FORTY FOURTH MEETING OF THE UNECE AARHUS CONVENTION COMPLIANCE COMMITTEE

Communication ACCC/C/2013/86 by Alyson Austin concerning compliance by the United Kingdom with Article 9 of the Convention in connection with the costs of her claim for nuisance against Miller Argent (South Wales) Limited

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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

- PART 1: NON-EXHAUSTION OF DOMESTIC REMEDIES -

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1. The communicant alleges that the United Kingdom has breached Article 9, paragraphs (2), (3) and (4) of the Convention because she cannot bring a private law claim for nuisance against Miller Argent (South Wales) Ltd ("**Miller Argent**") in respect of its operations in the vicinity of her home, due to those proceedings being *"prohibitively expensive"*. The United Kingdom refutes this allegation.

2. By email dated 20 March 2014 the Secretary to the Committee confirmed that, notwithstanding the preliminary conclusion that the communication is admissible, a final ruling on admissibility will be made in the light of representations as to the extent to which the subject-matter of the communication is within the scope of the ongoing domestic appeal procedure.

3. The United Kingdom submits in the strongest terms that the communication should be declared inadmissible on the grounds that domestic remedies have not yet been exhausted.

4. The communicant's essential complaint is that the costs of bringing a nuisance claim against Miller Argent would be *"prohibitively expensive"* within the meaning of Article 9, paragraph (4) of the Convention, because of her potential liability to pay Miller Argent's legal costs if the claim were to fail.

5. The communicant accepts that the grant of a protective costs order would be capable of securing compliance with the Convention: see paragraph 88 of her Detailed Submissions.[1]

6. The Court of Appeal of England and Wales has granted the communicant permission to appeal against the refusal of the High Court to grant a protective costs order.[2] That appeal is listed to be heard on 25 or 26 June 2014. The Court of Appeal has also granted the communicant an interim protective costs order for the purposes of that hearing, which means that if the appeal fails she will only be liable for £2,500 of Miller Argent's costs.[3]

7. The Court of Appeal's reasons for granting permission to appeal expressly rejected Miller Argent's contention that there was no power to make a protective costs order in a case of this nature. [4] Similarly, in previous proceedings brought by the claimant against Miller Argent, the Court of Appeal did not rule out the possibility that a protective costs order could be made in private law nuisance proceedings if necessary in order to secure compliance with the Convention.[5]

8. The current position, therefore, is that within only a few weeks the communicant will have an effective opportunity to persuade the Court of Appeal that a protective costs order, which she accepts would secure compliance with the Convention, should be granted, and that the Court of Appeal has indicated that it does not consider there to be any in principle barrier to it granting such an order.

9. It is absolutely clear, therefore, that the allegation that without costs protection the communicant's nuisance claim would be *"prohibitively expensive"*, if well-founded, remains capable of being remedied within the domestic legal system.

10. Paragraph 21 of Decision I/7 provides that the Committee should *"at all relevant stages"* (including considering whether a communication is inadmissible e.g. on

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[1] Annex I to the Communication.
[2] See Annex I to the DEFRA letter dated 20 December 2013
[3] The order is dated 20 November 2013 and was enclosed with the letter from Richard Buxton Environmental & Public Law dated 29 November 2013. That letter accepts that the interim PCO will enable the communicant to proceed with the appeal.
[4] See para. 2 of the Order.
[5] See *Austin v. Miller Argent (South Wales) Ltd* [2011] EWCA Civ 928 at para. 64 (page 88 of the bundle submitted with the communication).

the grounds that it is manifestly unreasonable) "*take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress*".

11. The Committee's own Guidance document, noting this provision, states at p.31 that "*before making a communication to the Committee, the member of the public should consider whether the problem could be resolved by using such domestic remedies*". At pp.34-35, whilst noting that the exhaustion of domestic remedies does not constitute a strict requirement that has to be satisfied in all cases, the Guidance states that "*It is at the discretion of the Committee to decide not to examine the substance of a communication if in its view the communicant has not sufficiently explored the domestic administrative or judicial procedures, especially at times of particularly increased workload.*"

12. Given that the communicant's appeal before the Court of Appeal is only a few weeks away, could potentially result in her obtaining the protective costs order which she says would be sufficient to secure compliance with the Convention in her case, and will not itself be prohibitively expensive due to the interim protective costs order that the Court of Appeal has already granted, the domestic remedy available to her cannot sensibly be described as "*unreasonably prolonged*" or one which "*obviously does not provide an effective and sufficient means of redress*".

13. If the Committee were to proceed to consider the communication now, notwithstanding the pending domestic appeal which is so close to being heard and which has the potential to resolve the communicant's complaint, it would deprive the provisions in Decision I/7 and the Committee's Guidance on exhaustion of domestic remedies of any meaningful effect. It is hard to see how any communication could fail for non-exhaustion of domestic remedies if this one does not. The consequences for the Committee's workload could be serious.

14. Moreover, it cannot be said that the United Kingdom is in breach of the Convention when there remains a prospect that even on the communicant's own case compliance could still be secured if the pending appeal is allowed by the Court of Appeal.

15. Accordingly, the United Kingdom strongly submits that this communication should be declared inadmissible. Alternatively, consideration of the

communication should be adjourned pending the outcome of the Court of Appeal's decision.

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26 March 2014