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Ms Fiona Marshall  
Secretary to the Aarhus Convention Compliance Committee  
UN Economic Commission for Europe  
Environment Division  
Palais des Nations  
CH-1211 Geneva 10  
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23 March 2015

Dear Ms Marshall

**Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom with the access to justice provisions of the Convention in relation to the in relation to the Legal Aid, Sentencing and the Punishment of Offenders Act 2012 (ACCC/C/2013/85)**

and

**Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom in connection with access to justice in private nuisance proceedings (ACCC/C/2013/86)**

General observations

1. It is disappointing that in coming to its draft findings the Committee has given no consideration to a fundamental difference between private nuisance claims and claims against public authorities, being the very different nature of the defendants to these claims. Private nuisance claims can be brought against members of the public who are private individuals who may themselves be of limited means. There is significant complexity and difficulty involved in providing costs protection in cases involving these types of defendants.
2. In recognising the very different issues raised by the provision of costs protection in claims against public authorities and those against other private persons, we must again emphasise the distinction between the issues raised in this communication and the recommendations welcomed by the Parties under decision IV/9i. The recommendations welcomed by the Parties in decision IV/9i were made by the Committee in respect of two communications, ACCC/C/2008/27 and ACCC/C/2008/33. In respect of the first of these communications, the Committee made recommendations referring to judicial review. The recommendations in the second communication followed an analysis by the Committee that did not include any detailed consideration of costs in private nuisance claims. A third communication, ACCC/C/2008/23, in which the Committee did undertake some analysis of the costs of a private nuisance claim, did not result in the Committee



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making any recommendations. The *sensu stricto* finding of non-compliance was not sufficient to substantiate a breach resulting from a systemic error and the Committee, correctly, refrained from presenting any recommendations.

3. The Committee's decision to handle the present communications through the ordinary rather than the summary procedure is consistent with our view that the legal issues raised by them had not previously been fully considered, and that there had certainly been no findings of non-compliance and associated recommendations applicable to costs in private nuisance claims. We therefore continue to view the issues raised in these communications as being entirely distinct from those covered by decisions IV/9i and V/9n.

#### Specific observations

4. Paragraph 7 – The draft findings state that the “*Party concerned appeared to interpret the recommendations of the Committee, endorsed [sic] by decision IV/9i, as applying only to procedures for judicial review but not private nuisance proceedings*”:
  - a. There is a typographical error in the second sentence: a superfluous full stop follows the word “*section*” and we suggest that it is removed.
  - b. The recommendations were welcomed, rather than endorsed, by the Parties in decision IV/9i, so this should be corrected.
  - c. The argument presented above was focused on private nuisance proceedings not being within the scope of those recommendations welcomed by the Parties in decision IV/9i. The draft findings should reflect that the United Kingdom's position is based upon a lack of specific prior consideration of private nuisance proceedings. We would also suggest that there is no need to be equivocal about the United Kingdom's position.
  - d. In the interests of fairness, and in order to avoid the impression currently given that the United Kingdom's position is an unsubstantiated assertion, we would request that the United Kingdom's position, as set out above, is set out alongside the Committee's arguments for taking a different view.
5. Paragraph 15 – The second sentence refers to the proceedings as “*relating to environmental harm*”. We do not consider this to be an appropriate description of the case. Although the communicant made assertions about the issue, the Court of Appeal rejected the argument that the nuisance at issue was within the scope of article 9(3) of the Convention. Consequently, we suggest that this description is amended.
6. Paragraph 19 –
  - a. The first sentence incorrectly states that the Supreme Court judgment in question was a judgment of the Court of Appeal. We suggest that the words “*Court of Appeal*” should be replaced with the words “*Supreme Court*”.
  - b. The first sentence erroneously refers to “*public nuisance*” (emphasis added) when this should read “*private nuisance*” (emphasis added), as the case in question was considering private nuisance.
  - c. The way in which the first sentence introduces the quotation from the Supreme Court judgment risks misrepresenting the Supreme Court. The first sentence introduces the quotation by stating that the court “*defined [private] nuisance*

as...”. However, the wording of the Supreme Court judgment suggests that it did not intend its definition of private nuisance to be either complete or definitive, as the words which precede the definition are: “*a nuisance can be defined, albeit in general terms, as...*” (emphasis added). We suggest that the first sentence of paragraph 19 is amended to reflect this, using the following formulation “... *at paragraph 3 of its judgment, stated that private nuisance can be defined in general terms as...*”.

