

In the matter of the Aarhus Convention Compliance Committee

ELIZABETH CONDRON

Communicant

and

UNITED KINGDOM

Party concerned

SUBMISSIONS OF COMMUNICANT

Note: Documents referred to are contained in the bundle and marked by page numbers e.g. [1].

A INTRODUCTION

1. This is a Communication submitted on behalf of Mrs Elizabeth Condron of Merthyr Tydfil, South Wales (the Communicant) that the UK is in breach of its obligations under Article 3(8) of the Aarhus Convention 1998. The Communicant submits that Merthyr Tydfil County Borough Council (the Council) and Miller Argent (South Wales) Ltd (the mining company) are penalizing, persecuting and harassing the Communicant as she asserts her right of access to justice by challenging decisions relating to the Ffos-y-fran opencast coal mine scheme situated 500 metres from her home.
2. As a consequence of the Article 3(8) breach any proceedings taken by the Communicant are unfair and inequitable and so in breach of Article 9(4) of the Convention.

Factual background

3. The Communicant challenged a 2005 planning permission to allow the mining company to extract 10.8 million tonnes of coal by opencast methods

for a period of between 17-22 years.¹ The opencast coal mine is known to be the largest in the UK² and one of the largest in Europe. It is adjacent to one of the largest waste landfill sites in the UK. The boundary of the opencast site is less than 40 metres from peoples' homes and the edge of Methyr Tydfil town (population: 55,000 people) see e.g. the location map [1].

4. A legal challenge to the permission was dismissed by the Court of Appeal in 2007.³ Since then, the Communicant has sought to challenge: (a) the non-enforcement by Merthyr Council of proposed breaches of the permission by carrying out excavation right up to the site boundary instead of some 35 metres inside the boundary,⁴ and more recently, (b) the failure by the Council to comply with the environmental impact assessment (EIA) regime (and, in particular, the EIA Directive 85/337/EEC) by granting planning permissions for a related 23.44 hectare site for the processing, washing and transportation of up to 1.5 million tonnes of coal at the Cwmbargoed Disposal Point.⁵
5. The Communicant and many other local residents are experiencing significant from noise and dust pollution from the main opencast operations. Complaints are made to the Council and mining company, although no action to stop the pollution has yet been taken. The Council refers complainants to the mining company, who then fails to resolve the concern.

B DETAILS OF ARTICLE 3(8) BREACH

6. The particulars of the Article 3(8) breach arise from a recent challenge of the failure by Merthyr Council to comply with its EIA obligations granting

¹ Paragraph 30 of the Planning Inspector's decision of 11 November 2004 states that: 'Coal production would be anticipated to be 750,000 to 1 million tonnes per annum, with a total operational period of 17 years followed by a 5 year aftercare period.'

² See eg, written evidence to the Select Committee on Welsh Affairs 2008 by the mining company.

³ *R (Condon) v National Assembly for Wales* [2007] EWCA Civ 1573. The House of Lords refused permission to appeal. The Communicant has since petitioned the European Parliament about the matter. The European Commission is investigating the petition.

⁴ CO/1272/2008. This application was refused permission by the Court as being premature. However, the mining company has not since sought to operate right up to the site boundary.

⁵ Permission to pursue this application was refused by the High Court. The Communicant has renewed the permission application to the Court of Appeal.

permission for the processing plant at Cwmbargoed. One of the Communicant's primary concerns was the potential for the processing operations to increase the annual coal extraction production from between 0.75-1 million tonnes of coal per annum to up to 1.5 million tonnes per annum. Such an increase in production was likely to cause even greater pollution problems of noise and dust deposition in the locality. In summary, the Communicant contends that the cumulative and indirect effect of the Cwmbargoed operations for increased coal processing justifies the application of the EIA regime and the subsequent legal challenge for a failure to comply with the EIA Directive.

1 Pressure on local residents to back down from proceedings

7. Before issuing judicial review proceedings for the EIA challenge, Richard Buxton Solicitors wrote to Merthyr Council on behalf of local residents setting out the unlawfulness and inviting the public body to consent to judgment⁶ [2-4]. The Council did not respond to the allegation but instead sought details of all residents seeking to challenge the decision and asking how they were able to fund legal proceedings [9]. In reply, Richard Buxton's explained that neither the residents group nor any other resident was able to afford legal proceedings but then asked why this was relevant to whether the Council has acted unlawfully [11].
8. Merthyr Council then stated that it was insufficient to write on behalf of a residents group [12]. This is incorrect and contrary to Article 2 of the Aarhus Convention which provides that:

4. "The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;

5. "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non governmental organizations promoting environmental protection and meeting any

⁶ Pre-action correspondence is required in England and Wales under Pt 54, Civil Procedure Rules

requirements under national law shall be deemed to have an interest.

