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### Economic Commission for Europe

Meeting of the Parties to the Convention on  
Access to Information, Public Participation  
in Decision-making and Access to Justice  
in Environmental Matters

#### Compliance Committee

##### Thirty-first meeting

Geneva, 22–25 February 2011

### Report of the Compliance Committee on its thirty-first meeting

#### Addendum

#### Compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention

#### Introduction

1. During the past intersessional period of the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), the Compliance Committee considered four communications concerning compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under Convention. With respect to communication ACCC/C/2009/38, the Committee did not find that the matters examined with respect to the communication established non-compliance by the Party concerned with the provisions of the Convention on access to information and public participation, and it postponed consideration concerning issues relating to access to justice. The following paragraphs review the findings and recommendations of the Committee with regard to communications ACCC/C/2008/23, ACCC/C/2008/27 and ACCC/C/2008/33. After taking into consideration information submitted by the Party concerned in its national implementation report and the letter of the Party dated 15 February 2011, as well as information submitted by the Coalition for Access to Justice for the Environment (CAJE) on 15, 21 and 23 February 2011, the Committee at its thirty-first meeting concluded the draft of the present findings and recommendations and the Party concerned and the communicants were invited to provide comments. The Committee then considering the comments submitted, it adopted

the findings and recommendations using its electronic decision-making procedure and agreed to submit them to the Meeting of the Parties.

## **I. Implementation of recommendations with regard to communication ACCC/C/2008/23**

2. Communication ACCC/C/2008/23 was made on 21 February 2008 by Mr. Morgan and Ms. Baker with regard to compliance by the United Kingdom with its obligations under article 9, paragraph 4, of the Convention in connection with the availability of fair, equitable, timely and not prohibitively expensive review procedures in their private nuisance proceedings against the operator Hinton Organics (Wessex) Ltd, seeking an injunction to prohibit offensive odours arising from the operator's waste composting site near their homes. Following the cancellation of an interim relief, the communicants were ordered to pay the costs of the operator and public authorities/added parties to the proceedings, and the communicants alleged that demands from the public authorities for their costs to be paid forthwith and not to await the outcome of the trial amounted to non-compliance of the Party concerned with article 3, paragraph 8, of the Convention.

3. Having considered the communication in accordance with the procedure set out in section VI of the annex to decision I/7 of the Meeting of the Parties, the Committee at its twenty-ninth meeting (21–24 September 2010) found that, in respect of the requirements of article 9, paragraph 4, for procedures referred to in paragraph 3 to be fair and equitable, related to the fact that in the above circumstances where the communicants were ordered to pay the whole of the costs while the operator was not ordered to contribute at all, that that constituted *stricto sensu* non-compliance with article 9, paragraph 4.

4. Taking into consideration that no evidence had been presented to substantiate that the non-compliance with article 9, paragraph 4, was due to a systemic error, the Committee refrained from presenting any recommendations in that case.

5. The above findings and recommendations of the Committee are contained in the addendum to the report of the twenty-ninth meeting of the Committee (ECE/MP.PP/C.1/2010/6/Add.1).

## **II. Implementation of recommendations with regard to communication ACCC/C/2008/27**

6. On 18 August 2008, Cultra Residents' Association submitted communication ACCC/C/2008/27 with regard to compliance by the United Kingdom with its obligations under articles 3, 7 and 9 of the Convention in connection with the decision-making procedure to expand Belfast City Airport operations and with respect to the costs charged upon the communicant following the dismissal of its application for judicial review proceedings.

7. Having considered the communication, the Committee at its twenty-ninth meeting found that: the communicant's judicial review proceedings were within the scope of article 9, paragraph 3, of the Convention and thus were also subject to the requirements of article 9, paragraph 4, of the Convention, and that the quantum of costs awarded in that case, £39,454, rendered the proceedings prohibitively expensive and that the manner of allocating the costs was unfair, within the meaning of article 9, paragraph 4, and thus, amounted to non-compliance.

8. The Committee recommended to the Party concerned, with its agreement, to review its system for allocating costs in applications for judicial review within the scope of the

Convention, and to undertake practical and legislative measures to ensure that the allocations of costs in such cases was fair and not prohibitively expensive.

