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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

#### Fifty-fifth meeting

Geneva, 6–9 December 2016

Item 9 of the provisional agenda

#### Communications from members of the public

### Findings and recommendations with regard to communications ACCC/C/2013/85 and ACCC/C/2013/86 concerning compliance by the United Kingdom of Great Britain and Northern Ireland\*

Adopted by the Compliance Committee on 17 June 2015

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\* The present document is submitted late as additional time was required to finalize the meeting agenda.



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## **I. Introduction**

### **A. Communication ACCC/C/2013/85**

1. On 18 September 2012 the Environmental Law Foundation submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging that the United Kingdom of Great Britain and Northern Ireland failed to comply with its obligations under the Convention. Specifically, it alleges that section 46 of the Legal Aid, Sentencing and the Punishment of Offenders Act 2012, in force since April 2013, would result in prohibitively expensive costs in private nuisance proceedings and would increase financial and other barriers to access to justice in breach of article 9, paragraphs 3, 4 and 5, of the Convention.<sup>1</sup>

2. At its forty-first meeting (Geneva, 25–28 June 2013), the Committee determined on a preliminary basis that the communication was admissible in accordance with paragraph 20 of the annex to decision I/7 of the Meeting of the Parties to the Convention.

3. Pursuant to paragraph 22 of the annex to decision I/7, the communication was forwarded to the Party concerned on 22 July 2013.

### **B. Communication ACCC/C/2013/86**

4. On 28 February 2013, a member of the public, Alyson Austin, submitted a communication to the Compliance Committee alleging that the United Kingdom failed to comply with its obligations under the Convention. Specifically, the communication alleges that the Party concerned failed to comply with article 9, paragraphs 3 and 4, of the Convention by not ensuring that the costs of access to justice in private nuisance cases, including her own, are fair, equitable, timely and not prohibitively expensive.

5. At its forty-first meeting, the Committee determined on a preliminary basis that the communication was admissible in accordance with paragraph 20 of the annex to decision I/7.

6. At the meeting, the Committee considered that, further to its discussion with the Party concerned during that meeting, the Party concerned interpreted the Committee's recommendations as applying only to procedures for judicial review but not to private nuisance proceedings. According to the Party concerned, private nuisance proceedings were not specifically considered in the previous findings of the Committee, endorsed by decision IV/9i of the Meeting of the Parties. The Committee noted that paragraph 3 (a) of decision IV/9i concerned costs for all court procedures covered by article 9, and thus stressed that it did not agree in general with the position of the Party concerned, but that, in the light of the Party's position, the Committee would consider the present communication under its ordinary, and not its summary, proceedings procedure. The Committee also provisionally decided that it would possibly consider the communication jointly with communication ACCC/C/2013/85.

7. Pursuant to paragraph 22 of the annex to decision I/7, the communication was forwarded to the Party concerned on 22 July 2013 for its response.

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<sup>1</sup> Communications, including related documentation from communicants, the Party concerned and the secretariat, are available from <http://www.unece.org/env/pp/cc/com.html> by clicking on the appropriate reference.

### **C. Joint consideration of the two communications**

8. The Party concerned provided its joint response to communications ACCC/C/2013/85 and ACCC/C/2013/86 on 20 December 2013.

9. On 14 January 2014, the communicants of communications ACCC/C/2013/85 and ACCC/C/2013/86 provided a joint note commenting on the response.

10. The Committee held a hearing to discuss the substance of the communications at its forty-fourth meeting (Geneva, 25–28 March 2014), with the participation of the communicants and the Party concerned. The Committee confirmed that it would proceed to discuss the communications jointly and confirmed the admissibility of communication ACCC/C/2013/85. It also confirmed that communication ACCC/C/2013/86 was admissible to the extent that it raised systemic issues also within the scope of ACCC/C/2013/85, but that it would not consider the allegations concerning the case then pending before the national courts.

11. At its forty-fifth meeting (Maastricht, the Netherlands, 29 June–2 July 2014), the Committee decided to put additional questions to the communicants and to the Party concerned. The communicants and the Party concerned provided their responses to those questions on 5 September 2014.

12. The Committee completed its draft findings at its forty-seventh meeting (Geneva, 16–19 December 2014), save for some minor points which it agreed through its electronic decision-making procedure after the meeting. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were forwarded for comments to the Party concerned and the communicants on 23 February 2015 with an invitation to provide comments by 23 March 2015. The communicant of communication ACCC/C/2013/86 and the Party concerned provided comments on 9 March and 23 March 2015, respectively. No comments were received from the communicant of communication ACCC/C/2013/85.

13. At its forty-eighth meeting (Geneva, 24–27 March 2015), the Committee prepared revised draft findings taking into account the comments received from the parties. In accordance with paragraph 34 of the annex to decision I/7, the revised draft findings were then forwarded for comments to the parties on 10 April 2015 with an invitation to provide comments by 5 May 2015.

14. The Party concerned and the communicant of communication ACCC/C/2013/86 provided comments on the revised draft findings on 5 May 2015. The ACCC/C/2013/85 communicant did not provide comments. Taking into account the comments received, the Committee adopted its findings through its electronic decision-making on 17 June 2015 and requested the secretariat to send the adopted findings to the Party concerned and the communicants.

## II. Summary of facts, evidence and issues<sup>2</sup>

### A. Legal framework

#### Private nuisance

15. In *Coventry v. Lawrence, No 1*, the Supreme Court of the United Kingdom has defined private nuisance as: “an action (or sometimes a failure to act) on the part of a defendant, which is not otherwise authorised, and which causes an interference with the claimant’s reasonable enjoyment of his land, or to use a slightly different formulation, which unduly interferes with the claimant’s enjoyment of his land”.<sup>3</sup>

#### Costs

16. The general framework regarding costs in the legal system of the Party concerned was examined in the Committee’s findings on communication ACCC/C/2008/33<sup>4</sup> and its report to the Meeting of the Parties on the implementation of decision IV/9i.<sup>5</sup> In summary, the general rule is “costs follow the event”.

17. In England and Wales, Practice Direction 45 to the Civil Procedure Rules, in force since 1 April 2013, provides for costs protection in “Aarhus Convention claims” of “£5,000 where the claimant is claiming only as an individual and ... in all other cases, £10,000”.<sup>6</sup> A defendant’s liability for a successful claimant’s costs is capped at £35,000. Rule 45.41 defines an “Aarhus Convention claim” as “a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the [Aarhus Convention], including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject.”

18. Section 46 of the Legal Aid, Sentencing and the Punishment of Offenders Act 2012 (LASPOA) amends the Courts and Legal Services Act 1990 by inserting a new subsection 58C. Subsection (1) of section 58C provides:

A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless such provision is permitted by regulations under subsection (2).

19. Section 46 LASPOA also repealed section 29 of the Access to Justice Act 1999, which had previously enabled the successful party to recover the premium of an “after the event” (ATE) insurance policy — a policy insuring against the risk of incurring a liability for costs, in particular the opposing party’s costs. Section 46 entered into force on 1 April 2013.

<sup>2</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.

<sup>3</sup> [2014] UKSC 13, para. 3.

<sup>4</sup> See ECE/MP.PP/C.1/2010/6/Add.3, paras. 34–71.

