20 November 2020

ACCC/C/2015/131 (United Kingdom)
Final Submission from the Communicant

Background

1. My communication alleging non-compliance with the Aarhus Convention by the United Kingdom concerns a multi-stage decision-making procedure granting permission for redevelopment of a former hospital site in a suburb of London, UK.

2. The permit procedure consisted of:

   - an initial "Screening Opinion" which determined whether or not the project was deemed likely to have a significant impact on the environment;
   - an initial grant of conditional "planning permission" which required that further environmental reports and construction/technical details (e.g. noise, drainage, etc) must be submitted to the local authority for approval before development could commence;
   - approval of multiple "subsequent applications" containing those further details required by the initial planning permission.

3. I consider all stages of the decision-making process in this case to have been defective and not in compliance with the Convention.

Article 5

4. The initial planning application was screened as potential EIA development by the local authority, and a Screening Opinion was adopted in March 2012. The public were not notified that the project was being screened, and were not informed of the outcome of the screening process until July 2014.

5. In December 2012, following consultation with the public, the project was granted conditional planning permission. The Decision Notice granting conditional planning permission was not placed on the planning register until September 2013.

6. As the UK points out in paragraph 44 of its response of 13 May 2016, the Committee is concerned with ensuring that environmental information available to the authorities taking the decision was accessible to the public, see paragraph 79 of the Committee's decision in ACCC/C/2006/16 (Lithuania):

   79. With regard to the communicants' allegations …the role of the committee is to find out if the data that were available for the authorities taking the decision were accessible to the public and not to check whether the data available were accurate.

7. Similarly, in this case the pertinent issue is whether information relevant to the decision-making processes was in the possession of the local authority; was available to the planning committee members who made the decision to grant the initial planning permission; and was accessible to the public during the decision-making process.

Article 5(1)

8. The local authority did not possess all the information relevant to the decision-making processes including responses from two of the statutory consultees (English Heritage and Greater London Archaeological Advisory Service). Relevant information (i.e. the Screening Opinion, the responses of Natural England, the Environment Agency and several other statutory consultees, and the Noise Assessment) was not placed on the planning register and, as a result, was not available to the planning committee members. I consider this to be in breach of Article 5(1).

Article 5(2)

9. Relevant information was not accessible to the public during the decision-making processes, and the decisions were not made available to the public in a timely manner. Without the relevant information,

the public were unable to participate effectively or challenge the decisions at the time they were made, in breach of Article 5(2).

10. In its correspondence of 31 October 2016, the UK says these failures can be challenged by judicial review and therefore it is compliant with the Convention. But the very long delays by the Council in making documents available to the public meant that "events on the ground" had moved on to such an extent that judicial review of the earlier decisions would have been pointless and/or considered out of time. Before the results of the earlier decisions were even released to the public, a number of subsequent applications had already been submitted to the Council and concerns surrounding the subsequent decision-making had already come into play. I considered that these subsequent applications required screening and public consultation, in order to take into account new environmental information and any other information that had not been available during the earlier decision-making procedures. Therefore, my request for judicial review focussed on these subsequent applications, see below.

Article 6

11. Over a period of two years following the initial grant of planning permission, further environmental reports and construction/technical details were submitted to the local authority in "subsequent applications" for approval. Most of these subsequent applications were supposed to be approved before the project was allowed to commence.

12. The Aarhus Implementation Guide, at page 130, explains the situation regarding multiple-stage permits in EU law. It states:

> *"If national law provides for a consent procedure comprising more than one stage, the EIA Directive has been interpreted by the ECJ (C-290/03 Barker [2006]) to require an environmental impact assessment to be carried out if it becomes apparent, in the course of the later stage, that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location. In practice, this includes both those situations where (i)* ***it was decided at the initial screening stage that the project was unlikely to have significant environmental effects*** *and thus no EIA was done; and (ii) an EIA was carried out at the earlier stage, but it subsequently becomes apparent that the project is likely to have further significant environmental effects that have not been assessed."* [my highlighting]

13. So, like (i) above, even though it was decided at the initial screening stage that this project was unlikely to have significant effects on the environment, the only way to be certain that, in the course of the later stage, the project remains unlikely to have significant environmental effects is to reconsider/rescreen the project at the stage of the subsequent decision.

