



Department  
for Environment  
Food & Rural Affairs

Nobel House  
17 Smith Square  
London SW1P 3JR

T: 08459 335577  
helpline@defra.gsi.gov.uk  
[www.gov.uk/defra](http://www.gov.uk/defra)

Fiona Marshall  
Secretary to the Aarhus Convention Compliance Committee  
UN Economic Commission for Europe  
Environment Division  
Room 429-2  
Palais des Nations  
CH-1211 Geneva 10  
Switzerland

20 December 2013

Dear Ms Marshall,

**UK response to communications ACCC/C/2013/85 & ACCC/C/2013/86**

1. Thank you for your letters of 22 July 2013 inviting the United Kingdom to respond to these communications.

**Handling of the communications**

2. We understand that the Committee has considered the possibility of dealing with these communications together. Given the degree of overlap between the communications it would in our view be sensible to deal with them together in one response. The two communications raise very similar arguments, in some respects in identical terms, so this response refers separately to one or other communication only where a point is made specific to that communication.
3. This response therefore deals both with communication ACCC/C/2013/85 (“C-85”), submitted by the Environmental Law Foundation (“C-85 communicant”) to the Committee on 18 September 2012, and communication ACCC/C/2013/86 (“C-86”), submitted by Alyson Austin (“C-86 communicant”) to the Committee on 28 February 2013.

## Summary

4. Both communications allege failure by the United Kingdom to comply with the provisions of article 9 of the Convention in respect of claims for the tort of nuisance (referred to as “private nuisance claims”).
5. The C-85 communicant concentrates in particular on the changes enacted by the United Kingdom Parliament in section 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPOA”)<sup>1</sup>. Following the recommendation of Lord Justice Jackson in his *Review of Civil Litigation Costs: Final Report* (“the Jackson Report”)<sup>2</sup>, these changes repealed section 29 of the Access to Justice Act 1999<sup>3</sup>. This provision had previously enabled the recovery, as part of a costs order in favour of a successful party to proceedings, of the premium of an insurance policy, an “After the Event” (“ATE”) insurance policy. A policy taken out by that party would insure against the risk of incurring a liability for costs – in particular for their opponent’s costs – in those proceedings. The changes restored the position to that which existed prior to 1 April 2000 (when section 29 of the 1999 Act came into force), when such premiums had not been recoverable from the other party.
6. The C-85 communicant argues that this breaches article 9(3) and (4) because the ability to bring a private nuisance claim is required by article 9(3) and private nuisance claims are required by article 9(4) not to be prohibitively expensive. The C-85 communicant also argues that the reversion to the pre-2000 position is not in compliance with article 9(5).
7. The C-86 communicant alleges a very specific instance of non-compliance in the form of a decision of the High Court of England and Wales on 31 January 2013 that the costs of a pre-action application for costs protection in relation to a proposed private nuisance claim should be costs in the application (that is, payable by the losing party), rather than, as the C-86 communicant had proposed, no order for costs (i.e. each party should bear its own costs regardless of the outcome of the application). The C-86 communicant appears to argue that this decision is evidence of a systemic breach of article 9, in particular article 9(3) and (4). This decision has been the subject of an appeal, and has been followed by the hearing of the application for costs protection and a decision on that application, against which, we understand, permission to appeal to the Court of Appeal has been granted.

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<sup>1</sup> Available at: <http://www.legislation.gov.uk/ukpga/2012/10/section/46/enacted>.

<sup>2</sup> December 2009; published January 2010 (available at: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf>).

<sup>3</sup> Available in its original form at: <http://www.legislation.gov.uk/ukpga/1999/22/section/29/enacted>.

8. The C-86 communicant also suggests that the United Kingdom may have failed to comply with article 9(2) on the basis that the case to which they refer engages the Environmental Impact Assessment Directive (“EIA Directive”)<sup>4</sup> and, in turn, article 6 of the Convention.
9. The United Kingdom does not accept that the complaints of either communicant are well founded. This response deals with the relevant points made in the two communications.
10. We submit that it would be mistaken to look at the regime applicable to private nuisance claims and simply measure this against the criteria in article 9(4). Such an approach makes two assumptions which are, in our view, incorrect:
  - (i) That the Convention *requires* the availability of claims for private nuisance or indeed that all private nuisance claims are within the scope of the Convention.
  - (ii) That private nuisance claims that are considered to be within the scope of the Convention must be viewed in isolation from the wide range of procedures for challenging acts and omissions available to the public.
11. In very brief summary:
  - (i) Provision for private nuisance claims is not required by article 9(3) of the Convention. Even if it is argued that some provision is required by article 9(3), it cannot be required for private nuisance claims as a class, covering every type of claim.
  - (ii) The requirements of article 9(3) of the Convention are met by the availability of access to other procedures; and those procedures meet the requirements of article 9(4).
  - (iii) Similarly there is no breach of article 9(5). The provisions included there are consistent with the procedures for bringing a challenge available to the public.
  - (iv) It is not accepted that the EIA Directive is relevant to C-86 and, accordingly, article 9(2) is not relevant to this communication.

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<sup>4</sup> Directive 2011/92/EU.

