

United Kingdom submissions on
ACCC/C/2014/115 (United Kingdom)

26 November 2015

1. Communicant's allegations regarding Pillar I – access to environmental information

Inadmissibility of allegations: use and exhaustion of domestic remedies; abuse of right to bring a communication

1. We submit that the communicant's allegations on access to information are inadmissible on the basis that the communicant has not made use of available domestic remedies before bringing a communication to the Compliance Committee.
2. In accordance with decisions I/7 and V/9 of the Parties, the Committee must take account of whether such remedies have been utilised and exhausted by the communicant. At the time of the complaint to the Committee from the communicant, the available remedies had not been used by the communicant.
3. At the general level, it is accepted that not every public authority will get every decision correct every time. As such, a State Party is not properly to be seen as in breach of the Convention because of a specific decision as long as there is suitable provision for any wrong decision to be corrected. Accordingly, a composite administrative and judicial process for reviewing specific decisions of individual public authorities is relied upon as forming part of the United Kingdom's implementation of the Convention. That process is in fact a standard feature of the body of UK law on the supervision of public authority decision-making, and is designed to offer affected parties an effective route of challenge and, where decision-making is held to be unlawful, appropriate remedies.
4. It follows that failure to exhaust appropriate domestic remedies is to be taken into account when assessing the merits of a complaint.
5. This is not to say that the decisions in this case were incorrect – we set out below why these were taken in accordance with the Convention – but the communicant's failure to make use of the available domestic remedies means that the Committee would only be looking at an incomplete aspect of the United Kingdom's implementation of the Convention if it were to consider these allegations further. The Committee can only get the complete picture if it can see whether potential corrective measures have been applied in circumstances where a member of the public disagrees with the public authority's decision.

Internal review and appeals to the Information Commissioner

6. The correspondence from Natural Resources Wales (NRW) to the communicant (dated 14 August 2013 (**Annex 1**) and 30 March 2015 (**Annex 2**)) contained

information headed “Rights of appeal”. This explained that, if the communicant is unsatisfied with the response he may contact NRW to ask for the decision to be reviewed. The letters give contact details of NRW’s Head of Governance and Communication, for this purpose.

7. The letters also stated if, following any NRW review of the decision, the communicant is still not satisfied, he may make an appeal to the Information Commissioner. The letter explained that the Information Commissioner is the statutory regulator for Freedom of Information. It provided the website and the contact details for the Office of the Information Commissioner.
8. The communicant did not make use of the internal NRW review mechanism. So far as we are aware, the communicant did not make an appeal to the Office of the Information Commissioner.
9. The communicant was made aware of the potential for recourse to the Information Commissioner (as per the Freedom of Information Act 2000, section 17¹ and the Environmental Information Regulations 2004, regulation 14²). Our position is that the communicant was aware of the procedures for having such recourse, not least since he has been a frequent correspondent with NRW under the 2000 Act.
10. The communicant has confirmed (see response to the Compliance Committee’s 19 November 2014 questions), that he has not approached the Information Commissioner to complain about the refusal to provide the information requested in 2013. He suggests in his reply to the Committee’s questions that the reason he did not approach the Information Commissioner was because he “felt they had to give the authority the benefit of the doubt”. This is an unfounded assertion by the communicant.
11. Insofar as the communicant is seeking to demonstrate that there is no obligation on him in this case to exhaust these domestic remedies before communicating under the Convention, our position is that his argument fails. The view that the Information Commissioner ‘[has] to give [NRW] the benefit of the doubt’ is not tenable: the Information Commissioner is an independent statutory office-holder with a remit to deal with appeals in relation to decisions of public authorities concerning the provision of information. Our position is that the communicant decided not to seek recourse via the Information Commissioner, and instead to move directly to communicate a complaint under the Convention. This is in, our view, an abuse of the right to make a communication, and grounds for considering these allegations to be inadmissible, under paragraph 20(b) of the annex to decision I/7.
12. The communicant further suggests that, having not brought his complaint to the Information Commissioner, he is now out of time for doing so. Our position is that this is not accurate as a matter of law. Under the 2000 Act, s. 50³ the Information Commissioner is obliged to make a decision following a complaint unless they

