**FORTY FOURTH MEETING OF THE UNECE AARHUS CONVENTION COMPLIANCE COMMITTEE**

**Communication ACCC/C/2013/85 by the Environmental Law Foundation concerning compliance by the United Kingdom with Article 9 of the Aarhus Convention in connection with s.46 of the Legal Aid Sentencing and Punishment of Offenders Act 2012**

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**NOTE OF THE ORAL PRESENTATION**
**by Charles Banner to the Committee**
**on 26 March 2014 on behalf of**
**THE GOVERNMENT OF THE UNITED KINGDOM**

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## Introduction

1. This communication concerns the compatibility with Article 9 of the Convention of s.46 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 ("LASPOA"), which was enacted by the United Kingdom Parliament on 1 May 2012. The effect of this provision is that, where a court makes a costs order in favour of a party to litigation who has taken out a costs insurance policy (i.e. what is known as 'after the event' insurance against their potential liability to pay the other side's costs if they lose), that order may not require the paying party to pay the premium of that policy. In all other respects, it remains the case that the winning party in litigation is ordinarily entitled to an order that the losing party should pay their reasonable and proportionate costs of the litigation, except where a protective costs order or costs-capping order has been granted.

2. The communicant alleges that the effect of s.46 of LASPOA in the context of private law nuisance litigation results in a breach of Article 9, paragraphs (3), (4) and (5) of the Convention.

3. The United Kingdom refutes this allegation and refers the Committee to the letter dated 20 December 2013 from the Department for Environment, Food & Rural Affairs which sets out its case in detail in response to this communication and ACCC/C/86/2013 ("C/86").

4. The purpose of this oral presentation is to highlight the core points.

**Article 9, paragraphs (3) and (4)**

5. The requirement in Article 9, paragraph (3) is that each Party "*shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment*". Article 9, paragraph (4) requires that such procedures should not be "*prohibitively expensive*".

6. Article 9, paragraph (3) is not prescriptive. Administrative or judicial procedures may be made available in order for members of the public to challenge acts and omissions within its scope. No particular kind of procedure is mandated.[1] Nor is there any attempt to prescribe what the "*provisions of national law relating to the environment*" for this purpose should contain.

7. It follows that Article 9, paragraph (3) cannot be interpreted as specifically requiring the availability of private law claims for nuisance, which is the subject matter of the present communication.

8. Instead, in assessing compliance with Article 9, paragraph (3), a holistic view needs to be taken. The key question is: do members of the public in the United Kingdom have access to administrative or judicial procedures to challenge acts and omissions which contravene provisions of national law relating to the environment? And for Article 9, paragraph (4) the question is: can they do so without prohibitive expense?

9. As detailed in DEFRA's letter of 20 December 2013 (at paragraphs 36-67), there is a wide range of administrative and judicial procedures available to members of the public in the United Kingdom to challenge acts and omissions which contravene provisions of national law relating to the environment. These include:

    a. administrative procedures by which a member of the public may complain to the relevant regulator or local authority who may then take enforcement action or other legal action if it considers that

[1] Contrast this with Article 9, paragraph (2) which requires access to a procedure before a court of law or independent body for reviewing the substantive and procedural legality of the decisions, acts and omissions within the scope of that paragraph.

provisions of national law relating to the environment have been contravened;

b. administrative procedures by which a member of the public may complain to an independent ombudsman against a regulator's or local authority's refusal to take action;

c. a judicial procedure by which a member of the public may (whether additionally or alternatively to an ombudsman complaint) bring a judicial review claim in the High Court to challenge a regulator's or local authority's refusal to take action or an ombudsman's decision to dismiss a complaint;

d. a judicial procedure by which a member of the public may bring proceedings under s.82 of the Environmental Protection Act 1990 ("EPA") for the abatement of a "statutory nuisance" as defined in s.79(1) of that Act. The definition of a statutory nuisance is wider and includes amongst other things dust, smoke, fumes and gases, smell, noise, artificial light arising from or emitted from premises "*so as to be prejudicial to health or a nuisance*".

10. The administrative procedures are low-cost and do not involve any risk of having to pay another party's costs. Judicial review claims, insofar as they fall within the scope of the Convention, are subject to new rules providing for a claimant's costs liability to be capped at £5,000.[2] Statutory nuisance proceedings under s.82 normally result in complainants receiving an order for their costs if they are successful but not being subject to any order for costs if they are unsuccessful (unless they have acted improperly).

11. It is therefore possible for members of the public to use these administrative and judicial procedures for challenging acts and omissions which contravene national law provisions relating to the environment without incurring prohibitive expense.