<sup>5</sup> See ECE/MP.PP/2014/23, paras. 41–58.

<sup>6</sup> See <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs/practice-direction-45-fixed-costs>.

## B. Facts

### Communication ACCC/C/2013/85

20. Since the allegations in communication ACCC/C/2013/85 concern the legal framework only, those allegations are presented in section C, “Substantive issues”, below.

### Communication ACCC/C/2013/86

21. Since 2008, the communicant of communication ACCC/C/2013/86 has, acting by herself and with others, raised concerns of continuing and excessive noise and dust deposition emanating from opencast coal mining operations located within 500 metres from her home. The communicant has sought to resolve the nuisance through correspondence and attempted negotiation with the operator, Miller Argent (South Wales) Ltd. She has also raised concerns with the environmental regulator, Merthyr Tydfil County Borough Council, which she alleges has not to date taken action against the operator.

22. In June 2010, the communicant and 491 other residents applied to the High Court for a pre-action group litigation order to manage a large number of claimants in one claim. In November 2010, the High Court dismissed the application due to uncertainty as to the claimants’ funding provisions.<sup>7</sup> The claimants sought to appeal the dismissal. In December 2010, the operator sought payment of £257,104 for its legal costs for the pre-action application. In July 2011, the Court of Appeal dismissed the claimant’s appeal against the dismissal when, on the day of the appeal, the operator undertook that it would only claim costs on a pro rata basis to a total of £553 per claimant and that it would not pursue any claimant for those costs unless they recommenced legal proceedings.<sup>8</sup>

23. After the July 2011 appeal, the communicant sought to resolve the problems individually with the operator through negotiation. This failed, and in November 2012 the communicant issued a further pre-action application to the High Court, seeking costs protection for the hearing on costs on either a “no order for costs” or “each party pay their own costs” basis. In January 2013, the High Court refused to direct that the one day pre-action costs protection hearing should be on an “each party pays their own costs” but that instead it should be on the basis of “costs in the application”, i.e., costs to be awarded to the successful party.

24. The communicant appealed and in November 2013 the Court of Appeal granted a protective costs order of £2,500 with a cross-cap on the respondent’s cost liability of £15,000 for the appeal hearing of the communicant’s application for costs protection in her private nuisance proceedings. By judgment of 21 July 2014, the Court of Appeal dismissed the communicant’s application for costs protection, chiefly on the ground that the case did not involve significant environmental benefit. The communicant applied to the Supreme Court for permission to appeal the Court of Appeal judgment. This application was refused on 24 February 2015.

## C. Substantive issues

### ACCC/C/2013/85

25. The communicant of communication ACCC/C/2013/85 alleges that the availability of ATE insurance to fund the costs and expenses of private nuisance proceedings and cover

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<sup>7</sup> *Austin and others v. Miller Argent (South Wales) Ltd* (decision of 11 November 2010) (unreported).

<sup>8</sup> *Austin and others v. Miller Argent (South Wales) Ltd* [2011] EWCA Civ 928.

the risk of exposure to an opponent's costs is critical to ensuring that private nuisance proceedings can be pursued. The communicant contends that the potential costs risk is severe, as demonstrated by *Austin v. Miller Argent* (see para. 22 above), where the operator sought costs of over £250,000. The communicant contends that costs for environmental nuisance cases almost always exceed £100,000 and often £2 million. It cited various cases in which it alleged that, but for ATE insurance, the claimants would have been prevented from effective legal action.<sup>9</sup>

26. The communicant alleges that the introduction of LASPOA section 46 breaches articles 9, paragraphs 3, 4 and 5, of the Convention. It submits that article 9, paragraphs 3 and 4, taken together, require the Party concerned to ensure that members of the public have access to judicial procedures to challenge acts or omissions by private persons and public bodies that contravene national environmental laws and that those procedures must provide adequate and effective remedies and be fair, equitable, timely and not prohibitively expensive. It contends that by removing the ability to recover the ATE insurance premium in private nuisance proceedings, the Party concerned has made a critical judicial procedure for challenging acts and omissions resulting in environmental harm unfair, inequitable and prohibitively expensive.

27. The communicant alleges that by enacting LASPOA section 46, the Party concerned is also in breach of article 9, paragraph 5, of the Convention, as section 46 will add or increase financial and other barriers to environmental justice.

28. The communicant submits that the Party's non-compliance with article 9, paragraphs 3, 4 and 5, could be resolved through one or more of the following:

- (a) Committing not to bring into force LASPOA section 46;
- (b) Introducing regulations to permit recovery of ATE insurance premiums in environmental nuisance claims, as is already done for personal injury claims;
- (c) Expressly including environmental nuisance claims within the protective costs order regime, without reciprocal caps on claimants' costs;
- (d) Introducing qualified one-way costs shifting in private nuisance litigation.

#### **ACCC/C/2013/86**

29. The communicant of communication ACCC/C/2013/86 alleges that the Party concerned fails to ensure that private nuisance proceedings are fair, equitable, timely and not prohibitively expensive as required under article 9, paragraph 4, of the Convention.

30. The communicant also alleges that the Party concerned fails to recognize that, contrary to Rule 45.41, paragraph 2, of the Civil Procedure Rules, an "Aarhus Convention claim" should not be limited to claims for judicial review and should include, for instance, private nuisance claims.

31. The communicant contends that she has been trying to resolve dust and noise pollution since 2008, but to date has been prevented from the review of her case on the merits due to costs concerns. She submits that she has been involved in six High Court hearings since 2010, and issued three Court of Appeal proceedings — all relating to costs. Despite this, it has not been possible to issue legal proceedings to stop the pollution because of the costs concerns. The communicant submits this has prevented her having timely access to justice as required by article 9, paragraph 4, of the Convention.

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<sup>9</sup> See communication ACCC/C/2013/85, para. 76.

32. The communicant asks the Committee to, inter alia, find that:

(a) Private nuisance proceedings fall clearly within the Convention and, if there is any doubt as to whether a private nuisance claim falls within the Convention, a purposive, inclusive approach should be taken such that the Convention is assumed to apply;

(b) If the Party concerned continues to rely upon protective costs orders for costs protection in environmental cases, then such orders must apply to all cases subject to the Convention, including private nuisance proceedings. Further, the protective costs order mechanism must not in itself be prohibitively expensive;

(c) LASPOA section 46 unduly restricts access to justice in environmental matters such that the Party fails to comply with the Convention, and the Party should take action to remedy that failure, the simplest way being to stipulate that section 46 does not apply to cases within the Convention, including private nuisance claims.

#### **Response of the Party concerned**

33. In its response of 20 December 2013, the Party concerned states that private nuisance claims are not required by article 9, paragraph 3, of the Convention and, even if some provision for private nuisance claims is required by article 9, paragraph 3, it cannot be required for private nuisance claims as a class, covering every type of claim. The requirements of article 9, paragraph 3, are met by the availability of other procedures, and those procedures likewise meet the requirements of article 9, paragraph 4. Similarly, there is no breach of article 9, paragraph 5.

