

In the matter of the Aarhus Convention Compliance Committee

ELIZABETH CONDRON

Communicant

- and -

UNITED KINGDOM

Party concerned

**RESPONSE TO FURTHER SUBMISSIONS
OF THE COMMUNICANT IN REPLY TO
QUESTIONS FROM THE COMPLIANT
COMMITTEE**

Note: This document has been prepared by Miller Argent (South Wales) Limited to assist the Convention Compliance Committee and the Party concerned following the further communication received from Paul Stookes of Richard Buxton Environmental & Public Law dated 1 November 2009.

This response follows the same paragraph numbers used by the Communicant in her further submissions.

1. It is not agreed that the legal proceedings have not been "fair or equitable" contrary to Article 9(4) of the Convention.
2. This response replies to the further submissions made by the Communicant dated 1 November 2009 submitted in reply to the specific questions raised by the Compliance Committee in its letter of 27 July 2009.

1. Please elaborate on your allegations concerning a breach of article 3, paragraph 8 and article 9, paragraph 4
3. See Miller Argent's response to the Communicant's answers to questions 2 - 8 below.

2. Please specify how statements made in court are to be regarded as a breach of article 3, paragraph 8.

4. Statements made to the court by the Councils were entirely reasonable and reflective of the normal cost application made in a case where the claimant had been unsuccessful. In particular, the statements did not ask the court to penalise or punish the Communicant. As noted in Miller Argent's main submissions the Communicant has brought a number of legal challenges against the Councils and the Welsh Assembly Government all of which have been found to be unmeritorious. It is to be noted that no other party has been prepared to bring proceedings against the Councils or the Welsh Assembly Government. Miller Argent assume that the reason for this is that without the protection of the normal costs award made in publicly funded cases any other party would have considered the risks involved in pursuing the case to be such that there was a significant risk of an adverse costs award.
5. The Communicant fails to explain that the costs submissions were made following the decisions of two High Court judges with particular experience and standing in this area of administrative law to refuse permission to proceed to judicial review. As a result the claimant was not prevented from *bringing* her challenge but having been *unsuccessful* was faced with the ordinary award that follows the event of a finding by the court that a case is not arguable. It is denied that the Councils placed financial pressure on the claimant before proceedings were issued.
6. As noted in Miller Argent's main submissions the case is unmeritorious; two High Court Judges, at separate hearings/applications, have found the case to be unarguable. The application to the Court of Appeal to which the Communicant refers does not reflect a finding that the case has merit but to hear the Communicant's application for permission to appeal against the order of Justice Beatson to refuse permission to appeal against his finding that the case had no merit. It is not unreasonable to suggest that the Communicant has been advised to pursue an unmeritorious legal challenge as the Communicant has pursued five legal challenges all of which have been found to be unmeritorious.
7. It is not agreed that a challenge to the Legal Services Commission in respect of its grant of public funding is unprecedented or wholly unjustified, there have been a number of examples of similar cases having been brought.

8. In circumstances where the Councils have had to absorb the costs of defending a number of legal challenges which were subsequently found to be unmerited it was not unreasonable for the Councils to seek to understand the basis upon which the Communicant continued to secure public funding for her claim.
9. As the Communicant notes, the High Court dismissed the Councils' claim against the LSC. In the circumstances of the claim having been unsuccessful it is not understood how a breach of Article 3(8) can be said to have been committed by the Party concerned, or how the Communicant can be said to have been prejudiced.
10. No evidence has been produced to show how the Councils have tried to penalise and persecute the Claimant or how (or why) they may try to do so in the future. Similarly no evidence is produced to show that Miller Argent is seeking to revise the terms of the land reclamation scheme in a manner that is "wholly unsustainable". Both statements are entirely without foundation. Despite several attempts to do so, the Communicant has failed to establish that any of the decisions made by the Councils or the Welsh Assembly Government have been unlawful and it is an arrogant and entirely spurious assertion to suggest that any decision yet to be made "is likely to be unlawful".

3. You refer to statements made in the local press as a breach of article 3, paragraph 8. How are these statements to be seen as a breach of article 3, paragraph 8, by the Party concerned?

