On ACCC/C/2015/131

In the matter of a communication to the Aarhus Convention Compliance Committee

MS TRACEY BREAKELL

Communicant

and

UNITED KINGDOM

Party Concerned

RESPONSE ON BEHALF OF THE UNITED KINGDOM

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1. This Communication arises out of the decision of the London Borough of Merton to grant planning permission for redevelopment of the Nelson Hospital, London on 18 December 2012, having previously decided on 12 March 2012 that the proposed development was not "EIA development" for the purposes of The Town and Country Planning (Environmental Impact Assessment) Regulations 2011/1824.

2. The Communicant takes issue with a number of decisions taken by the London Borough of Merton ("the Council"), the Secretary of State for Communities and Local Government ("the Secretary of State"), and the domestic Courts. In summary, the decisions challenged are:

   (i) The Council's negative screening decision of 12 March 2012 (in which it decided that the proposed development was not "EIA development" for the purposes of The Town and Country Planning (Environmental Impact Assessment) Regulations 2011/1824);[1]

   (ii) The grant of planning permission for the proposed redevelopment by the Council on 18 December 2012 in the absence of a full environmental impact assessment having been carried out[2];

   (iii) The "subsequent failure" of the Council to require an environmental impact assessment to be carried out when the developers submitted various matters to the Council for approval, in accordance with conditions imposed on the December 2012 planning permission;

[1] Communication Annex 2

[2] Communication Annex 3

(iv) The Secretary of State's decision of 20 August 2014 not to issue a screening opinion or direction in respect of the developer's application to discharge planning conditions attached to the planning permission[3];

(v) The decision of The Honourable Mr Justice Mitting refusing the Communicant's application for permission to apply for judicial review on 20 March 2015, certifying it as being "totally without merit" and ordering her to pay the Council's costs of responding to the claim assessed at £6,000 but capped at £5,000[4]; and

(vi) The decision of the Rt. Hon Lord Justice Sullivan of 6 July 2015 refusing permission to appeal against the Order of Mitting J[5].

3. The Communication also raises various alleged failures to secure compliance with Articles 3, 5 and 9 of the Convention, as against the Council, the courts, and the Local Government Ombudsman ("the LGO").

Preliminary submissions

4. Firstly it is critical to understand that what, in reality, lies at the heart of this Communication is the Communicant's disagreement with the Council's decision of 12 March 2012 that the proposed development was not likely to have significant effects on the environment by virtue of factors such as its nature, size or location.

5. As this Committee has previously made clear, it is no part of the Committee's remit to investigate alleged non-compliance with the substantive requirements of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment ("the EIA Directive"). As the Committee stated at paragraph 82 of its Findings and Recommendations in ACCC/C/2008/24 (Spain)[6]:

> "*The Committee notes that it cannot address the adequacy or result of an EIA screening procedure, because the Convention does not make the EIA a mandatory part of public participation: it only requires that when public participation is provided for under an EIA procedure in accordance with national legislation (paragraph 20 of annex I to the Convention), such public participation must apply the provisions of its article 6. Thus, under the Convention, public participation is a mandatory part of EIA, but EIA is not necessarily a part of public participation. Accordingly, the factual accuracy, impartiality and legality of screening decisions are not subject to the provisions of the Convention, in*

[3] Communication Annex 5

[4] Communication Annex 9

[5] Communication Annex 11

[6] Annex 9(i)

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."

6. That is an answer to many of the Communicant's complaints, which allege (inter alia) a failure to provide adequate support, or protection of Convention rights, by reason of the Council, or other bodies, 'failing' to require the proposed development to be subject to a full environmental assessment – or at least, to reassess whether such assessment was required – at various stages post March 2012.

7. Secondly, it also is critical to understand that it was open to the Communicant to seek redress from the domestic courts in respect of the grant of planning permission / negative screening decision as soon as she became aware that those decisions had been made. It was neither necessary, nor appropriate, for her to wait until she had pursued other avenues prior to seeking a remedy from the courts in respect of the alleged non-compliance with the EIA Directive. Instead, she waited nearly 9 months after obtaining a copy of the negative screening decision (and some 18 months from publication of the planning permission on the Council's website)[7] before seeking to challenge those decisions in the domestic courts. In those circumstances, 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.

8. Thirdly, it should also be understood that the role of the Local Government Ombudsman ("the LGO") is to act as a final stage for complaints against local authorities (such as the Council) to determine if there has been maladministration which has caused injustice to a complainant. The office of the LGO was established back in 1974. It was not created to secure compliance with the UK's obligations under the Aarhus Convention, nor is it any part of its role to ensure compliance with those obligations. Any complaints made in respect of the LGO are therefore wholly misplaced.

9. Fourthly, in respect of the costs award made against the Communicant by the Administrative Court in March 2015, the Committee will be aware that the issue of costs in litigation in the United Kingdom in cases concerning environmental decision making are the subject of ongoing discussions under decision V/9n of the Meeting of the Parties. In accordance with the Committee's own recent practice, therefore, as no new issues are raised on this Communication the Party Concerned would respectfully request that the Committee decline to consider this aspect of the Communication.