34. The Party concerned cites the following as possible alternatives to private nuisance proceedings for those experiencing environmental problems:

(a) Complaint to the relevant regulator or local authority with a view to the authority's taking action under section 80 of the Environmental Protection Act 1990 (EPA);

(b) Complaint to the relevant regulator or local authority where the contravention is alleged to breach a condition or licence, or amount to an offence which it is the duty of the regulator or local authority to enforce;

(c) Complaint to the Parliamentary Ombudsman or Local Government Ombudsman;

(d) Statutory nuisance proceedings under section 82 of the EPA;

(e) Judicial review;

(f) Seeking a prosecution of the person responsible, or mounting a private prosecution.

35. The Party concerned submits that possible alternatives to ATE insurance to reduce the costs of private nuisance proceedings include:

(a) Before the event (BTE) insurance;

(b) Conditional fee agreements.

These alternatives are discussed in more detail in paragraphs 58–60 below.



### Substantive issues common to both communications

36. In sum, the two communications raise the following substantive issues:

(a) Should private nuisance proceedings, in general, be considered as “judicial procedures to challenge acts or omissions by private persons and public authorities which contravene national law relating to the environment” under article 9, paragraph 3?;

(b) If private nuisance proceedings are to be considered as procedures under article 9, paragraph 3 (or to the extent that they should be so considered), must they meet the requirements of article 9, paragraph 4, including being not prohibitively expensive, or may compliance with those requirements be achieved through access to alternative procedures?;

(c) If the requirements of article 9, paragraph 4, indeed apply to private nuisance proceedings, does LASPOA section 46 actually make private nuisance claims prohibitively expensive under article 9, paragraph 4, or impose a financial barrier under article 9, paragraph 5?

The parties’ submissions on the above points are summarized below.

**(a) Should private nuisance proceedings be considered as “judicial procedures to challenge acts or omissions by private persons and public authorities which contravene national law relating to the environment” for the purposes of article 9, paragraph 3?**

37. Both communicants submit that the courts of the Party concerned have recognized that private nuisance may fall within the ambit of the Convention.<sup>10</sup> They also point to the Committee’s findings on communication ACCC/C/2007/23, which held: “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.”<sup>11</sup>

38. The Party concerned disputes that article 9, paragraph 3, necessarily applies to private nuisance claims. It contends that, as stated by the High Court in *Austin v. Miller Argent*, “the question has not been decided in the courts of England and Wales”.<sup>12</sup> It submits that the Court of Appeal in *Morgan v. Hinton Organics*<sup>13</sup> did not determine the issue, but merely assumed for the purposes of the argument before it that the Convention was capable of applying to some private nuisance cases. The Court also accepted that, for the purposes of the Convention, the particular remedy sought in a particular case needed to be seen in the wider context of available remedies generally, which would need to be considered individually not only in terms of costs but of legal efficacy.

39. The Party concerned submits that, as noted in the Jackson Report,<sup>14</sup> the tort of nuisance covers a wide variety of matters. Nuisance was defined in *Bamford v. Turnley* as “any continuous activity or state of affairs causing a substantial and unreasonable interference with a [claimant’s] land or his use or enjoyment of that land”.<sup>15</sup> Private

<sup>10</sup> For example, *Morgan v. Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107, [2009] Env LR 30, paras. 22 and 44, and *Barr v. Biffa Waste Services Ltd* [2012] EWCA Civ 312.

<sup>11</sup> ECE/MP.PP/C.1/2010/6/Add.1, para. 45.

<sup>12</sup> [2013] EWHC 2622, para. 7.

<sup>13</sup> *Ibid.*

<sup>14</sup> Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report*, Ministry of Justice, December 2009 (London, The Stationery Office, 2010). Available from <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>.

<sup>15</sup> (1860) 3 B & S 62; 122 ER 25.

nuisance is therefore primarily concerned with protecting the rights of individual property owners to enjoy their land. On occasion, an instance of private nuisance will have a wider effect such as to constitute an environmental threat to the public more widely, but the essence of private nuisance remains the protection of private property rights. Many nuisance claims involve encroachment, which is akin to trespass, and it is difficult to see how such interference would constitute a breach of national law relating to the environment. Even where the interference takes the form of noise or dust, a distinction may be drawn between actions for private nuisance mounted to protect private property rights and actions which more clearly vindicate general public rights to a clean environment — or, as it was put in the Jackson Report, where the acts complained of are “damaging to the environment, in particular toxic torts such as pollution of watercourses”.<sup>16</sup>

40. To the extent that the Convention may apply to private nuisance, the Party concerned endorses the Jackson Report’s conclusion that it would apply only to those cases where the alleged nuisance is an activity: (a) damaging the environment; and (b) adversely affecting the wider public. Only a small proportion of private nuisance claims therefore involve matters which may be argued to bring them within the Convention’s scope. Private nuisance claims as a class do not come within its scope.

41. The communicants submit that the Convention’s application to private nuisance is wider than the Jackson Report suggests. Moreover, they disagree that if the issue under challenge has an impact on the environment but may affect only one or a few individuals, the nuisance is not part of national law relating to the environment. They add that the Aarhus Convention Implementation Guide<sup>17</sup> attributes a wide meaning to the environment including the state of human health and life.

**(b) Does compliance require that private nuisance proceedings meet the requirements of article 9, paragraph 4, or may compliance be achieved through access to alternative procedures?**

42. The Party concerned submits that compliance with article 9, paragraphs 3 and 4, of the Convention is achieved through the public having access to a number of other types of procedures (see para. 34 above) and access to private nuisance proceedings is not required.

43. The communicants concede that some of the alternative procedures may be appropriate in some instances, but submit that these alternatives do not, individually or collectively, ensure compliance with the Convention. They contend that, indeed, many options provide little or no effective remedy at all, and that the significant shortcomings in each or all of the alternatives suggested mean that private nuisance has to be part of national law relating to the environment. Moreover, the availability of adequate and effective remedies under article 9, paragraph 4, includes the possibility of injunctive relief and private nuisance is the main way through which such relief is secured in the Party concerned.

44. The parties’ submissions regarding the adequacy of the possible alternative procedures available are summarized below.

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<sup>16</sup> p. 314.

<sup>17</sup> *The Aarhus Convention: An Implementation Guide*, 2nd ed., United Nations publication, Sales No. E.13.II.E.3.

(i) *Complaint to the relevant regulator or local authority, including with a view to the authority taking action under section 80 of the EPA*

45. The Party concerned asserts that members of the public can report potential or alleged breaches of environmental legislation to the appropriate regulator, for the regulator to investigate and consider whether there is a need to take enforcement action, for example under section 80 of the EPA.

46. The communicants submit that the right to complain to an authority which may or may not then take administrative action does not provide access to relevant procedures in any meaningful sense.

(ii) *Complaint to the relevant ombudsman*

47. The Party concerned contends that if members of the public are dissatisfied with the responsible regulator, they may complain to the relevant ombudsman, usually after complaining to the regulator itself. If the ombudsman takes up the complaint, he or she will normally report to the complainant and the authority complained of once the investigation has been concluded. The ombudsman may make a report to Parliament if the investigation raises an important public policy issue or if the authority complained of does not accept the recommendations.

48. The communicants submit that a complaint to the relevant ombudsman is limited to reviewing maladministration of a regulator. An ombudsman cannot consider complaints about environmental pollution by an individual or corporate body. Even if the ombudsman finds maladministration, he or she has no power to order a remedy for the environmental harm but can only recommend that the public body take action.