7. Paragraph 21 – The first sentence misrepresents the Aarhus Convention protective costs regime which has been in place in England and Wales since 1 April 2013 by erroneously stating that it “*provides for a protective costs order*” in relevant cases. As the Committee has been made aware in the context of update reports on decisions IV/9i and V/9n, ACCC/C/2012/77 and these communications, the regime provides for automatic costs caps to be applied to cases which fall within the regime and there is no need for the court to make a protective costs order. To reflect this, we suggest that the words “*a protective costs order*” are replaced with the words “*costs protection*”.
8. Paragraph 22 –
  - a. There is a typographical error in the first sentence: a superfluous full stop follows the word “*section*” and we suggest that it is removed.
  - b. The way in which the first sentence introduces the quotation from section 58C Courts and Legal Services Act 1990 erroneously implies that the quotation reproduces the whole of that section and not just the first of its five subsections. We suggest that the text of the first sentence is amended along the following lines “...*by inserting a new subsection 58C. Subsection (1) of section 58C reads as follows:...*”
9. Paragraph 23 – The opening words of the paragraph (“*These changes*”) erroneously imply that it was the amendment to the Courts and Legal Services Act 1990 which repealed section 29 of the Access to Justice Act 1999. We suggest that the words “*These changes*” are replaced with the words “*Section 46 LASPOA 2012 also...*”.
10. Paragraph 26 – It is disappointing that the final two sentences of this paragraph are presented as facts and fall within Part B – ‘Facts’ when the points are not facts but the communicant’s assertions. It is troubling that the Committee should include such matters under this heading before setting out any analysis of the arguments that it has been presented with.
11. Paragraph 27 – There is a typographical error in the third sentence. It seems that the word “*basis*” should be inserted after the words “*each party pay their own costs*”.
12. Paragraph 28 –
  - a. The first sentence describes the proceedings as relating to “*environmental harm*”. For the reasons set out above in relation to paragraph 15 of the draft findings, we do not consider this to be an appropriate description of the case and suggest that the description is amended.
  - b. The first sentence includes a statement that the appeal was dismissed “*chiefly on the ground that the case did not involve ‘significant environmental benefit’.*”

The term 'significant environmental benefit' is not used in the judgment so we suggest removing the quotation marks so as not to misrepresent the judgment.

13. Paragraph 29 –

- a. It is disappointing that the paragraph falls within Part B – 'Facts', when the points set out in the paragraph are not facts but the communicant's assertions. It is troubling that the Committee should include such matters under this heading before setting out any analysis of the arguments that it has been presented with.
- b. The second sentence of the paragraph is presented as a statement of fact and we suggest that it is amended to clarify that this is not the case. We suggest the addition of the following words at the beginning of the sentence: "*The communicant contends that...*".

14. Paragraph 30 - The second and third sentences are presented as statements of facts rather than the communicant's assertions. We suggest the addition of the following words at the beginning of these sentences: "*The communicant contends that...*".

15. Paragraph 31 - The second and third sentences are presented as statements of facts rather than the communicant's assertions. We suggest the addition of the following words at the beginning of these sentences: "*The communicant contends that...*".

16. Paragraph 33 subparagraph (a) –

- a. There is a typographical error, in that the draft findings provide that the defined term for the Legal Aid, Sentencing and the Punishment of Offenders Act 2012 is "*LASPOA 2012*" (defined at paragraph 22), yet this subparagraph uses the term "*LASPOA*".
- b. We suggest subparagraph (a) is amended to note that section 46 of LASPOA 2012 was brought into force on 1 April 2013.

17. Paragraph 36 subparagraph (c) – As above, there is a typographical error, in that the draft findings provide that the defined term for the Legal Aid, Sentencing and the Punishment of Offenders Act 2012 is "*LASPOA 2012*" (defined at paragraph 22), yet this subparagraph uses the term "*LASPOA*".

18. Paragraph 38 – The paragraph lists at subparagraphs (a) to (e) alternative procedures to private nuisance claims, cited by the United Kingdom. However, it fails to include one such alternative procedure, put forward by the United Kingdom at paragraph 36 (i) of its letter of 20 December 2013. We suggest adding a new subparagraph to paragraph 38 to reflect this, as follows: "*A complaint to the relevant regulator or local authority where the contravention is alleged to lie in breach of a condition or licence or conduct amounting to an offence which in either case it is the duty of the regulator or local authority to enforce.*"

19. Paragraph 47 – The second, third, fourth, fifth and sixth sentences are presented as statements of facts rather than the communicants' assertions. We suggest the addition of the following words at the beginning of these sentences: "*The communicants contend that...*".

