ACCC/C/2009/40

In the matter of the Aarhus Convention Compliance Committee

ELIZABETH CONDRON

Communicant

and

UNITED KINGDOM

Party concerned

FURTHER SUBMISSIONS OF COMMUNICANT IN REPLY TO QUESTIONS FROM THE COMPLIANCE COMMITTEE

Note: Documents referred to are contained in the original bundle of documents supplied or in the supplementary bundle and marked by page numbers e.g. [1]

1. The Communicant alleges that the UK, through the actions of Merthyr Tydfil County Borough Council and Caerphilly Council (the Councils), have penalised or persecuted the Communicant in relation to legal proceedings concerning the Ffos-y-fran opencast coal mining scheme in South Wales contrary to Article 3(8) of the Aarhus Convention. As a consequence, those legal proceedings have not been 'fair or equitable' contrary to Article 9(4) of the Convention.

2. The Communicant relies upon her submissions of 11 June 2009. These further submissions reply to specific questions raised by the Compliance Committee in its letter of 27 July 2009.

1. Please elaborate on your allegations concerning a breach of article 3, paragraph 8 and article 9, paragraph 4

3. The Communicant relies on the specific answers to questions 2-8 below to elaborate on the allegations made.

2. Please specify how statements made in court are to be regarded as a breach of article 3, paragraph 8.

4. The Communicant believes that the statement made in court by the Councils go beyond what is reasonable in seeking to resolve the question of costs between the parties. The costs submissions followed a 2 hour hearing as to whether the Communicant could proceed with her claim for judicial review that the Councils failed to comply with the EIA Directive 85/337/EC. In particular, those statements asked the court to penalize or punish the Communicant through an adverse costs order. The statement provided that:

> 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]

5. Costs should not be used in environmental cases as a sanction to try and prevent a claimant from challenging an environmental act, omission or decision. This is certainly not the case in public law cases such as judicial review, which includes a permission stage designed to limit any unmeritorious claims. For the Councils to try and obtain a costs sanction as a punishment and preventive measure may reasonably be regarded as seeking to penalising or persecuting the Communicant. This allegation is reinforced by the attempts by the Councils before proceedings were issued to place financial pressure on proposed claimants.[1]

6. The judicial review claim in this case is not unmeritorious; it is the opposite. The failure to comply with the EIA Directive was made in express terms, fundamental and obvious.[2] The proceedings have progressed to the Court of Appeal which has considered the judicial review claim and, rather than dismiss the appeal, it has listed the matter for a half-day hearing on 17

[1] see paragraphs 7-10 of the Submissions of 11.6.09.

[2] The alleged breach of the EIA Directive 85/337/EC is that Merthyr Tydfil CBC has failed to carry out a comprehensive screening assessment to determine whether the Cwmbargoed Processing Plant is EIA development. The failure is clear because on more than one occasion the Councils have stated in documents: "*Did the application have to be screened for an EIA? No. Was an EIA required? Not applicable.*" This is simply wrong. It offends the 'wide scope and broad purpose of the Directive.[2]

January 2010. Further, it is unreasonable to suggest that the Communicant would ever be advised to pursue an unmeritorious legal challenge.

7. Following the costs submission which were, in the event, unsuccessful due to the operation of the statutory protection contained in the public funding legislation, the Councils issued legal proceedings against the Legal Services Commission (LSC)[3] for granting public funding to the Communicant. This is unprecedented and was wholly unjustified.

8. The Communicant was entitled to (and did) receive public funding (legal aid) to proceed with her legal claim. The Councils, in both its costs submissions and subsequent legal action, were trying to go behind the statutory protection afforded by the public funding system to directly attack the Communicant's financial position, cause financial hardship and to prevent further proceedings.

9. On 15 September 2009, the High Court dismissed the Councils' claim against the LSC as unarguable.[4] However, the issue of these proceedings does highlight the unreasonable approach of the Councils. Had they been successful, the Communicant would have lost the public funding statutory protection.

10. Notwithstanding the dismissal of the Councils' claim the Communicant is concerned that they may try to further penalise and persecute the Claimant should the need to challenge an unlawful decision arise once more. This is possible. For example, the mining company has applied to revise the terms of the opencast permission in a manner that is wholly unsustainable. Should the Councils approve the application the decision is likely to be unlawful.[5]

[3] The LSC is the statutory body responsible for administering public funding (legal aid).
[4] A copy of the order is provided at [68]
[5] The application is to vary Condition 37 of the mining permission which restricts the export of all coal to rail only. The mining company now wishes to import up to 5% of coal by road, this would amount to up to 50,000 tonnes per year.