## Exhaustion of domestic remedies

12. As indicated in paragraph [15], the C-86 communicant is still seeking to bring private nuisance proceedings against the operator of a site who is alleged to be causing a nuisance to the communicant. We understand that, following a decision by the High Court dismissing the C-86 communicant's application for costs protection on 30 August 2013, the communicant has been given permission to appeal to the Court of Appeal (enclosed as Annex 1). It remains open to the communicant to apply to the Court of Appeal for an expedited hearing if she considers that an urgent determination is required.
13. Notwithstanding the comments that follow in this letter, we submit that because the C-86 communicant is still making active use of some of the domestic procedures available to them it would not be appropriate for the Committee to consider this communication at this stage. The C-86 communicant frames their complaint by reference to these on-going proceedings. In order to give the Committee the complete picture, before accepting a communication we submit that the Committee should ensure that communicants have exhausted the domestic remedies that are available to them. This is consistent with paragraph 21 of decision I/7 and accords with normal practice under international law.
14. We have responded to the points raised by the C-86 communicant, but for the reasons given above, invite the Committee to suspend consideration of C-86 until domestic remedies have been exhausted. The domestic remedy available in the form of the appeal which the communicant has permission to pursue is not unreasonably prolonged (particularly given the ability of the communicant to apply for expedition) nor does it obviously fail to provide a sufficient means of redress. Accordingly, the circumstances in which paragraph 21 of decision I/7 and pp.34-35 of the Committee's *modus operandi* Guidance Document indicate that a failure to exhaust domestic remedies may not preclude the Committee examining the substance of a communication do not exist.
15. We have raised the issue of domestic remedies in a number of responses to communications, including most recently in communications ACCC/C/2010/53, ACCC/C/2012/77 and ACCC/C/2013/83. We refer the Committee to the points made in those responses. We again suggest that it would be helpful for the Committee to set out in more detail than is currently provided, its reasons for accepting the communication while domestic proceedings are still on-going, or confirmation from that its consideration of the communication will cease or be suspended.

## Decision IV/9i

16. The C-86 communicant makes reference to decision IV/9i concerning compliance by the United Kingdom. We maintain the view, expressed at the 41st meeting of the Compliance Committee earlier this year, that the communications which resulted in *recommendations* from the Committee were focused on judicial reviews, and that the decision is not relevant to private nuisance proceedings.
17. We note the position of the Committee in this regard and its decision to deal with C-85 and C-86 under the ordinary procedure. We do not therefore intend to discuss decision IV/9i in the context of these communications.

## Points relevant to both communications

18. The first substantive issue is whether, and if so how far, article 9(3) of the Convention applies to private nuisance claims.
19. As has been stated by the High Court of England and Wales in *Austin v Miller Argent*,<sup>5</sup> “The question has not been decided in the courts of England and Wales”. Those proceedings involve the C-86 communicant and are on-going. As indicated above, the C-86 communicant has been granted permission to appeal to the Court of Appeal on the issue of costs protection.
20. The Court of Appeal in *Morgan v Hinton*<sup>6</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. It 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 in terms not only of cost but of legal efficacy (which it did not do in the context of the case before it).
21. There are two aspects to this question.
22. The first concerns the extent to which a private nuisance claim is, in the words of article 9(3) of the Convention, a “procedure... to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment”. The argument that a private nuisance claim is such a procedure must rely on categorising the protection offered by the common law, via the tort of nuisance, of the private

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<sup>5</sup> [2013] EWHC 2622 at paragraph 7 [**Annex 1**].

<sup>6</sup> [2009] EWCA Civ 107 (available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2009/107.html>).

property interest of enjoyment of one's land as a provision of "national law relating to the environment".

23. As explained in the *Jackson Report*, the tort of nuisance covers a wide variety of matters. Nuisance was defined in *Bamford v Turnley*<sup>7</sup> 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". Private 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 under the law of England and Wales remains the protection of private property rights.
24. Many nuisance claims involve encroachment, which is akin to trespass, and it is very 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, for example, 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>8</sup>
25. To the extent that the Convention may be argued to apply to private nuisance, the United Kingdom would endorse the *Jackson Report's* conclusion<sup>9</sup> that it would be capable of applying only to those cases where the alleged nuisance is an activity: (a) damaging the environment; and (b) adversely affecting the wider public.
26. The United Kingdom considers, therefore, that only a small proportion of private nuisance claims involve matters which may be argued to bring them within the scope of the Convention. The proposition that private nuisance claims as a class should be considered to be within the scope of the Convention is accordingly not accepted.
27. In advancing that proposition, the C-86 communicant refers to the findings of the Committee in communication ACCC/C/2008/23, in particular at paragraph 45 (mistakenly labelled as paragraph 47 in C-86). This does not assist the C-86 communicant, as the findings relate to application of the law of private nuisance in the context of that particular case rather than in any more general terms.

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<sup>7</sup> (1860) 3 B & S 62; 122 ER 25.

<sup>8</sup> Page 314.

<sup>9</sup> At paragraph 1.4, pages 314-315.

28. The second issue is whether article 9(3) requires private nuisance claims to be available. The relevant wording of article 9(2), (3) and (4) provides as follows (emphasis added):

*“2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned ....*

*have access to a review procedure **before a court .... to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention....***

*3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, 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.***

*4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide **adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive ....”***

29. It can be seen that article 9(2) envisages a specific right in relation to a specific category of environmental decisions (those within article 6). The requirement is to provide access to a procedure before a court (or a court-like body) to challenge the substantive and procedural legality of those decisions – but only those decisions.

30. Article 9(3), in contrast, envisages a right which is more general, but also in some regards more limited:

(i) article 9(3) does not require access to judicial procedures – it provides a right of access to *procedures*, which may or may not be judicial;

(ii) it does not require a direct right to challenge the lawfulness of an act or omission – it provides a right of *access* to procedures to challenge acts or omissions;

(iii) it relates only to breaches of national law relating to the environment;

(iv) the breaches of national law concerned may be those of private persons as well as public authorities.