(iii) *Statutory nuisance proceedings under section 82 of the EPA*

49. The Party concerned submits that there are strong judicial statements endorsing section 82 of the EPA (and proceedings under it) as: “a statute specifically directed to the protection of the environment and contemplating action taken by the aggrieved layman” and “intended to provide ordinary people, numbered amongst whom are those who are disadvantaged ... with a speedy and effective remedy”.<sup>18</sup> The Party submits that the domestic proceedings of the communicant of communication ACCC/C/2013/86 could have been brought as statutory nuisance proceedings, and adds that the Jackson Report noted that costs recovery under section 82 is “somewhat more generous than costs recovery on the standard basis in the civil courts”.<sup>19</sup>

50. The communicants accept that proceedings under section 82 could provide an alternative mechanism to private nuisance in some instances. They contend, however, that section 82 proceedings have a number of limitations including: (a) the many types of environmental nuisances outside the statutory nuisance definition;<sup>20</sup> (b) the best practicable means defence; (c) the reasonable excuse defence; (d) the stricter procedural and evidential limitations of section 82 proceedings, which are governed by the Criminal Procedural Rules, without the possibility to settle costs issues in advance; (e) the defence that the nuisance is not ongoing; (f) the Prosecution of Offenders Act 1985, which does not make provision for multiple claimants; (h) the limits on the level of compensation payable; and (i) the potential for a costs claim by a successful defendant.

<sup>18</sup> *Hewlings v. McLean Homes East Anglia Ltd* [2001] 2 All ER 281.

<sup>19</sup> p. 316.

<sup>20</sup> Communication ACCC/C/2013/85 (pp.14–17) lists categories of nuisance the communicants allege would not come within the definition of statutory nuisance.

(iv) *Judicial review*

51. The Party concerned submits that, in many cases, the breach at issue will concern an alleged breach of a condition or licence or an offence for which a regulator or local authority is responsible for enforcement. In such cases, where the breach or nuisance is clear, so will be the duty of action (for example, the duty to investigate a complaint under section 79 of the EPA or to serve an abatement notice under section 80). Such matters are clearly capable of founding a claim for judicial review.

52. The communicants submit that an application for judicial review challenging the regulator or authority's acts or its failure to act does not provide any realistic means of review. A failure to act is subject to challenge on *Wednesbury* grounds,<sup>21</sup> which the Party's courts consider to be a high hurdle, even in cases where a precautionary approach to environmental protection applies.<sup>22</sup> The communicants note that the Compliance Committee has previously expressed concern regarding the use of the *Wednesbury* standard.<sup>23</sup> Moreover, judicial review of a regulator is expensive and it is unlikely that the court would require a regulator to take effective enforcement action.

(v) *Mounting a private prosecution*

53. The Party concerned submits that conduct alleged to constitute a criminal offence — including offences constituting statutory nuisance under the EPA or the common law offence of public nuisance — may be subject to a private prosecution. A public nuisance may arise in respect of a person's act not warranted by law or the omission of a legal duty that endangers the health, property or comfort of the public. This differs from private nuisance in that the damage, injury or inconvenience affects everyone or a class of people (e.g., those within a particular neighbourhood), and is ordinarily available in circumstances where a statutory offence is not.

54. The communicants point out that there are virtually no instances where the public concerned has successfully pursued a prosecution of public nuisance. They contend that a private prosecution for public nuisance cannot therefore be considered as providing any realistic mechanism of review.

(c) **If the requirements of article 9, paragraph 4, apply to private nuisance proceedings, does LASPOA section 46 render such proceedings prohibitively expensive (article 9, para. 4), or impose a financial barrier (article 9, para. 5)?**

55. The communicants submit that LASPOA section 46, which removes the right to recover ATE insurance premiums, makes private nuisance claims prohibitively expensive under article 9, paragraph 4, of the Convention. Moreover, by introducing a barrier to access to justice that did not exist before, it directly conflicts with article 9, paragraph 5, of the Convention regarding the removal or reduction of such barriers. The communicants provide a list of private nuisance claims that they allege cannot be pursued after the possibility to recover ATE insurance premiums was cancelled.<sup>24</sup>

56. The Party concerned contends that LASPOA section 46 gives effect to a primary recommendation of the Jackson Report. The issue of the recoverability of ATE insurance premiums was given full consideration in that report and subsequently in Parliament. Lord

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<sup>21</sup> *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223.

<sup>22</sup> See, e.g., *Aston v. Secretary of State for Comm. and Local Govt.* [2013] EWHC 1936 (Admin).

<sup>23</sup> ECE/MP.PP/C.1/2010/6/Add.3, para. 125.

<sup>24</sup> Communication ACCC/C/2013/85, para. 27.

Justice Jackson concluded regarding private nuisance claims, that to the extent that there was any problem, it was not so widespread as to be in breach of the Convention.

57. With respect to article 9, paragraph 5, of the Convention, the Party submits that provision requires Parties to consider the extension of appropriate assistance mechanisms to remove or reduce financial or other barriers — and is not a prohibition on any changes which may arguably not benefit claimants.

58. Moreover, the Party concerned contends that BTE insurance is a potential alternative mechanism to ATE insurance for funding private nuisance claims.

59. The communicants submit that BTE insurance is an inadequate answer to address non-compliance with the Convention, because the overwhelming majority of proposed claimants do not have BTE insurance in place before the event giving rise to the nuisance occurs. For example, in *Austin and others v. Miller Argent (South Wales) Ltd*<sup>25</sup> only 2 out of more than 500 claimants had BTE insurance in place. The communicants contend that even when persons have BTE insurance in place, every effort is made by a BTE insurer to prevent the policy covering environmental nuisance claims.

60. The Party concerned also submits that claimants will still be able to engage solicitors on conditional fee agreements, even if they do not have BTE insurance. The communicant of communication ACCC/C/2013/86 counters that, though she instructed her legal representatives by way of a conditional fee agreement regarding her own legal fees, she still could not afford to issue private nuisance proceedings without a pre-action order providing costs protection.

#### **D. Domestic remedies**

61. The Party concerned submits that, since the ACCC/C/2013/86 communicant was still making active use of domestic procedures during the Committee's consideration of the communications, it would not be appropriate for the Committee to consider that communication at this stage. The Party invites the Committee to suspend consideration of communication ACCC/C/2013/86 until domestic remedies have been exhausted. The Party concerned does not object to the admissibility of communication ACCC/C/2013/85.

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

62. The United Kingdom ratified the Aarhus Convention on 23 February 2005. The Convention entered into force for the United Kingdom on 24 May 2005.

63. The Committee decided at its forty-fourth meeting to consider communications ACCC/C/2013/85 and ACCC/C/2013/86 jointly (see para. 10).

64. The Committee decides not to examine the ACCC/C/2011/86 communicant's allegations concerning her private nuisance claim for noise and dust from the opencast coal mining operation, because at the time of the Committee's deliberations the case was still ongoing at the domestic level. The Committee notes that after the Committee's draft findings were published, on 23 February 2015, the Supreme Court refused permission to appeal, this being the final determination of the matter. The Committee accordingly takes the case into account as an example illustrating the practice of private nuisance proceedings in the Party concerned.