3. You refer to statements made in the local press as a breach of article 3, paragraph 8. How are these statements to be seen as a breach of article 3, paragraph 8, by the Party concerned?

11. The mining company, Miller Argent (South Wales) Ltd, is carrying on public functions on behalf of the Councils. These include the investigation of pollution complaints including noise, dust and other air pollution. It also holds environmental information. While the mining company denies it is carrying on public functions; this is the reality.

12. In March and May 2009, the mining company issued press releases that misrepresented judicial comment and sought to encourage local animosity. The Communicant objects to the Council failing to regulate the mining operations and passing the responsibilities to the mining company. The Communicant considers that if the Councils are passing public functions such as environmental regulation to the mining company then the associated obligations such as compliance with the Aarhus Convention should apply.

4. How is the approach of the High Court in not accepting the concerns of the communicant about the transfer of proceedings from London to Cardiff linked to a breach of article 3, paragraph 8?

13. The Communicant does not contend that the transfer of proceedings from London to Cardiff was a breach of Article 3(8). She does, however, maintain that the transfer was unfair and so in breach of Article 9(4). The reasons for the unfairness are detailed in the earlier submissions. In summary, the Communicant objected to the transfer because of intense local media attention and the high level of tension in the local community about the opencast operations. The Civil Procedure Rules in England and Wales governing High Court action expressly provides that such reasons may justify avoiding local courts.[6] The Councils and the mining company were

[6] 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;

well aware of this, yet despite increasing the cost of proceedings by incurring travel and accommodation costs chose to insist on a transfer.

5. Please specify why in your view the actions of the mining company (in relation to its statements to the press) result in a breach of article 3, paragraph 8, by the Party concerned.

14. As stated in §10 above, it is the Communicant's view that the mining company is carrying on public functions on behalf of the Councils, the investigation of pollution complaints and holding environmental information.

6. Did you ever report your allegations of being penalized, persecuted or harassed to a government body or court competent to hear such allegations?

15. The question of a potential breach of Article 3(8) was raised before the High Court in the oral permission hearing of 30 April 2009. The Communicant's skeleton argument provided that:

> **3 Promptness**
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> 22 C resists the allegation of delay. The earliest C knew of *any* of the decisions for the project was 10 September 2009. From then on C acted promptly, with the pre-action protocol being complied with, the claim being issued less than seven weeks later, and the detailed claim and documents being served soon after.
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> 23 During the pre-action stage, C was content not to bring proceedings in her name but to allow others residents to proceed. But for the pressure from the opposing parties this would have been the case [CB 338-340]. When others feared taking proceedings, C agreed to do so. If permission were refused on the basis of delay then this would be contrary to Article 10a of the EIA Directive and that proceedings should be fair and equitable. It is also likely to breach Article 3(8) of the Aarhus Convention 1998 and that *'each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement.'*
>
> …

4 Venue

30 C resists the opposing parties request to hear the matter in Cardiff. The reasons are set out in the summary reply [CB 28-9] and that (a) C does not consider that she will have a fair trial and (b) that a trial in the locality will increase the stress, anxiety and tension for C and other members of the public concerned. Transfer to Cardiff has been considered in earlier proceedings with the Court concluding that the matter remain in London [CB 330/1-4]].

31 Cs concerns are justified. Two days after C informed the Court and the parties that she was renewing her permission application, IP issued a press release [SB 82-83] and that was then mis-reported [CB86]. *Again, this may be regarded as being contrary to Article 3(8) of the Aarhus Convention.*

32 In the circumstances, C seeks an order that the matter be heard in London. [emphasis added] [71-9]

16. The Compliance Committee has asked the UK whether national legislation provide procedures to deal with allegations under Article 3(8). The Communicant is not aware of any procedures in place. The matter may be raised before a court provided legal procedures are underway or proposed. There is no independent or free standing provision for reporting a complaint under Article 3(8).

7. Did the communicant institute legal proceedings relating to the "Ffos-y-fran" opencast coal mine earlier and was it dealt with by competent administrative authorities and courts on the merits?

17. In 2005, the Communicant did institute legal proceedings objecting to the grant of planning permission for the opencast. The factual background is summarised of the earlier submissions (§3-5, 11 June 2009). The grounds of challenge related to procedural aspects of the decision rather than the merits (or substance) of the decision. The grounds of challenge were:

(1) That the Planning Inspector (who reported to the Welsh Government (the decision-maker)) failed to have regard to the fact that the environmental statement (ES) required under the EIA Directive recommended that the opencast coal mine be subject to a buffer zone

between the area of proposed excavation and surrounding residential properties, or in the alternative, the Inspector acted unreasonably in so far as he failed to adopt the recommendation contained in the ES, that the Scheme be subject to a buffer zone.