31. Article 9(3), therefore, does not *require* Parties to provide individuals with an unqualified right to bring a claim against a private person for breach of environmental law. Article 9(3) recognises that national law may provide for

criteria which need to be satisfied for such claims to be brought. *The Aarhus Convention: An Implementation Guide*<sup>10</sup> also recognises that enforcement by members of the public can be “direct or indirect”, and does not require that direct enforcement be available. At paragraph 3 of page 206 it states:

“that members of the public may enforce environmental law either directly i.e., by bringing the case to court to have the law enforced (**rather than simply to redress personal harm**) [*emphasis added*] or indirectly by triggering and participating in administrative procedures so as to have the law enforced”.

32. The provisions of article 9(4) apply to article 9(3) as well as to article 9(2), so the procedures to which article 9(3) requires access to be provided must be adequate and effective, fair, timely and not prohibitively expensive.
33. As was argued in *Morgan*, however, it is necessary to see the requirements of the Convention, and in particular article 9(3), in the context of the full range of proceedings permitted by domestic law. Article 9(3) of the Convention gives a right of access to procedures, but no right to any particular form of legal remedy; and the particular remedy sought in a particular case needs to be seen in the wider context of available remedies generally. The Committee has recognised that members of the public need access to administrative or judicial procedures to challenge acts and omissions under article 9(3).<sup>11</sup>
34. For those claims which may be argued to come within the scope of the Convention, the current mechanisms by which alleged violations of “national laws relating to the environment” can be addressed are, in the view of the United Kingdom, quite sufficient to meet the requirements of the Convention and indicated in this regard in the *Implementation Guide*.
35. In the United Kingdom there are a number of procedures (other than a private nuisance claim) to which members of the public may have access for indirect or direct enforcement when there is an alleged contravention of national law of the sort which is within the scope of the Convention.
36. In England and Wales, there are the following procedures in particular;
  - (i) Where the contravention is alleged to lie in a breach of a condition or licence (such as a licence to operate a particular business or process with environmental impacts, which is granted only with specific conditions as to how the business or process is to be operated to minimise the impacts), or conduct amounting to an offence (for example under the Clean Air Act

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<sup>10</sup> 2nd edition, 2013.

<sup>11</sup> For example in ACCC/C/2006/18 (Denmark), paragraph 28.



1993<sup>12</sup>), which in either case it is the duty of a regulator or local authority to enforce, **a complaint to the relevant regulator or local authority**;

- (ii) Where the breach is alleged to be of something amounting to a statutory nuisance, **a complaint to the relevant local authority with a view to the authority's taking action under section 80 of the Environmental Protection Act 1990 ("the 1990 Act")**;<sup>13</sup>
- (iii) Where the breach is alleged to amount to a statutory nuisance, **bringing summary proceedings against the person responsible under section 82 of the 1990 Act**;<sup>14</sup>
- (iv) Where a complaint is made in respect of a failure by the regulator or local authority to take the action under (i) or (ii) above, **a complaint to the Parliamentary Ombudsman or Local Government Ombudsman in respect of such a failure**;
- (v) Where a complaint is made in respect of a failure by the regulator or local authority to take the action under (i) or (ii), **seeking a judicial review of that failure**;
- (vi) Where the breach is alleged to constitute an offence (such as public nuisance), **seeking a prosecution of the person responsible, or mounting a private prosecution**.

37. These are explained in more detail below.

38. Similar procedures apply in Scotland, except that in category (iv) above where a complaint is made in respect of a failure by a regulator or local authority, a complaint may be made to the Scottish Public Services Ombudsman.

39. Similar provisions apply in Northern Ireland which can be found in Part 7 of the Clean Neighbourhoods and Environment Act (Northern Ireland) 2011.

40. Both communicants provide, in very similar terms, a comparison between private nuisance and the other procedures available to the public in respect of alleged contraventions of national law relating to the environment. We submit that such comparisons miss the point in respect of the obligations flowing from article 9(3) of the Convention on challenges to acts or omissions by private persons. The available procedures must be viewed together in order to provide

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<sup>12</sup> Available at: <http://www.legislation.gov.uk/ukpga/1993/11/contents>.

<sup>13</sup> Available at: <http://www.legislation.gov.uk/ukpga/1990/43/section/80>.

<sup>14</sup> Available at: <http://www.legislation.gov.uk/ukpga/1990/43/section/82>.

an accurate assessment of the way in which public is given access to the procedures required under article 9(3).

41. It is incorrect for the communicants to focus on any one of the available procedures in isolation. Article 9(3) of the Convention does not prescribe the form which procedures the public should have access to must take. Consequently, any assessment of the requirements of article 9(4), as they apply to the article 9(3) obligations, must take into account the whole regime. Taken together it is submitted that there is clearly no breach of article 9(4).
42. We set out further details of the procedures used to deliver the requirements of article 9(3) and how these help achieve compliance with article 9(4) (and article 9(5), where relevant).

#### Reporting to regulator/complaints to ombudsmen

43. Members of the public can report potential or alleged breaches of environmental legislation to the appropriate regulator (for example, in England, the Environment Agency), for the regulator to investigate and consider whether there is a need to take enforcement action. There is public access to clear and comprehensive information about the procedures to be followed on the websites of Defra, the Environment Agency, Natural Resources Wales and individual local authorities.
44. If members of the public are dissatisfied with the responsible regulator, complaints may be made to the relevant ombudsman, usually after complaining to the regulator itself:
  - Parliamentary and Health Service Ombudsman;<sup>15</sup>
  - Local Government Ombudsman;<sup>16</sup>
  - Public Services Ombudsman for Wales;<sup>17</sup>
45. The Parliamentary and Health Service Ombudsman hears complaints about government departments and agencies, including those acting as regulators for environmental licences. If the Ombudsman takes up the complaint it will normally report to the complainer and the organisation complained about once it has concluded its investigations. If the complaint was made through the complainer's Member of Parliament, they will also be sent a copy of the report. The Ombudsman may make a report to Parliament if the investigation raises an

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<sup>15</sup> <http://www.ombudsman.org.uk/>.