<sup>25</sup> [2011] EWCA Civ 92.

65. The Committee also decides not to deal with the ACCC/C/2013/86 communicant's allegations concerning non-compliance with article 9, paragraph 2, of the Convention by the Party concerned, as these allegations were not sufficiently substantiated and moreover were related to the case then still ongoing at the domestic level.

66. The Committee recalls its findings on communication ACCC/C/2008/33 (United Kingdom), in which it concluded that "by failing to ensure that *the costs for all court procedures subject to article 9* are not prohibitively expensive, and in particular by the absence of any clear legally binding directions from the legislature or judiciary to this effect, the Party concerned fails to comply with article 9, paragraph 4, of the Convention".<sup>26</sup> Subsequently, the Committee recommended the Party concerned "review its system for allocating *costs in environmental cases within the scope of the Convention* and undertake practical and legislative measures ... to ensure that *such procedures* are fair and equitable and not prohibitively expensive and provide a clear and transparent framework".<sup>27</sup> These recommendations were subsequently welcomed by decisions IV/9i and V/9n of the Meeting of the Parties. In this respect, the Party concerned interprets the above conclusions and recommendations as applying only to judicial review procedures and not private nuisance proceedings (see also para. 6 above). The Committee stresses that, in its view, the findings endorsed and recommendations welcomed by decisions IV/9i and V/9n of the Meeting of the Parties apply to all court procedures subject to article 9 of the Convention, not only judicial review procedures. However, in the light of the Party's position on this point, the communications have been considered under the Committee's ordinary, not summary proceedings, procedure.

67. The Committee will examine each of the substantive issues set out in paragraph 36 above.

**(a) Private nuisance proceedings as national law relating to the environment (article 9, para. 3)**

68. The communicants submit that private nuisance cases in general, as a category or "class", fall within the scope of article 9, paragraph 3, of the Convention. In contrast, the Party concerned argues that the essence of private nuisance proceedings is to protect private property rights, not the environment, and that therefore article 9, paragraph 3, does not apply to private nuisance claims "as a class". The Party concerned adds that it is for its national law to define what should be considered as "national law relating to the environment".

69. As a preliminary matter, the Committee stresses that the terms used in the Convention, as an international agreement, must be interpreted in the context of international law and the Convention itself, in the light of its object and purpose.<sup>28</sup> To this end, what constitutes "national law relating to the environment" must be interpreted in accordance with the object and purpose of the Convention.

70. The Convention does not define the term "national law relating to the environment". Article 2, paragraph 3, does, however, contain a definition of "environmental information". This definition is broad and includes, inter alia, "factors such as noise", "conditions of human life", and "built structures". As the Committee pointed out in its findings on

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<sup>26</sup> ECE/MP.PP/C.1/2010/6/Add.3, para. 141, emphasis added.

<sup>27</sup> Ibid., para. 145, emphasis added.

<sup>28</sup> 1969 Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, No. 1-18232, article 31.

communication ACCC/C/2011/63 (Austria), this also implies a broad understanding of the term “environment” in article 9, paragraph 3.<sup>29</sup>

71. In this vein, in those findings, the Committee found that “the text of the Convention does not refer to ‘environmental laws’, but to ‘laws relating to the environment’”, and consequently that “article 9, paragraph 3, is not limited to ‘environmental laws’, e.g., laws that explicitly include the term ‘environment’ in their title or provisions”.<sup>30</sup> The Aarhus Convention Implementation Guide states that “the provisions on access to justice essentially apply to all matters of environmental law”<sup>31</sup> and that “national laws relating to the environment are neither limited to the information or public participation rights guaranteed by the Convention, nor to legislation where the environment is mentioned in the title or heading. Rather, the decisive issue is if the provision in question somehow relates to the environment.”<sup>32</sup> The Committee finds that a broad interpretation of the term “national law relating to the environment” should likewise be applied when considering whether article 9, paragraph 3, of the Convention applies to private nuisance proceedings.

72. In its findings on communication ACCC/C/2008/23 (United Kingdom), the Committee concluded that, in the context of that case, which related to offensive odours from a waste composting site, the law on private nuisance was part of the law relating to the environment of the Party concerned, and therefore was within the scope of article 9, paragraph 3, of the Convention. The Committee considers that the same conclusion should apply to cases of private nuisance resulting from noise, odours, smoke, dust, vibrations, chemicals, waste or other similar pollutants. In *Coventry v. Lawrence, No. 1*, the Supreme Court held that “since the middle of the 19th Century common law nuisance has played an important complementary role to regulatory controls, on the one hand stimulating industry to find better technical solutions to environmental problems, and, on the other, stimulating the legislature to fill gaps in the regulatory system.”<sup>33</sup> The fact that the law of private nuisance primarily relates to protecting the rights of individual property owners to enjoy their land does not exclude that it at the same time regularly concerns various components of the environment and aims to protect them.

73. The Committee therefore concludes that, in general, private nuisance proceedings should be considered as judicial procedures aimed to challenge acts or omissions by private persons and public authorities that contravene national law relating to the environment in the sense of article 9, paragraph 3, of the Convention. This does not mean that the Convention must necessarily apply to each and every private nuisance proceeding. In practice, the principal criteria for assessing the Convention’s applicability to a specific private nuisance case would be whether the nuisance complained of affects the “environment”, in the broad meaning of this term (see paras. 70–71 above). The number of people affected, the claimant’s motivation for bringing private nuisance proceedings or the proceedings’ possible significance for the public interest are not decisive to an assessment of whether the procedure falls within the scope of national law relating to the environment.

**(b) Alternatives to private nuisance proceedings (article 9, paras. 3 and 4)**

74. The communicants submit that if private nuisance proceedings are within the scope of article 9, paragraph 3, of the Convention, they must necessarily meet the requirements of article 9, paragraph 4, as that provision’s requirements apply to all procedures referred to in

<sup>29</sup> ECE/MP.PP/C.1/2014/3, para. 54.

<sup>30</sup> Ibid., para. 52.

<sup>31</sup> p. 187.

<sup>32</sup> p. 197.

<sup>33</sup> [2014] UKSC 13, para. 176.

paragraphs 1, 2 and 3 of article 9. Therefore, private nuisance procedures must not be prohibitively expensive. The Party concerned counters that members of the public have access to other low cost procedures to challenge the same acts and omissions and, consequently, even if private nuisance proceedings are within the scope of article 9, paragraph 3, they would not have to meet the requirements of paragraph 4. Rather, there would only be non-compliance if the alternative procedures were either not available to members of the public or would not provide for effective remedies.

75. The Committee must therefore determine whether the requirements of article 9, paragraph 4, must be met for all procedures falling within the ambit of paragraph 3, or whether the Party concerned can achieve compliance with the Convention so long as members of the public have access to even one alternative procedure through which they could challenge a particular act or omission, and which would provide for adequate and effective remedies.

