates' court is satisfied on the hearing of a complaint under this section—

(a)that, when the complaint was made to it, the highway or land in question was defaced by litter or refuse or, as the case may be, was wanting in cleanliness, and

(b)that there were reasonable grounds for bringing the complaint,

the court shall order the defendant to pay such reasonable sum to the complainant as the court may determine in respect of the expenses incurred by the complainant in bringing the complaint and the proceedings before the court.
(13)In the application of this section to Scotland—

(a)for any reference to a magistrates' court there shall be substituted a reference to the sheriff;

(b)for any reference to a complaint there shall be substituted a reference to a summary application, and "complainant" shall be construed accordingly;

(c)for any reference to the defendant there shall be substituted a reference to the person against whom the proceedings are taken;

(d)for any reference to a highway and a relevant highway there shall be substituted a reference to a road and a relevant road; and

(e)for any reference to a highway authority there shall be substituted a reference to a roads authority,

and any person against whom proceedings are brought may appeal on a point of law to the Court of Session against the making of a litter abatement order.

EXPENSE

a) **The procedure is prohibitively expensive.** The local authority have stated that they do not wish to ask me to pay the costs of the second appeal. However, the total amount I have paid them is £17,788.56. I have already paid £8,000 in legal costs and court fees for the first appeal. I did all the paperwork myself for the hearing at the court of first instance. Hence I had no costs for that. The court fee was £210. These risks make making such an application too financially risky for citizens of an ordinary means.

FAIRNESS

b) The fundamental point about fairness is that the application was made to ensure that the litter authority cleared up the rubbish. Because the application was made the litter authority cleared up the rubbish. Paragraph 53 of the first appeal judgment states:
53. In my judgment, it is clear from the statutory scheme that the judge would have been wrong in law to consider matters which occurred after the complaint had been made when considering whether there were reasonable grounds for bringing the complaint, unless there were exceptional circumstances, such as evidencing a lack of good faith in something which had happened prior to the bringing of the complaint. But there was no question in this case of any allegation of lack of good faith.

Hence the fact that making the application was necessary in order to get the litter and rubbish cleared is considered irrelevant. This is fundamentally unfair given that the application was all about getting litter and rubbish cleared. The fact that the application was "*necessary*" has to indicate that the grounds were "*reasonable*". Notwithstanding that Section 91 is a procedure to ensure that the local authority follows its statutory duty. If the local authority only follows its statutory duty because the application is made then the applicant has in essence won the case and should be awarded costs. Any interpretation of *"reasonable"* that excludes cases which in retrospect are necessary is clearly absurd.

c) Claimants should be able to rely on assertions by defendants. The local authority told me in writing they were not going to clear up the rubbish. They did this continually on a day to day basis. It is unfair to expect me to be telepathic.

d) It is unfair to require applicants to ask for a meeting and be fined £25,000 if they don't ask for a meeting. Costs were awarded against me because I did not ask for a meeting. The council's witness statement did not claim that I would have been told of an intended attempt to clear up the rubbish (which in fact did not clear up the rubbish that the case was about).

e) It is unfair not to allow an appeal in either the high court or court of appeal. I was not given permission to appeal in the Court of Appeal. The judge in the first appeal did not hear the appeal he merely considered an application to vary a stated case and did not allow me to vary the skeleton argument of my barrister given the judgment on the application to vary the stated case.

f) It is unfair to have a double hurdle as exists for an application to vary a stated case. Having a progress where the magistrates court effectively drafts the grounds for appeal creates a double hurdle for appellants wishing the challenge the decision of the magistrates court.

g) The Court of Appeal sat on the application for a second appeal for over a year so that was not timely.

h) The remedy is not effective.

i) It is unfair to ignore the Aarhus convention when it is raised in court simply because it was not raised in the court of first instance. The Aarhus convention was raised in the second appeal, but the judge refused to look at the question as to whether the convention was complied with.

j) It is unfair to refuse to consider an appeal because it is about costs. Part of the difficulty of appealing is that the courts resist appeals on costs. In this case it is about who won.

k) It is unfair to allow a judge to make up an assertion about what the local authority may have told the claimant when the local authority have not said this themselves. The local authority did not say in their evidence that they would have told me the date of the blitz. It was merely that they would have told me their policy that I fully understand.

l) It is absurd to require people to meet in person or otherwise face adverse costs. Email, letters and phone calls have to be acceptable as a mechanism of communication.

m) It is absurd (and hence unfair) to require an applicant to be telepathic and know that a public authority is lying to him when they say they won't clear up the rubbish and refuse to give a date when they will clear it up.

n) It is unfair to give insufficient judicial attention to the key issue which determines the case (the issue of the meeting) which shouldn't determine the case anyway.

o) There are probably other problems with the process in terms of article 4, but I think I have provided enough for going on with.

It should be noted that I am aware of another person (Peter Silverman) who has ended up paying large amounts of costs simply because he tried to get the local authority to clear up some rubbish. (A different local authority)

Section 5 states:
5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

This has been breached as well. Whereas the civil procedure rules and forms have been modified for the Aarhus convention as far as judicial review is concerned, the rules for litter abatement orders have not.

This is a specific complaint about my own case, but I would be happy to obtain details of what happened with Peter Silverman. The English and Welsh Judiciary have in their decisions on this case (and his) created a situation in which S91 of the 1990 Environmental Protection Act is effectively unusable because of the potential financial risk (as it confirmed by the Council for Protection of Rurla England in their letter)

VII. Use of domestic remedies

A hearing in the Magistrates Court on October 2014. An appeal to the High Court in March 2015 and a hearing in the Court of Appeal (for permission to appeal which was refused) on 19th July 2016. Domestic procedures have now been exhausted.

VIII. Use of other international procedures

No international procedures have been invoked other than this application.

IX. Confidentiality

This is not a confidential issue.

X. Supporting documentation (copies, not originals)

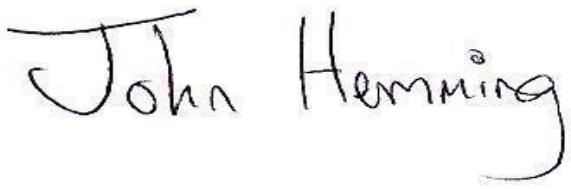
Copies of the relevant paperwork will be sent via email. I will aim to send the key elements of the court documentation that is currently available.

The documents attached are: (five documents allowed)

1. The judgment of the application for a variation of the case stated at which the appeal was dismissed.
2. The statement to the original hearing.
3. The statement from the day before the original hearing.
4. An extract from the council's policy that demonstrates that they had a policy of leaving flytipped rubbish.

I am hoping to get the judgment from the court of appeal soon, but am sending this now because today is the deadline. I had hoped to have the court of appeal judgment before sending this.

XI. Signature



23rd August 2016

Sign and date the communication. If the communication is submitted by an organization, a person

XII. Sending the communication

Send the communication by **e-mail and by registered post** to the following address:

Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10, Switzerland

E-mail: aarhus.compliance@unece.org

Clearly indicate:
"Communication to the Aarhus Convention Compliance Committee"