20. Paragraph 54 –

- a. The second sentence is presented as a statement of fact rather than the communicants' assertion. We suggest the addition of the following words at the beginning of the sentence: "*The communicants contend that...*".
  - b. Footnote 19 is worded as a statement of fact rather than the communicant's assertion. We suggest that the words "*what categories of nuisance*" are replaced with the words "*the categories of nuisance which the communicants contend*".
21. Paragraph 57 – The title to paragraph 57 is incorrect. The words "*for public nuisance*" should be removed from the title as the paragraph discusses a number of offences, just one of which is public nuisance.
22. Paragraph 59 - The second sentence could be read as presenting a fact rather than the communicants' assertion. We suggest the addition of the following words at the beginning of the sentence: "*The communicants contend that...*".
23. Paragraph 63 - The final sentence is presented as a statement of fact rather than the communicants' assertion. We suggest the addition of the following words at the beginning of the sentence: "*The communicants contend that...*".
24. Paragraph 72 –
- a. The paragraph again refers to the Committee's recommendations being "*endorsed*" in decision IV/9i, when these were in fact welcomed by the Parties. This should be corrected.
  - b. The Committee's position on the scope of the recommendations is set out in some detail, while the United Kingdom's arguments are alluded to but not set out. We request that they are provided here and that United Kingdom's position is not presented as being equivocal.
  - c. In the penultimate paragraph it is stated that: "*The Committee stresses that the findings and recommendations endorsed [sic] by decisions IV/9i and V/9n of the Meetings of the Parties apply to all court procedures subject to article 9 of the Convention, not only judicial review procedures*". This is presented as though it is a factual statement and we request that the text instead more accurately reflects that this is the view of the Committee, by inserting "*, in its view,*" after the words "*The Committee stresses that*".
25. Paragraph 74 – The second sentence contains an error. It states that "*...the Party concerned argues that the essence of private nuisance proceedings is to protect private property (land)...*". This is incorrect. The United Kingdom argued that the essence of private nuisance proceedings is to protect private property rights. This is an important distinction and it is troubling that the draft findings misrepresent the United Kingdom's submissions in this manner. We suggest that the sentence is amended to remove "*(land)*" and to replace it with the word "*rights*".
26. Paragraph 78 – The third and fourth sentences state that "*the case law of the courts of the Party concerned... supports the view that in general the Convention is applicable to private nuisance cases*" and that the judgment in *Coventry v Lawrence No 1* supports this. We consider these sentences to be misleading, in that they suggest that the case law demonstrates that the UK courts consider that, in general, the Aarhus Convention is applicable to private nuisance cases. This is not correct.

We suggest that these sentences are amended so as to avoid being misleading in this regard.

27. Paragraph 79 – Typographical errors: the penultimate sentence contains incorrect paragraph references.
28. Paragraph 86 –
  - a. There is a typographical error at the end of the first sentence: a full stop is missing.
  - b. The third sentence states that the “*acts and omissions which can be subject to private nuisance claim is wide and includes various kinds of interferences, usually related to different aspects of the environment (see para 78 above)*” (emphasis added). Paragraph 78 does not provide a basis for asserting that the various kinds of interferences usually relate to different aspects of the environment. It is disappointing that the Committee’s reasoning for reaching this conclusion in paragraph 86 is not set out in the draft findings and that the Committee appears to have relied on this conclusion in deciding the communications.
29. Paragraph 88 to 91 – It is disappointing that these paragraphs only address one of the types of complaint addressed in the United Kingdom’s submissions. The paragraphs address complaints to a relevant regulator or local authority where the contravention is alleged to lie in breach of a condition or licence, or conduct amounting to an offence, which it is the duty of the regulator or local authority to enforce (paragraph 36 (i) of the United Kingdom’s letter of 20 December 2013). The paragraphs do not address complaints to the relevant local authority with a view to the authority’s taking action under section 80 of the Environmental Protection Act 1990 where the breach is alleged to amount to a statutory nuisance (paragraph 36 (ii) of the United Kingdom’s letter of 20 December 2013). We suggest that this is rectified.
30. Paragraph 94 – There are typographical errors in footnote 35: the case is “*Austin v Miller Argent*” and not “*Miller v Argent*” and the correct reference to the quoted text is “*paragraph 18*” and not “*pages 16-17*”.
31. Paragraph 105 – The final sentence of paragraph 105 of the draft findings is correct in saying that compensation cannot substitute an abatement Order but is incorrect in saying that a compensation order can only ‘accompany’ an abatement Order – the grounds for making a compensation Order are different so it will either accompany an abatement Order or be made on its own. We therefore suggest that the final sentence of paragraph 105 of the findings needs to be corrected to say “*more importantly, in contrast to private nuisance cases, compensation cannot substitute, the abatement order although if the Court is unable to make an abatement order because the nuisance has ceased and is unlikely to recur this will not prevent compensation from being awarded if the nuisance was ongoing when proceedings were issued*”.
32. Paragraph 110 – Typographical errors: the subparagraphs are illogically labelled.
33. Paragraph 115 – Typographical error: the reference in the first sentence to “44.3 (2)” of the Civil Procedure Rules should be to “44.2 (2)”.