76. In past findings, the Committee has repeatedly held that, when evaluating compliance with article 9, it pays attention to the general picture regarding access to justice in the Party concerned, in the light of the purpose reflected in paragraph 18 of the preamble of the Convention that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced”. For example, in its findings on communication ACCC/C/2006/18 (Denmark), the Committee noted that the lack of opportunity for the communicant in that case to initiate penal proceedings did not in itself amount to non-compliance with 9, paragraph 3, so long as there were other means for challenging those acts and omissions.<sup>34</sup>

77. Similarly, in its findings on communication ACCC/C/2011/63 (Austria), the Committee found that “whereas lack of access to criminal or administrative penal procedures as such does not amount to non-compliance, the lack of any administrative or judicial procedures to challenge acts and omissions contravening national law relating to the environment such as in this case amounts to non-compliance with article 9, paragraph 3, in conjunction with article 9, paragraph 4, of the Convention.”<sup>35</sup>

78. Following this line of reasoning, it is apparent to the Committee that if the legal system of the Party concerned provides for more than one procedure through which members of the public can challenge a particular act or omission contravening national law related to environment, it is sufficient for compliance with the Convention that at least one of these procedures meets all the requirements of article 9, paragraphs 3 and 4. The Committee points out, however, that it would be in keeping with the goals and spirit of the Convention to maintain several such procedures meeting all these requirements.

79. The Committee stresses that, for any procedure to be considered as a fully adequate alternative to another, it must be available to at least the same scope of members of the public, enable them to challenge at least the same range of acts and omissions, provide for at least as adequate and effective remedies, and meet all the other requirements of article 9, paragraphs 3 and 4, of the Convention.

80. In this regard, the Committee refers back to the definition of private nuisance set out in paragraph 15 above. It follows from this definition that the scope of the members of the public entitled to bring private nuisance proceedings is limited to the users or occupiers of land or to those entitled to enjoy the land or some right connected with that land. The range of acts and omissions which can be subject to a private nuisance claim is wide and includes various kinds of interferences, often related to different aspects of the environment.

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<sup>34</sup> ECE/MP.PP/2008/5/Add.4, para. 30.

<sup>35</sup> ECE/MP.PP/C.1/2014/3, para. 63.



Moreover, private nuisance claims can be used to challenge acts and omissions infringing the rights of the applicant in various situations: continuous and long-lasting interference; “one-off” activities causing serious harm;<sup>36</sup> disturbing activities ongoing for a certain period and subsequently ceased;<sup>37</sup> or even in cases when the harm has not yet commenced, but there is a reasonable presumption that if the activity goes ahead it will result in “substantial and imminent damage”.<sup>38</sup> The remedies available in the private nuisance proceedings include injunctions, inter alia, to terminate or limit the nuisance or to take some other action to redress the nuisance and, under some circumstances, the award of damages.

81. The Committee must determine whether the administrative and judicial procedures presented by the Party concerned (see para. 34 above), individually or collectively, represent adequate alternatives to private nuisance proceedings, bearing in mind the characteristics summarized in the above paragraph.

(i) *Complaints to the relevant regulator, local authority or ombudsman*

82. The Party concerned asserts that where the alleged nuisance concerns a breach of a licence condition or where the activity amounts to an offence, any member of the public can report it to the appropriate regulator (administrative authority), which should consider whether to take enforcement action. Where the breach is alleged to amount to a statutory nuisance, it is possible to make a complaint with a view to the authority taking action under section 80 of the EPA. If members of the public are not satisfied with the actions taken by the authority, or with its refusal to take such measures, they can complain to the relevant ombudsman.

83. As the Committee stated in its findings on communication ACCC/C/2006/18 (Denmark), article 9, paragraph 3, requires more than a right to address an administrative agency about an illegal activity.<sup>39</sup> It is intended to provide members of the public with access to adequate remedies regarding acts and omissions which contravene environmental law, and with the means to have environmental laws enforced and made effective. Parties to the Convention are therefore obliged to ensure that members of the public meeting the criteria, if any, laid down in national law, have access to administrative or judicial procedures to directly challenge the acts and omissions of private persons or public authorities which they allege contravene national environmental law.

84. The right to ask a public authority to take action does not amount to a “challenge” in the sense of article 9, paragraph 3, and especially not if the commencement of action is at the discretion of the authority, as is the case in the Party concerned. Rather, members of the public must be able to actively participate in the process of reviewing the acts or omissions, the legality of which they question.<sup>40</sup> The process must also meet all the requirements of article 9, paragraph 4, of the Convention. If the Party opts to provide for access to justice

<sup>36</sup> Joint reply by communicants of 5 September 2014, para. 11, citing *Vernon Knights Associates v. Cornwall Council* [2014] Env LR 6.

<sup>37</sup> *Ibid.*, paras. 12–14, citing *Thomas v. Merthyr Tydfil Car Auction Ltd* [2013] Env LR 12 and *Barr v. Biffa Waste Services Ltd* [2013] QB 455.

<sup>38</sup> *Ibid.*, paras. 15–16, citing *Fletcher v. Bealey* (1884) ChD 688.

<sup>39</sup> ECE/MP.PP/2008/5/Add.4, para. 28.

<sup>40</sup> See also the Aarhus Convention Implementation Guide, p. 199: “Regardless of the particular mechanism, the Convention makes it abundantly clear that it is not only the province of environmental authorities and public prosecutors to enforce environmental law, but the public also has an important role to play.”

through administrative review procedures, those procedures must fully compensate for any absence of judicial procedures.<sup>41</sup>

85. The Committee does not consider that the possibility for members of the public to report alleged nuisances to the responsible administrative authorities (regulators), and then subsequently to complain to the ombudsman, provide for adequate alternatives to private nuisance proceedings. These possibilities are not connected with any procedural rights enabling members of the public to effectively commence a procedure to review the act or omission allegedly causing the nuisance, to actively participate in such proceedings, or to enforce adequate remedies. Furthermore, the ombudsman cannot deal with the alleged nuisance as such, but may only review the actions of the regulator and provide recommendations.

(ii) *Judicial review of complaints to the relevant regulator, local authority or ombudsmen*

86. The Party concerned submits that, if an alleged nuisance constitutes a breach of a condition of licence or an offence, this may require a duty of action by the responsible administrative authority and, should the authority fail to take appropriate action, members of the public can seek judicial review of this failure. This, according to the Party concerned, should be considered as one of the alternatives to private nuisance proceedings.

87. The Committee notes that private nuisance proceedings aim to challenge acts or omissions by users of land (usually private persons) that have allegedly caused, or are causing, harm to their neighbours. Only some, and by no means all, of private nuisances involve a breach of a licence or amount to an offence. Moreover, even if an alleged private nuisance would also constitute a breach of a licence or an offence, the focus of any ensuing judicial review would not be the private nuisance itself, but rather an act or omission by the public authority related to its regulatory powers. As the Court of Appeal pointed out in *Austin v. Miller Argent*, “It seems to us unrealistic to believe that the powers conferred upon public authorities will suffice to achieve the Convention's objectives”.<sup>42</sup>

88. The Committee therefore concludes that judicial review of the responsible administrative authority's failure to take appropriate action in case of a licence breach or an offence by an operator does not represent an adequate alternative to private nuisance proceedings.

(iii) *Statutory nuisance proceedings*

89. The Party concerned claims that the “statutory nuisance proceedings” under section 82 of the EPA represent a further alternative to private nuisance claims. Under section 82, any person aggrieved by a statutory nuisance is entitled to start judicial proceedings against the responsible person. If the existence of the statutory nuisance is proved, the court may make an abatement order requiring that the nuisance is stopped and may also impose a fine.

