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1 December 2009

**Jeremy Wates**  
**Secretary – Aarhus Convention**  
**Economic Commission for Europe**  
**Environment, Housing and Land Management Division**  
**Bureau 332**  
**Palais des Nations**  
**CH-1211 Geneva 10**  
**Switzerland**

Dear Sirs,

**Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom with the provisions of the Convention in connection with an opencast coal mine at Merthyr Tydfil, Wales (Ref. ACCC/C/2009/40).**

Thank you for your letter of 27 July enclosing a copy of a communication dated 11 June 2009 from Messrs Richard Buxton. This letter responds to the two questions on which the Committee requested further information from the UK in the letter.

We welcome the Secretariat's invitation to comment on the other aspects of the Communication. However, in order to properly address the matters raised in the initial complaint in light of the further submissions from the Communicant which we received on 1 November and to allow proper consultation with the authorities and private undertakings concerned, we would like to request an extension of three months to the original deadline for response set by the Committee. If the Committee can agree to this request, we would submit further substantive observations on both the communicant's submissions and their further submissions by 27 March 2009.

### **Question 1**

The Committee has asked whether there are any criteria established by law or practice applicable in respect of consideration of an application for legal aid and are there any review procedures in place.

Section 8 of the Access to Justice Act 1999 established the Funding Code Criteria which are used by the Legal Services Commission to assess every

application for legal aid. This is supplemented by the Guidance adopted by the Legal Services Commission. The funding criteria and the guidance can be found at the following link:

[http://www.legalservices.gov.uk/civil/guidance/funding\\_code.asp](http://www.legalservices.gov.uk/civil/guidance/funding_code.asp)

In particular, applicants are subject to a financial means test and a legal merits test.

The financial means test establishes the wealth of the applicant and whether they can afford to pay for their legal costs privately. If a person is found to be above the disposable income limit or capital limit they do not qualify for legal aid.

The legal merits test under the Funding Code Criteria considers both the prospects of success and the costs and benefits of the legal action. Legal challenges on environmental grounds will usually fall within section 7 of the Funding Code (Judicial Review & other challenges to decisions of public bodies). Under criterion 7.4.5 of the Funding Code Criteria full representation under legal aid will be refused if the prospects of successfully obtaining the substantive order sought in the proceedings are either poor or unclear. If, however, they are borderline but the case appears to have significant wider public interest, to be of overwhelming importance to the client or to raise significant human rights issues, funding may be granted. Under criterion 7.4.6 full representation under legal aid may be refused unless the likely costs are proportionate to the likely benefits of the proceedings, having regard to the prospects of success and all other circumstances.

If the question of whether wider public interest is significant arises in a case, it can be referred to the Public Interest Advisory Panel (PIAP). There is no fixed limit or minimum number of people who must benefit in order to establish a significant wider public interest as this will vary greatly according to the nature of the benefits. PIAP has regularly considered environmental claims and has concluded that many of them have a significant wider public interest, which makes them a priority for funding under the Legal Aid Scheme.

Furthermore, the Guidance (Volume 3 Part C, 5.5 paragraph 8) states that environmental cases may be less likely to require significant private contributions compared to certain other types of public interest case, but in all cases the contribution will be fixed so as not to be prohibitively expensive, consistent with the UK's obligations under the Aarhus obligation.

If an application is refused on the merits of the case the applicant has the opportunity to appeal against the Commission's decision to an independent adjudicator, or if the case is high profile, complex or likely to have costs over £25,000 to a Funding Review Committee. All adjudicators and the Funding Review Committee are solicitors or barristers.

## **Question 2**

The Committee has also asked whether any Government authorities or courts received any complaints by the communicant concerning allegations of being penalised, persecuted or harassed and whether national legislation provides procedures to deal with such allegations.

The communicant explains that article 3(8) of the Convention was raised before the High Court in the oral permissions hearing of 30 April 2009. No complaints concerning harassment or persecution were received by the Welsh Assembly Government, the Legal Services Commission or the Public Services Ombudsman for Wales. The Ombudsman's main role is to look into complaints made by members of the public that they have suffered hardship or injustice through maladministration or service failure on the part of a public body within his jurisdiction. Complaints of being penalised, persecuted or harassed would also fall within the Ombudsman's jurisdiction.

In addition, and as set out in the UK's 2008 implementation report, several legal and administrative measures are available in the UK to protect people from penalisation, persecution or harassment in pursuing matters covered by the Convention. Some of these measures relate to the avoidance of discrimination against particular members of the public (e.g., the Race Relations Act 1976, or the Disability Discrimination Act 1995). Others have more general application, or are based on fundamental human rights. In particular, the Protection from Harassment Act 1997 makes it a criminal offence to behave in a way amounting to the harassment of another person and the Human Rights Act 1998, which makes rights from the European Convention of Human Rights enforceable in UK courts. ([www.humanrights.gov.uk](http://www.humanrights.gov.uk)).

The Protection from Harassment Act 1997 was introduced primarily to tackle stalking but the offence of harassment extends to *any* form of persistent conduct which causes another alarm or distress. So the range of behaviour that is capable of constituting an offence under the 1997 Act is potentially very wide. Indeed, research has shown that it is used to deal with a variety of behaviour other than stalking, including domestic and inter-neighbour disputes. The behaviour must be such that a reasonable person would think it amounted to harassment.

Under section 1(1) of the Protection from Harassment Act 1997, a person must not pursue a course of a course of conduct which amounts to harassment of another, and which he knows or ought to know amounts to harassment of the other. Section 2 of the Act makes such conduct a criminal offence punishable a maximum of 6 months' imprisonment and/or a fine of up to £5,000. This offence therefore addresses persistent conduct, although it may not make the victim fear that violence will be used, nonetheless is a form of harassment. It is for the courts to decide, on the facts of each case, whether the 'course of conduct' falls within section 1(1).

In addition to this criminal offence, section 3 of the Act also provides for a civil remedy. Under this provision, victims of harassment falling under section 1(1)

can seek an injunction against a person who is harassing them or may be likely to do so. There is no need for a person to have been convicted of harassment in order for an injunction to be granted against them. If a court is satisfied that harassment has taken place or is anticipated, then they may grant the injunction. Breach of an injunction is a criminal offence which carries a maximum penalty on indictment of 5 years imprisonment and/or an unlimited fine.

We hope this information assists the Committee and look forward to hearing from you concerning our request for a time extension for submitting further substantive observations.

Yours faithfully,

A handwritten signature in cursive script, appearing to read 'J. M. Barton'.

**Jane Barton, UK national focal point.**

**Cc Richard Buxton**