ACCC/C/85/2013
ACCC/C/86/2013

A communication to the Aarhus Convention Compliance Committee

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Communicants

and

UNITED KINGDOM

Party concerned

COMMUNICANT'S SUMMARY NOTE ON UK RESPONSE TO ACCC/C/2013/85 & 86

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1. The Communicants for ACCC/2013/85 & 86 (C-85 & C-86) have prepared this summary joint note in reply to the UK response of 20.12.13 to Communications ACCC/C/2013/85 & 86. The purpose of the note is to assist the Compliance Committee's further consideration of the matters and to ask that they be considered at a substantive hearing at the earliest opportunity.

2. The Communicants submit that the matters raised are of general public importance in relation to the Convention. They also include matters that the UK was invited to consider as part of its follow up to Decision IV/9i, but that the UK subsequently declined to respond to. This summary reply is prepared promptly and in anticipation that the UK and the Communicants will be invited to submit further skeleton arguments to assist the committee prior to any meeting to consider C-85 and C-86.

Request to suspend the Communication

3. The UK complains that C-86 raises a very specific complaint and one for which C-86 has not exhausted all domestic remedies. The Communicants

maintain that the C-85 and 86 should be considered in substance at the earliest opportunity and, further, that the UK response fails to note the following:

1) The alleged non-compliance is summarised in §12(1) & (2) of the Communication Notice as: 'failing to ensure that the courts are not preventing the public from exercising their rights under Article 9(3) and (4); and failing to recognise that CPR 45.41(2) an Aarhus Convention claim should not be limited to judicial review and cover a private nuisance claim such as the present case (i.e. dust and noise from an opencast coal mine). In short, C-86 is not limited to a 'very specific instance' of non-compliance. Rather, the decision referred to is evidence of continuing non-compliance by the UK.

2) Mrs Austin (C-86) has been prevented from actually issuing legal proceedings, notwithstanding that she been trying to resolve dust and noise pollution since 2008 and also, that she has: (a) had to appear or be represented at 6 High Court hearings since 2010, and (b) issued 3 separate sets of Court of Appeal proceedings (all relating to costs). Despite this, it has not been possible to actually issue legal proceedings to stop the pollution precisely because costs concerns remain in 2014. This concern is expressed in C-86 as a failure to provide timely proceedings under Article 9(4).

3) The UK in its response misunderstands the nature of the concerns raised in C85 and C86 which relate to concerns about the environment. It is not suggested that nuisance claims arising from sending 'poison-pen' letters[1] or firing off guns to cause vixens to abort[2] necessarily fall within the scope of the Convention. However, the UK is wrong to suggest that nuisance is not part of national law relating to the

[1] *Stoakes v Bridges* (1958) 32 ALJ 205
[2] *Hollywood Silver Fox Farm v Emmett* [1936] 2 KB 468

environment if the issue under challenge has an impact on the environment which may affect only one or a few individuals[3].

Moreover, the Communicants endorse the amendment that was proposed to s.46 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) by Lord Thomas of Gresford QC. This specifically restricted to environmental claims to within the meaning of Article 2(3) of the Convention. The amendment would therefore not extend cost protection to other types of nuisance cases, see paragraph 67 of C-85.

4) It is not suggested that the procedures cited by the UK do not also fall within the scope of the Convention. However, there is a sense of unreality in the UK's response in that it fails to acknowledge that there are significant shortcomings in each or all of the alternatives suggested (either individually or collectively) such that private nuisance has to play a role and be part of the judicial provisions of national law relating to the environment. And, moreover, that private nuisance relating to the environment should reasonably be afforded effective costs protection under the Convention. The shortcomings of the UK alternatives are discussed further below. However, the UK must appreciate that the Communicants would far prefer to get on and use an effective environmental judicial procedure to protect their environment - if one was available. As Mrs Austin explains in her submissions to the Court, she is attempting to pursue legal proceedings as a last resort: all other options have failed.

   It should also be noted that the effective and adequate remedies to be provided by Article 9(4) must include the possibility of injunctive relief. Private nuisance is the main way in which such relief can be secured. Further, members of the public must have access to procedures to challenge relevant acts and omissions. The ability to make a complaint to an authority which may or may not then take

[3] see by analogy to the proceedings in Case C-420/111 *Leth v Republik Österreich* [2013], CJEU.

administrative action is not providing access to relevant procedures in any meaningful sense.

5) The Communicants are aware of Decision I/7, §21 and that the Compliance Committee may take into account any available domestic remedy. However, in the light of: (a) the UK's continuing failure to address the concern about private nuisance proceedings, (b) the unreasonably prolonged nature of the environmental harm arising out of C-86, and (c) the lack of any alternative remedies in relation to C-85, it is entirely appropriate to consider these Communications at the earliest possible stage.[4]

6) Finally, even if one adopts the UK suggestion to look at the 'complete picture' when considering compliance, it is undeniable that s. 46 of LASPO 2012 introduces a barrier to access to justice which did not exist before and therefore is in direct conflict with Article 9(5) of Aarhus Convention which refers to the removal or reduction of such barriers[5].