<sup>16</sup> <http://www.lgo.org.uk/>

<sup>17</sup> <http://www.ombudsman-wales.org.uk/>.

important public policy issue or if they organisation complained about does not accept the recommendations.

46. The Local Government Ombudsman (concerning local authorities in England) and the Public Services Ombudsman (concerning the Welsh Government, Natural Resources Wales and local authorities in Wales) may also carry out investigations, compile reports and make recommendations to the authority concerned.

### Statutory nuisance

47. In addition, acts and omissions of private persons in breach of national law can be challenged directly or indirectly as statutory nuisance. The indirect route is by way of enforcement proceedings under section 80 of the 1990 Act. Section 79(1) of the 1990 Act<sup>18</sup> defines a “statutory nuisance” widely, including dust, smell or noise arising or emitted from premises so as to be “prejudicial to health or a nuisance”, and places a duty on every local authority: (a) to carry out inspections in its area from time to time to detect any statutory nuisances which ought to be dealt with; and (b) where a complaint of a statutory nuisance is made to it by a person living in its area, “to take such steps as are reasonably practicable to investigate the complaint”.
48. Section 80 requires a local authority, where it is satisfied that a statutory nuisance exists, or is likely to occur or to recur in its area, to serve on the person responsible for the nuisance (or the owner or occupier of the premises in certain circumstances) an “abatement notice” requiring the abatement of the nuisance and any associated action necessary for that purpose. Failure, without reasonable excuse, to comply with an abatement notice is a criminal offence; but the local authority may take action in the High Court if it considers that proceedings for that offence would be insufficient. The local authority may also take the abatement action itself and recover the cost of doing so from the person responsible for the nuisance (by a charge on the premises if necessary). Where the initial complaint was made to the local authority by an individual, the court may also order compensation to that individual.
49. Thus a person affected by a statutory nuisance can complain to the local authority which must investigate and must take action, including criminal proceedings, if it is satisfied of the existence (or likely occurrence or recurrence) of the nuisance.<sup>19</sup>

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<sup>18</sup> Available at: <http://www.legislation.gov.uk/ukpga/1990/43/section/79>.

<sup>19</sup> Guidance issued by Friends of the Earth, for example, recommends that: “First, a local authority has a legal duty to investigate statutory nuisances. If it finds a nuisance exists then it **must** issue court proceedings against the polluter. This means that if you find yourself faced with a potential statutory

50. The direct route is under section 82 of the 1990 Act, which enables a person aggrieved by a statutory nuisance to bring proceedings directly themselves against the person responsible in a magistrates' court (or sheriff court in Scotland), and the court is required, if satisfied of the nuisance, to make an abatement order requiring abatement of the nuisance and which may include a fine. Breach of such an order without reasonable excuse is a criminal offence. Section 82(12) allows for costs recovery by a successful complainant. The court is required to order that the defendant(s) pay to the person bringing the proceedings such amount as it considers reasonably sufficient to compensate that person for "any expenses properly incurred by him in the proceedings". There is no specific provision for costs recovery against a complainant who is unsuccessful, and complainants are not usually at risk of costs.
51. There are strong judicial statements (a number of them collected in the decision of the High Court in *Hewlings v McLean Homes East Anglia Ltd*<sup>20</sup>) endorsing section 82 (and the use of 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".
52. The *Jackson Report* noted<sup>21</sup> that costs recovery by a statutory nuisance complainant under section 82 is "somewhat more generous than costs recovery on the standard basis in the civil courts". Costs are generally lower in the magistrates' courts, and "the complainant is not usually at risk of an adverse costs order in the magistrates' court". As the solicitors representing the C-86 communicant explain on their website:
- "The advantage of the procedure is that if you lose, you do not run the risk of paying the other side's costs, unlike in civil litigation. (There are exceptions to this rule if you have conducted yourself improperly, but the honest, responsible complainant has nothing to fear). If you win, you get your costs paid."<sup>22</sup>
53. It may also be noted that a successful statutory nuisance complainant can bring a private claim for compensation in respect of the nuisance. Again this is explained on the website of the C-86 communicant's solicitors:

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nuisance the first thing that you should do is write to your local authority asking them to investigate and to take action" (available at: [http://www.foe.co.uk/resource/guides/5\\_2\\_statutory\\_nuisance.pdf](http://www.foe.co.uk/resource/guides/5_2_statutory_nuisance.pdf)).

<sup>20</sup> [2001] 2 All ER 281.

<sup>21</sup> Chapter 31, paragraphs 3.3 to 3.6.

<sup>22</sup> Available at: <http://www.richardbuxton.co.uk/v3.0/node/18>

“If you win in statutory nuisance, you are still able to sue in the civil courts for compensation (if, and this may be for a number of reasons, the magistrates do not order compensation, or this is only limited).”<sup>23</sup>

54. A finding by the court that a statutory nuisance exists or has existed will assist as evidence for a subsequent claim.
55. Both communicants, in substantially identical terms, criticise statutory nuisance remedies as insufficient, under a number of broad headings:
- (i) the possibility of nuisances which do not fall within the statutory definition;
  - (ii) the existence of statutory defences as part of the statutory nuisance procedures;
  - (iii) “procedural and evidential limitations” of the statutory nuisance procedures;
  - (iv) that statutory nuisance procedures do not easily lend themselves to group or multiple claims;
  - (v) that compensation is limited;
  - (vi) that there exists the potential for a costs claim by a successful defendant.
56. *Scope of statutory definition:* The essence of the criticism here is that the scope for claims for “nuisance” at common law is wider than the range of matters which may constitute a statutory nuisance. It may be noted that some of the matters excluded are excluded because they are covered by other legislation, in particular the Clean Air Act 1993, which has its own scheme of enforcement. For such cases, other, indirect, methods of enforcement, including judicial review of a failure of a regulator to fulfil its duties, are available. It may also be noted that the nuisance complained of by the C-86 communicant would appear to be within the scope of the statutory nuisance procedures. Certain other exclusions are for non-business premises, where a claim would in essence be against an individual as an occupier of residential premises; and as the *Jackson Report* pointed out,<sup>24</sup> that sort of claim does not fit the paradigm of impecunious individual claimant against wealthy corporate defendant. It may be questioned (as Lord Justice Jackson did) whether such claims are ones which article 9(3) requires to be made available.