9. The above findings and recommendations of the Committee are contained in the addendum to the report of the twenty-ninth meeting of the Committee (ECE/MP.PP/C.1/2010/6/Add.2).

### **III. Implementation of recommendations with regard to communication ACCC/C/2008/33**

10. On 2 December 2008, ClientEarth, the Marine Conservation Society (MCS) and Mr. Robert Latimer submitted communication ACCC/C/2008/33 with regard to compliance by the United Kingdom with its obligations under article 9, paragraphs 2, 3, 4 and 5, of the Convention in connection with the lack in general of substantive review in procedures for judicial review, the prohibitively expensive costs of judicial review proceedings, the lack of rights of action against private individuals for breaches of environmental laws and the restrictive time limits for judicial review; and, in particular in connection with access to justice, to challenge a government licence issued to the Port of Tyne in northern England that allows for the disposal and protective capping on of highly contaminated port dredge materials at an existing marine disposal site called “Souter Point” approximately four miles off the coast. The Committee decided to focus on the systemic issues raised by the communication.

11. Having considered the communication, the Committee at its twenty-ninth meeting found that:

(a) By failing to ensure that the costs for all court procedures subject to article 9 were not prohibitively expensive, and in particular by the absence of any clear legally binding directions from the legislature or judiciary to that effect, the Party concerned failed to comply with article 9, paragraph 4, of the Convention;

(b) The system as a whole was not such as “to remove or reduce financial [...] barriers to access to justice”, as article 9, paragraph 5, of the Convention required a Party to the Convention to consider;

(c) By not ensuring clear time limits for the filing of an application for judicial review and by not ensuring a clear date from when the time limit started to run, the Party concerned had failed to comply with article 9, paragraph 4;

(d) By not having taken the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement article 9, paragraph 4 of the Convention, the Party concerned also failed to comply with article 3, paragraph 1.

12. The Committee recommended to the Party concerned, with its agreement, to:

(a) Review its system for allocating costs in environmental cases within the scope of the Convention and to undertake practical and legislative measures to overcome the problems identified in paragraphs 128–136 of its findings (ECE/MP.PP/C.1/2010/6/Add.3) to ensure that such procedures:

(i) Were fair and equitable and not prohibitively expensive; and

(ii) Provided a clear and transparent framework;

(b) Review its rules regarding the time frame for the bringing of applications for judicial review identified in paragraph 139 of its findings to ensure that the legislative measures involved were fair and equitable and amounted to a clear and transparent framework.

13. The recommendations in the findings with regard to communication ACCC/C/2008/33 covered the specific issues raised in communications ACCC/C/2008/23 and ACCC/C/2008/27.

14. The above findings and recommendations of the Committee are contained in the addendum to the report of the twenty-ninth meeting of the Committee (ECE/MP.PP/C.1/2010/6/Add.3).

#### **IV. Follow-up and conclusions**

15. The Committee invited the Party concerned to provide information, no less than four months before the fourth session of the Meeting of the Parties, on the measures taken and the results achieved in implementation of the above recommendations.

16. On 15 February 2011, the Party concerned submitted the information on measures taken to address the above recommendations, as requested by the Committee. The Committee considered the information submitted by the Party concerned and also the national implementation report for the period 2008–2011. The Committee also considered the information submitted by CAJE on 15, 21 and 23 February 2011.

17. The Committee welcomed the progress undertaken by the Party concerned promptly after the adoption of the findings by the Committee.

18. With regard to the recommendation mentioned in paragraph 12 (a) above on costs, the Party concerned informed the Committee that the Ministry of Justice was preparing amendments to the Civil Procedure Rules of England and Wales to codify the case law on protective costs orders (PCOs) in order to provide added clarity and transparency to the law and the procedure for making an application for a PCO with a view to achieve compliance with the Convention. That was based on four potential problems identified by the Committee in its findings with regard to communication ACCC/C/2008/33 (see para. 129 of the findings). The rules would be based on the law as set out in the case of *Corner House*, as developed in particular with the *Garner* case.

19. The new rules were expected to be implemented by April 2011, while similar rules were in preparation to regulate the award of costs orders in environmental cases in Scotland and Northern Ireland.

