London
[Contact details redacted]

Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environmental Division
Palais des Nations
CH-1211 Geneva 10
Switzerland

Copy by email to: Ahmed Azam [email address redacted]

2 October 2015

Dear Ms Marshall,

PRE/ACCC/C/2015/131
Response to UK comments on admissibility dated 28 September 2015

Thank you for forwarding a copy of the comments on admissibility from DEFRA (UK). I would like to address some of the points raised as I feel that DEFRA is shifting the focus away from the substantive issues.

I strongly believe that this communication should be considered admissible as it is representative of the problems faced by many residents of the UK when trying to obtain access to justice in environmental matters. The limited access afforded to the public has very recently been eroded by changes to the judicial review system made by the Criminal Justice and Courts Act 2015, and is potentially under further threat by proposed changes to the Court Procedure Rules governing costs protection in environmental cases.

As a means of addressing particular points, I have copied the letter from DEFRA below with my comments added in blue text:

PRE/ACCC/C/2015/131: UK comments on admissibility

Summary

1. This communicant has made a number of allegations of non-compliance against the United Kingdom that relate to a decision made by the London Borough of Merton Council ("LBMC"). The decision in question was a screening opinion on the development of a former hospital site in London.

My allegations of non-compliance relate to a number of decisions made by Merton Council, not just to a single decision. The decisions in question concern the initial screening opinion, the grant of consent to the initial planning application, and the lack of screening and grant of consent to several subsequent planning applications as part of a "multi-stage" planning application.

2. We submit that the communication, or alternatively individual grounds in the communication, should be considered **inadmissible** for the following reasons:

- Many of the communicant's arguments are based on the correctness of a screening decision by LBMC. The correctness of that decision is **outside the scope of the Convention**, as are allegations of non-compliance predicated on that decision being taken in the way that it was. These are not matters that the Committee is able to consider.

I disagree. Most of my arguments are independent from the validity of the initial screening opinion:

– The failure of Merton Council to possess all the relevant environmental information when undertaking its functions as the competent authority (i.e. screening and granting consent for a planning application);

– For each subsequent determination (i.e. for each subsequent planning application), the failure of the Council to consider whether the activity/project "may have a significant effect on the environment" causing it to fall within the remit of article 6; and

– Problems encountered in seeking judicial review of these failures;

are all matters that fall within the scope of the Aarhus Convention.

- The communicant's other arguments are **unsubstantiated** and appear, in some instances, to be an **abuse of the right to bring a communication**. There is also an example of the communicant's argument being **manifestly unreasonable**. In accordance with paragraph 20 of the annex to decision I/7, the Committee should not consider these allegations further.

I refer to documents and correspondence in support of all my allegations (with reference to dates and summarised content). Many of these documents are held on the case files by the Courts, and I have already indicated that I am happy to provide copies of any of these documents as necessary.

3. The issues the communicant raises on the costs of bringing a judicial review have **already been considered** by the Committee. The United Kingdom will soon be providing the Committee with an update in accordance with decision V/9n, which we would maintain is the appropriate means by which to conduct further discussions on this topic, where no new issues are raised, as is the case here. Notwithstanding that we would consider some of the points to be **unsubstantiated** and an **abuse of the right to bring a communication**, we would urge the Committee to act consistently with recent practice by not taking these aspects further.

Although the issue of costs has already been considered by the Committee, in decision V/9n the Committee expressed concern that the implementation of the "Aarhus costs cap" may not be sufficient to prevent access to justice from being prohibitively expensive. This case confirms the Committee's concerns and illustrates the problems and costs that can be encountered at the very early stages of a challenge before permission to apply for judicial review has even been granted. My communication raises issues of the judicial process that contribute to prohibitive expense (such as the excessively high costs cap and inequality of arms) which have not been considered previously.

In their first progress report following Decision V/9n (dated 29 December 2014), the Party concerned stated that new rules implemented in 2013 providing costs protection for cases under the Aarhus Convention would be reviewed and consideration would be given to whether there is "scope to amend the levels of the current costs caps".