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<sup>23</sup> *Ibid.*

<sup>24</sup> Chapter 31, paragraphs 2.1 and 3.7.

57. *Statutory defences:* Complaint is made of the existence of defences as part of the statutory nuisance scheme. There are two such defences: a defence that the “best practicable means” were used to abate the nuisance complained of, and a defence that there was a “reasonable excuse” for failure to comply with an abatement notice under section 80 of the 1990 Act or an abatement order under section 82. The significance of the existence of these defences is questioned. It might be queried whether the fact that a defence has been made out means that there has been a contravention of “national law relating to the environment”. In the case of section 80, the use of “best practicable means” to abate the nuisance is both a ground of appeal against an abatement notice and a defence to the offence of breaching the notice in certain cases. By contrast, there is no express right to appeal the making of an abatement order under section 82 on the basis that “best practicable means” were used. The “best practicable means” defence is only expressly provided for in the case of a prosecution for contravening a noise abatement order in certain cases. The wording of section 82 indicates that a magistrates’ court (or sheriff) would not have discretion to decline to make a noise abatement order on the basis that a defence of “best practicable means” would be available in the case of a prosecution for breach of that order. In the case of both section 80 and 82, the defence of “reasonable excuse” is to the offence of contravening the abatement notice or order, not to any finding that a nuisance exists or has existed. Under section 82, an abatement order only falls to be made where the court is satisfied of the nuisance. That there may subsequently be a defence to prosecution for breach of a requirement of the notice or order does not alter the finding that a nuisance exists or existed. As explained above, such a finding will assist in evidence in any subsequent civil claim.
58. *Procedural and evidential limitations:* The complaint in relation to procedure and evidence is, in essence, that section 82 proceedings are criminal in nature, such that the criminal standard of proof will apply, and that defendants may seek to have a more formal prosecution process followed so as to place pressure on the complainant. As explained above, article 9(3) does not require Parties to provide individuals with an unqualified right to bring a claim against a private person for breach of environmental law, or indeed a claim by a particular route. It is not accepted that the criminal nature of the proceedings makes the statutory nuisance procedure a procedure which does not comply with article 9(4). It may be noted that the evidential value of a finding of nuisance for the purposes of a subsequent civil claim is greater where the finding is to the criminal standard. The argument that the procedure is of its nature burdensome and may be made more so by procedural devices employed by the defendant should also be seen against the strong judicial statements about the procedure, for example in the judgment of the then Lord

Chief Justice, Lord Bingham, in *Pearshouse v Birmingham City Council*,<sup>25</sup> where he remarked:

"Section 82 is intended to provide a simple procedure for a private citizen to obtain redress when he or she suffers a statutory nuisance of any one of the various kinds itemized in s 79(1), which may relate to the state of premises or the emission of smoke or the emission of fumes or gases, or dust, steam, smell or other elluvia arising on premises, or the accumulation or deposit, or the keeping of an animal, or noise, or anything else declared by statute to be a statutory nuisance. It would frustrate the clear intention of Parliament if the procedure provided by s 82 were to become bogged down in unnecessary technicality or undue literalism. It is important that the system should be operable by people who may be neither very sophisticated nor very articulate, and who may not in some cases, unlike this appellants, have the benefit of specialized and high quality advice."

59. *Unsuitability for multiple claims:* It is complained that the section 82 procedure does not easily lend itself to the bringing of multiple complaints against a defendant. It is not clear that article 9(3) or (4) requires this; but in any event, there is, as both communicants concede, no reason in principle why a number of such proceedings cannot be brought jointly. It may also be noted that a finding of nuisance may be of evidential value in a subsequent civil claim which may involve multiple claimants.
60. *Limited claim for compensation:* As indicated above in paragraph [39], the *Implementation Guide* focuses on the purpose of enforcing the law, "rather than simply to redress personal harm", and it is not accepted that the more limited scope of compensation in statutory nuisance procedure compared to a claim in tort for nuisance renders statutory nuisance procedure non-compliant with article 9(3) and (4) of the Convention. It may, however, be noted (as the solicitors for the C-86 communicant point out on their website) that a subsequent civil claim may be brought for compensation (for which the finding of statutory nuisance would provide evidential assistance), and that in C-85, before arguing as a criticism that the primary purpose of section 82 proceedings is to secure an abatement order, it is asserted (at paragraph 18) that claimants in nuisance actions are "frequently primarily motivated by a desire to bring the nuisance to a conclusion rather than to seek damages".
61. *Potential for a costs claim by a successful defendant:* Both communicants complain that it is possible for a successful defendant in section 82 proceedings to claim costs where they were incurred by the defendant as a result of "an unnecessary or improper act or omission" by the complainant<sup>26</sup> or to seek the payment of "wasted costs" by the complainant's legal representative on the

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<sup>25</sup> [1999] LGR 169 at 183.