11. Miller Argent does not carry out public functions on behalf of the Councils. The Councils statutory obligations in relation to the investigation of pollution complaints, including noise, dust and air pollution are not discharged by Miller Argent. Miller Argent does not hold environmental information within the meaning of the Environmental Information Regulations (which is the only basis upon which the holding of environmental information has any bearing on its status, or otherwise, as a public body). It is noteworthy that the Communicant does not explain how it considers that Miller Argent carries out "public functions".
12. The Communication does not explain in what respect Miller Argent is alleged to have "misrepresented judicial comment" or "sought to encourage local animosity". Similarly it is not understood on what basis the Council is alleged to

have failed to regulate the operations undertaken by Miller Argent. The operations are regulated by planning conditions and an IPPC permit which contain conditions for which the Councils are the regulating and enforcing authorities. The Communicant's allegations in this respect are not only ill founded, but legally and factually incorrect.

4. How is the approach of the High Court in not accepting the concerns of the Communicant about the transfer of proceedings from London to Cardiff linked to a breach of article 3, paragraph 8?

13. It is not accepted that the transfer of proceedings from London to Cardiff was unfair and therefore in breach of Article 9(4). In particular it is not agreed that there was "intense local media attention" or a "high level of tension in the local community" about the land reclamation scheme. As noted in Miller Argent's main submissions, Mr Justice Beatson found such allegations to be entirely unsubstantiated and for this reason practice direction 54(d) did not apply. It is not understood how the holding of the proceedings in South Wales increased the cost of proceedings "by incurring travel and accommodation costs" because the Councils are based in South Wales, the Communicant is based in South Wales, the subject property is in South Wales, and Miller Argent is based in South Wales. It would appear that the only increased costs would have been in respect of the Communicant's solicitor who is based in Cambridge and for whom the issuing of and conduct of proceedings in the High Court in London is more convenient.

5. Please specify why in your view the actions of the mining company (in relation to its statements to the press) result in a breach of article 3, paragraph 8, by the Party concerned.

14. As noted in the reply to paragraph 10 above, Miller Argent does not carry on public functions on behalf of the Councils, including the investigation of pollution complaints, or the holding of environmental information on behalf of the Councils.

6. Did you ever report your allegation of being penalized, persecuted or harassed to a government body or court competent to hear such allegations?

15. The Communicant's skeleton arguments sought to use the Aarhus Convention to justify her failure to comply with established principles of UK domestic law and the civil procedure rules when submitting her claim.
16. It is not understood in what circumstances independent or free standing provisions to make a complaint under Article 3(8) would arise where legal proceedings were not underway or proposed.

7. Did the Communicant institute legal proceedings relating to the "Ffos-y-fran" opencast coal mine earlier and was it dealt with by competent administrative authorities and courts on the merits?

17. The important thing to note is that the Communicant's claim was unsuccessful, the Court of Appeal determining that the planning permission was lawful and the House of Lords (now the UK Supreme Court) refused leave to appeal against the decision of the Court of Appeal.
18. It should be noted that the Communicant has not disclosed the basis upon which she has submitted a petition to the European Parliament or the scope of any investigations by the European Commission to the Councils, the Welsh Assembly Government or to Miller Argent.
19. The Communicant misrepresents the position. The Communicant had every opportunity to engage with the application for the land reclamation scheme, there having been a public inquiry into the related planning application. In terms of a challenge to the decision, in general terms the court will not interfere with a public body's decision on its merits unless the basis for reaching a particular decision was irrational or "*Wednesbury* unreasonable" that is to say a decision that no public authority acting reasonably could have reached.
20. It is noted that the Communicant now seeks to make an analogy with human rights legislation, however notwithstanding the fact that the UNECE has a Convention Implementation Guide which has been available since 2000 no other claimant has sought to make a similar assertion in respect of environmental cases and moreover neither the Communicant nor her advisers have sought to make such a submission in the course of any of the proceedings brought to date.
21. It is noted that the Communicant does not allege that the merits are capable of being reopened in this case.

22. With the greatest of respect to the Compliance Committee Miller Argent would submit that the Aarhus Convention does not enable the court to reopen the merits of a public authority's decision except where such decision is irrational or Wednesbury unreasonable.

8. Are there any criteria established by law or practical applicable in respect of consideration of an application for legal aid and are there any review procedures in place?

23. The Communicant underplays the very detailed guidance that applies to the consideration of an application for legal aid and fails to note that the LSC initially refused public funding to the Communicant in respect to the most recent proceedings brought against the Councils. It is not understood how the Communicant can maintain that its claim has a 70% prospect of success particularly since two High Court judges have found that the Communicant's case is not arguable.

24. Miller Argent trusts that these further submissions are of assistance but if further information or clarification is required please do not hesitate to contact their solicitors whose details are set out below.

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