In a Ministry of Justice consultation that began in September this year (see attachment entitled "MoJ Consultation Paper.pdf"), comments are invited on the proposal to amend the costs cap. Although it does not suggest specific new cost caps, at paragraph 47 the reader is invited to comment on an "example" cost cap of double the existing amount, i.e. £10,000 for individuals. In earlier paragraph 33, there is also consideration of whether the costs protection should only be available once permission to apply for judicial review has been granted by the Court. This would inhibit public access to justice even further. As this case illustrates, the costs at the pre-permission stage can be very high – in fact, without cost protection, I would have been liable for £6,000 of costs for the Council, a further £11,500 costs for the first interested party and a potentially similar amount for the second interested party.

4. The Committee's present workload has significantly increased in recent months. In order to be able to maintain its ability to give communications the scrutiny they deserve within a speedy timetable, we would urge the Committee not to give further consideration to communications such as this, which include a number of inadmissible unsubstantiated and irrelevant allegations as well as raising issues which are already being examined in detail by the Committee.

Submissions on admissibility

5. The communicant has questioned the correctness of the screening opinion, as well as decisions by both LBMC and the Secretary of State for Communities and Local Government not to undertake further screening of the proposed development.

6. The Convention does not deal with the correctness of decisions on whether to carry out an environmental assessment. The Committee was clear on this point in its findings in ACCC/C/2008/24 (Spain):

"Accordingly, the factual accuracy, impartiality and legality of screening decisions are not subject to the provisions of the Convention, in particular the decisions that there is no need for environmental assessment, even if such decisions are taken in breach of applicable national or international laws related to environmental assessment, and cannot thus be considered as failing to comply with article 6, paragraph 1, of the Convention."

My allegation of non-compliance with article 6(1)(b) does not concern the merits of a screening decision, it concerns the fact that no screening was undertaken at all during subsequent (multi-stage) environmental decision-making procedures.

7. Those allegations are therefore **out of scope** in terms of the Convention and what the Committee is able to consider.

8. The United Kingdom submits that the communicant's allegations – so far as they are stated to be linked to particular provisions of the Convention – are also inadmissible or relate to matters that are already under active consideration by the Committee.

a. Article 3(2)

The communicant's allegations regarding article 3(2) are **unsubstantiated**, amounting to assertions about the information provided to them by LBMC, compliance with rules on pre-litigation procedures, compliance with a court order against the communicant and conduct of an investigation by the Local Government Ombudsman. The communicant does not support their assertion that the United Kingdom has failed to "endeavour to ensure that officials and authorities assist and provide guidance to the public" in respect of the procedural rights given by the Convention. The communicant also appears to allege that the Secretary of State's

decision not to issue a screening opinion amounts to a breach of article 3(2). For the reasons mentioned above, this is **out of scope**.

b. Article 3(8)

The communicant's allegation that the court's designation of her case as being "totally without merit" – following consideration by the court of the communicant's submissions – amounts to "penalization, persecution or harassment" is similarly **unsubstantiated**. The making of such allegations may be considered an **abuse of the right to make a communication**, as this simply appears to be a failure by the communicant to accept the findings of the court.

The allegation that demands for the communicant to comply with a court order made against her for costs is again **unsubstantiated** and an **abuse of the right to make a communication**.

We note that the communicant has indicated that they do not intend to comply with a court order pending the Committee's consideration of this communication. It would be helpful for the Committee to remind the communicant in this case that it is not a court, that it cannot set aside a court order and that the compliance mechanism is not a judicial process. The communicant may wish to reconsider their position with regard to their compliance with the binding court order given these circumstances.

The Party concerned claims incorrectly that I have indicated that I do not intend to comply with a court order for costs. I have not indicated this at all. My offer to place the money into a separate account pending the Committee's consideration of this communication was merely a suggestion made to Merton Council which they rejected. Since then, Merton Council has confirmed to me that they will not refer the matter to the High Court Sheriff for the time being as there are other issues (including issues regarding the inclusion of Value Added Tax in the costs) which Merton Council is seeking clarification on. For correspondence on this matter see attachment entitled "Costs correspondence.doc".

c. Article 5(1)(a) and (2)

The communicant's allegations in respect of article 5 are centred on the alleged failure to undertake an adequate assessment of the effects and its decision not to screen the development again. As set out above, this is **outside the scope** of the Convention.