90. The Committee has no doubt that statutory nuisance proceedings represent a judicial procedure in the sense of article 9, paragraph 3, through which members of the public, aggrieved by acts or omissions amounting to a statutory nuisance, can challenge those acts or omissions. It is also clear from the parties' submissions that there is a considerable overlap between the scope of private and statutory nuisance proceedings. The communicants concede that in some cases statutory nuisance proceedings might indeed

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<sup>41</sup> See the findings of the Committee on communication ACCC/C/2008/32 (European Union) (ECE/MP.PP/C.1/2011/4/Add.1), para. 92.

<sup>42</sup> [2014] EWCA Civ 1012, para. 18.

provide an adequate alternative to a private nuisance claim. Yet they allege that many types of environmental nuisances fall outside the definition of statutory nuisance, and furthermore that claimants face a number of barriers that are not present in private nuisance claims. The Committee must therefore consider the extent to which these alleged differences and barriers prevent statutory nuisance proceedings from being a fully adequate alternative to private nuisance claims.

91. Concerning the respective scope of private nuisance and statutory nuisance, the communicants have provided a list of environmental nuisances that they allege would not constitute a statutory nuisance but could be challenged through a private nuisance claim (including smoke emissions, fumes and gases from business premises, noise from traffic, harm caused by contamination of land or shadowing). The Party concerned has not disputed this list.<sup>43</sup> Moreover, the communicants submit that the scope of private nuisance continues to evolve through case law over time, whereas the categories of statutory nuisances are explicitly defined in section 79, paragraph 1, of the EPA.

92. Based on the above, the Committee finds that while the majority of environmental nuisances appear to fall within the scope of both private nuisance and statutory nuisance under the EPA, a number could only be challenged by a private nuisance claim. In such cases, statutory nuisance cannot be considered to be an adequate alternative to private nuisance proceedings.

93. Another aspect concerns the issue of whether the nuisance must be ongoing (existing) at the date of the complaint. Under section 82 of the EPA, this is a necessary condition for a statutory nuisance procedure. In contrast, a private nuisance claim can in certain circumstances be used to challenge serious harms caused by “one-off” activities, as well as activities that were ongoing for a certain period but have subsequently ceased, or as a means of protection against substantial and imminent damage which can reasonably be presumed if an activity goes ahead (see para. 80 above). The Committee finds that in all these situations, if the particular nuisance concerns the environment, the nuisance should be considered as within the scope of article 9, paragraph 3. Therefore, statutory nuisance proceedings would not represent an adequate alternative to a private nuisance claim in these cases either.

94. The communicants submit that a further deficiency of statutory nuisance is that the possibility to claim compensation (damages) as a remedy is more limited than in private nuisance.

95. In both types of proceedings, the primary remedy sought by claimants is to stop or diminish the nuisance. In private nuisance, as a rule, a finding of nuisance should normally be followed by an injunction, unless specific circumstances provide otherwise.<sup>44</sup>

96. However, in some circumstances the courts in private nuisance cases can award damages to compensate the harm instead of an injunction. According to the communicants, the judgment of the Supreme Court in *Coventry v. Lawrence, No. 1*, indicates that the award of damages in private nuisance cases may become more common in the future.<sup>45</sup>

97. In statutory nuisance proceedings, when the nuisance is proved, the court issues an abatement order. In addition, the courts can make a compensation order for personal injury, loss or damage arising from the statutory nuisance. This order, however, can only compensate for damage that occurred during the period of the proceedings and is therefore, according to the communicants, generally very modest.

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<sup>43</sup> E.g., letter of the Party concerned of 5 September 2014, para. 23.

<sup>44</sup> *Coventry v. Lawrence, No. 1*, [2014] UKSC 13, para. 101–115.

<sup>45</sup> *Ibid.*, paras. 120–132, 154–161.

98. The Party concerned submits that, according to the Aarhus Convention Implementation Guide,<sup>46</sup> article 9, paragraph 3, envisages that members of the public may bring court proceedings to have the law enforced, rather than to redress personal harm. The Party concerned argues that it follows that compensation or damages should not be considered as remedies in the sense of article 9, paragraph 4, for procedures under article 9, paragraph 3.

99. From the information provided, the Committee understands that injunctions or abatement orders are, in practice, the most common and adequate remedies to enforce the law in the case of environmental nuisances. However, as the judgment of *Coventry v. Lawrence, No. 1* cited in paragraph 96 above illustrates, there are cases in which an injunction or abatement order is not a reasonable solution. In such cases, compensating the claimant with damages may be the only adequate and effective remedy. This does not mean that the case is not related to the environment any more. As the Aarhus Convention Implementation Guide's commentary on article 9, paragraph 4, states: "Adequacy requires the relief to ensure the intended effect of the review procedure. This may be to compensate past damage, prevent future damage and/or to provide for restoration" and "although monetary compensation is often inadequate to remedy the harm to the environment, it may still provide some satisfaction for the persons harmed".<sup>47</sup>

100. The Committee therefore concludes that, with respect to environmental nuisances for which monetary compensation for the damage occurring before the case was brought to court would be the only available or reasonable remedy, statutory nuisance proceedings do not amount to an adequate alternative to a private nuisance claim, as they do not provide for such a remedy.

101. The communicants referred to a number of other limiting aspects of statutory nuisance proceedings, namely, the defences of "best practicable means" and "reasonable excuse", stricter procedural and evidential limitations, an inability to use such proceedings in cases of multiple claimants, and the possibility of a costs claim by a successful defendant. The Committee decides not to deal with these aspects, as it does not find them necessary for determining whether statutory nuisance proceedings represent a fully adequate alternative to private nuisance claims, since for the reasons set out in paragraphs 99 to 108 above it has already found that such proceedings do not.

102. Based on the above findings, and without making any finding regarding the aspects set out in paragraph 101 above, the Committee is of the view that statutory nuisance proceedings may to a considerable extent provide an alternative to private nuisance claims. However, it finds that for a number of cases this conclusion would not apply, since:

(a) The definition of statutory nuisance does not cover all the kinds of environmental nuisance which can be challenged by means of a private nuisance claim;

(b) Statutory nuisance proceedings cannot be used in situations when the nuisances are not ongoing;

(c) Statutory nuisance does not provide the possibility for compensation through the award of damages in cases where this would be the only available or reasonable remedy.

For these reasons, the Committee finds that statutory nuisance proceedings do not represent a fully adequate alternative to private nuisance claims.

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<sup>46</sup> p. 197.

<sup>47</sup> p. 200.

*(iv) Private prosecution*

103. The Party concerned alleges that, in cases where a nuisance amounts to a criminal offence, in addition to statutory nuisance proceedings, which as such are criminal in nature, any person can institute criminal proceedings. The Party concerned does not provide any details about the scope of private nuisance cases which might be challenged by means of a private prosecution, nor the specific conditions and requirements for starting such a prosecution. Neither does it provide any examples of successful private prosecutions for environmental nuisance. Therefore, the Committee does not find private prosecution to be an adequate alternative to a private nuisance claim.

