Reply to the Communication ACCC/C/2016/151

Introduction

In the Communication ACCC/C/2016/151, hereinafter referred to as the "Communication", ClientEarth Foundation claims that Poland failed to properly implement of the Article 9, paragraph 3 of the Aarhus Convention[1] with regard to local law. Article 9 paragraph 3 of the Aarhus Convention provides that in addition and without violating the provisions of appeal procedures referred to in paragraphs 1 and 2, each Party shall ensure that members of the public who meet the requirements, if they exist, as defined in national law, will have access to an administrative or judicial procedure allowing for the challenging of acts and omissions of private persons or public authorities violating the provisions of its national environmental law.

In the further part of the document, it is explained how the Minister of the Environment addressed specific allegations presented in the Communication.

1. The admissibility of the Communication

According to paragraph 21 of Decision I/7 (ECE/MP.PP/2/Add.8) of the Meeting of the Parties to the Aarhus Convention, the Aarhus Convention Compliance Committee should at all relevant stages 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. In ACCC/C/2016/151 case, the Chair and the Vice-Chair of the Committee sent a letter dated November 15, 2017 to the ClientEarth, in which they asked about the use of these remedies. In its letter the Committee also stated that only one from presented by ClientEarth judgments - II SA/Bk 507/13 concerns the appeal of an environmental organisation against the provisions of a local environmental law. In the submitted supplement, ClientEarth presented several judgements of administrative courts, but their content does not indicate whether the Communicant was a complainant in even one of them, i.e. whether he used the national appeal procedure in the matter covered by the Communication. In addition, on March 5, 2018, ClientEarth presented the decision of the Supreme Administrative Court of January 23, 2018, (reference number II OSK 3218/17) regarding the Air Quality Plan, in which it was a complainant. Therefore, Minister of the Environment asks for recognition by the Compliance Committee of the Aarhus Convention that the subject matter of the Communication covers only this kind of plan.

In the opinion of Minister of the Environment, the author of the Communication bears the burden of proving a breach of a specific obligation stemmed from the Aarhus Convention. However, in the Communication it is stated that the violation of the Aarhus Convention in the case of local law acts is systemic. In the opinion of Minister of the Environment, such allegation was not properly proved by the ClientEarth. It is not enough to present only one case regarding the environmental plan and then to formulate on this basis the assertions that there is a systematic violation of the Aarhus Convention.

This way of formulating the Communication makes it difficult for the Minister of the Environment to reply to the Communication, as it does not indicate any specific plans or programmes concerning the environment where the provisions of the Aarhus Convention were violated. Reported

[1] Convention on access to information, public participation in decision-making and access to justice in environmental matters, Aarhus, June 25, 1998.

violations of the Convention should be supported by a documentation of the use of legal remedies by the author of the Communication. An isolated case cannot form the basis for the thesis on the systemic nature of the violation.

At this point it is important to add that the mentioned provisions of local government laws referred to in the further part of the reply to the Communication do not directly concern environmental issues. Chapter 10 of the Act of March 8, 1990 on Municipal Local Government (OJ of 2018, item 994, with amendments), hereinafter referred to as the "Local Government Act", refers generally to supervision over the activities of the basic local government unit in the Republic of Poland, which is the municipality. In the opinion of the Minister of the Environment, the author of the Communication is obliged to indicate a specific plan or programme that was adopted by the municipality and only then prove that in this case he did not get an access to justice, recalling the relevant law to support this thesis. On the contrary, the ClientEarth Communication is limited only to indicating the legal provision on the supervision of local government activities, and then indicates that it does not meet the requirements of the Aarhus Convention, without considering other legal provisions that may affect a given plan or programme.

2. The rights resulting from art. 101 of the Act of 8 March 1990 on the Municipal Local Government[2]

According to art. 101 para. 1 of the Local Government Act, everyone whose legal interest or entitlement was violated by a resolution adopted by a municipal authority in a matter of public administration, may appeal against a resolution to an administrative court. At the same time, pursuant to art. 101 para. 2a of the Local Government Act, the complaint against the resolution referred to in para. 1, may be brought by entitled person to the administrative court on its own behalf or on behalf of a group of residents of the municipality, who shall give their written consent. According to the provision the non-governmental organization, can submit a complaint to the administrative court if it represents a group of residents of the municipality. This provision is general and refers to all resolutions adopted by the municipal authority.