My allegations are not only based on the failure of Merton Council to undertake adequate assessment of the environmental effects (as confirmed by the Local Government Ombudsman), but also on the facts that the responses from the Statutory consultees (such as Natural England and the Environment Agency) and the Environmental Noise Assessment predicting noise levels above limits recommended by the World Health Organisation were not made available to the public or to the Council's planning committee members who were responsible for making the decision to grant planning permission. The failure of the competent authority to possess the environmental information relevant to its functions and failure to make relevant information available to the public are issues which fall within the remit of the Convention.

d. Article 6(1)(b)

The allegations concerning article 6(1)(b) appear to be predicated on the correctness of the screening decision, which is **outside the scope** of the Convention and not an issue that the Committee can give a view on. The communicant restates the substance of some of their

arguments on the lawfulness of the screening opinion by reference to the Environmental Impact Assessment Directive, which is not relevant to compliance with the Convention.

The lawfulness of the screening opinion for the initial planning application, although of some importance, is not the main issue – the most important issue is that screening was not undertaken at all during subsequent (multi-stage) environmental decision-making procedures. Such issues fall within the remit of the Convention.

e. Article 9(2), (3) and (4)

The communicant raises the issue of the costs of bringing a judicial review claim. This particular **matter has already been considered** by the Committee, and remains the subject of an ongoing review in the United Kingdom, as the Committee is aware. The United Kingdom is due to provide the latest update on costs in accordance with decision V/9n by the end of October. Given that the issue of costs is already being addressed and that the Committee's caseload has significantly increased in recent months, we would question the need for these issues to be given any further consideration by the Committee.

Notwithstanding this, the communicant's suggestion that LBMC should not have defended the case brought by the communicant or sought legal counsel to assist them – incurring costs in the process – is **manifestly unreasonable**. The allegations of "profiteering" appear to be **unsubstantiated**, and therefore, given their nature, amount to an **abuse of the right to make a communication**.

I have asked Merton Council to confirm the actual costs charged by their solicitor, but despite repeated requests they have not confirmed these charges. For full details see the series of emails attached entitled "Costs correspondence.doc".

The communicant appears to complain that the fact that the Secretary of State is not under a duty to make a screening direction when requested amounts to a failure to provide an adequate remedy under article 9(4). Questions on whether a screening decision should or should not have been made are **outside the scope of the Convention**. In any case, the communicant clearly had the opportunity to seek an effective remedy by bringing a judicial review. The fact that the communicant's case was dismissed by the High Court and that they were not given leave to appeal does not amount to a breach of article 9(4).

The Party concerned has misunderstood my point. My allegation of non-compliance with article 9(4) does not concern the failure of the Secretary of State to make a screening direction.

I consider that an application to the Secretary of State to make a screening direction, itself, is not a sufficient remedy. Firstly, the Secretary of State is not under a duty to make a screening opinion, so there is no certainty of an outcome. Secondly, a decision by the Secretary of State (including a decision not to issue a decision) make take longer than the six-week limit on bringing a judicial review claim which would then preclude any challenge to the preceding decision/act/omission of the competent authority.

The fact is that I was refused permission to apply for judicial review because the Appeal Court judge claimed that my remedy was to apply to the Secretary of State for a screening direction. The Party concerned now claims that I had the opportunity to seek an effective remedy by bringing a judicial review. The two statements are contradictory.

The communicant's allegations regarding the six week time limit for bringing a judicial review claim in a planning case are **unsubstantiated**. General assertions are made suggesting that the time period is problematic. However, the communicant's claim related to decisions or

actions taken up to three years before, and the communicant does not demonstrate any correlation between the rejection of their challenge as being “hopelessly out of time” with the six week time limit.

I have provided a detailed chronology showing how failure of the local authority to release information to the public in a timely manner, and my attempts to address the issue with the various bodies has resulted in difficulties in bringing a challenge within six weeks of the decision/act being challenged. It should be noted that the Party concerned is now proposing that a claimant must also provide a Schedule of financial resources with the submission of a judicial review claim (see the attached “MOJ Consultation Paper.pdf”). This would be a difficult and onerous task, potentially requiring additional expertise (and cost) from an accountant or other similarly-qualified expert, and rendering the six-week time limit virtually impossible to meet.

We are of course happy to provide the Committee with any further information on these points should these be considered necessary for its preliminary determination on admissibility.

I hope that you will agree that my communication should be admissible.

Yours sincerely,

Tracy Breakell
London
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