*(v) Conclusion regarding alternatives to private nuisance proceedings*

104. It follows from the above examination that with respect to the requirements of article 9, paragraphs 3 and 4, of the Convention, only statutory nuisance proceedings may be considered to be a viable alternative to a private nuisance claim. However, in a number of respects, statutory nuisance does not provide an adequate alternative either (see para. 102 above). The Committee thus finds that the administrative and judicial procedures presented by the Party concerned do not either individually or collectively provide for a fully adequate alternative to private nuisance proceedings.

**(c) Costs of private nuisance proceedings (article 9, para. 4)**

105. Having found that there is no fully adequate alternative to private nuisance proceedings, the Committee must next determine whether private nuisance proceedings in the Party concerned are in fact prohibitively expensive under article 9, paragraph 4, of the Convention.

106. When assessing the costs related to procedures for access to justice in the light of the standard set by article 9, paragraph 4, the Committee considers the cost system of the Party concerned, or its relevant parts, as a whole and in a systemic manner.<sup>48</sup> Therefore, the Committee considers whether, taking into account the entry into force of LASPOA section 46, the legal system of the Party concerned as a whole makes the costs of private nuisance proceedings within the scope of article 9, paragraph 3, prohibitively expensive.

107. In its findings on communication ACCC/C/2008/33, the Committee held that the usual “costs follow the event” rule (which, according to section 44.2, paragraph 2, of the Civil Procedure Rules also applies as a general rule in private nuisance proceedings in England and Wales) is not inherently objectionable under the Convention, and the compatibility of this rule with the Convention depends on the availability of other aspects of the legal system to modify the effects of the basic rule in cases involving members of the public as litigants.<sup>49</sup> The Committee finds that the above conclusion is equally applicable to private nuisance cases.

108. Also in its findings on communication ACCC/C/2008/33, the Committee found that without a clear rule to prevent prohibitively expensive court procedures, the measures then available under the legal system of the Party concerned, including a wide discretion for courts regarding the award of costs, did not ensure that costs remained at a level which met the requirements of the Convention. The Committee therefore concluded that “by failing to ensure that the costs for all court procedures subject to article 9 are not prohibitively expensive, and in particular by the absence of any clear legally binding directions from the

<sup>48</sup> See findings on communication ACCC/C/2008/33 (United Kingdom) (ECE/MP.PP/C.1/2010/6/Add.3), para. 128.

<sup>49</sup> Ibid., para. 129.

legislature or judiciary to this effect, the Party concerned fails to comply with article 9, paragraph 4, of the Convention”.<sup>50</sup> With respect to private nuisance proceedings within the scope of article 9, paragraph 3, the Committee finds that there is similarly an absence of any clear legally binding directions from the legislature or judiciary ensuring that the costs for private nuisance proceedings within the scope of article 9, paragraph 3, are not prohibitively expensive.

109. Despite the different characteristics of private nuisance proceedings and challenges to acts and omissions by public authorities, to the extent that each is within the scope of article 9, paragraph 3, of the Convention, the requirements of article 9, paragraph 4, apply to both. The Committee therefore considers that the above findings on communication ACCC/C/2008/33 are relevant also for private nuisance proceedings within the scope of article 9, paragraph 3. Such a conclusion is supported by the communicants’ submission, not rebutted by the Party concerned, that the costs of environmental nuisance cases almost always exceed £100,000 per party (see para. 25 above).

110. In its findings on the communication ACCC/C/2008/33, the Committee recommended that the Party concerned “review its system for allocating costs in environmental cases within the scope of the Convention and undertake practical and legislative measures ... to ensure that such procedures: (i) are fair and equitable and not prohibitively expensive; and (ii) provide a clear and transparent framework”.<sup>51</sup> This recommendation was subsequently welcomed by decisions IV/9i and V/9n of the Meeting of Parties.

111. The Party concerned subsequently amended its procedural rules to introduce costs limits for proceedings defined as “Aarhus Convention Claims”.<sup>52</sup> However, according to the Party’s submissions to the Committee, these costs limits apply only to judicial review cases, not to private nuisance claims.

112. Given that (a) the Party concerned takes the view that private nuisance proceedings fall outside the costs limits introduced through the procedural rules, (b) the Party has not put before the Committee any other means (besides those already examined in the Committee’s findings on communication ACCC/C/2008/33) through which it ensures private nuisance proceedings are not prohibitively expensive, and (c) it is not disputed that the costs in private nuisance proceedings typically exceed £100,000, the Committee finds that the Party concerned has failed to ensure that private nuisance proceedings falling within the scope of article 9, paragraph 3, of the Convention, and for which there is no fully adequate alternative procedure, are not prohibitively expensive.

113. This conclusion is further strengthened by the entry into force of section 46 of LASPOA, since its prohibition on successful claimants recovering the premium for ATE insurance introduces an additional financial burden for members of the public seeking access to private nuisance procedures. On the basis of the information before it, the Committee considers that the Party concerned cannot presently rely on BTE insurance as a mechanism to eliminate this additional burden as the vast majority of the public, i.e., potential private nuisance claimants, do not have BTE insurance. Moreover, the Committee does not consider any kind of private insurance scheme whose general availability is not guaranteed by law to be capable of ensuring a Party’s compliance with the Convention’s requirement that members of the public have access to procedures which are not prohibitively expensive. The same reasoning applies to the possibility for claimants to engage solicitors on conditional fee agreements, an option which is likewise not guaranteed

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<sup>50</sup> Ibid., para. 141.

<sup>51</sup> Ibid., para. 145.

<sup>52</sup> Civil Procedure Rule 45.41, para. 2.

by law but depends on the willingness of the solicitor involved, and which furthermore does not prevent claimants from the risk of other high costs in the proceedings.

114. The Committee accordingly finds that, by failing to ensure that private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention, and for which there is no fully adequate alternative procedure, are not prohibitively expensive, the Party concerned fails to comply with article 9, paragraph 4, of the Convention.

**(d) Article 9, paragraph 5**

115. In its findings on communication ACCC/C/2008/33, the Committee further held that that the system of the Party concerned as a whole was not such as “to remove or reduce financial ... barriers to access to justice”, which article 9, paragraph 5, of the Convention requires Parties to consider.<sup>53</sup> Through decision V/9n, the Meeting of the Parties endorsed the Committee’s finding that the Party concerned was still not in full compliance with this provision. Given this decision, the Committee does not consider it necessary to adopt further findings with regard to article 9, paragraph 5.

## **IV. Conclusions and recommendations**

116. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

### **A. Main findings with regard to non-compliance**

117. The Committee finds that, by failing to ensure that private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention, and for which there is no fully adequate alternative procedure, are not prohibitively expensive, the Party concerned fails to comply with article 9, paragraph 4, of the Convention (see para. 114 above).

### **B. Recommendations**

118. The Committee, pursuant to paragraph 35 of the annex to decision I/7 of the Meeting of the Parties, recommends that the Meeting of the Parties, pursuant to paragraph 37 (b) of the annex to decision I/7, recommends that the Party concerned review its system for allocating costs in private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention and undertake practical and legislative measures to overcome the problems identified in paragraphs 109 to 114 above to ensure that such procedures, where there is no fully adequate alternative procedure, are not prohibitively expensive.

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<sup>53</sup> ECE/MP.PP/C.1/2010/6/Add.3, para. 136.