¹ <http://www.legislation.gov.uk/ukpga/2000/36/section/17>

² <http://www.legislation.gov.uk/uksi/2004/3391/regulation/14/made>

³ <http://www.legislation.gov.uk/ukpga/2000/36/section/50>

think that the complainant has not exhausted the public authority's complaints procedure, or there has been undue delay in making the application. Clearly there is some discretion here, and although the Information Commissioner's website suggests that 'undue delay' would amount to not raising the concerns within three months of the last meaningful contact with the organisation concerned, our position is that that is by no means a rule of law on which the communicant is entitled to rely. There have been cases where the Information Commissioner has considered complaints brought 12 months after the response was issued.

13. In any event, the communicant ought in our view not to be able to make an argument for admissibility or non-compliance which is based on his own failure to act. It would be contrary to the principle of exhaustion of domestic remedies if a communicant were to be able to argue successfully that his failure to use a domestic remedy within the prescribed time limit (and consequent lack of opportunity to do so) should allow him to circumvent the need to have exhausted the remedies which were available.

14. Our position is that these aspects of the communication are inadmissible because:

(i) the communicant has not exhausted the available domestic remedies; and

(ii) bringing this communication directly to the Compliance Committee without attempting to make use of domestic remedies is an abuse of the right to make communications.

Background

15. Notwithstanding our position that the allegations under Pillar I are inadmissible, we set out responses to the allegations below.

16. The allegation of a failure to comply with article 4 of the Convention is centred on requests for information on habitat conditions assessments. The communicant requested information from NRW on 17 July 2013.⁴ The request related to "the dune habitats and forest at the Newborough site within the Abermenai to Aberffraw dunes SAC" (special areas of conservation). The request was for "reports, surveys, monitoring consultants' reports and planning documents that relate to the conservation status and management of dune habitats and the future structure and planned management of the forest".

17. NRW responded to the communicant in correspondence dated 14 August 2013 (**Annex 1**). The correspondence was under the provisions of the Environmental Information Regulations 2004. The correspondence stated: "NRW holds a copy of 'Approaches to the selection of tree species and planning of future silviculture for the Newborough Forest' by Dr Scott Wilson. However, this report is not freely available and would need to be release[d] under a restricted license."

⁴ See Annex 13 to the communication.

18. NRW emailed the above report, together with Countryside Council for Wales (CCW) Science Report No. 1002, *"A Geomorphological Survey of Welsh Dune Systems to Determine Best Methods of Dune Rejuvenation"* by K. Pye & S.J. Blott, to the communicant on 16 August 2013.
19. At the time of the request (ATI-1446), the SAC monitoring reports were in draft form. Accordingly, the email from NRW to the communicant, dated 16 August 2013,⁵ stated *"However, the habitat assessment reports for the SAC are still not complete."*

Material in the course of completion

20. Article 4(3)(c) of the Convention provides that *"a request for environmental information may be refused if...the request concerns material in the course of completion..."*. It is the view of the United Kingdom that the response of NRW with regard to the habitat assessment reports (email dated 16 August 2013) is compatible with the requirements of the Convention.
21. It is noted that the communicant asserts that reports under Article 17 of the Habitats Directive (92/43/EEC) had already been published by the Joint Nature Conservation Committee (JNCC) – which advises the Welsh Government on UK-wide and international nature conservation issues – incorporating the information. This forms the basis for his argument that NRW's assertion that the information was not complete is incorrect. That is not the case: as has been explained to the communicant in further email correspondence between the communicant and NRW (dated 23 September 2013 and 18 October 2013 (**Annex 3**)). The email dated 23 September 2013 to the communicant referred to a conversation between the communicant and an NRW officer at a Newborough Community meeting on 5 September 2013, and explained