[2] Whilst it is noted that the Committee has recently made some critical observations on these new rules in its draft report on compliance by the United Kingdom following Decision IV/9i of the Meeting of the Parties, the compliance of the new rules is not the subject of the current communication. The Committee is referred to the United Kingdom's response to its draft report, which was submitted on 21 March 2014.

12. The communicant's contention is that these administrative and judicial procedures are unsatisfactory, so that members of the public are therefore obliged to ventilate their complaints against environmentally-deleterious acts using the law of nuisance instead.[3] It is from this premise that they contend that s.46 of LASPOA leads to a breach of Article 9, paragraphs (3) and (4) by rendering such proceedings prohibitively expensive because the cost of after the event insurance premiums can no longer be recovered.

13. This contention is without merit for the following reasons.

14. First, the communicant argues that the administrative procedures are unsatisfactory on the ground that the High Court's judicial review jurisdiction over decisions of regulators and local authorities not to take enforcement or legal action is confined to correcting errors of law as opposed to being a full merits-based appeal.[4] As noted above, however, Article 9, paragraph (3) of the Convention does not require any judicial procedures, still less does it define the scope of the court's jurisdiction. In any event, in circumstances where a regulator or local authority has decided not to take action in a particular case because the action did not "*contravene provisions of national law relating to the environment*", the High Court's judicial review jurisdiction would provide adequate scrutiny. A misdirection as to what the provisions of national law required would be an error of law falling squarely within the Court's jurisdiction.

15. More fundamentally, there is no evidence, as opposed to bare assertion, from the communicant that the administrative procedures referred to are ineffective in practice.

16. Secondly, the communicant's contention the judicial procedure under s.82 of the EPA is unsatisfactory is based in part upon a complaint that the range of prohibited activities within the definition of "statutory nuisance" in s.79(1) does not cover some potential environmentally deleterious activities[5] and/or that the potential defences to such complaints (in particular 'Best Practicable Means') may mean that harmful activity is found not to contravene the EPA. This complaint is misconceived. It amounts to a complaint that the *"provisions of*

[3] See e.g paragraphs 3(4) and 6-19 of the communicant's joint summary note with the C/86 communicant.
[4] See paras. 9-10 of the communicant's joint summary note with the C/86 communicant.
[5] See para. 27 of Annex I to the communication (Detailed Facts and Alleged Non-Compliance).

*national law relating to the environment"* should be broader. Yet Article 9, paragraph (3) does not seek to prescribe what national law provisions relating to the environment should contain. It simply requires that where they are contravened, members of the public have access to procedures by which such contraventions can be challenged. Section 82 does this.

17. Thirdly, the communicant also contends that s.82 of the EPA is not effective because the level of the fine which may be imposed for breach of an abatement order is limited to £5000 plus £500 per day.[6] This ignores the fact that breach of an abatement notice is a criminal offence under s.82(8), carrying with it clear reputational damage for the individual(s) concerned. No evidence has been provided to show that abatement notices are routinely being breached in the United Kingdom. It therefore cannot be concluded that this is an ineffective procedure. In any event, the communicant also overlooks s.82(11) which provides that, where an abatement order has been breached, the magistrates' court may direct the local authority for the area to do anything which the person convicted was required to do by the order. In other words, the court can order the local authority to put a stop to the environmental harm.

18. Standing back and looking at the big picture, therefore, it can be seen that the United Kingdom has a range of administrative and judicial procedures by which members of the public can challenge acts or omissions which contravene provisions of national law relating to the environment, and that members of the public can take advantage of those procedures without incurring prohibitive expense. Section 46 of LASPOA does not alter this.

19. The only context in which s.46 is alleged by the communicant to result in a breach of the Convention is in the context of private nuisance claims. In the light of the above, this does not justify a conclusion that the United Kingdom is in breach of Article 9, paragraphs (3) and (4) of the convention. In particular:

    a. As noted above, Article 9, paragraph (3) does not require any specific judicial procedures nor does it seek to prescribe what the contents of national law provisions relating to the environment should be. The law of private nuisance is therefore not a necessary plank of the United

[6] See paragraph 13(b) of the communicant's joint Summary Note with the C/86 communicant. The relevant provision is s.82(8) of the EPA.