(2) In reaching its decision, the Welsh Government failed to have regard to a material consideration; namely that on 16 March 2005 it had passed an amendment to a proposal to impose a 500 metre buffer zone on opencast mining operations. Alternatively, the Welsh Government acted unreasonably in not exercising its power to impose such a buffer zone, given that its own policy advocates the use of buffer zones to protect residential areas from the effects of open cast mining; and the environmental statement advocated the imposition of a buffer zone in these particular circumstances.

(3) In reaching his recommendation, the Inspector failed to have regard to the waste operations at the adjacent Trecatti landfill site.

(4) The Welsh Government failed to have regard to post-inquiry submissions made by objectors to the Scheme. These submissions related to (a) the inaccurate information contained in the ES and the Council's evidence regarding the number of former landfill sites at the opencast site; and (b) the irrelevance of the Newcastle Study on the impacts of opencast coal operations.

(5) The decision was biased because the Chair of the Welsh Government's Planning Development Committee pre-judged that committee's determination of the application. By reaching a view as to the merits of the Application prior to the meeting on the 3rd February 2005, the Chair of that committee had fettered his discretion.

18. The permission was quashed on ground (5). The Court of Appeal overturned the quashing order and the planning permission survived. The matter is now being investigated by the European Commission following a Petition to the European Parliament.

19. The Compliance Committee has raised an important point of law by asking whether the permission to grant the opencast coal mine was challenged o the

merits. In short, the answer was 'No'. Until very recently, the UK courts have repeatedly stated that a challenging the *merits* of a public body's decision is not possible under judicial review. However, since ratification of the Aarhus Convention 1998, this may no longer be correct. If the rights conferred by the Convention are substantive rights through, for instance, the application of the preamble to the Convention, then any public law challenge must provide the opportunity to challenge a decision on the merits. This is the position in the UNECE *Aarhus Convention Implementation Guide* (2000, UN p.4) which suggests that the Convention rights are similar in nature to human rights.

20. The position in terms of human rights law in the UK is shifting in relation to merits-based claims in judicial review. In the recent decision of *Nasseri v Secretary of State for the Home Dept.* [2009] UKHL 23, Lord Hoffman said:

> 12. … It is understandable that a judge hearing an application for judicial review should think that he is undertaking a review of the Secretary of State's decision in accordance with normal principles of administrative law, that is to say, that he is reviewing the decision-making process rather than the merits of the decision. In such a case, the court is concerned with whether the Secretary of State gave proper consideration to relevant matters rather than whether she reached what the court would consider to be the right answer. But that is not the correct approach when the challenge is based upon an alleged infringement of a Convention right. In the *Denbigh High School* case, which was concerned with whether the decision of a school to require pupils to wear a uniform infringed their right to manifest their religious beliefs, Lord Bingham of Cornhill said, in para 29:
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> > "the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated."
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> 13. Likewise, I said, in para 68:
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> > "In domestic judicial review, the court is usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer. But article 9 is

> concerned with substance, not procedure. It confers no right to have a decision made in any particular way. What matters is the result …"

21. In summary, while the Communicant tried to challenge the planning permission to grant opencast, it was only considered possible, at that time, to challenge that decision on procedural grounds. It may well be that the legal position has now changed in the light of the Aarhus Convention.

22. In the circumstances, the Compliance Committee is asked to provide its view as to whether a challenge that involves environmental rights under the Aarhus Convention can include a challenge to the merits of that decision.

8. Are there any criteria established by law or practice applicable in respect of consideration of an application for legal aid and are there any review procedures in place?

23. There are two main criteria for considering an application for legal aid: (a) financial test which is whether an applicant is in receipt of social or state benefits[7] or receives an income broadly equivalent to those benefits, which the Communicant met and (b) a merits test, which in our view the Communicant met and continues to meet. The LSC undertakes the test on the information provided by the Communicant and her legal advisers. Despite the strong prospects of success in this case (at least 70% prospects due to the clear and express error of law) the LSC has had some reservations on prospects. Notwithstanding this, the LSC did grant public funding on 16 April 2009 and prior to the Court hearing on 30 April 2009. The Order of 15 September 2009 concluded that that decision was not subject to challenge.

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1 November 2009

[7] This includes income support, guarantee pension credit and income-based job seekers allowance.