In the matter of the Aarhus Convention **ACCC/2008/23**

BETWEEN:

(1) FRANCIS ROY MORGAN
(2) CATHERINE MARGARET BAKER

Communicants

and

UNITED KINGDOM

Party

COMMUNICANTS' POST-MEETING NOTE

The Compliance Committee asked the Communicant to set out its complaint against the UK. The Communicant would also like to clarify 2 points arising out of the 1 July 2009 meeting (a) the concept of reasonable costs in this and other matters, and (b) the role of judicial review in the UK.

1. Communicant's complaint

1. The above complaint as it now stands is that the UK maintains a system under which public authorities can shift legal costs onto members of the public, as shown by its position in the case of *Morgan & Baker v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 15, which is not 'fair' nor 'equitable' and, as such, has breached Article 9(4) of the Convention. Further, the UK has penalized the Communicant in breach of Article 3(8) by pursuing its costs from the Communicant instead of awaiting the outcome of the costs position at final trial.

2. Had the UK wished not to penalise the Communicant for seeking to put forth its legal position, it could have sought to revise the Court of Appeal order in suitable terms. Alternatively, it could have simply not pursued its costs in the first place.[1] The UK position is exacerbated by its failure to regulate and protect the local community and environment from pollution caused by the waste operator. The extent of such pollution is recognised and evidenced by the UK authorities in the issue of numerous enforcement type notices. The Communicant maintains such notices have, nevertheless, failed to stop the pollution.

[1] The waste operator who was equally, if not more so, liable for the costs in refusing to appoint an independent expert as an assessor of odours for the purpose of the interim injunction, has avoided its costs liability altogether for the UK's costs.

2. What are fair and equitable costs?

3. During its oral discussion of 1 July 2009 the Compliance Committee invited the Communicant to confirm whether the costs of the UK were 'reasonable' (The legal standard under Article 9(4) is not 'reasonable', but 'fair, equitable, and not prohibitively expensive,' of course.) At that time, we replied that they were not because the UK had asked the Communicant to pay those costs instead of leaving the question of who pays until the conclusion of the nuisance trial (with measures taken to preserve those costs). It was accepted that the Communicant had not pursued the question of those costs in the Court of Appeal. This was not because it thought that the level was reasonable, but because it was highly likely that the Court of Appeal would not disturb that cost order (because this type of sum is typical of costs imposed on losing parties in legal proceedings in UK[2]) and the very process of appealing would have incurred further costs and exposed the Communicant to a much greater costs risk.

4. In fact, we consider the sum of £5,130 claimed to be neither reasonable, fair, nor equitable and, for many citizens, it would also be prohibitively expensive. 'The costs did not cover representation at trial or full hearing. They were only for the Environment Agency and the Council (acting jointly) to correspond with the Court and with the parties, and to attend an interim hearing. It did not involve the cost of investigation, evidence gathering, preparing for or appearing at a trial. It could hardly be regarded as cheap legal representation. It is particularly inequitable and unfair that the Environment Agency's total prosecution costs paid by the waste operator just £1,200 in (January 2005) and £2,960 (March 2009),[3] as compared to claiming £5,130 from the Communicant for some correspondence and an interim hearing.

5. In our experience £5,000 is often too much for local residents group to pay or risk exposure to in legal proceedings. It is simply not a sum that local residents can afford to pay in trying to protect their environment, even in the UK. In other Aarhus-party states it is likely to be an even more so. Thus,

[3] This is set out in the joint statement of the parties of 22 July 2009

in many instances, this kind of sum would be regarded as prohibitively expensive. In the present case the financial position of the Communicant was assisted by legal expenses insurance (until the interim injunction order). This is available in some property-based environmental claims (such as private nuisance) but is not generally available in environmental cases.

3. The purpose of judicial review

6. It is important to clarify that in the UK a challenge to a public body by way of judicial review is an option of last resort. There is no entitlement to challenge the merits of any decision, only whether the decision was taken lawfully. Thus, you can have public bodies taking bad environmental decisions but doing so lawfully.[4] Further, the Courts have discretion not to quash a decision, even if there has been unlawfulness. This is less so where EU legislation applies, e.g., the EIA Directive. However, there are many environmental decisions that fall outside EU legislation.

7. In these circumstances, a public law claim is not taken lightly and only if there is no other option available. Moreover, the general rule that 'the loser pays the winners costs' applies to judicial review. And, while there has been some effort by the Courts to dis-apply the costs rule by the use of Protective Costs Orders etc. more often than not the normal rule is applied. This is of particular concern when, in public law matters, the complainant and its supporter will often be paying the public body twice; once by way of taxes to take the bad decision in the first place; and a second time if any legal challenge is dismissed by the Court and a costs order is made.

Dr Paul Stookes
Richard Buxton Environmental & Public Law
24 July 2009

[4] By way of example, in the present case, in 2003 the Environment Agency approved an increase the volume of waste allowed to be held at the site from 420 to 800 tonnes at any one time, while the Council approved an increase in the height of the waste piles ("windrows") from 3 to 6 metres. These were both bad decisions in terms of impacts on the local environment and coincided with an increase in odours, air pollution and other effects; there have been problems ever since. However, unless the regulators acted unlawfully in reaching those decisions they could not be challenged by way of judicial review.