4. In summary, the Committee will be aware that the Communicants have been entirely open and sent to the UK updates on the current state of domestic position. Further, the UK's request to suspend or dismiss C-86 is unacceptable and is, in reality, a further attempt to ignore the important need for clarification that private nuisance in environmental matters is covered by the Aarhus Convention.

The extent, scope and application of Article 9(2), (3) & (4)

5. The Communicants submit that the extent, scope and application of the Convention (matters touched upon at §§22-35 of the UK response) would benefit from more detailed legal submissions. It is proposed that any

[4] The UK recognises the efficacy in considering C-85 & C-86 together: §2 of its response.
[5] The UK refers to the pre-1999 position to appear to justify the application of s. 46. However, the UK will be aware that it ratified the Aarhus Convention in February 2005 and thus the pre-1999 provisions were not subject to its obligations.

substantive hearing by the Committee invites the parties to make submissions no later than 21 days before consideration of the Communications[6].

The UK's 'alternatives' to private nuisance in environmental cases

6. The UK has not genuinely addressed the detailed submissions by both C-85[7] and C-86[8] as to why potential 'alternatives' to private nuisance were not realistic options at all and had some limitations or restrictions in their scope and application. Further, the responses it provides do not properly characterise the true position.

7. Importantly, the Communicants do not state that some options may be appropriate in some instances. However, the alternatives do not, individually or collectively, provide an answer to private nuisance being covered by the Aarhus Convention. Indeed, many options are often found to provide little or no effective remedy at all.

8. Again, the Communicants consider that discussion of options will best be served by concise legal submissions with reference as appropriate to the Communications. However, in an effort to reiterate why the UK response is unrealistic. The following brief submissions are below. These adopt the sub-paragraph numbers of the UK's response §36.

(i), (ii), (v) a complaint about a breach of condition or permit or a failure to issue a statutory nuisance abatement notice

9. As the UK points out, a breach of condition or permit proceeds by a complaint to the regulator and any failure to act required an application for judicial review. The failure to act is subject to challenge on *Wednesbury* grounds which the UK courts consider to be a high hurdle, even in cases where a precautionary approach to environmental protection applies which

[6] It is understood that the next Compliance Committee meeting is on 25-28 March 2014. In the circumstances, the Communicants suggest any further submissions may be submitted by 4.3.14.
[7] paragraphs 16-61
[8] paragraphs 53-75

would suggest a lower threshold of review by the courts[9]. The Compliance Committee has expressed concerned with the use of *Wednesbury* standard in ACCC/C/2008/33, §125. The UK Court of Appeal rejected an alternative to the *Wednesbury* standard in *Evans v Secretary of State* [2013] EWCA Civ 87 in which the Mr Evans made reference to the Compliance Committee findings of concern.

10. In summary, a complaint to a regulator about a breach of condition or permit involves: (a) the public concerned having to get a regulator to act effectively[10]; and (b) if it doesn't then an insurmountable task of challenging either the effectiveness of the regulator or its discretion not to act. Indeed, in relation to C-86, there have been complaints to the regulator on numerous occasions, but the pollution problems persist.

(iii) s. 82 EPA 1990 proceedings

11. C-85 and C-86 make extensive submissions about the limitations of s. 82 of the Environmental Protection Act 1990 (EPA 1990). These include factors such as the limited scope of what the statute defines as a nuisance; that a defendant is not, in fact, prevented from claiming costs from an unsuccessful claimant; and the quite extensive defences available to a defendant which is something that regularly prevents the issue of an abatement notice by a regulator.

12. The UK comment that 'best practicable means' is not relevant to s. 82 is unrealistic and has been found to be relevant by the courts. In *Nichols, Albion & Lainson v Powergen Renewables Ltd* (20.1.04) (unreported), South Lakeland Magistrates' Court the District Judge noted:

> "… it is clear to me that I must give consideration to the means employed by the defendants in order to attempt to obviate an alleged nuisance for the very simple and obvious reason that to disregard those means at the s. 82(2) stage would have two most undesirable consequences as follows:

[9] see e.g. *Aston v Secretary of State for Comm. & Local Govt.* [2013] EWHC 1936 (Admin).
[10] The cases on private nuisance very often involve instances where the regulator has acted but done so ineffectively see e.g. *Barr v Biffa Waste Services Ltd* [2013] QB 455.

(a) if (for want of a better description) best practicable means are being employed the framing of an abatement order would be a well-nigh impossible task, and
(b) the defendants would not be in a position to comply with any such order and accordingly would be in breach of it.