Background

[7] On the basis of the dates set out in paragraphs 8 and 9 of the Communication

10. In or around February 2012, an application[8] was made for planning permission for the redevelopment of the site known as The Nelson Hospital, 220 Kingston Road, London, SW20 9DB ("the Site"), comprising:

    (i) Construction of a new two/three storey (5600 sq m) Local Care Centre (incorporating retention of 3 pavilion buildings) and new access route with 68 car parking spaces to the rear (Site 1);
    (ii) Construction of a new part two/part three storey Assisted Living Extra Care Development (51 units) with associated communal facilities, dedicated vehicle access and 21 car parking spaces, involving demolition of all existing buildings on this part of the site (Site 2);
    (iii) Alterations, including new landscaping to The Rush and Kingston Road (Site 3A) and Blakesley Walk and Kingston Road (Site 3B); and
    (iv) Application for Conservation Area Consent in connection with the demolition of buildings on Site 1.

    (Collectively, "the Proposed Development").

11. The application included a request for a Screening Opinion pursuant to regulation 5 of The Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the EIA Regulations")[9].

12. By its Screening Opinion dated 12 March 2012 ("the Screening Opinion")[10], the Council determined that the Proposed Development did not require submission of an Environmental Impact Statement. Whilst the Proposed Development did fall within Schedule 2 to the EIA Regulations, it was not considered that it was likely to give rise to significant environmental effects by reasons of its nature, size or location having regard, *inter alia,* to likely traffic movements, effects on residential amenity and accumulation with other development (specifically, existing buildings on the Site).

13. Members of the public were notified of the application for planning permission by means of letters to local residents (418) and a notice in the local newspaper dated 1 March 2012,[11] in accordance with the procedures prescribed by The Town and Country Planning (Development Management Procedure) Order 2010[12]. They were given 21 days to respond with any comments on the application. The Communicant was one of 104 local residents

[8] Planning application reference 12/P0418

[9] A copy of the EIA Regulations can be found at Annex 1 to the Communication.

[10] Communication Annex 3

[11] A copy of the notice is at Annex 2.

[12] Now superseded by The Town and Country Planning (Development Management Procedure) Order 2015

who responded to the consultation, of whom 16 indicated support for the scheme and 88 raised objections on grounds including traffic impacts, impact on the conservation area, loss of trees, and the need to control noise from any plant or machinery.[13]

14. Following initial consultation, amendments to the application scheme were submitted in June 2012, and there was a further round of public consultation on the revised proposals. 14 objections were received, together with a petition signed by 40 people.

15. At a public meeting held in December 2012, the Council's Planning Applications Committee resolved that planning permission should be granted for the Proposed Development. The planning permission was granted in a decision letter dated 18 December 2012 ("the Planning Permission") and was subject to 50 conditions, including a number of conditions requiring the developer to submit details to the Council for approval prior to carrying out specific aspects of the works.[14]

16. Between March 2013 and January 2015, the developer made a number of applications for discharge of various conditions attached to the Planning Permission, the majority of which were discharged in November/December 2013 and in March 2014. Building work on Site 1 commenced in February 2013 (completed in April 2015), and on Site 2 in April 2014.

17. In April 2014, the Communicant wrote to the Secretary of State for Communities and Local Government ("the Secretary of State") pursuant to regulation 4(8) of the EIA Regulations requesting that he make a screening direction[15] in respect of the developer's application to discharge certain conditions pertaining to Site 2.[16] By letter dated 20 August 2014, the Secretary of State notified the Communicant that he declined to issue a screening opinion in this matter, on the basis that (1) having considered the Council's pending decision on the application, the initial planning application and Screening Opinion he was satisfied that there were no issues that required revisiting; and (2) the Planning Permission having been implemented, his decision was confined to the issues raised in the application for discharge of conditions, he was satisfied that any effects arising from that application were identified and formed part of the Screening Opinion, and the application did not raise any issues that had not previously been assessed.[17]

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[13] See paragraphs 5.1 – 5.4 of the Officer's Report on the application to the Council's Planning Applications Committee of 6th September 2012. A copy is annexed hereto at Annex 1.

[14] Communication Annex 3.

[15] "Screening direction" is defined in regulation 2 of the EIA Regulations as "a direction given by the Secretary of State as to whether a development is EIA development".

[16] Application ref 13/P2192. A copy of the Communicant's letter is at Communication Annex 5.

[17] Communication Annex 6

18. On 6th February 2015, the Communicant issued a claim seeking permission to apply for judicial review challenging the lawfulness of the Screening Opinion and the Council's subsequent "failure" to reassess the potential environmental effects of the Proposed Development before granting subsequent consents (in the form of approving the applications for discharge of the conditions attached to the Planning Permission).[18]

19. Permission to apply for judicial review was refused on the papers by Mitting J on 20th March 2015[19] on the grounds that:

    (i) the challenges to the Screening Opinion were "hopelessly out of time";
    (ii) the applications for discharge of conditions were (save in respect of conditions 5, 6 and 8) were not applications within the meaning of regulation 2(1) of the EIA Regulations (and so did not require the Council to issue a screening opinion); and
    (iii) in respect of the application concerning conditions 5, 6 and 8, the time permitted under the regulations for the Council to consider whether a screening opinion was required had not elapsed when the claim form was issued, and no decision had yet been taken.