<sup>26</sup> Regulation 3 of the Costs in Criminal Cases (General) Regulations 1986 (Available at: <http://www.legislation.gov.uk/ukxi/1986/1335/regulation/3/made>). It has been amended by the Costs in Criminal Cases (General) (Amendment) Regulations 2008, available at: <http://www.legislation.gov.uk/ukxi/2008/2448/contents/made>).



basis that the costs were incurred “as a result of any improper, unreasonable or negligent act or omission” on the part of the legal representative<sup>27</sup>. Both communicants also concede, however, that the application of such rules “will tend to be the exception rather than the rule”. This is consistent with the *Jackson Report’s* observation that the complainant is “not usually at risk of an adverse costs order”<sup>28</sup> and the assertion by the C-86 communicant’s solicitors on their website that “the honest, responsible complainant has nothing to fear”<sup>29</sup>. It is not accepted (particularly in the light of article 3(8) of the Convention<sup>30</sup>) that this possibility of costs in such exceptional circumstances renders statutory nuisance procedure prohibitively expensive or otherwise a remedy which does not meet the requirements of article 9(4).

62. The website of the C-86 communicant’s solicitors sums up the value of the statutory nuisance procedure thus:

“The statutory nuisance tool is not used nearly as much as it could be. We recommend anyone aggrieved by some activity that affects their lives to consider using it – but be quick about it.”<sup>31</sup>

#### Judicial review of failure to fulfil duty

63. As explained above, in many cases, the breach of national law in issue is alleged to lie in a breach of a condition or licence or to be an offence for which a regulator or local authority is responsible for enforcement, or in a statutory nuisance, complaint of which has been made to the local authority. In such cases, where the breach or nuisance is clear, so will be the duty of action (for example, to investigate on a complaint under section 79 of the 1990 Act, or to serve an abatement notice under section 80). Such matters will clearly be capable of founding a claim for judicial review.
64. It may be noted that, in relation to the development concerned in C-86, such a judicial review was proposed, and this appears to have been successful in prompting the operator to concede that it would not in fact undertake coal extraction activities up to the boundary of the development (see paragraph 33 of the detailed submissions of the C-86 communicant).

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<sup>27</sup> Section 19A of the Prosecution of Offences Act 1985 (available at: <http://www.legislation.gov.uk/ukpga/1985/23/section/19A>).

<sup>28</sup> Page 316.

<sup>29</sup> Available at: <http://www.richardbuxton.co.uk/v3.0/node/18>.

<sup>30</sup> Article 3(8) provides that it “shall not affect the powers of national courts to award reasonable costs in judicial proceedings”. The Committee has found the award of costs of £5,130 plus interest in a particular case not to be prohibitively expensive (ACCC/C/2008/23 (United Kingdom), paragraph 49).

<sup>31</sup> Available at: <http://www.richardbuxton.co.uk/v3.0/node/18>.



## Prosecution

65. Conduct alleged to constitute a criminal offence – including offences under the 1990 Act associated with statutory nuisance or the common law offence of public nuisance – may be remedied by seeking a prosecution or bringing a private prosecution.
66. Statutory nuisance is explained in paragraphs [54 to 69] above. A public nuisance may arise in respect of a person’s act not warranted by law or omission of a legal duty endangers the health, property or comfort of the public.<sup>32</sup> This differs from private nuisance in that the damage, injury or inconvenience affects everyone or a class of people (for example, those within a particular neighbourhood), and is ordinarily available in circumstances where a statutory offence is not.<sup>33</sup>
67. In addition to prosecutions brought by public authorities, there is a general right for any person to bring a private prosecution by instituting criminal proceedings.<sup>34</sup>

### **C-85: “Before the Event” insurance**

68. “Before the Event” (“BTE”) insurance is not an alternative to a claim in private nuisance; rather it is a potential mechanism for funding such a claim. The C-85 communicant alleges that the coming into force of section 46 of LASPOA, which (as explained above in paragraph [13]) restores the pre-2000 position under which a party may not recover from the other party a premium for ATE insurance, breaches article 9(3) and (4) of the Convention (and also article 9(5)).
69. Section 46 of LASPOA gives effect to a primary recommendation of the *Jackson Report*. The fact that there is not a specific exception from its operation so as to allow claimants in private nuisance to continue to recover ATE premiums from defendants also follows a specific conclusion of the *Jackson Report*. It is necessary, therefore, to consider the *Jackson Report’s* conclusions in some detail.

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<sup>32</sup> *R. v Goldstein* [2004] 2 All ER 589, paragraph 3.

<sup>33</sup> *R v Rimmington* [2006] 1 AC 459, paragraph 30 (available at: <http://www.bailii.org/uk/cases/UKHL/2005/63.html>).

<sup>34</sup> In England and Wales it is open to the Director of Public Prosecutions to take over such proceedings (section 6(2) of the Prosecution of Offences Act 1985, available at: <http://www.legislation.gov.uk/ukpga/1985/23/section/6>).

70. The issue of private nuisance was considered at length in the *Jackson Report*. In it, Lord Justice Jackson concluded, having had regard to the *Implementation Guide*, that:

“..... articles 9.3 and 9.4 of the Aarhus Convention apply to those private nuisance actions in which the alleged nuisance is an activity:

(a) damaging the environment and

(b) adversely affecting the wider public, rather than the claimants alone.”<sup>35</sup>

71. That aside, in the wider context of the review of civil litigation costs, Lord Justice Jackson concluded that only a small proportion of private nuisance claims will engage the UK’s obligations under the Aarhus Convention, essentially for the reasons given in paragraphs 42 to 44 of the judgment of the Court of Appeal in *Morgan*.

