

Aarhus Compliance Committee

UK's 3rd Progress Report on Aarhus Convention Decision VI/8k

On the matter of non-compliance of Art.9, Aarhus Convention by the UK

Comments of Communicants C85 & 86 on UK's 3rd Progress Report

1. This is a short note on behalf of Communicants C85 and C86 in response to the UK's 3rd progress report and which focuses specifically on the failure by the UK to comply with Article 9 of the Aarhus Convention in respect of private nuisance.
2. As a preliminary point it is disappointing to note that after several years of non-compliance all the UK has to say in its 3rd Progress Report of relevance to C85 and C86 is: -

'43. The UK Government has committed to undertaking a review of the ECPR, and the current view is that this is the most appropriate vehicle with which to consider the scope of the ECPR with respect to private nuisance claims.'
3. Communicants 85 & 86 do not understand what paragraph 43 means in practical terms. It is so scrupulously vague, non-committal and circular such as to be entirely meaningless. It also fails to provide any evidence of steps having been taken to bring about compliance.
4. The only thing that is clear from the comment at paragraph 43 is that the UK has failed to take any action to address non-compliance despite the Committee's findings in C85 & C86 being formally adopted over three years ago, a chronology of the relevant events is appended for ease of reference.

5. The UK has also failed to have regard to the very clear direction given by the Committee, at paragraph 129 of its Second Progress review, which states ‘The Committee invites the Party concerned together with its final progress report to provide the text of any practical and legislative measures it has by that date taken...’.
6. The suggestion now made that the ECPR could be extended in some way to private nuisance claims is nothing new. Communicants 85 and 86 proposed the extension of what was then referred to as the PCO (Protective Costs Orders) regime in their submissions to the Committee at the hearing in Geneva in March 2014, we refer to paragraphs 28 (c) and 32 (b) of the Findings adopted by the Committee on 17 June 2015 . However, to propose ‘undertaking a review’ as to this at this stage is simply not, with respect to the UK, an adequate response to the Committee’s findings.
7. The Communicants also note that the UK has, once again, failed to explain why the introduction of Qualified One-way Costs Shifting (‘QOCS’) is not an appropriate measure to overcome the problems identified by the Committee. The Communicants have drafted the text of a proposed amendment to the relevant rule, Civil Procedure Rule 44.13, for the UK to consider. This can be found at Annex 1 to Communicants Joint Note of 13 March 2018. The Communicants have attempted to be helpful by drafting this, but the proposal is being actively ignored for reasons why are not clear to the Communicants.
8. The UK will be aware that QCOS has applied to claims for personal injury since 2013. The principles are well established and enable claimants to access justice in personal injury claims. There is no apparent reason why QOCS cannot be used in private nuisance claims to enable claimants to access the courts.

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15 October 2020

Appendix

Chronology of key events

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|--------------------------|---|
| 18 September 2012 | Communication by Environmental Law Foundation ACCC/C/2013/85 |
| 28 February 2013 | Communication by Alyson Austin ACCC/C/2013/86. |
| 25-28 March 2014 | Committee hearing to discuss the substance of communications ACCC/C/2013/85 & 86 (Geneva). |
| 17 June 2015 | Findings and recommendations with regard to communications ACCC/C/2013/85 & 86: - |

‘A. Main findings with regard to non-compliance

117. The Committee finds that, by failing to ensure that private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention, and for which there is no fully adequate alternative procedure, are not prohibitively expensive, the Party concerned fails to comply with article 9, paragraph 4, of the Convention (see para. 114 above).

B. Recommendations

118. The Committee, pursuant to paragraph 35 of the annex to decision I/7 of the Meeting of the Parties, recommends that the Meeting of the Parties, pursuant to paragraph 37 (b) of the annex to decision I/7, recommends that the Party concerned review its system for allocating costs in private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention and undertake practical and legislative measures to overcome the

problems identified in paragraphs 109 to 114 above to ensure that such procedures, where there is no fully adequate alternative procedure, are not prohibitively expensive.'

11–13 September 2017 Meeting of the Parties 6th session (Montenegro): -

'5. *Endorses* the finding of the Committee with regard to communications ACCC/C/2013/85 and ACCC/C/2013/86 that, by failing to ensure that private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention, and for which there is no fully adequate alternative procedure, are not prohibitively expensive, the Party concerned fails to comply with article 9, paragraph 4, of the Convention;

6. *Recommends* that the Party concerned review its system for allocating costs in private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention and undertake practical and legislative measures to overcome the problems identified in paragraphs 109 to 114 of the Committee's findings on communications ACCC/C/2013/85 and ACCC/C/2013/86 to ensure that such procedures, where there is no fully adequate alternative procedure, are not prohibitively expensive.;

26 February 2019 First progress review of the implementation of decision VI/8k: -

'107. With respect to paragraph 6 of the decision VI/8k, in its first progress report the United Kingdom does not report any progress as regards the allocation of costs in private nuisance proceedings, but only that it continues to engage with key stakeholders to consider options.

...

108. The United Kingdom has not provided the Committee with any evidence that it has taken any practical or legislative measures to ensure that procedures in private

nuisance proceedings, where there is no fully adequate procedure, are not prohibitively expensive. Consequently, the Committee find that the United Kingdom has not yet met paragraph 6 of decision VI/8k.

IV Conclusions

137. With respect to paragraph 6 of decision VI/8k, the Committee invited the United Kingdom, in its second progress report to provide the texts of all legislative measures and an explanation of all practical measures it has taken to fulfil paragraph 6, clearly indicating when each measure entered into force, as well as to provide the texts of any such measures then in draft form together with the expected timeline for their adoption.'

6 March 2020 Second progress review of implementation of decision VI/8k: -

'Paragraph 6 of decision VI/8k

127. With respect to paragraph 6 of decision VI/8k, the Party concerned reports that it "continues to consider the recommendation in paragraph 6 of decision VI/8k".⁸⁶ The Party concerned however does not report on any practical or legislative measures it has taken to ensure that its system for allocating costs in private nuisance proceedings within the scope of article 9(3) of the Convention, and for which there is no fully adequate alternative procedure, is not prohibitively expensive.

128. The communicants of communications ACCC/C/2013/85 and ACCC/C/2013/86 confirm that the Party concerned has failed to extend the CPR to cover such claims.

129. In light of the above, the Committee considers that the Party concerned has not yet met the requirements of paragraph 6 of decision VI/8k, nor demonstrated any progress in that direction. The Committee invites the Party

concerned together with its final progress report to provide the text of any practical and legislative measures it has by that date taken to ensure that its system for allocating costs in private nuisance proceedings within the scope of article 9(3) of the Convention and for which there is no fully adequate alternative procedure, is not prohibitively expensive.

158. The Committee reminds the Party concerned that all measures necessary to implement decision VI/8k must be completed by, and reported upon, by no later than 1 October 2020, as that will be the final opportunity for the Party concerned to demonstrate to the Committee that it has fully met the requirements of decision VI/8k.'