14. Screening of each subsequent application, although not the only means, would also serve to address the requirement of Article 6(1)(b) that the Party must determine whether those subsequent decisions on the activity should be subject to the provisions of Article 6.

15. In paragraph 37 of its response of May 2016, the UK quotes from its *Planning Practice Guidance* which states: "There are requirement for screening for the need for an Environmental Impact Assessment for "subsequent applications" set out in regulations 8 and 9."

16. Regulation 9 prescribes the procedure for a subsequent application where the initial application was <u>not</u> accompanied by an "environmental statement", as in this case. It states:

> 9. Where it appears to the relevant planning authority that—
> (a) an application which is before them for determination—
> (i) is a subsequent application in relation to Schedule 1 or Schedule 2 development;
> (ii) has not itself been the subject of a screening opinion or screening direction; and
> (iii) is not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these regulations; and
> (b) the original application was not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations,
> paragraphs (4) and (5) of regulation 5 shall apply as if the receipt or lodging of the subsequent application were a request made under regulation 5(1).

17. The subsequent applications before the planning authority in this case (i) were related to Schedule 2 development; (ii) had not themselves been the subject of screening opinions or screening directions, and (iii) were not accompanied by an environmental statement. Therefore they were to be treated as if the lodging of these applications were requests under regulation 5(1) which, in turn, requires those applications to be screened.

18. On page 4 of its comments of 31 October 2016, the UK states that "… the complaint that the Council failed to screen any of the subsequent applications is not understood."

19. The UK appears to consider that Regulation 9(a)(ii) refers to the original planning application, whereas 9(a)(ii) clearly refers to the subsequent application identified in 9(a)(i).

20. The UK goes on to state that the subsequent applications in this case did not require "further assessment". It is not clear by this phrase whether the UK is suggesting that screening of the subsequent applications was not required, or whether an EIA was not required (although the latter could only be determined by way of screening). Either way, I consider that screening of the subsequent applications was necessary in order to comply with regulation 9 of the EIA Regulations and the EIA Directive.

21. In the absence of any other means of determining whether these subsequent decisions were "decisions on proposed activities not listed in Annex I which may have a significant effect on the environment", I consider the UK has also failed to comply with Article 6(1)(b) of the Convention.

22. In this particular case, most of the subsequent applications comprised of new environmental reports and construction/technical details which had not been submitted and considered previously. It is at these later stages that it would have been possible for the local authority, and the public, to examine those environmental reports that were missing from, or had not been considered in, or had been produced subsequent to, the initial planning application. For example, an air quality assessment was never produced; those documents indicating problems with excessive noise and loss of habitat for protected species were only disclosed to the public after the initial grant of planning permission. Mitigation for these could (and should) then have been considered during the subsequent decision-making process.

23. In paragraph 28 of its response of May 2016, the UK highlights the fact that domestic legislation requires all "subsequent applications" to be subject to public participation procedures, regardless of whether the development is EIA development. But in this case, the subsequent applications were not subject to such procedures. As a consequence, I consider the UK has failed to meet its obligations under Article 6.

24. In Case ACCC/C/2012/71 (Czech Republic), at paragraph 92, the Committee considered:

> *92. The Committee considers that the discretion as to the range of options to be addressed at consecutive stages of the decision-making is closely related to the opportunities for public participation on those options. A multi-stage decision-making procedure in which certain options are considered at a stage without public participation and where no subsequent stage provides an "opportunity for the public to also participate on the options decided at that earlier tier" would be incompatible with the Convention. Similarly, a multi-stage decision-making procedure that provides for public participation on certain options at an early stage but* ***leaves other options to be considered at a later stage without public participation*** *would likewise not be compatible with the Convention.* [my highlighting]

25. To make matters worse, demolition and building work were allowed to continue over a long period before many of those subsequent applications (for approval of supposedly "pre-commencement conditions") had actually been approved.

26. However, the Courts refused permission to apply for judicial review because they considered that I was too late to challenge those decisions that had already been made, but too early to challenge the failure to screen those subsequent applications that had not yet been decided upon.