9. Nevertheless, as a consequence of the Council's stance and that legal costs would be a prominent aspect of the Council's resistance to the claim; local residents were reluctant to institute proceedings for fear of, among other things, financial risk. In those circumstances, the Communicant agreed to institute proceedings in her own name. Richard Buxton Solicitors wrote to the Council confirming this [13].
10. The Communicant considers that the Council placed undue pressure on local residents. The Communicant alleges that, in the absence of any genuine defence to the claim that it failed to comply with the EIA Directive, it sought to prevent legal proceedings by trying to get residents to back down through financial pressure.

2 Representations against public funding and no order for costs

11. The Communicant is a member of a residents group opposed to the opencast coal mining scheme. She is concerned about the adverse environmental impact of pollution in the local community and the effect on the wider world from the indirect consequence of significant greenhouse gas emissions arising from the extraction and burning of coal. In the absence of that group or a collective of individuals being prepared to proceed with the EIA claim, the Communicant applied for public funding. The Communicant is retired, disabled and in receipt of state benefits. She is entitled to public funding in financial terms.
12. Merthyr Council, the mining company and Caerphilly CBC (an adjacent public body granting permission alongside Merthyr Council) made representations to the Legal Services Commission (LSC), the administrative body regulating public funding. They objected to the grant of public funding. This appears to be accepted under the public funding regime, although the Communicant contends that such representations are contrary

to the Aarhus Convention as a collateral attack on a potential claimant's ability to take legal proceedings.

13. Public funding was initially refused by the LSC. However, after two reviews and further representations, public funding was eventually granted on 16 April 2009. Merthyr Council and the other opposing parties were advised by way of notice on 21.4.09.
14. Following refusal of permission to proceed with the EIA challenge on 1.5.09,⁷ the High Court directed that submissions on costs be filed and served by the Communicant and Council [37]. The Communicant submitted that there should be no order for costs or, alternatively, that if there is an order for costs that the Council's costs should be limited and subject to an order that they were not to be enforced without order of the Court [38-44].⁸
15. The Communicant submits that the Council's submissions amounted to a personal attack on the Communicant and her legal representatives including that:

4.1 ... this is an exceptional case because of the casual disregard for the CPR but also because this is the fifth time this Claimant has launched an unmeritorious claim to frustrate the Ffos-y-Fran project. This claim was never in truth about the CPR itself and it is fair to say that the Claimant's motivation and her objectives were oblique.

4.2 Absent a sanction in costs, this Claimant is likely to continue to launch unmeritorious actions without risk to herself, through solicitors who act upon a conditional fee basis, as here. This is a heavy burden upon the Defendants who pay their costs out of the public purse. [48]

16. In terms of the 'disregard for the CPR', the Council has known all along that the Communicant had sought to dispose of the Claim in a summary fashion by consent for the very purpose of avoiding costs to all parties. This was

⁷ The Communicant has renewed her application for permission to the Court of Appeal. The Communicant maintains that the breach of EU law is clear, fundamental and the impacts arising out of the permission will have potentially significant adverse effects. The grounds of appeal are attached [44-8].

proposed because the breach of the EIA Directive was in express terms, fundamental and fatal to the permission. This was clear in pre-action correspondence [26].

17. The most recent attack on the Communicant and, in particular, her funding position is the challenge to the grant of public funding by way of judicial review by the Council [59-61]. This is, as far as the Communicant's legal representatives are aware, is the first occasion that any party has ever attempted to judicially review the grant of public funding. The Communicant has resisted the claim and explained why such a review would fail [62-65]. However, that the Council has even threatened to pursue this action is of concern and, in the Communicant's view, amounts to being penalized, persecuted and harassed contrary to Article 3(8) of the Convention.