20. He therefore refused permission, and certified the claim as being "totally without merit", which meant that the Communicant was unable to renew her application for permission to apply for judicial review to an oral hearing before the Administrative Court. He ordered that she pay the Council's costs of responding to her claim, which he assessed at £6000 but capped at £5000 in accordance with the Aarhus costs claims provisions in Part 45 of the Civil Procedure Rules 1998, as amended in 2013.

21. The Communicant subsequently sought to appeal against that Order to the Court of Appeal. Permission was refused by Sullivan LJ on 1 July 2015, who expressly endorsed the decision of Mitting J, and concluded that the order as to costs "*was well within the ambit of his discretion*".[20]

The domestic legal framework

22. The procedures which must be followed as regards publicity and public consultation on applications for planning permission (whether or not the development proposed is 'EIA Development' for the purposes of the EIA Directive) are prescribed in secondary legislation. At the relevant time, the provisions were to be found in The Town and Country Planning

[18] A copy of the Statement of Facts and Grounds is at Annex 7 to the Communication.

[19] Communication Annex 9

[20] Communication Annex 11

(Development Management Procedure) Order 2010,[21] ("the DMPO") now superseded by The Town and Country Planning (Development Management Procedure) Order 2015.

23. The requirement for applications for planning permission to be publicised are set out in Article 13 of the DMPO:

> 13.—
> (1) An application for planning permission shall be publicised by the local planning authority to which the application is made in the manner prescribed by this article.
>
> (2) In the case of an application for planning permission for development which—
> (a) is an EIA application accompanied by an environmental statement;
> (b) does not accord with the provisions of the development plan in force in the area in which the land to which the application relates is situated; or
> (c) would affect a right of way to which Part 3 of the Wildlife and Countryside Act 1981 (public rights of way) applies,
> the application shall be publicised in the manner specified in paragraph (3).
>
> (3) An application falling within paragraph (2) ("a paragraph (2) application") shall be publicised in accordance with the requirements in paragraph (7) and by giving requisite notice—
> (a) by site display in at least one place on or near the land to which the application relates for not less than 21 days; and
> (b) by publication of the notice in a newspaper circulating in the locality in which the land to which the application relates is situated.
>
> (4) In the case of an application for planning permission which is not a paragraph (2) application, if the development proposed is major development the application shall be publicised in accordance with the requirements in paragraph (7) and by giving requisite notice—
> (a)
> (i) by site display in at least one place on or near the land to which the application relates for not less than 21 days; or
> (ii) by serving the notice on any adjoining owner or occupier; and
> (b) by publication of the notice in a newspaper circulating in the locality in which the land to which the application relates is situated.
>
> (5) In a case to which neither paragraph (2) nor paragraph (4) applies, the application shall be publicised in accordance with the requirements in paragraph (7) and by giving requisite notice—

[21] Annex 4(ii)

(a) by site display in at least one place on or near the land to which the application relates for not less than 21 days; or

(b) by serving the notice on any adjoining owner or occupier.

(6) Where the notice is, without any fault or intention of the local planning authority, removed, obscured or defaced before the period of 21 days referred to in paragraph (3)(a), (4)(a)(i) or (5)(a) has elapsed, the authority shall be treated as having complied with the requirements of the relevant paragraph if they have taken reasonable steps for protection of the notice and, if need be, its replacement.

(7) The following information shall be published on a website maintained by the local planning authority—

(a) the address or location of the proposed development;

(b) a description of the proposed development;

(c) the date by which any representations about the application must be made, which shall not be before the last day of the period of 14 days beginning with the date on which the information is published;

(d) where and when the application may be inspected;

(e) how representations may be made about the application; and

(f) that, in the case of a householder application, in the event of an appeal that proceeds by way of the expedited procedure, any representations made about the application will be passed to the Secretary of State and there will be no opportunity to make further representations.

(8) Subject to paragraph (9), if the local planning authority have failed to satisfy the requirements of this article in respect of an application for planning permission at the time the application is referred to the Secretary of State under section 76A (major infrastructure projects) or 77 (reference of applications to Secretary of State) of the 1990 Act, or any appeal to the Secretary of State is made under section 78 of the 1990 Act, this article shall continue to apply, as if such referral or appeal to the Secretary of State had not been made.

(9) Where paragraph (8) applies, when the local planning authority have satisfied the requirements of this article, they shall inform the Secretary of State that they have done so.

(10) In this article—

"adjoining owner or occupier" means any owner or occupier of any land adjoining the land to which the application relates;

"EIA application" has the meaning given in regulation 2(1) of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (interpretation), and

"environmental statement" means a statement which the applicant refers to as an environmental statement for the purposes of those Regulations; and

"requisite notice" means notice in the appropriate form set out in Schedule 3 or in a form substantially to the like effect.