27 The *Aarhus Implementation Guide*, at page 145, states:

> *Similarly, in its findings on communication ACCC/C/2006/16 (Lithuania) the Committee held that a key issue is whether the public has had the opportunity to participate in the decision-making before*

the "events on the ground" have effectively eliminated alternative options. The Committee held:

> *If the only opportunity for the public to provide input to decision-making on technological choices, which is subject to the public participation requirements of article 6, is at a stage when there is no realistic possibility for certain technological choices to be accepted, then this would not be compatible with the Convention. [ECE/MP.PP/2008/5/Add.6, para 74]*

28. The fact that "pre-commencement" conditions in this case have been allowed to be left undecided until after commencement of the project, and that a challenge cannot be made until those conditions have been decided upon, makes it impossible for the public to challenge/participate in decisions on environmental effects/technological choices at a stage when alternative options are still possible. I consider that this is not compatible with Article 6 of the Convention.

Article 9(2) and 9(3)

29. In Case ACCC/C/2010/50 (Czech Republic), the Committee found that the outcome of an EIA screening decision is a determination under Article 6(1)(b) (see ECE/MP.PP/C.1/2012/11 paragraph 82). As such, the determination is subject to Article 9(2). Similarly, I consider that an allegation concerning the omission of such a determination would also be subject to Article 9(2).

30. By refusing permission to challenge the omission of screening of the subsequent applications, or alternatively by refusing to allow a challenge to the local authority's reliance upon an inadequate earlier screening opinion, I consider the UK has failed to comply with the requirements of Article 9(2).

31. I consider the failure of the Council to comply with domestic legislation engages Article 9(3).

Article 9(4)

Fairness and rules on timing

32. The UK considers that my opportunity to seek judicial review was lost primarily as a result of delay, and claims that the rationale in the Noble case, regarding the principle of legal certainty, applies.

33. The UK made similar submissions in the case of Wells [2004] EUECJ C-201/02:

> *59. The United Kingdom Government further submits that the considerable period which has elapsed since the decision determining new conditions in 1997 renders revocation of that decision contrary to the principle of legal certainty. The claimant in the main proceedings should have challenged the decision in due time before the competent court.*
>
> *60. As to that submission, the final stage of the planning consent procedure was not completed when the claimant in the main proceedings submitted her request to the Secretary of State. It cannot therefore be contended that revocation of the consent would have been contrary to the principle of legal certainty.*

34. We have a similar situation here – the planning consent procedure had not been completed because the subsequent applications for approval of "pre-commencement conditions" had not been fully determined at the time that the challenges were made.

35. I object strongly to the accusations that I have "waited" to challenge these decisions. The UK repeatedly refers back to the dates that the initial decisions were made and implies that I have purposefully delayed up to three years before making a challenge. This is absolutely not the case.

36. The Decision Notice detailing the grant of planning permission was withheld from the public for 9 months. The Screening Opinion and Noise Assessment were withheld for over two years; the responses from the statutory consultees have never been released to the public, even to this day. In fact, the grounds for a challenge to the initial decisions were not revealed until July 2014, after problems concerning subsequent application 13/P2192 had already come into question.

37. I consider it unreasonable of the UK to expect that a member of the public should risk thousands of pounds to undertake a high-risk challenge to decisions that were more than 18 months old, when a subsequent application was, by that time, already under consideration by the local authority and the

Secretary of State. My decision not to challenge those earlier decisions should not prevent me from challenging subsequent decisions.

38. The issue of timing is a difficult one. Domestic law requires that the claimant submit a claim within six weeks of the date on which the claimant became aware of the grounds for challenge.

39. Although it may be possible, in theory, to make a direct challenge to a Screening Opinion as soon as it had been published, in practice, most claimants wait until a decision to grant planning permission has been made (in reliance upon the Screening Opinion). This is because it is open to the local authority to update its Screening Opinion at any point up until the planning permission is granted. The six week time limit is then deemed to start on the day that the public is notified of the decision to grant planning permission.

40. I would expect challenges to subsequent applications to follow a similar pattern. Complications arise where (as in this case):

a) the public are not notified of the application;
b) a single subsequent application may contain multiple "conditions", each condition requiring separate approval;
c) the subsequent applications are only partially determined (i.e. some, but not all, of the conditions submitted for approval are determined);
d) the public are not notified of the local authority's decisions.

41 Under these circumstances it is extremely difficult to determine at which exact point the grounds for challenge have arisen and when the six-week period is deemed to have begun.

