Communication numbers ACCC/C/2013/85 & 86

Aarhus Compliance Committee - 66th Meeting
Open session on Decision VI/8k (2.00 pm, Friday, 13 March 2020)

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

Note of oral presentation points by representatives of Communicants C85 & 86

1. The Communicants to ACCC/C/2013/85 & 86 (C-85 and C-86) welcome the 2\textsuperscript{nd} progress review of the implementation of Decision VI/8k and its findings in relation to the United Kingdom (UK). On private nuisance specifically, we agree entirely with the comments at paragraph 127-128 and elsewhere. To confirm, our understanding is that the UK has done absolutely nothing to address the concerns raised. This is despite the Committee’s findings in C-85 & C-86 being formally adopted almost 5 years ago (17 June 2015).

2. As environmental law practitioners, we continue to have instances where unlawful or illegal environmental concerns are unable to be addressed through the use of legal mechanisms because of the costs risks involved in pursuing legal proceedings: The access to justice rights under article 9 of the Aarhus Convention 1998 are being denied.

3. The Communicants have suggested a very simple solution to bring about compliance with the Convention for private nuisance; this is not a complex or difficult issue. The Communicants have proposed the introduction of Qualified One-way Costs Shifting (‘QOCS’) for environmental claims that fall under the convention which will, they say, bring the UK into compliance.

4. The Communicants have drafted the text of the proposed amendment to the relevant rule, Civil Procedure Rule 44.13, for the UK to consider. This can be found at annex 1 to the joint note of 13 March 2018. The UK appears to have ignored this suggestion.

5. The Communicants wish to add that the principle of QOCS for personal injury claims has been in place since 2013. It is working well and is understood by all practitioners. Its principles are well established and enable claimants access to
justice in personal injury claims. However, that same right of access is not available to those seeking redress in claims of private nuisance. There is no apparent reason why such an application of QOCS in private nuisance claims cannot achieve the required objective.

6. In February 2019 the UK, through the Ministry of Justice, following consultation, published its Post-Implementation Review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2013 ('LASPO 2013'). This is the very legislation that resulted in the finding of non-compliance. The review did not mention the findings of the Committee or Decision VI8/k paragraphs 6 and 7. This is despite the fact that Communicant 85 responded to the consultation making reference to the decision and the proposed amendment in an email to David Smeeton of the Ministry of Justice dated 22 August 2018 a copy of which is attached (note that Mr Smeeton was in attendance for the UK at the open session).

7. The perspective is that the UK Government is not really taking the environmental rights seriously under the Convention 1998 seriously. Contrary to Article 9(5) of the Convention the UK appears make matters more difficult rather than less; where the opportunity to acknowledge the rights in emerging legislation (arguably, the most important piece of environmental law for over 30 years) the UK has dropped the Aarhus rights from draft provisions notwithstanding that the legislation deals with many other aspects of environmental governance post-Brexit.

8. The Communicants concern is that there is a real danger that unless significant progress is made the UK will still be in breach at the next Meeting of the Parties. The Communicants therefore invite the UK to agree to set out in detail in its next report what it has done to address the Committee’s recommendation and to specifically address the proposed amendment to CPR 44.13 referred to above.

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