72. As Lord Justice Jackson explained, the claimants in such cases can usually enforce their rights by one of two routes; statutory nuisance in the magistrates’ court or an action for private nuisance in the civil courts. He concluded that the costs position in respect of statutory nuisance was satisfactory and made no recommendations for change in that regard. The nature of a claim in private nuisance is that it is a claim by an owner or occupier of land alleging interference with the land or his enjoyment of it in some way. Lord Justice Jackson expressed the view that if claimants have BTE insurance cover as part of their household insurance, they would be able to bring such a civil action without the need for ATE insurance or costs protection through qualified one-way costs shifting or similar mechanisms.

73. Lord Justice Jackson did not consider private nuisance claims to be suited to one-way costs shifting (where the claimant is not required to pay the costs of the defendant if the claim fails). The rationale for this view was that (unlike, for example, personal injury claims, for which qualified one-way costs shifting has been implemented) such applications rarely involve the paradigm of a weaker claimant against a well-resourced defendant: “the claimant ... was not always David, and the defendant was not always Goliath”.<sup>36</sup> Lord Justice Jackson’s preferred approach was to encourage the take-up of BTE insurance, the average cost to householders of which is approximately £20-£30 per annum, together with the implementation of recommendations made elsewhere in the report for costs incentives on defendants to accept reasonable offers of settlement by claimants. Lord Justice Jackson also concluded that in relation to private nuisance claims, to the extent that there is any problem, the problem

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<sup>35</sup> Page 314.

<sup>36</sup> Page 315.

is not so widespread as to put the UK in breach of its obligations under the Aarhus Convention. Furthermore, claimants would, in his view, continue to be able to engage solicitors on Conditional Fee Agreements, even if they do not have BTE insurance.

74. Lord Justice Jackson accordingly recommended that there should neither be an exception from the irrecoverability of ATE insurance premiums from losing party in private nuisance claims, nor the application of a one-way costs shifting regime to such claims. He recommended that “Encouragement of further take up of BTE insurance is, in my view, the best means of promoting access to justice in respect of private nuisance claims”; that the implementation of his other recommendations (by way, ultimately, of LASPOA) would provide the opportunity “to alert all property owners to the fact that, as from the appointed date, they should all have cover in respect of private nuisance and similar litigation, in the same way that they have cover against subsidence, burglary, and so forth”; and that while “I appreciate the difficulties of persuading the whole population to take out BTE insurance against litigation costs generally .... I believe that, with proper marketing, it should be feasible to bring about widespread BTE insurance cover as an add-on to household insurance.”<sup>37</sup>
75. The C-85 communicant asserts that the reversion to the pre-2000 position in respect of the recoverability of ATE insurance premiums from the other party means “the loss of environmental nuisance claims”. It is not accepted that such claims, to the extent that their availability may be argued to be required by article 9(3) of the Convention will become unavailable or impossible as asserted. C-85 predates the coming into force of section 46 of LASPOA, and lists a number of instances, all predating the enactment of section 46, of BTE insurance not covering a dispute, principally because the dispute predated the taking out of the insurance.
76. The communicant argues that “many people simply do not associate environmental nuisance with cover provided by, say, their buildings or contents insurance”. That may be argued to underline the need for encouragement of both take-up and of understanding of BTE insurance. As evidence that BTE insurance “is simply not an answer”, its backward-looking nature is a problem (much of it is contemporaneous with the preparation of the *Jackson Report*, which did not suggest that the availability of BTE insurance as it stood at the time of the report provided a complete solution, but rather recommended greater take-up of BTE insurance). It may also be noted that the C-86 communicant’s solicitors on their website state that: “The “before the event”

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<sup>37</sup> Page 317.

(BTE) insurance is particularly useful with environmental nuisance and similar claims.”<sup>38</sup>

77. In respect of article 9(5) of the Convention, the requirement in issue is a requirement to *consider* the extension of appropriate assistance mechanisms to remove or reduce financial or other barriers – not a requirement so to extend or a prohibition on any change which might be argued not to be for the benefit of claimants. The issue of the recoverability from the other party of ATE insurance premiums was given full consideration by Lord Justice Jackson and subsequently in Parliament; and it is not accepted that this entailed any breach of article 9(5).

## C-86

78. In C-86 it is asserted that in the C-86 communicant’s particular circumstances, the United Kingdom has failed to provide a system of access to justice that is compliant with the Convention. The communicant asserts that the global costs liability resulting from the failure of an earlier application for a Group Litigation Order in relation to the matters complained of is the reason why ATE insurance was not available.
79. The communicant does not, however, appear to complain of the decision of the High Court itself, endorsed by the Court of Appeal, not to make the Group Litigation Order. Furthermore, it appears that the reason why the Group Litigation Order was not made was that the necessary information had not been provided to enable the court to determine that the case for such an order was made out – in other words, that the application was not well founded. Nor is it argued by the C-86 communicant case that their individual costs liability resulting from the failure of the application for a Group Litigation Order is such as to render the proceedings prohibitively expensive (it appears that the liability for each potential claimant arising out of those proceedings is £553.56, being £361.52 in respect of the proceedings up to and including the High Court decision, and £192.04 in respect of the appeal to the Court of Appeal: see paragraphs 47 and 60 of the Court of Appeal’s decision).<sup>39</sup>
80. The proceedings are continuing, leave to appeal to the Court of Appeal having been granted in respect of the decision on the application for a protective costs order.
81. It is clear, moreover, that the development which is the subject of the C-86 communicant’s complaint has been the subject of a considerable number of

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<sup>38</sup> Available at: <http://www.richardbuxton.co.uk/v3.0/node/277>.