42. In addition, as stated in my initial communication, the six-week period in which to prepare and lodge a judicial review claim is extraordinarily challenging for a legal professional, let alone a self-litigant.

43. For all these reasons I disagree strongly with the contention of the UK, in paragraph 7, that:

> "…it can hardly be contended that the United Kingdom has somehow failed to comply with the protections set out in Article 9 where it was the Communicant's decision not to avail herself of those procedures in a timely fashion which led, in part, to her being refused permission to progress her complaints to a substantive hearing."

Adequate and effective remedy

44. In the Appeal Court Order (Annex 11 to my communication), the reasoning under paragraphs (i) and (ii), refusing permission to apply for judicial review, relies upon the conclusions of the contested initial Screening Opinion instead of taking into account the environmental reports available, and submitted, at the time of the challenge. I do not consider this to be compliant with Article 9(4).

45. In Case ACCC/C/2012/76 (Bulgaria) (see ECE/MP.PP/C.1/2016/3), the ACCC considered:

> *82. The Committee finds that, with respect to appeals under article 60, paragraph 4, of the Administrative Procedure Code of orders for preliminary enforcement challenged on the ground of potential environmental damage, a practice in which the courts rely on the conclusions of the contested EIA/SEA decision rather than making their own assessment of the risk of environmental damage in the light of all the facts and arguments significant to the case, taking into account the particularly important public interest in the protection of the environment and the need for precaution with respect to preventing environmental harm, does not ensure that such procedures provide adequate and effective remedies to prevent environmental damage. Therefore, the Party concerned fails to comply with article 9, paragraph 4, of the Convention.*

46. In paragraph (v) of the Appeal Court Order, the judge refused permission to appeal the High Court's refusal to grant permission to apply for judicial review of the Council's failure to screen planning application 15/P0121 because he considered that my remedy was to apply to the Secretary of State for a screening direction. However, the Secretary of State is not obligated to make a screening direction and therefore the refusal to do so could not be challenged. I do not consider this to be an effective remedy as required by Article 9(4).

47. In paragraph (vi), the judge states:

> (vi) It is clear in any event that relief would be refused as a matter of discretion given the fact that the 2012 permission has been substantially implemented (site 1 is operational).

48. I consider that to refuse any remedy purely on this basis fails to meet the requirement of Article 9(4) for the provision of adequate and effective remedy, particularly when some of the environmental effects would be caused by the ongoing use of the development.

Procedural equality of arms

49. I question whether the Council, as the "competent authority" responsible for undertaking the EIA procedure, really required the services of both a Grade A solicitor and central London barrister of over 30 years experience – particularly when I was acting as a self-litigant and the claim was still at the permission stage. My challenge ultimately involved an interest common to both parties, namely, ensuring that the law is upheld and the environment is protected.

50. In consideration of Case C-530/11, AG Kocott gave the following opinion:

> *24. Denmark is correct to point out, however, that in certain review proceedings professional representation may be unnecessary. This is conceivable, for example, if the competent body concerned has extensive responsibility for the procedure and, for that reason, investigates of its own motion all the relevant arguments and circumstances. However, the possibility that representation may be unnecessary must be assessed in the context of each specific case having regard to all the legal and practical circumstances and custom and practice.*

51. I consider the action of the Council in engaging a solicitor and barrister at a total cost of £6,000 was unnecessary and out of proportion to the issue at hand where the overriding aim is to protect the environment. The action of the Council in this case is unfair, inequitable and has caused the judicial procedure to be prohibitively expensive for me, therefore failing to uphold the principles of Article 9(4).

52. The amount of costs which may be allowed to a self-litigant under CPR rule 46.5 is £19 per hour. The claimant bringing the challenge must also pay Court fees in advance of submitting the claim and further substantial fees if permission to proceed is granted.

53. I consider the fact that I would potentially have been liable for solicitor's costs accruing at £250 per hour plus a barrister's fee, whereas the Council would only have been liable for costs accruing at £19 per hour instantly put us on an inequitable footing and seems manifestly unfair, contrary to Article 9(4).

Profiteering

54. South London Legal Partnership (SLLP) has an agreement to provide legal services to Merton Council at £55 per hour. However, the costs submitted by the Council to the Court included fees for the SLLP solicitor of £250 per hour.