Kingdom's compliance with Article 9, paragraph (3). Compliance is already achieved by the range of judicial and administrative procedures referred to above.

b. The common law relating to the tort of nuisance does not in any event constitute "*provisions of national law relating to the environment*". As Lord Neuberger PSC very recently reiterated in *Coventry v. Lawrence* [2014] UKSC 13,[7] the term 'nuisance' "*is properly applied only to such actionable user of land as interferes with the enjoyment by the plaintiff of rights in land*": in other words, it is a cause of action focused on enabling those with interests in land to protect their private property rights rather than enabling members of the public to challenge environmentally deleterious acts. The latter function is performed by the Environmental Protection Act. The differing roles of the tort of nuisance and the EPA are underlined by the contrasting the remedies available. Section 82(2) of the EPA requires the court, if satisfied that the law prohibiting statutory nuisances has been contravened, to make an order, breach of which is a criminal offence, requiring the defendant to abate the nuisance and/or prohibiting the nuisance from recurring. The tort of nuisance does not oblige the court to make any order requiring the activity in question to cease. The Supreme Court in *Coventry v. Lawrence* held that, particularly where planning permission has been granted for the activity in question and/or where the activity is in the public interest and/or an injunction would result in disproportionate financial implications for the defendant, damages may well be the appropriate remedy (which would allow the activity in question to continue).[8]

c. On those occasions where a private law claim in nuisance relates to actions which do not merely harm the claimant's private property rights but also contravene provisions of national law relating to the environment, the judicial and administrative procedures mentioned above may be relied upon by members of the public.

[7] At para. 2, citing the earlier case of *Hunter v. Canary Wharf Ltd* [1997] A.C. 655.
[8] See the judgments of Lord Neuberger PSC at paras. 124-128 and the judgment of Lord Sumption JSC at paras 154—161.

20. It must also be borne in mind that the claimant in a private law nuisance claim will not necessarily be the party with lesser means. A large company could bring nuisance proceedings against the occupier of a house next-door to its head office. If the costs rules were slanted in favour of claimants, this may impact upon the ability of defendants of limited means to resist such actions. It is clear that different considerations apply than, for example, in judicial review claims against Government bodies where any shortfall in the defendant's ability to recover costs is covered by the public purse. There is therefore nothing untoward about the policy behind s.46 of LASPOA in seeking to ensure that unsuccessful defendants in private litigation are not routinely hit with having to pay the insurance premiums taken out by claimants for after the event insurance, on top of having to pay the claimant's legal costs. Linked to this, the encouragement of people to take out 'before the event' insurance (i.e. insurance acquired before the activity complained of), for example as an add-on to household insurance, is a legitimate objective for the reasons explained in DEFRA's letter.[9] The cases referred to by the communicant where claimants have been unable to persuade their BTE insurers to fund their litigation are mainly instances where the insurance was first taken out after the activity complained of took place. If, however, the Government's desire for greater take-up of BTE insurance is fulfilled, then such instances will inevitably reduce.

21. In conclusion, for a breach of Article 9, paragraphs (3) and (4) to be made out, the Committee would need to be provided with specific evidence of an instance or instances where:

    a. a member of the public has sought to rely upon the administrative and judicial procedures outlined above to challenge an act or omission which contravenes provisions of national law relating to the environment, but those procedures have been inaccessible, ineffective or prohibitively expensive; and

    b. that member of the public would have been able to obtain an order requiring the cessation of the act or omission which contravenes provisions of national law relating to the environment by bringing a nuisance claim; but

[9] At paragraphs 73-76.

c. as a result of s.46 of LAPSAO, bringing that nuisance claim would be prohibitively expensive.

22. In order for it to be appropriate for the Committee to make recommendations with regard to compliance, it would also be necessary to show that such breaches are systemic.[10]

23. There is no evidence of any of these things before the Committee.

**Article 9, paragraph (5)**

24. The part of Article 9(5) upon which the communicant relies states that *"each Party… shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice"*.

25. The communicant's allegation that LAPSOA s.46 breaches Article 9(5) is based upon interpreting the above words as a 'standstill clause', prohibiting the introduction of any new rules that are less favourable to claimants than the existing rules.[11] The wording of Article 9(5) cannot support such an interpretation. The requirement is simply to consider (and no more than that) the establishment of appropriate assistance mechanisms. Interpreting this as a standstill clause would distort the wording beyond all recognition.

**Conclusions**

26. For all these reasons, together with the United Kingdom's written response to the communication, it is contended that the Committee should hold that the communication has not established a breach of Article 9 of the Convention by the United Kingdom.

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[10] See e.g. the Committee's findings in ACCC/C/2008/23 paragraph 59.
[11] See e.g. paragraph 80-81 of Annex I (Detailed Facts and Alleged Non-Compliance) to the communication and paragraph 3(6) of the communicant's joint Summary Note with the C/86 communicant.