<sup>39</sup> *Alyson Austin and others v Miller Argent (South Wales) Limited* [2011] EWCA Civ 928 (available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2011/928.html>).

challenges by members of the local public over a long period. These have included taking steps towards a challenge by way of judicial review of a failure to take action to prevent a proposal to extract coal in breach of the conditions of the permission for the development which appears to have been successful. The communicant asserts (paragraph 35 of the detailed submission) that the local authority does not fulfil its duties as a regulator or act on complaints received; but it is not clear whether consideration has been given to a further application for judicial review to challenge the local authority's alleged failures. It is unclear, moreover, whether the communicant, or any other member of the local public, has attempted either to make a complaint to the local authority to secure investigation under the statutory nuisance procedure, or to take direct action under section 82 of the 1990 Act, notwithstanding that the matters complained of would seem to come within the remit of those procedures. The C-86 communicant argues, in terms similar to the C-85 communicant, that the statutory nuisance procedures are not an adequate alternative in general terms to a private nuisance claim, but does not appear to address the issue of whether such procedures would have been a viable option in the particular circumstances complained of, particularly given the benefits of the procedures which the C-86 communicant's solicitors identify. It does not appear, therefore, that there has been a general prevention of access to procedures to challenge relevant acts or omissions.

82. As noted above in paragraphs [20 to 23], we submit that the on-going nature of these proceedings, and the lack of clarity as to whether the C-86 communicant has made full use of the options available to them in their circumstances, casts some doubt over the admissibility of C-86 under international law on the grounds that the communicant has not exhausted domestic remedies.

#### Application of the Environmental Impact Assessment Directive 2011/92/EU

83. The C-86 communicant argues that the EIA Directive<sup>40</sup> is relevant, which may have a bearing on the applicability of article 9(2). This argument is without merit.
84. Firstly, the objective of the EIA Directive is that projects likely to have significant effects on the environment should be subject to a requirement for development consent and an assessment of their environmental effects before consent is given (see Article 2(1)). The process of undertaking such an assessment in respect of a project involves, amongst other matters, a requirement on developers to supply information about the potential environmental effects of their project and for consultation with appropriate bodies and the public at large

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<sup>40</sup> Available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:026:0001:0021:EN:PDF>

(see Articles 5-7). However, the obligations imposed by the Directive, including the requirement that members of the public have access to a review procedure under Article 11, are limited to the process by which a decision as to whether development consent is granted. In proceedings which do not relate to the process by which a decision to grant development consent was taken, the EIA Directive does not apply.

85. Secondly, Article 11 of the EIA Directive provides for members of the public having a sufficient interest or maintaining the impairment of a right to have: "...access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive." It is clear that proceedings in private nuisance would not constitute a review procedure for the purposes of Article 11. Proceedings covered by Article 11 will be those relating to a challenge to the decision to grant development consent (by way, as appropriate, of a claim by way of judicial review or statutory review of that decision) not with separate proceedings in private law relating to the ongoing operation of the project.
86. Thirdly, it is well established in the case law of the Court of Justice of the European Union that Directives do not have 'horizontal direct effect' and therefore cannot be relied upon directly in private law litigation by one private body against another private body. See e.g. Case 152/84 *Marshall v. Southampton and South-West Hampshire Area Health Authority* [1986] E.C.R. 723 at paragraph 48. It follows that the EIA Directive cannot as a matter of EU law be relied upon by a claimant in nuisance proceedings against a private body.
87. Indeed, it would appear that the communicant had at one stage considered, in earlier group litigation proceedings against the operator of the mine (*Austin v Miller Argent*<sup>41</sup>), that the Directive is not relevant. At paragraph 28 of the Court of Appeal judgment in the case, Jackson LJ confirms the claimant's position on the EIA Directive: "I should add that the claimants' grounds of appeal contain reference to the EIA Directive. It is now common ground, however, that that directive does not apply to this case". In later proceedings brought solely in the communicant's name relating to the same circumstances (see *Austin v Miller Argent*<sup>42</sup>) the High Court confirmed that the EIA Directive is not relevant in the context (see, in particular, paragraph 35).
88. Accordingly, article 9(2) of the Convention is not relevant for the purposes of the Committee's consideration of C-86.

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<sup>41</sup> [2011] EWCA Civ 928.

<sup>42</sup> [2013] EWHC 2622.

## Conclusions on the communication

89. The communicants have not established that the United Kingdom is in breach of article 9 of the Convention. Both communications make assumptions about the effects of article 9(3) in particular which we submit are incorrect.
90. It has been assumed that article 9(3) specifically requires Parties to provide for private nuisance claims. The Convention is not this prescriptive, requiring instead something more general, namely “access to administrative or judicial procedures to challenges acts and omissions by private persons and public authorities”. Provided that such procedures meet the requirements of article 9(4), there is nothing to suggest that they must provide a right to take direct action against another private person, rather than a public authority with duties that apply in respect of the conduct of such persons, or indeed that the procedures must be judicial.
91. It has also been assumed that private nuisance claims would, as a class, be subject to the requirements of the Convention. This ignores the primary concern of private nuisance actions, which are private property interests. As Lord Justice Jackson has explained, only those cases where the alleged nuisance causes damage to the environment and with the consequence of adversely affecting the wider public are capable of being subject to the Convention.
92. These have led to a further assumption, that the procedures associated with private nuisance claims, must be measured, in isolation, against the requirements of article 9(4). We submit that such an approach does not reflect the wording of article 9(3) and that there is a need to look at the complete picture when considering the procedures available to the public for challenging acts and omissions. In doing so, we invite the Committee to dismiss these communications on the basis that no breach of article 9 has been established, and additionally in the case of the C-86 communicant, that domestic remedies have not been fully tried or exhausted.

Yours sincerely,



Ceri Morgan