3. Possibility to submit a complaint via the Ombudsman

According to art. 9 point 1 of the Act of July 15, 1987 on the Ombudsman (OJ of 2017, item 958, as amended), the Ombudsman acts on the request of citizens or their organization. Article 14 point 6 stipulates that after examining the case, the Ombudsman may ask for administrative proceedings, lodge complaints with the administrative court, and participate in these proceedings with the same rights as the prosecutor. An environmental organization may, therefore, ask the Ombudsman to file a complaint to the administrative court if it finds that the local provision violates the law. This is an indirect form of access to justice.

4. Possibility for environmental organizations to submit complaints to the administrative court about actions taken by local government authorities related to environmental protection

From specific provisions contained in the Act of October 3, 2008 on access to information on environment and its protection, public participation in environmental protection and on environmental

[2] A similarly formulated provision can be found in art. 87 of the Act of June 5, 1998 on the Poviat Government (OJ of 2018 item 995, as amended) and in art. 90 of the Act of June 5, 1998 on the Voivodship Government (OJ of 2018, item 913, as amended)

impact assessment (OJ of 2017, item 1405, as amended), hereinafter referred to as the "EIA Act", arises the possibility for environmental organizations to submit their complaints to administrative courts.

According to art. 44 para. 3 of the EIA Act, an environmental organization has a right to complain to the administrative court against a decision issued in proceedings requiring public participation, if it is justified by the statutory purposes of that organization, also when it did not participate in a specific procedure requiring public participation. According to art. 3 para. 1 point 10 of the EIA Act, a non-governmental organization is recognized as the environmental organization when its statutory objective is an environmental protection.

In addition, Directive 2001/42/EC of the European Parliament and of the Council of June 27, 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L 197, p. 30 - special edition in Polish, chapter 15, vol. 6, p. 157) is applicable to most plans and programmes relating to the environment. The procedure for conducting an environmental impact assessment guarantees non-governmental organizations the opportunity to participate in the proceedings.

5. The right to report damage to the environment according to art. 24 of the Act of April 13, 2007 on Preventing Environmental Damage and the Remediation of Environmental Damage (OJ of 2018, item 954)

According to art. 24 sec. 1 of the Act on the Preventing Environmental Damage and the Remediation of Environmental Damage, the environmental protection authority is obliged to accept from everyone, report of the direct threat or occurrence of environmental damage. Paragraph 6 of the same article stipulates that the environmental organization which submitted the report, based of which the proceeding has been initiated, has the right to participate in this proceeding as the legal party.

6. The right to submit complaints and applications according to art. 221 of the Act of June 14, 1960 - Code of Administrative Procedure (OJ of 2017, item 1257, as amended)

The right to question the acts or omissions of public authorities, also in the field of the environment, is ensured in art. 63 of the Act of April 2, 1997 - the Constitution of the Republic of Poland (OJ of 1997, No. 78, item 483, as amended). The procedure for examining requests and complaints is specified in the Act of June 14, 1960 - the Code of Administrative Procedure. A subject of the complaint may be negligence or improper performance of tasks by competent authorities or their employees, violation of the rule of law or interests of the applicants, as well as protracted or bureaucratic handling of matters. If the specific provisions do not specify other bodies competent to deal with complaints, the authority competent to deal with complaints regarding the tasks or activities of the government administration body, a state enterprise body or other state organizational unit is a higher level or directly supervising body. Prime Minister is competent to consider a complaint regarding the minister's tasks.

7. Summary

Minister of the Environment believes that the Polish law does not limit access to justice for non-governmental organizations in a way that would violate Article 9 para. 3 of the Aarhus Convention. First, it should be noted that the author of the Communication is not able to properly prove his thesis, as he has used national remedies in the individual case concerning the Air Quality Plan only.

Therefore, in the opinion of the Minister of the Environment, only this case falls within the scope of the Communication. However, considering the need to clarify the functioning of the Polish law in the field of access to justice in relation to local law acts, this reply presents the way non-governmental organizations can obtain such access.