(11) Paragraphs (1) to (6) apply to applications made to the Secretary of State under section 293A of the 1990 Act (urgent Crown development: application) as if the references to a local planning authority were references to the Secretary of State."

24. Article 16, read with Schedule 5, requires the local planning authority to consult specified statutory consultees (depending on the nature of the proposed development) prior to granting planning permission. By Article 16(5), the application shall not be determined until a period of 21 days has expired following the statutory consultee being notified of the application. By Article 16(7), the local planning authority is required to have regard to any representations of the statutory consultee in determining the application.

25. Article 23 makes provision for representations by Parish Councils in respect of certain planning applications.

26. Article 31 requires the local planning authority to give written notice of their decision on a planning application, including a requirement to give reasons for their decisions,[22] by reference to relevant development plan policies, and reasons for imposing any condition which is attached to a grant of planning permission.

27. By Article 36 of the DMPO, the local planning authority is required to keep a register of all planning applications in its area, the information contained thereon to include:

"(4) … in respect of every application for planning permission relating to the local planning register authority's area—

(a) a copy (which may be photographic or in electronic form) of the application and of plans and drawings submitted in relation thereto and of any accompanying design and access statement provided in accordance with article 8;

(b) particulars of any direction given under the 1990 Act or this Order in respect of the application;

(c) the decision, if any, of the local planning authority in respect of the application, including details of any conditions subject to which permission was granted, the date of such decision and the name of the local planning authority;

(d) the reference number, the date and effect of any decision of the Secretary of State in respect of the application, whether on appeal, on an application under section 293A(2) of the 1990 Act (urgent Crown development: application) or on a

[22] In respect of a decision to grant planning permission, what is required is a "summary" of reasons (Article 31(1)(a)) whereas for a refusal, the local planning authority must "state clearly and precisely their full reasons for the refusal, specifying all policies and proposals in the development plan which are relevant to the decision" (Article 31(1)(b)).

reference under section 76A or 77 of the 1990 Act (reference of applications to Secretary of State);

(e) the date of any subsequent approval (whether approval of reserved matters or any other approval required) given in relation to the application;

(f) a copy (which may be photographic or in electronic form) of any planning obligation or section 278 agreement entered into in connection with any decision of the local planning authority or the Secretary of State in respect of the application;

(g) a copy (which may be photographic or in electronic form) of any other planning obligation or section 278 agreement taken into account by the local planning authority or the Secretary of State when making the decision; and

(h) particulars of any modification to or discharge of any planning obligation or section 278 agreement included in Part 2 of the register in accordance with sub-paragraphs (f) or (g) or paragraph (6)."

28. These requirements apply to all applications for planning permission or subsequent consents, regardless of whether the development is "EIA development". It is simply not correct to state (cf the Communicant's submissions) that public consultation or participation in the decision making process for planning applications, depends on whether the local planning authority determines that the development is 'EIA development' and thus subject to the requirements of the EIA Regulations.

29. In respect of development falling within the scope (or potentially within the scope) of the EIA Directive, the protections afforded by the Directive are implemented in domestic law by The Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the EIA Regulations")[23].

30. These Regulations prescribe the procedures that are to be followed (and information required to be provided to the local planning authority and to the public) where permission is sought for "EIA development". "EIA development" is defined in regulation 2(1) as being either "Schedule 1 development" or "Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location".

31. Regulation 4 stipulates when development is to be treated as "EIA development":

> "(1) Subject to paragraphs (3) and (4), the occurrence of an event mentioned in paragraph (2) shall determine for the purpose of these Regulations that development is EIA development.
>
> (2) The events referred to in paragraph (1) are—
>
> (a) the submission by the applicant or appellant in relation to that development of a statement referred to by the applicant or appellant as an environmental statement for the purposes of these Regulations; or
>
> (b) the adoption by the relevant planning authority of a screening opinion to

[23] Communication Annex 1

the effect that the development is EIA development.

(3) A direction of the Secretary of State shall determine for the purpose of these Regulations whether development is or is not EIA development.

(4)

(a) The Secretary of State may direct that these Regulations shall not apply in relation to a particular proposed development specified in the direction either—

(i) in accordance with Article 2(3) of the Directive (but without prejudice to Article 7 of the Directive), or

(ii) if the development comprises or forms part of a project serving national defence purposes and in the opinion of the Secretary of State compliance with these Regulations would have an adverse effect on those purposes;

(b) Where a direction is given under paragraph (4)(a) the Secretary of State must send a copy of any such direction to the relevant planning authority.

(5) Where a direction is given under paragraph (4)(a)(i) the Secretary of State must—

(a) make available to the public the information considered in making the direction and the reasons for making the direction;

(b) consider whether another form of assessment would be appropriate; and

(c) take such steps as are considered appropriate to bring the information obtained under the other form of assessment to the attention of the public.