Obscure though the intentions of Parliament may have been, I beg leave to doubt whether the situation I have just described was either intended or contemplated but that august body.[11]

13. The UK notes that the matter arising in C-86 could have fallen within the statutory nuisance provisions. No doubt it could. However, this would not have prevented the Defendant from threatening to claim costs, the application of the statutory defences, the ineffectiveness of any abatement order (see below) or the limited availability of compensation available. However, perhaps more fundamentally for C-86 in relation to s. 82 is that:

a) The Criminal Procedure Rules which govern statutory nuisance proceedings do not provide the opportunity of a pre-action procedure to clarify the costs position *before* substantive liability on issuing criminal proceedings is incurred. In C-86, it has been possible (although so far ineffective) to make a pre-action application under the Civil Procedure Rules before issuing private nuisance proceedings.

b) The effectiveness of any abatement order in statutory nuisance proceedings is likely to be ineffective in circumstances, where non-compliance with an abatement order is limited to a maximum fine of up to £5,000 plus a daily fine of up to £500. The cost of providing evidence of breach of an order in relation to dust or noise will result in any subsequent prosecution for breach of an order being prohibitively expensive (not least because of the need for further legal representation and expert evidence in support).

There is the option of the criminal court to direct the environmental regulator to act on an abatement order. However, this is often unlikely

[11] See.e.g JPL (2004) p. 1025, Tromans, S *Statutory nuisance, noise and windfarms.*

to provide an effective remedy. For instance, for C-86, the enforcing regulator would be Merthyr Tydfil County Borough Council and it is highly unlikely, in the circumstances of C-86, to provide a satisfactory solution because of a potential conflict of interest in that: (i) the Council owns much of the land being mined and so is potentially a defendant in any proceedings; and (ii) the Council is paid a royalty of £1 for every tonne of coal mined from the site. Perhaps of more direct concern is that Merthyr Council's stated position on regulating the opencast site is that anyone complaining of dust, noise or other environmental pollution is directed straight to the operator (i.e. the nuisance maker).

(iv) complaint to the Ombudsman

14. A complaint to an Ombudsman is limited to a review as to the maladministration of a regulator. It will not consider complaints about environmental pollution from an individual or corporate body. The UK will be aware that, at best, any complaint to the Ombudsman will only result in a recommendation by the Ombudsman to the regulator. The recommendation may be ignored or limited to a very modest suggestion to the regulator to pay compensation see e.g. the extensive criticism of the Ombudsman referred to in the case of *R (Thomas) v Carmarthenshire CC* [2013] EWHC 783 (Admin) but which failed to address the underlying water pollution, flooding complaints and a failure to determine a permission over a number of years.

(vi) private prosecution

15. The UK will be aware that there are virtually no instances where the public concerned has pursued a prosecution of public nuisance. The reasons for this are set out in C-85 and C-86.

16. In concluding this part, it is notable that the UK in its response has made no less than six references to the websites of NGOs, charities or the legal representatives of C-86 in providing advice to the public about

environmental matters, yet no comparable advice to the public from government organisations.

Before the event insurance

17. It should be noted that the UK relies upon the availability of before the event (BTE) insurance, as a means of enabling private nuisance to be available as a procedure to address environmental harm[12]. However, the UK then effectively seeks to exclude the use of private nuisance as an effective means of securing an environmental remedy if BTE insurance is not available.

18. The experience of the Communicants' legal representatives is that, despite the optimism of the government and its advisers, BTE insurance is simply not widely available see, for instance, the detailed submissions in support of C-85 and those made to Compliance Committee Decision IV/9i Follow Up meeting of 27.6.13. The UK refers to and appears to rely upon the comment that BTE insurance is particularly useful for environmental nuisance. It is: if it is available. However, the UK has provided no evidence that BTE insurance is widely available.

19. In summary, the UK appears to suggest that those with BTE insurance that will cover an environmental claim can and should use private nuisance to bring proceedings however, those who don't, such as C-86, should not. This cannot be a correct approach. If private nuisance proceedings are prohibitively expensive then they cannot be rendered not prohibitively expensive by the ability to insure in advance. It is notable that the European Court of Justice at §40, Case C-260/11 *Edwards v Environment Agency* [2013] has affirmed that in cases in which the Convention applies costs should not be prohibitively expensive both on an objective and subjective basis. On either basis it cannot be assumed that all or even the majority of prospective claimants would have the benefit of insurance.

[12] As far as the Communicants are aware, BTE insurance is only available in private nuisance proceedings and not statutory nuisance or public nuisance procedures.

Conclusion

20. In conclusion, the UK's response to C-85 and C-86 do not answer the continuing concerns as to the prohibitive nature of s. 46 of LASPOA 2012, address the problems in failing to include private nuisance in recent CPR amendments or otherwise ensure that private nuisance proceedings are not prohibitively expensive.

21. In the circumstances, we invite the Compliance Committee to consider the Communications at a substantive meeting at the earliest opportunity.

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14.1.14