You expressed surprise that the Article 17 reporting was completed before the SAC reports were finalised. You should understand that the format of the Article 17 reports is now much more focussed on assessment of the whole habitat resource in the member state and eventually at the biogeographic region, rather than specifically on Natura 2000 sites. This requires a much broader body of information, along with expert judgement, and the contribution of the SAC monitoring process is relatively modest. While the raw data (showing whether the plot was favourable or unfavourable) from SAC monitoring across Wales was made available to experts, it may have contributed relatively little to these Article 17 reports. In the case of the sand dune reports, this appears to be the case, as the SAC monitoring reports are not referenced, though the raw data may have confirmed an overall expert opinion. So SAC monitoring reports are not deemed to be an essential prerequisite to Article 17 reporting, though they are clearly desirable to inform the process. As you will see from the supporting documentation supplied to JNCC, the sand dune report drew on a wider range of referenced material to give an assessment of this broader canvas.

⁵ See Annex 13 to the communication.

22. Thus, whilst the raw data from the monitoring work was used in the Article 17 assessments, the individual SAC monitoring reports, which include details of methods, results and discussion, were still in draft in order to provide the much more complete and rounded description and analysis as described in the email dated 23 September 2013. As the individual SAC monitoring reports were not complete, it would not have been in the public interest to provide reports in which the methods, results and discussion and conclusions were incomplete and unfinished.

Provision of the information to communicant

23. The information requested comprised of six separate reports (listed below). NRW received a further request from the communicant, dated 4 March 2015. The last of these reports was completed and formally signed off by NRW officers on 10 March 2015. Following the completion of all the reports, all the information requested was provided to the communicant on 30 March 2015 (covering letter is **Annex 2**). This information comprised the following reports:

- Y Twyni⁶ SAC Dune Slack Monitoring Report 2012
- Y Twyni SAC Embryonic Shifting Dunes Monitoring Report 2012
- Y Twyni SAC Fixed Dune Grassland Monitoring Report 2012
- Y Twyni SAC P. Ralfsii SAC Monitoring Report 2012
- Y Twyni SAC Rumex Monitoring Report 2012
- Y Twyni SAC Shifting Dune Monitoring Report 2012.

24. Our position is that the complaint is unfounded. NRW acted compatibly with the Convention by refusing to provide the reports at the time they were requested, on the basis that they were material in the course of completion and that it would not have been in the public interest to disclose it. In any event, the information originally requested was supplied to the communicant in March 2015.

2. Communicant's claim regarding Pillar II – public participation in decision-making

Scope of article 6(1)(a)

25. The communicant acknowledges that the Forest Management Plan is not within the scope of article 6(1)(a) of the Convention because the Plan is not a permit for an activity listed in annex I. That is common ground.

Article 6(1)(b)

Significance of the effect on the environment

26. The communicant's argument is that the Plan is covered by article 6(1)(b) (i.e. it is a decision on proposed activities which is not listed in annex I but which may have a significant effect on the environment). We note that the Convention

⁶ Y Twyni o Abermenai i Aberffraw is the Welsh name for Abermenai to Aberffraw Dunes.

provides expressly that it is for Parties to determine whether such proposed activities are covered.

27. In terms of assessing the significance of the effect on the environment, the following are considered to be of importance in the determination of this issue:

- The total area of the forest is 689 ha, all conifer plantation.
- For the period to 2015, the Forest Management Plan 2010-15 plan allocated 22.5 ha of shoreline felling for remobilisation of shoreline dune features. This amounts to 3.3% of the total area of forest.
- Only 2 x 3ha = 6ha total of the 22.5 ha planned have been cleared in the present plan period, i.e. <1% of the total forest area. These blocks are located on the seaward edge of the forest, on former dunes, adjacent to the beach and un-afforested dunes. As such they are subject to severe wind and salt stress resulting in stunted growth and a high proportion of tree mortality. These areas are being monitored.
- Up to 4 ha along the forest/dune boundary might be felled as part of ongoing forest management to support hydrological research. This allocation has not been used to date and there are no plans to use this before end 2015. NRW is gathering baseline data at this stage.

28. In November 2010, the Forestry Commission Wales screened the Forest Management Plan in relation to assessment under the Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999 (**Annex 4**). The threshold for consideration of possible significant effects for deforestation within a protected area is 0.5 ha and as such the plan was considered under these Regulations.