(6) Where a local planning authority or the Secretary of State has to decide under these Regulations whether Schedule 2 development is EIA development the authority or Secretary of State shall take into account in making that decision such of the selection criteria set out in Schedule 3 as are relevant to the development.

(7) Where a local planning authority adopts a screening opinion under regulation 5(5), or the Secretary of State makes a screening direction under paragraph (3)—

(a) that opinion or direction shall be accompanied by a written statement giving clearly and precisely the full reasons for that conclusion; and

(b) the authority or the Secretary of State, as the case may be, shall send a copy of the opinion or direction and a copy of the written statement required by sub-paragraph (a) to the person who proposes to carry out, or who has carried out, the development in question.

(8) The Secretary of State may make a screening direction either—

(a) of the Secretary of State's own volition; or

(b) if requested to do so in writing by any person.

(9) The Secretary of State may direct that particular development of a description mentioned in Column 1 of the table in Schedule 2 is EIA development in spite of the fact that none of the conditions contained in sub-paragraphs (a) and (b) of the definition of *"Schedule 2 development"* is satisfied in relation to that development.

(10) The Secretary of State shall send a copy of any screening direction and a copy of the written statement required by paragraph (7)(a) to the relevant planning authority."

32. By regulation 5, the applicant for planning permission may request the local planning authority to adopt a "screening opinion"[24]. The authority has 21 days to provide the opinion (or longer period as may be agreed). The applicant may ask the Secretary of State to make a "screening direction"[25] if the local planning authority does not adopt a screening opinion within the specified timescales, or if they determine that the proposed development is "EIA Development".

33. Where it appears to the local planning authority that a screening opinion is required, they are required to follow the procedures in regulation 5, even where no request has been made (Regulation 7).

34. Regulation 23 requires that where a planning application is placed on Part 1 of the planning register, the local authority is to take steps to secure that (inter alia) any screening opinion / screening direction, scoping opinion / scoping direction, or environmental statement is also placed on that register.

35. The requirement to consider potential significant environmental effects of a proposed development is not limited to the initial application for planning permission. Regulation 4 prohibits a decision maker from granting a permission or consent on a "subsequent application" for EIA development without considering environmental information as it does for an initial application for planning permission. "Subsequent application" is defined in regulation 2(1) as meaning "*an application for approval of a matter where the approval (a) is required by or under a condition to which a planning permission is subject; and (b) must be obtained before all or part of the development permitted by the planning permission may be begun.*"

36. Similarly, regulations 8 and 9 make provision for a decision maker to consider whether environmental information already submitted is sufficient, when considering a subsequent application, or if no environmental information was provided on the application for planning permission, whether a screening opinion is required on the subsequent application.

37. The Government has also issued guidance on the approach to be taken to considering whether an environmental impact assessment is required where a consent procedure

[24] Defined in regulation 2(1) as "a written statement of the opinion of the relevant planning authority as to whether development is EIA development"

[25] Defined in regulation 2(1) as "a direction made by the Secretary of State as to whether development is EIA development"

involves more than one stage, in section 8 of its '*Planning Practice Guidance: Environmental Impact Assessment*'.[26] This states, so far as is material, as follows (at para 56):

"Where a consent procedure involves more than one stage (termed a 'multi-stage consent'), for example, a first stage involving a principal decision (such as an outline planning permission) and the other an implementing decision (such as reserved matters), the likely significant effects of a project on the environment should be identified and assessed at the time of the procedure relating to the principal decision (See reference for a preliminary ruling in R v. London Borough of Bromley ex parte Barker (C-201/02) and Commission v UK (C-508/03)). However, if those effects are not identified or identifiable at the time of the principle decision, an assessment must be undertaken at the subsequent stage.

Under the Town and Country planning system this could be prior to approval:

- *of reserved matters following a grant of outline planning permission;*
- *of matters required by a condition attached to a full planning permission; or*
- *by a mineral planning authority or the Secretary of State of details required by conditions determined following a review of a minerals permission under Schedule 2 to the Planning and Compensation Act 1991 or Schedules 13 or 14 to the Environment Act 1995.*

An application for approval for the first two examples above is referred to in the regulations as a "subsequent application" (regulation 2(1)). A consent granted in approving a subsequent application is a "subsequent consent" (or a Review of Mineral Permission subsequent consent). There are requirements for screening for the need for an Environmental Impact Assessment for "subsequent applications" set out in regulations 8 and 9.

[...]

If sufficient information is provided with the application for planning permission, the local planning authority should determine whether the Environmental Impact Assessment obtained at that stage will take account of all the potential environmental effects of the project.

To minimise the possibility that further environmental information is required at a later stage of a multi-stage consent procedure, it is considered that (R v Rochdale MBC ex parte Tew [1999] 3 PLR 74 and R v Rochdale MBC ex parte Milne [2001 81 PCR 27]):

- *where an application is made for an outline permission with all matters reserved for later approval, the permission should be subject to conditions or other parameters (such as a section 106 agreement) which 'tie' the scheme to what has been assessed; and*

[26] The guidance was issued in 2013, and referred to in the Secretary of State's letter of 20 August 2014. A copy is at Annex 6(i)

- *while applicants are not precluded from having a degree of flexibility in how a scheme may be developed, each option will need to have been properly assessed and be within the remit of the outline permission.*

  However, there may be circumstances where an environmental impact assessment will be required even after outline planning permission has been granted (Commission v UK (C-508/03)). This is because it is not possible to eliminate entirely the possibility that it will not become apparent until a later stage that the project is likely to have significant effects on the environment. In that event, account will have to be taken of all the aspects of the project which have not yet been assessed, or which have been identified for the first time as requiring assessment."