3 Direct attack on the Communicant to undermine legal challenge

18. In addition to the attack on the financial resources of the Communicant and other local residents, the mining company have sought to use the local press to intimidate the Communicant. This was explained in the Communicant's submissions in the EIA proceedings [36]. In particular, on 11.3.09 the mining company were informed that the Communicant had renewed her permission application. Yet on 13.3.09 it issued a press release which was subsequently misrepresented in the local press to the detriment of the Communicant [66]. Reference to the local press was repeated in May 2009, when the mining company again discussed the continuing legal proceedings with the press and, again to the detriment of the Communicant [67].
19. The Communicant recognises that if legal proceedings are brought in her name, she may be subject to public attention. However, it is unfair if that attention is misleading. The correct approach is for the mining company not to discuss in any detail legal proceedings that are continuing.

⁸ Such an order arises out of s 11 of the Access to Justice Act 1999 and related legislation.

4 High Court approach to location of legal proceedings

20. The Council and the mining company requested that the EIA legal proceedings were transferred from London to Cardiff. The Communicant objected to this on the basis of the intense local media attention and because of the high level of tension in the local community about the opencast operations [36]. The Council and the mining company were well aware that the Communicant would resist any transfer. A similar proposal was made in 2005 when the High Court concluded that proceedings should remain in the London due to the representations on behalf of the Communicant.
21. The High Court objected to the Communicant's position on the basis of lack of evidence, yet the Civil Procedure Rules provide that reasons such as local media attention are reasons for not transferring proceedings.⁹ Further, the evidence of unrepresentative press attention was before the Court. In the circumstances, the Communicant submits that the Court's transfer of proceedings to Cardiff was unfair.

C CONCLUSIONS

22. Any legal proceedings that may be brought by the Communicant or any other local resident or group are likely to relate to whether decisions are taking lawfully or in an effort to stop pollution and harm to the environment in the absence of the environmental regulators, including the Council, taking effective pollution control measures. With evidence of significant noise, dust and other air pollution from the opencast coal mining and the absence of effective regulatory control access to review procedures and the courts is vital.
23. The Council and the mining company, by adopting the position set out above are restricting or fettering the Communicant's environmental rights.

⁹ Practice Direction 54D of the Civil Procedure Rules provides that, 5.2 The general expectation is that proceedings will be administered and determined in the region with which the claimant has the closest connection, subject to the following considerations as applicable, (1) any reason expressed by any party for preferring a particular venue; ... (4) the ease and cost of travel to a hearing; ... (6) the extent and nature of media interest in the proceedings in any particular locality;

This is unfair and inequitable. The question of inequality in relation to the opencast was raised in the original High Court proceedings. In *R (Condrón) v National Assembly for Wales* [2005] EWHC 3316 (Admin) Mr Justice Lindsay noted that:

‘... there is something to be said for the inequality of arms that was argued as a feature of the case at an earlier stage. The objectors did not have legal representation at the inquiry but the developer did have. ... At the inquiry the local authority, Merthyr Tydfil, had the services of its own planning officer and staff. The objectors had no legal representation. By the time it came to me, Mrs Condrón had the benefit of being able to instruct leading counsel, Mr George, and junior counsel. But even then, there were four counsel ranged against them, ...’

24. Further, there is also an argument that the opencast and the decisions relating to it are objectionable in terms of environmental justice in its broader sense (environmental equity). That is, Merthyr Tydfil is widely regarded as one of the most deprived areas in the UK.¹⁰ It appears that the Council and the national government are willing to accept highly polluting processes to be located close to the local community where in more affluent localities this simply would not occur.
25. In all the circumstances, the Communicant invites the Compliance Committee to rule the Communication admissible and to investigate the matter. In particular, the Committee is asked to review:
 - 1) the alleged breach of Article 3(8) in terms of the financial pressure being brought by the Council and the mining company;
 - 2) the attack on the Communicant’s public funding status;
 - 3) the personal attack on the Communicant through, for instance, the local press; and
 - 4) the approach of the High Court in not accepting the concerns of the Communicant about the transfer of proceedings from London to Cardiff.

¹⁰ See, for instance, the Welsh Index for Multiple Deprivation 2008, www.statswales.wales.gov.uk

26. The Communicant submits that the matter is one of general public importance and considers that the Committee's review would benefit individuals, groups and others interested in access to environmental justice and finding themselves being penalised, persecuted or harassed by either the state or private persons when seeking to assert their environmental rights.
27. The Communicant welcomes the opportunity of the Committee to clarify the position relating to Article 3(8) of the Convention.

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