29. The conclusion of Forestry Commission Wales was that the impact of the activities was not “significant enough to require a formal assessment under these regulations”, and so the activities did not require Forestry Commission Wales consent under those Regulations.

30. Thus, the Forest Management Plan 2010-15 as a whole was assessed by Forestry Commission Wales not to have significant environmental effect. The actual impact of the Plan in the present plan period has been the felling of less than 1% of the total forest area, mostly of trees that were dead or stunted.

31. This supports the view that the plans are not “significant” in the context of the requirements of article 6(1)(b) of the Convention.

Scope of article 6(1)(b)

32. Article 6(1)(b) provides that parties “*shall apply the provisions of the article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment*”. The focus of the communicant’s complaint concerns the Forestry Management Plan.

33. We note that the FMP did not, of itself, allow any decisions to be taken on whether specific activities should be carried out.

34. The need for a separate licence for felling to have been obtained to allow activities to be carried out underlies this. The FMP set the context for such a decision concerning the issuing of a felling licence to permit the activities but cannot be said to be a “decision on a proposed activity”.
35. Forestry Commission Wales issued a certificate of approval for tree felling under Forestry Design Plan ref 7/10-11 Newborough on 22 December 2010⁷. This licence is current until December 2015. Without a current design plan and licence, NRW could not demonstrate the chain of custody for selling of timber products from a renewable resource. NRW would only be allowed to do essential forest maintenance without a licence.
- 36. Our overall view is that these allegations are outside the scope of article 6; and that non-compliance has not been substantiated.**
37. Consideration is required as to whether this complaint properly comes within article 6 at all (which is broadly concerned with permitting decisions) or article 7 (which deals with plans and programmes relating to the environment). However, we note that the communicant has made no allegation of breach of article 7 of the Convention.

Public engagement on the Forestry Management Plan

38. Article 7 requires that Parties “*shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans or programmes relating to the environment*”.
39. The Forestry Management Plan was informed by a large public consultation exercise on the issues affecting the site from 2004 to 2007. The Countryside Council for Wales and Forestry Commission jointly held extensive public meetings with the community of Newborough. The schedule of meetings shows 49 separate public meetings and opportunities for consultation (plus one aborted meeting) in the period 7 May 2004 – 25 April 2006. The schedule of meetings referred to is attached as **Annex 5**.
40. This engagement resulted in three main reports:
- **Newborough Forest Redesign – public consultation Report (2004) (Annex 6)**, produced independently by Lindsay Colbourne Associates. This reported the views of members of the public gathered from public drop-in sessions held during May, July and August 2004 and the public meetings of 20 September 2004 and 8 November 2004. The report notes that:
 - Approximately 300 people attended the drop-ins. Some people came several times. They were able to give feedback verbally, on flip charts or on questionnaires.

⁷ Annex 6 to the communicant’s response, dated 5 December 2014, to the Committee’s questions contains the application form for this licence, dated 1 December 2009. See also **Annex 4**.