38. Where an affected member of the public is concerned about a negative screening opinion or grant of planning permission without an environmental statement, it is open to that person to challenge the decision by way of judicial review before the domestic courts. It is well established that this procedure provides a sufficient remedy as a matter of EU law: see, for example, *R (on the application of the Noble Organisation Limited) v Thanet District Council* [2005] EWCA Civ 782 at para 61.[27] The main issue in that case was the principle that a decision which is not challenged within the time limit for a judicial review claim should be treated as having all the effects of a valid decision and cannot be questioned in subsequent proceedings (known as the principle of 'formal validity'). The Court of Appeal held that this principle was consistent with the EU law principles of (i) effective protection of individual rights and (ii) legal certainty: see paras. 46-68. It also held that, for reasons of good administration and legal certainty, "it is clearly in the public interest that [public authorities'] decisions cannot be open to challenge long after they have been acted upon" (para. 43). The Court's reasoning applies with equal or similar force in the context of the Aarhus Convention.

39. Part 54 of the Civil Procedure Rules 1998[28] provides that a claim for judicial review must be brought "promptly", and "in any event not later than 3 months after the grounds to make the claim first arose" (CPR r.54.5(1)). This was amended in 2013 to require that, in respect of decisions made under the planning acts (for example, a grant of planning permission under The Town and Country Planning Act 1990), "the claim form must be filed not later than six weeks after the grounds to make the claim first arose" (CPR r.54.5(5)). This change reflected some concern on the part of CJEU that the requirement to bring a claim "promptly" was insufficiently certain, and that a specific timescale was to be preferred. It is important to note, that the courts retain a power to extend the time for bringing a claim, if persuaded that it is appropriate to do so. A classic example of when the courts have been prepared to extend time, historically, is where the claimant did not become aware that planning permission had been granted until more than 3 months from the date of grant due

[27] Annex 5(i)

[28] Annex 3(i)

to (for example) a failure by the Council to comply with publicity requirements for the application, and where the court was satisfied that the claimant had acted promptly on becoming aware of the challenged decision..

40. When a claimant lodges a claim for judicial review, the case will be considered, firstly, on the papers by a Judge who will decide whether to grant permission to apply for judicial review (ie to determine that the case is arguable) or to refuse permission. Where permission is refused, the claimant has an automatic right to renew the application for permission to an oral hearing, unless, pursuant to CPR r.54.12(7), the Judge has certified that the case is "totally without merit". The purpose of this provision was explained by the Court of Appeal in *R (on the application of Grace) v Secretary of State for the Home Department* [2014] EWCA Civ 1091[29] at paragraph 2:

> "*By CPR 54.12(7) and its sister provision in the Upper Tribunal Rules rule 30(4A), a claimant whose application has been considered on the papers by a judge who has found it to be TWM is debarred from renewing his application at an oral hearing in the Administrative Court or the Upper Tribunal. His only recourse is to a judge of the Court of Appeal who will decide whether or not to grant permission to apply for judicial review or permission to appeal. That decision is confined to a consideration on the papers. The judge has no discretion to adjourn the application to an oral hearing. If the judge in the Court of Appeal, having considered the papers, refuses the application, that is the end of the matter: the application for permission to apply for judicial review will have been finally refused without its ever having been the subject of an oral hearing. The purpose of this recent innovation is to ensure that hopeless cases do not take up more of the time of respondents and of the court and the tribunal than is reasonable and proportionate*"

41. The Court clarified what was meant by the term at paras 13-15, and the safeguards built into the process, concluding at para 15:

> "*The adoption of this approach does contain within it two important safeguards. First, no judge will certify an application as TWM unless he is confident after careful consideration that the case truly is bound to fail. He or she will no doubt have in mind the seriousness of the issue and the consequences of his decision in the particular case. Secondly, the claimant still has access to a judge of the Court of Appeal who, with even greater experience and seniority, will approach the application independently and with the same care. To my mind, these safeguards are sufficient. CPR 54.12.7 so applied does not detract from the vital constitutional importance of the judicial review jurisdiction. Moreover, it is consistent with the overriding objective of the CPR .*"

The alleged breaches of the Convention

[29] Annex 5(ii)

42. The Communication raises a number of alleged breaches of various Articles of the Convention arising out of the matters set out above. These are addressed by Article, for ease of reference. A number of the complaints are, in the Party Concerned's respectful submission, inadmissible, for reasons set out below (and stated above at paragraphs 4-9) Given that the Committee does not, at present, given reasoning for its decision to find a communication admissible at the preliminary stage and treats the communication as being indivisible even where some aspects are clearly inadmissible, it is important for the Committee to consider these arguments on admissibility before considering the substantive allegations. The United Kingdom's submissions on the substantive allegations remain without prejudice to its position on their admissibility.