55. I consider that by submitting costs of £250 per hour for the solicitor, the Council is effectively profiting from my attempt to bring a judicial review claim. Such profiteering is unfair and serves to increase the prohibitive expense, contrary to Article 9(4).

Costs prohibitively expensive

56. I consider that exposing a claimant to the maximum £5,000 to cover the defendant's cost of preparing and submitting the Acknowledgement of Service merely at the permission stage is not compatible with the obligation of the Party concerned to ensure that access to judicial review in matters relating to the environment is not prohibitively expensive. Exposure of claimants to such costs, in addition to substantial court fees, would serve as a serious deterrent to individuals wishing to seek judicial review in environmental matters.

57. In apportioning the costs in this case, the High Court judge gives no reason why he has awarded costs against me at the maximum limit possible. He does not appear to have taken account of the pre-action conduct of the Council, the public interest nature of the claim, or the obligation to ensure that access to justice is fair, equitable and not prohibitively expensive.

58. Similarly, the Appeal Court judge refuses permission to appeal the award of costs as he says the decision was "…well within the ambit of [the High Court judge's] discretion". The judge in this case has also failed to take account of the obligations under article 9(4) to ensure that access to justice is fair, equitable and not prohibitively expensive.

59. In its findings in ACCC/C/2008/33, at paragraph 134, the Committee found:

> *134. Moreover, in accordance with its findings in ACCC/C/2008/23 (United Kingdom) and ACCC/C/2008/27 (United Kingdom), the Committee considers that in legal proceedings within the scope of article 9 of the Convention the public interest nature of the environmental claims under consideration does not seem to be given sufficient consideration in the apportioning of costs by the courts.*

60. In Case C-530/11 the Court of Justice of the European Union (CJEU) found, at paragraph 55:

> *55. However, it is not apparent from the various factors put forward by the United Kingdom and discussed, in particular, at the hearing that national courts are obliged by a rule of law to ensure that the proceedings are not prohibitively expensive for the claimant, which alone would permit the conclusion that Directive 2003/35 has been transposed correctly.*

61. In case ACCC/C/2012/77 concerning the award of costs of £8,000 against Greenpeace at the permission stage of an application for judicial review, the Committee found the UK had failed to comply with article 9, paragraph 4, of the Convention since the cost order awarded against the communicant in this case made the procedure prohibitively expensive (ECE/MP.PP/C.1/2015/3, paragraph 81).

Article 3(2)

62. My allegation that the UK has failed to comply with Article 3(2) centres, primarily, on the conduct of the Council. In particular, the provision of misinformation concerning the existence of particular documents relevant to environmental screening and decision-making which impeded and prolonged attempts to determine whether the project in this case may have a significant impact upon the environment. I consider the actions of the Council and LGO, and the decision by the Secretary of State not to issue a screening direction (which would have definitively confirmed whether the project was or was not EIA development, and could then have been challenged via judicial review), have actively hindered my attempts to seek access to information, public participation and access to justice in environmental matters, contrary to the obligation in Article 3(2).

Article 3(8)

Totally without merit (TWM) designation

63. By certifying a claim as TWM, the Court removes the opportunity for a claimant to present their case at an oral hearing. It also removes the opportunity for the claimant to dispute the costs (which is usually afforded during a permission hearing). I consider that this effectively penalises the claimant, contrary to the obligation in Article 3(8).

Unreasonable additional costs

64. My allegation of non-compliance with Article 3(8) is that the pursuit of additional costs over and above the costs awarded by the Court (i.e. interest at 8% backdated to the date of the High Court Order) and the threat to involve the High Court Sheriff (which would also incur further costs) were not reasonable and could amount to penalisation or harassment, especially given that I had previously informed the Council solicitor that I was preparing a communication for submission to the ACCC.

65. A charge of backdated interest at 8% (way above any commercial bank rate) is additional to the "monetary losses" of a defendant in responding to a judicial review challenge. It results in the access to justice process becoming even more expensive than necessary.

66. The potential involvement of a High Court Sheriff is a very intimidating threat, as the Sheriff has the right to enter a home and seize personal belongings in lieu of payment. [Note: the Council agreed that it would not involve the Sheriff "for the time being".]