- A total of 41 questionnaires were returned. Approximately 250 people attended the public meeting on 20 September in Llangefni. They were able to ask questions and make comments verbally or on comment forms.
 - Approximately 60 people attended the public meeting in Newborough on 8 November, although 113 people had registered to attend. They were able to ask questions and make comments verbally or on comment forms.
 - The final report was circulated to all participants attending drop-ins or the public meeting who left their name/address.
- **Newborough Forest and Warren – Full Draft Conclusions and Recommendations from the Liaison Partnership report (June 2006) (Annex 7)** produced on behalf of the Newborough Forest Liaison Partnership. This report notes that *The partnership includes about 50 people who represent local residents, local and voluntary groups, as well as organisations such as the Newborough Community Council, Forestry Commission, the Countryside Council for Wales and Anglesey Council. The Partnership has always been open to all individuals who have an interest in the site and its management.*
 - **Newborough Forest and Warren - consultation report (November 2006) (Annex 8)**, produced independently by Lindsay Colbourne Associates. This report notes that a 'full' questionnaire and newsletter were sent by the Newborough Forest Liaison Partnership in August 2006 to
 - all residents in Rhosyr Ward
 - all who left their contact details in the last round of consultation
 - all key fob holders
 The 'full' questionnaire and newsletter were also
 - available in the post office and the Prichard Jones Institute, Newborough
 - available from the Forestry Commission Wales website
 - handed out at the Newborough Festival on 17 September 2006.
41. To reach as many people as possible, and to raise interest in the future of the Forest and Warren, a festival was held by the Partnership on 17 September 2006. In addition to a range of activities, a 'short' questionnaire and children's versions of the questionnaire were handed out alongside the longer version. Approximately 500 people attended the festival on 17 September 2006. A total of 448 questionnaires were returned, of which 18 were short or children's questionnaires and 430 were long (full) questionnaires. The report provides a fully transcribed report of all the comments received.
42. These three reports very much informed the writing of the Forest Management Plan. NRW staff are not aware of any similar project which has received this level of public consultation and participation in Wales.
43. In August 2007 the 14th Newborough Liaison Partnership meeting considered and gave feedback on the then draft Forest Design Plan.
44. In 2009 the (then) Welsh Assembly Government requested a 'Review of Science' to consider the queries being raised concerning the CCW's advice on the conservation status of the Annex I and Annex II habitats and species in the Abermenai to Aberffraw Special Area of Conservation, and the most appropriate

management of the forest and habitats adjacent to it. The timeline to the review of science is detailed in **Annex 9**.

45. In terms of seeking public input into the FMP at a later date:

- There was a meeting of the Newborough Forest Liaison Partnership on 22 July 2010 which included a *Presentation on the Key Aspects of the Newborough Forest Management Plan*. Also on the agenda was *Feedback on the Science Review*. A note of the meeting (**Annex 10**) shows that the list of attendees included the communicant.
- A further meeting of the Newborough Forest Liaison Partnership on 21 October 2010, which the communicant attended, included a presentation on *Newborough Forest Management Plan and Discussion on Management Plan*

46. The above demonstrates significant and ongoing public participation well before the FMP was finalised.

47. We again note that the communicant has made no allegation of breach of article 7.

48. *Based on the above evidence, and for the avoidance of doubt, however, our view is that the article 7 requirements are met.*

49. *We also consider that the evidence above shows that paragraphs 3, 4 and 8 of article 6, namely that the public participation includes reasonable time frames, takes place at an early stage when options are open and that due account is taken of public comments, have been met.*

3. Communicant's claim regarding Pillar III – right to access to justice in environmental matters

50. The alleged non-compliance with the access to justice requirements in article 9 concerns an arbitration procedure discussed as being a way of resolving differences regarding the Newborough Science Review.

Inadmissibility of allegations: arbitration is not within the scope of article 9; use and exhaustion of domestic remedies

51. Our position is that an arbitration procedure of the sort described in the communication is outside the scope of article 9 and the Convention more generally. The Convention makes no specific reference to arbitration, except in the context of resolving disputes between State Parties. The Convention *Implementation Guide* itself describes an arbitration process (in that context) as “a process that it is used when parties cannot reach an agreement independently ...” (page 242).

52. It is clear from this description – and how the term is ordinarily understood – that arbitration is not to be regarded as a review procedure for challenging decisions, acts or omissions of public authorities and it cannot therefore be considered to be within the scope of article 9. These allegations should be considered inadmissible on the basis that they do not fall within the Convention.

53. In addition to this, we submit that domestic remedies have not been exhausted before bringing the communication on the access to justice grounds (see above). The communicant appears to have made no attempt to make use of the avenues available to challenge the decisions he disagrees with and seek appropriate remedies. Nor did he mention any reasons for not bringing such a challenge until prompted by the Committee in its questions. We submit that it is precisely those avenues and remedies (internal mechanisms, recourse to the Information Commissioner where appropriate, judicial review) which demonstrate that the UK is compatible with the guarantees enshrined in article 9.

54. In any case (see below), the view was properly taken by the Welsh Ministers that arbitration was not necessary in light of the way the position developed.