Articles 5(1) & (2)

43. The Communicant complains that the Council failed to possess the environmental information which was essential to determine whether the development was EIA development and/or in granting planning permission. This is clearly a complaint as to the substantive decision making process, and thus not a matter for this Committee's consideration: ACCC/C/2008/24 (Spain). It is clearly inadmissible for being outwith the scope of the Convention.

44. As regards the complaint that the Council thus failed to make important information available to members of the public, in breach of Article 5(2), as the Committee has previously made clear, it is concerned with ensuring whether environmental information available to a decision-maker in reaching its decision was available to the public: not whether the information available to the decision-maker was adequate. As set out at paragraph 79 of the Committee's decision in ACCC/C/2006/16 (Lithuania)[30]:

> *"79. With regard to the communicants' allegations with respect to lack of certain information relevant to the decision-making (para. 45), the Committee does not consider itself in a position to analyse the accuracy of the data which form the basis for the decisions in question. The Convention, while requiring the main alternatives studied by the applicant to be made accessible, does not prescribe what alternatives should be studied. Thus, 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."*

45. In respect of Article 5(2), this requires that parties shall ensure that "*within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible*". The Party Concerned has set out above (§27) the requirements for local authorities to maintain a register of planning applications, and information /documents

[30] Annex 8(ii)

which must be contained thereon. There is clearly no merit, therefore, in the suggestion that the United Kingdom is in breach of Article 5(2).

Article 6(1)(b)

46. Article 6(1)(b) requires a Party, in accordance with its national law, to apply the protections contained in Article 6, to a proposed activity which may have a significant effect on the environment, and to determine whether an activity is subject to those protections. In the present case, the Council determined that the Proposed Development was not likely to have significant effects on the environment, by its Screening Opinion of March 2012. The Communicant's complaint, under this Article, again centres on the allegation that the Council reached the wrong decision, and should have concluded that the Proposed Development was likely to have such effects. As the Committee made clear in ACCC/C/2008/24 (Spain), when an identical complaint was made, it is no part of the Committee's role to investigate the correctness or otherwise of such screening decisions, even when it is alleged that a negative decision was reached in breach of national or international laws:

> "*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"*

47. That is sufficient to dispose of the complaint under this ground. The complaint should be deemed inadmissible on the point.

Article 3(2)

48. The Communicant raises complaints in respect of:
    (i) the Council's handling of the planning application;
    (ii) the Council's failure to comply with the pre-action protocol in respect of her claim for judicial review;
    (iii) the time taken by the LGO in determining her complaint;
    (iv) the failure of the Secretary of State to issue a screening direction;
    (v) the designation of her claim as being "totally without merit"; and
    (vi) the Council's pursuit of the costs award against her.

49. Article 3(2) requires a Party to "*endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters*."

The planning application

50. The United Kingdom has in place a number of well-published and well-established procedures for ensuring that members of the public can obtain environmental information, participate fully in environmental decision-making and seek redress from domestic tribunals and courts if necessary.

51. The Party Concerned has set out above (§21-34)] the statutory arrangements which have been put in place to ensure (1) that members of the public are aware of applications for planning permission in their area; (2) are provided with prescribed information in respect of that development and directed to where they can obtain further information; (3) that a register is compiled with information relating to such applications; and (4) that members of the public are consulted upon, and have the opportunity to respond to, the proposed application prior to a decision being made as to whether to grant, or refuse, planning permission.

52. As is clear from the Officer's Report to the Planning Applications Committee, members of the public were aware of, and able to respond intelligently, to the application for planning permission. This included the Communicant, who participated vigorously in the procedures leading up to the grant of planning permission (at a public meeting) in December 2012.

53. If a member of the public is concerned that certain information held by the Council has not been made available, that person can request that that information be provided, if needs be, by means of a formal request for information under the Environmental Information Regulations 2004,[31] which requires information requested to be provided within 20 working days of the request, unless one of the specified exceptions applies.[32] If the person requesting the information is dissatisfied with the response, they can request a review,[33] and thereafter complain to the Information Commissioner,[34] with the further option of an appeal to the First-tier Tribunal (General Regulatory Chamber).[35]

54. These mechanisms are long established, well-known, well-publicised, and well-used.[36]

55. The Communicant did not choose to pursue these avenues in the present case, and has therefore failure to exhaust domestic remedies in this regard. These aspects of the

[31] Annex 3(iii). These Regulations implement Council Directive 2003/4/EC on public access to environmental information

[32] Regulation 5

[33] Regulation 14 requires the applicant to be informed of the right to request a review under regulation 11

[34] Pursuant to s.50 of the Freedom of Information Act 2000, as applied by regulation 18

[35] S.57 of the Freedom of Information Act 2000. Annex 3(iv)

[36] See, for example, the Information Commissioner's website: https://ico.org.uk/

allegations are inadmissible by reference to the paragraph 21 of the annex to decision I/7 and paragraph 6(b) decision V/9.

