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Your ref:

PRE/ACCC/C/2016/142

20 September 2016

Dear Ms Marshall

PRE/ACCC/C/2016/142 (United Kingdom)

Ahead of the Committee's meeting to discuss the preliminary admissibility of the above communication, we attach the United Kingdom's observations.

We intend to dial in to the meeting on 27 September and look forward to receiving details in due course.

Yours sincerely

Brian K A Ruddle
For the Treasury Solicitor

United Kingdom comments on the preliminary admissibility of

PRE/ACCC/C/2016/142 (United Kingdom)

20 September 2016

Summary

1. We consider that communication PRE/ACCC/C/2016/142 is inadmissible for the following reasons:
 - The communication does **not include corroborating information**, as is required under paragraph 19 of the annex to decision I/7, to substantiate the allegations. There is no argument or corroborating information to support the asserted breaches of article 9(2), (3) or (5) of the Aarhus Convention. The communicant does not engage with the requirements of the Convention beyond making bald assertions that these provisions have been breached.
 - Similarly, **no corroborating information** is provided in relation to the alleged breaches of the article 9(4) obligations. Where information is provided by the communicant, this appears to only relate to complaints about the outcome of his litigation before the courts. The communicant has conflated his disagreement with those outcomes with breaches of the Convention. Consequently, some of these arguments relate to matters that are not within scope of the Convention, making them, in addition, **incompatible with the provisions of the Convention** under paragraph 20(d) of the annex to decision I/7.
 - Notwithstanding the absence of corroborating information, the issue of prohibitively expensive costs raised by the communicant in relation to article 9(4) and (5) is **already under consideration by the Committee**. The Committee's view is that the recommendations made on costs under decision IV/9i (and by implication under decision V/9n) apply to costs in all procedures in the United Kingdom. In accordance with the Committee's established practice, reflecting the growing pressure on the Committee's time, we submit that the issue of costs is best addressed through the ongoing dialogue between the United Kingdom and the Committee on decision V/9n, and that there is no need to progress this communication..
2. We therefore request that the Committee finds the communication to be inadmissible and closes the case.
3. In order to assist the Committee ahead of the meeting to discuss the preliminary admissibility of this communication on 27 September, we have set out, in advance of that meeting, the reasoning we will talk the Committee through. We

are of course happy to provide any further information the Committee feels that it needs in order to determine the issue.

Comments on the admissibility of the communication

Failure to provide corroborating information: non-application of article 9(2)

4. The facts of the communicator's case appear completely irrelevant to article 9(2) of the Convention. In order to be within the scope of that paragraph in article 9, the communicator would need to demonstrate that the decision, act or omission in question was subject to the provisions of article 6 or be specifically provided for as such under national law. The communicator appears to acknowledge that this provision is not relevant in Part VI of the communication when he states: "In a sense it is [paragraph] 3 that is key".
5. The communicator has provided no information to support any suggestion that the litter issue was within the scope of article 6 or article 9(2). We therefore request that the Committee disregard the allegation of non-compliance with article 9(2) for **lack of corroborating information**.

Failure to provide corroborating information: article 9(3)

6. Article 9(3) requires that "...members of the public have access to administrative or judicial procedures to challenge acts and omissions by...public authorities which contravene provisions of its national law relating to the environment".
7. The communicator has provided no argument or corroborating information to suggest that he did not have access to such procedures. This is unsurprising because the communicator's arguments are all centred on him having access to procedures to challenge a public authority he considered to have breached legislation relating to the environment. The complaints are around his dissatisfaction with those procedures in terms of article 9(4) rather than there being no procedures available under article 9(3).
8. In the absence of any argument and a **lack of corroborating information** to support the assertion that article 9(3) was breached, we request that the Committee disregard this allegation.

Failure to provide corroborating information; incompatibility with the provisions of the Convention: article 9(4)

9. The communicator makes a number of allegations that the process mentioned in their case breach the requirement of article 9(4) that "procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive".