34. Paragraph 116 – We continue to question the relevance of communication ACCC/C/2008/33 given the clear position outlined above. There are significant differences between private nuisance claims and challenges against public authorities and we do not accept that the Committee has given full consideration to these either in these draft findings or in its analysis of the issues in communication ACCC/C/2008/33.
35. Paragraph 117 – The second sentence refers to the “*the communicants’ submission that the costs of private nuisance cases almost always exceed £100,000 per party*”. This misrepresents the communicants’ relevant submission, which was made at paragraph 14 of the communicants’ joint speaking note for the meeting of 26 March 2014, asserting that, “...environmental nuisance cases are expensive to run – legal costs almost always exceed £100,000...” (emphasis added). The communicants’ submission related only to environmental nuisance cases. The sentence in the draft findings misrepresents the submission by stating that it applied to nuisance cases generally. We suggest that the sentence is amended by inserting the word “*environmental*” before the words “*private nuisance cases*”. The United Kingdom is unable to confirm the accuracy of the communicants’ relevant submission.
36. Paragraph 118 – The Committee’s recommendations were welcomed by the Parties in decision IV/9i and reiterated in decision V/9n rather than “*endorsed*” and we invite the Committee to correct the text accordingly. We also continue to question the relevance of communication ACCC/C/2008/33 and decisions IV/9i and V/9n to these communications.
37. Paragraph 121 – As above, there is a typographical error, in that the draft findings provide that the defined term for the Legal Aid, Sentencing and the Punishment of Offenders Act 2012 is “*LASPOA 2012*” (defined at paragraph 22), yet this subparagraph uses the term “*LASPOA*”.
38. Paragraph 123 –
- a. The Committee suggests a link between the findings it makes in relation to these communications and those it made in communication ACCC/C/2008/33, as well as the recommendations in decision V/9n. The Committee’s suggestion that the findings that the United Kingdom was “*still not in full compliance*” with article 9(5) of the Convention creates two significant concerns for us. First, there is the suggestion that the issues raised in these communications are simply a continuation of what the Committee, and the Parties, have considered before. To state that “*this finding applies also in the case of private nuisance proceedings within the scope of article 9, paragraph 3*” is to suggest that the Parties in decision V/9n – including the United Kingdom – accepted that the Committee’s earlier findings applied to private nuisance proceedings. Given the position we stated at the Committee’s forty-first meeting, repeated above, we cannot accept this position, or therefore agree to findings being made by the Committee on this basis. In addition, the Committee’s decision to make findings on article 9(5) specifically in relation to decision V/9n also takes no account of the United Kingdom’s position, expressed in a statement<sup>1</sup> made at the 5<sup>th</sup> Meeting of the Parties and included in the report of the Meeting.<sup>2</sup> We

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<sup>1</sup> [http://www.unece.org/fileadmin/DAM/env/pp/mop5/Statements/MOP5-5b-UK\\_statement\\_on\\_item\\_5\\_b.pdf](http://www.unece.org/fileadmin/DAM/env/pp/mop5/Statements/MOP5-5b-UK_statement_on_item_5_b.pdf).

<sup>2</sup> [http://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Post\\_session\\_docs/ece\\_mp\\_pp\\_2014\\_2\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Post_session_docs/ece_mp_pp_2014_2_eng.pdf) at page 10.

expressed concerns the references to article 9(5) in the draft decision, based on the Committee's findings, conflated the Convention obligation to consider the establishment of appropriate assistance mechanisms with the obligations in article 9(4), and that accepting this approach therefore expanded the scope of the obligations under article 9(5). Given these reservations, the United Kingdom is unable to agree to the Committee's findings in this regard.

- b. Leaving aside the issue of earlier findings and decisions, we are also concerned about the Committee's approach to article 9(5) here. The obligation under article 9(5) is to "*consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice*". The Committee, in its findings here, appears to be introducing an additional concept to the Convention text, by suggesting that the United Kingdom has "*failed to sufficiently consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice*" (emphasis added). The obligation is to consider, and the issue of the recoverability of ATE insurance premiums was given full consideration by Lord Justice Jackson and subsequently in Parliament. Having previously expressed concerns about the way in which the Committee views the article 9(5) obligations, we are disappointed with the approach taken by the Committee here and invite them to reconsider.
- c. There is a typographical error at the end of the final sentence: a superfluous full stop should be removed.

39. Paragraph 126 – The United Kingdom cannot agree to the findings, given the issues raised above, in particular the links the Committee draws with its earlier findings and the Parties' decisions, and because of the Committee's approach to article 9(5). We therefore request that this paragraph is amended to reflect the need to refer these findings to the next Meeting of the Parties.

Yours sincerely



Ahmed Azam  
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to the UNECE Aarhus Convention