

ACCC/C/2016/142 (United Kingdom)

Submission by Communicant in response to Final Submission and response to Questions dated 29th October 2020 by Party Concerned (UK)

26th November 2020

This is the response by the Communicant in response to the UK Final Submission. This has been written quickly in order to enable the Committee to consider this with the Final Submission at its ongoing hearing.

If the Committee has any questions to put to the communicant, the communicant would be pleased to respond. This, however, is a summary response. The communicant and the party are both in agreement that the process can continue without a hearing.

The question for the committee to consider is whether the process operated for litter abatement orders is fair or not.

Two observers have sent submissions to the committee. What can be seen from the instant case and the other cases is that considerable damage has been done by the procedural unfairness of the process. There is not a group of happy claimants who have been able to use the process to ensure that public authorities follow environmental law. Instead there are a group of public spirited people who have been burnt and financially punished by the process.

In the instant case. The local authority (Birmingham) had decided as a matter of policy not to follow the law. The communicant had a continual process of discussion with them where he was asking them to give a date for clearing rubbish. Initially they gave dates then cleared the rubbish. However, after a point they decide to refuse to give a date for clearing the rubbish.

The communicant therefore satisfied the documented procedure as specified in the statute and the guidance from the relevant government department and issued proceedings in court.

As a consequence of the application being made the local authority did clear the rubbish. Some was cleared some months later and only cleared because of the application.

In making the decision to award costs against the communicant there are the following procedural unfairnesses.

1. The Court did not take into account the fact that the local authority had decided not to follow the law as a matter of policy.
2. The Court did not take into account the fact that some of the litter was only cleared because the application was made to court and that the application was necessary.
3. The Court decided a key issue was that the communicant took the view that talking on the phone and in emails with the local authority was sufficient and a meeting was a waste of time (because there was no indication that anything different would be communicated in a meeting) and as a consequence awarded costs against the communicant. The court decided that if a meeting is offered it is a mandatory requirement to attend that meeting failing which costs may be awarded against the communicant. The use of the telephone or email was legally insufficient.

From a procedural basis it is *unfair* to have a mandatory part of the process – meeting with the local authority – that is not documented in any of the documentation. It is procedurally unfair to create

this requirement without notice at the final stage of the consideration of the court of first instance, which is not in any case a reasonable requirement.

Beyond the procedural unfairnesses there is also the quantum, but I think that is accepted more generally by the party.

The Questions

Question 1 - Scope

It is agreed that litter abatement falls within the scope of the Aarhus Convention.

Question 2 – Fairness and the award of costs

The Party ignores the question of procedural fairness. I highlight above the three aspects of procedural unfairness. In particular making attending a meeting mandatory is clearly procedurally unfair. It does not appear in the statute or guidance and no-one would reasonably expect it to be a mandatory requirement. However, there is a broader procedural unfairness as can be seen in the observer submissions. This is not just a single case with a weird decision, but a procedural repugnance which is so unfair it makes the system unworkable.

Questions 3 and 4 – Costs limitations

The complainant's objective was to get the local authority to comply with the law and clear up the litter. The Party and the Communicant agree that there is no procedure for applying for limits on costs in the Magistrates Court. UK Government guidance is that the correct process for abating litter is to apply for a litter abatement order (not judicial review).

John Hemming

26th November 2020