20. The Ministry of Justice had also launched a public consultation (15 November 2010–14 February 2011), on the other key recommendations of Lord Justice Jackson's Review of Civil Costs (<http://www.justice.gov.uk/consultations/jackson-review-151110.htm>), which recommended, inter alia, a move to qualified one-way cost shifting (a view also put forward in the Sullivan update report).

21. The Party concerned stated that cross undertakings and interim injunctions were rarely required and that it had not been able to identify recent examples of claims that had not been taken forward because of the financial burden that a cross undertaking in damages would pose. However, due to the concerns expressed in that area, the Ministry of Justice for England and Wales had launched public consultations (24 November 2010–24 February 2011) on cross undertakings in damages in environmental judicial review cases (<http://www.justice.gov.uk/consultations/docs/cross-undertakings-in-damages-in-environmental-judicial-review-claims.pdf>). Consideration was being given to how to deal with this issue in Northern Ireland. Cross undertakings were not a feature of the law in Scotland.

22. With regard to the recommendation mentioned in paragraph 12 (b) above on time limits for judicial review proceedings, the Party concerned informed the Committee that the

Ministry of Justice was looking at the issue. It had consulted with the administrative court on whether the term “promptly” should be retained or whether the time limit should simply specify a maximum period, and whether it would be appropriate to set the clock running when the applicant became aware or should have become aware of the decision to be challenged. A further public consultation was currently under consideration.

23. At its thirty-first meeting, the Committee considered the progress achieved by the Party concerned. It notes the engagement of the United Kingdom demonstrated in its correspondence with the Committee and the participation of its representatives in the Committee’s meetings.

24. The Committee considers that, while the measures undertaken by the Party concerned demonstrate progress made towards achieving compliance with article 9 of the Convention, it would be premature to conclude that the Party concerned is no longer not in compliance with the Convention, since the measures have not been implemented and a number of concerns have been raised by the public concerned.

25. In order to ensure the comprehensive review of compliance by the United Kingdom, the Committee invited the United Kingdom, as well as the communicants whose communication had initially triggered the review of compliance by United Kingdom, to comment on the draft of the present report. The Party concerned commented on 15 March 2011. The Committee also received comments from CAJE on 14 March 2011 and from ClientEarth on 15 March 2011. The latter was a response to the information submitted by the Party concerned on 15 February 2011.

26. The Party concerned expressed its satisfaction at the Committee’s recommendations. ClientEarth noted that the ongoing reforms would not resolve the issue of non-compliance by the Party concerned with article 9 of the Convention. CAJE reiterated its concerns that, even if implemented, the proposals of the Party concerned regarding prohibitive expenses would not bring it in compliance with article 9, paragraph 4, of the Convention, because:

(a) The proposals for amendments only extend to cases covered by Directive 2003/35/EC providing for public participation, and not to all environmental cases, as covered by the Convention;

(b) The automatic imposition of a costs-cap of £25,000 for individuals will not address concerns regarding prohibitive expense (according to ClientEarth the average annual salary in the United Kingdom in 2010 was £25,543);

(c) The position in the proposals with regard to community groups and non-governmental organizations remains entirely unclear;

(d) All of the problems associated with cross-caps (as discussed by CAJE and Lord Justice Sullivan’s Working Group on Access to Environmental Justice) remain unsolved; and

(e) Significant concerns will persist in connection with the imposition of cross-undertakings in damages in relation to interim relief.

## V. Recommendations

27. The Committee recommends to the Meeting of the Parties, pursuant to paragraph 35 of the annex to decision I/7, and taking into account the cause and degree of non-compliance as well as the measures taken by the party concerned in the intersessional period, to:

- (a) Endorse the original findings and recommendations of the Committee on the three communications as adopted at its twenty-ninth meeting;
  - (b) Welcome progress made by the Party concerned in implementing the Committee's recommendations since their adoption in September 2010;
  - (c) Invite the United Kingdom to submit to the Committee periodically, namely in February 2012 and February 2013, and six months before the fifth session of the Meeting of the Parties, information on the progress in implementing the recommendations of the Committee;
  - (d) Undertake to review the situation at its fifth session.
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