10. The alleged breaches of article 9(4) relating to fairness, effective remedies and timeliness are set out in paragraphs (b) to (o) in Part VI of the communication.
11. None of these allegations include sufficient corroborating information to indicate a potential breach. It is clear that the communicant disagrees with the outcome of each stage of the litigation in which he has been engaged. The arguments and information provided by the communicant concern his disagreement with the magistrates' court, the High Court and the Court of Appeal, rather than corroborating any alleged breach of Convention requirements.
12. In broad terms, the communicant appears to consider that it is unfair that their submissions to the courts were not accepted. The concept of fairness under article 9(4) of the Convention is concerned with whether the process and final decision is "impartial and free from prejudice, favouritism or self-interest."¹ The communicant does not express any of his allegations of non-compliance in these terms and provides no corroborating information to support an argument that the requirement for procedures to be fair has, in Convention terms, been breached.
13. Instead the communicant has conflated their own dissatisfaction with the outcome of the litigation with Convention requirements on fairness, and has therefore omitted to provide any corroborating information to support the latter.
14. In order to assist the Committee, reference is made to the paragraphs set out in the communication below:
 - Paragraphs (b) and (d) centre on the **fairness** of how the requirement for the grounds for bringing the proceedings to be reasonable was applied by the courts. This follows the communicant's decision to decline the offer by Birmingham City Council to meet to discuss the issue and potentially avoid litigation. The communicant is conflating their disagreement with the decision of the courts with a breach of the Convention requirement to be fair. There is no suggestion, let alone any supporting evidence, that the courts were not, to quote the *Implementation Guide*, "impartial and free from prejudice, favouritism or self-interest". Neither is there any suggestion that the communicant was discriminated against on grounds such as age, gender or religion. The allegations are **not supported by corroborating information**.
 - Paragraph (c) alleges **unfairness** in relation to what the communicant was told by the local authority, suggesting that they should be able to rely on what they were told. Aside from inconsistencies between what the communicant said they were told here and in paragraph 10,² this seems to be irrelevant to

¹ *The Aarhus Convention: An Implementation Guide* (2nd edition), page 201.

² In paragraph 10 of the communication the communicant acknowledges that he was told by the Council by phone and e-mail in relation to the litter that "they wouldn't leave it there for ever", while in

the requirements of the Convention and therefore outside the scope of the compliance mechanism. The issue here seems to be what the communicant was or was not told by Birmingham City Council. This is nothing to do with the Convention requirement that procedures for challenging acts or omissions by local authorities are fair. The allegation is **irrelevant to the requirements of the Convention** and **incompatible with the provisions of the Convention**.

- Paragraphs (e) and (f) suggest that the communicant was denied the right to appeal, but he in fact had his case heard by three courts, the magistrates', the High Court and the Court of Appeal. The communicant again appears to be conflating his disagreement with the outcome of each of those stages with not having had the right to appeal and **unfairness** under the Convention. The communicant states that the appeal procedure is unfair but does not provide corroborating information for the allegation of unfairness. In this type of appeal, the lower court sets out the issues (the 'stated case') for the appellate court to consider and, if the appellant disagrees with the stated case, the appellant may make an application to the appellate court, asking that it requires the lower court to amend the stated case. The communicant states that this procedure creates a "double hurdle" but does not provide corroborating information to explain what he means by a "double hurdle" or why the procedure results in unfairness.
- Paragraph (g) suggests that the Court of Appeal "sat" on the communicant's application for a second appeal, with the implication that was not **timely** in accordance with Convention requirements. This assertion is made without any argument or evidence to demonstrate how the Convention was breached. The communicant does **not provide any corroborating information** to substantiate the allegation.
- Paragraph (h) includes a bald assertion, with no supporting information, that the "**remedy is not effective**". This seems to be another conflation between losing the case and systemic problems with the remedies available to the courts. There is no suggestion that the remedy sought by the communicant – a litter abatement order – was not effective. That the court found it was not necessary in the circumstances to make the order is not the same as saying that the order provides an ineffective remedy in Convention terms. Again, the allegation is **not supported by any corroborating information**.
- In paragraph (i) the communicant suggests that the Court of Appeal refused to consider the Aarhus Convention in the case. The communicant has not

paragraph (c) of Part VI the communicant claims that "The local authority told me in writing they were not going to clear up the rubbish".