55. The communicant's response to the Committee's questions suggests that the reason for not making use of available domestic remedies was the cost of judicial review proceedings. The communicant does not refer to the measures in place providing cost protection for members of the public in judicial review claims against public authorities. In any event, these matters have already been considered in detail by the Committee and remain the subject of ongoing discussions under decision V/9n. We do not consider that it would make sense – given the workload of the Committee, the ongoing discussions on this matter, and the lack of any argument from the communicant in support of this new information – for the Committee to consider these points further here.

56. We consider that the allegations relating to this arbitration procedure are inadmissible because they are outside the scope of the Convention.

57. More generally, the communicant has made no attempt to use available domestic remedies. In explaining why they have not done so, the communication has not substantiated their allegations. In any case, the issue of costs in judicial review cases – mentioned by the communicant in their reply to the Committee's questions – is properly dealt with in the framework of discussions under decision V/9n, rather than in this communication, which does not raise any new issues in this regard.

Account of events in relation to the Review of Science

58. For the sake of completeness, and without prejudice the principal argument that arbitration is not required by article 9 and not within the scope of the Convention, a timeline of events in relation to this is included as **Annex 9**.

59. The note of the meeting (dated 17 August 2010), which was attended by the communicant as a representative of the Newborough Forest Partnership, agreed the following:

The Newborough Science Review should move to independent arbitration in line with the WAG/CCW/GC Process Statement of 9 September 2009

60. In August 2011, the Minister wrote to Albert Owen MP and to Ieuan Wyn Jones AM⁸ explaining the following:

I understand that the terms of reference for the Review made provision for arbitration by a single independent scientist if a consensus was not forthcoming. I have seen CCW's subsequent proposal to convene an expert panel of scientists (agreed by both parties) but I am not convinced that it represents the best way forward.

Given the already protracted nature of the Newborough case, I believe a more cost-effective and streamlined approach is necessary. I have asked the Welsh Government's Chief Scientific Adviser, Professor John Harries to examine the scientific aspects of the case and determine what if any arbitration is necessary.

The Forestry Commission's Forest Management Plan for 2010-2015 has been running for over six months, and requires clarity on some of the scientific issues in order to progress. My officials have been in contact with representatives of Newborough Forest Partnership and CCW and it appears that there is considerable potential for agreement on a way forward. Both parties have been asked to outline their scientific concerns and submit them for the consideration of Professor Harries. I look forward to receiving his advice and expect that it will lead to the development of appropriate management measures for the site.

61. In late 2011 those parties which had contributed to the Review of Science were asked to document their positions for consideration by the Welsh Government's Chief Scientific Advisor (CSA). The Newborough Forest Partnership submitted a comprehensive briefing to the CSA which he reviewed.

62. As a result of his review, the CSA concluded there was insufficient evidence to support decision-making and advised that further scientific work, including on-site trials and research, should be undertaken to help guide future management. The remaining steps are as set out in **Annex 9**.

⁸ See Annex 7 to the communication.

LIST OF ANNEXURES

- Annex 1** Letter from NRW to communicant dated 14 August 2013
- Annex 2** Letter from NRW to communicant dated 30 March 2015
- Annex 3** Email correspondence between NRW and communicant dated 23 September 2013 – 22 October 2013
- Annex 4** Forestry Commission Wales Checklist for Environmental Impact Assessment, 17 November 2010 and Certificate of Approval for Tree Felling, 22 December 2010
- Annex 5** Schedule of meetings in the period 7 May 2004 – 25 April 2006
- Annex 6** Summary Report of Newborough Forest Redesign Public Consultation May – September 2004
- Annex 7** Newborough Forest and Warren – Full Draft Conclusions and Recommendations from the Liaison Partnership dated June 2006
- Annex 8** Newborough Forest and Warren – Full Transcribed Report of All Comments Received dated September 2006
- Annex 9** Review of science – timeline of events
- Annex 10** Note of Newborough Liaison Partnership Meeting, 22 July 2010
- Annex 11** Text of message from Newborough Forest Liaison Partnership to CEO of CCW dated 19 July 2009