provided the judgment of the court or even set out what he considers it to have said. The communicant suggests that there is a breach of the requirement on **fairness**, but it is impossible to tell what breach is being alleged. No argument or information is provided to support an assertion that the Court of Appeal acted unfairly. This is clearly **inadmissible for lack of corroborating information**.

- Similarly, with paragraph (j) it is difficult to tell what is being suggested from the very limited information provided by the communicant. The communicant suggests that there has been a breach of the requirement for the procedure to be **fair**. Again, there is **no corroborating information** to enable us to understand the allegation made here, let alone for that to be support.
- Paragraphs (k), (l), (m) and (n) all seem to be about the communicant's failure to take up the Council's offer to meet. Again, this all appears to be to do with the litigation going against the communicant rather than any specific or systematic examples of **unfairness** that breaches the Convention. The allegations are not formulated as breaches of the Convention and are **without corroborating information**.
- Paragraph (o) includes a statement that there are "probably other problems" with the process under article 9(4), but this is clearly **without any corroborating information**.

15. We therefore request that the Committee dismiss these allegations as being inadmissible.

Failure to provide corroborating information: article 9(5)

16. The communicant alleges that article 9(5) of the Convention, which requires Parties to "consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice" has been breached.

17. The communicant appears to provide only one sentence in support of this allegation. This is the assertion that only certain modifications to the civil procedure rules have been made; this does not engage with the requirement in article 9(5) which is that the Party *considers* the establishment of appropriate mechanisms. The communicant has not, for example, made reference to the 2015 consultation by the Ministry of Justice which asked consultees whether environmental costs protection should be extended to other types of challenge.

18. The communicant has **failed to provide corroborating information** in relation to this allegation and simply relies on an assertion which does not engage with

what is required under article 9(5). We submit that the Committee find this allegation to be inadmissible.

Issues already under consideration by the Compliance Committee: article 9(4) and (5)

19. None of the communicant's allegations are admissible on the basis that the communicant has not provided corroborating information. The information that has been provided is relevant to the substance of the communicant's litigation rather than to breaches of the Convention.
20. Notwithstanding this, in relation to the communicant's allegations on costs come within **matters already being considered by the Committee**. Since the adoption of decision IV/9i, there has been an ongoing dialogue between the Committee and the United Kingdom on the issue of costs in environmental litigation in the United Kingdom. This has continued since the adoption of decision V/9n in 2014.
21. The Committee has developed the practice – reflected in the *Guidance Document on the Aarhus Convention Compliance Mechanism* (page 22) – of not progressing communications that deal with issues that the Committee has already tackled. Indeed the Committee's stated position is that the recommendations in decision IV/9i "concerned costs in all court procedures" in the United Kingdom.³
22. If the Committee were to find the communication preliminarily admissible – and the United Kingdom strongly maintains the view that the communication is inadmissible for the reasons set out above – then we submit that it would be in accordance with established practice for the matters to be taken up in the context of decision V/9n rather than a fresh communication. This is the one hundred and forty-second communication that has come before the Committee. Given the pressures on the Committee's resources, it would be difficult to justify parallel processes being conducted on the same broad issue.

³ Compliance Committee's Report to the 5th Meeting of the Parties on the United Kingdom's compliance with obligations under the Convention, 22 May 2014 (ECE/MP.PP/2014/23), at paragraph 34. The United Kingdom expressed the view that costs in private nuisance proceedings were not covered because they were fundamentally different by their nature and agreed with the Committee's decision that those issues should be dealt with separately (as they were in communications ACCC/C/2013/85 (United Kingdom) and ACCC/C/2013/86 (United Kingdom)).