56. The requirement to exhaust domestic remedies, prior to seeking a remedy in an international tribunal, is a well-established principle which is part of customary international law, and recognised in many treaties.

57. This principle is reflected in paragraph 21 of the Annex to Decision I/7, which requires that "*The Committee should at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress."*

58. Similarly, in paragraph 6(b) of Decision V/9, the Meeting of the Parties reinforced the importance of this principle: "*That the Committee should ensure that, where domestic remedies have not been exhausted, it takes account of such remedies, in accordance with paragraph 21 of the annex to decision1/7".*[37]

59. Although the Committee has interpreted paragraph 21 as not being strict criteria and has a discretion as to whether to hear a complaint, the United Kingdom notes that the approach set out in decision V/9 is reflected in the draft revised Guide to the Compliance Committee (paragraph 2.6).[38]

60. As regards the allegations made in respect of the Council's conduct, these are neither particularised nor supported by proof, and strongly denied on the part of the Council in any event.

The subsequent consents

61. As set out above, it is clearly established that consideration of potential environmental effects of a proposed development should take place at the earliest point they can be identified: *R v. London Borough of Bromley ex parte Barker (C-201/02).*[39] Where conditions are imposed on a planning permission, those conditions should 'tie' the further approvals to what has been assessed: i.e. there should be no scope for the matters requiring further approval to alter the likely effects on the environment of the proposed development as assessed on the initial application: *R v Rochdale MBC ex parte Milne* (2001) 81 PCR 27.[40]

[37] Annex 7(i)

[38] Annex 7(ii)

[39] Annex 6

[40] Annex 4(iii)

62. The EIA Regulations and Planning Practice Guidance (§37 above) however recognise, and make provision for, the possibility of a future application for consent which must be obtained before development is commenced revealing potential environmental effects which were not identified, or foreseeable, on the initial application.

63. In the present case, the matters for which consent was sought did not require that further assessment, as was confirmed by the Secretary of State, in declining to issue a screening direction,[41] and by the Court of Appeal, dismissing the Communicant's appeal against the Administrative Court's refusal to grant permission to apply for judicial review.[42]

64. Insofar as the complaint under this ground is, in reality, a disagreement with the judgment reached by the relevant decision makers as to whether the matters for which consent was sought were likely to alter the assessment made of the likely environmental effects of the Proposed Development, that is again the sort of complaint which this Committee made clear it would not entertain in ACCC/C/2008/24 (Spain). Again, it is considered that for this reason the complaint should be deemed inadmissible.

The judicial proceedings

65. As regards the alleged non-compliance with the pre-action protocol by the Council, whilst parties are encouraged to comply with the pre-action protocol prior to proceedings being commenced, this not necessary to ensure protection of rights conferred by the Aarhus Convention. If the court considers that there has been a failure to comply with the pre-action protocol, and that has prejudiced the conduct of proceedings (for example, led to claims being made which could have been avoided, or proceedings unnecessarily complicated) it has the power to penalise that non-compliance by way of costs.

66. It appears that this is, in reality, an attempt to blame the Council for the Communicant's delay in commencing proceedings. That clearly is not substantiated on the facts. Nor has she been able to identify what it is she says she would or would not have done had she received the Council's response prior to issuing her claim. The Party Concerned notes, for example, that the Communicant had already obtained copies of the Planning Permission and Screening Opinion prior to commencing proceedings, together with other information which she relied upon in formulating her complaints to the Court.

67. As to the designation of her claim as being "totally without merit", this is a determination made by a judge and it is unarguable that it denies a claimant access to courts. As set out above, this power is only used by judges where, after careful consideration of a claim, it is considered that it is so hopeless that it is "bound to fail". This is an important safeguard, designed to avoid public authority, and court, time and resources being taken up with claims

[41] Communication Annex 9

[42] Communication Annex 11

which are clearly without merit. It in no way impedes a member of the public obtaining appropriate redress or remedy where there has been non compliance with (for example) the EIA Directive, as the designation can only be used where there is no prospects of the claimant obtaining any such remedy, the claim being totally hopeless. It is also critical to emphasise that there is a right of appeal against such a designation (as exercised in the present case) which provides an important safeguard against a claim being erroneously so designated, at risk of denying the access to remedy or redress protected by Article 9.[43]

68. The claim that the Council's failure to comply with the pre-action protocol, or designation of the Communicant's claim as "totally without merit" therefore constituted a breach of Article 3(2) is therefore baseless. The Party Concerned would also highlight that Article 3(2) does not apply to the Courts in any event, given the express exclusion of bodies performing a judicial function from the definition of "public authority" in Article 2.

The LGO

69. As set out above, it is no part of the LGO's role or remit to police compliance with obligations under the EIA Directive or Aarhus Convention. The LGO was established in 1974 under the Local Government Act 1974 to consider complaints about potential maladministration or other service failures by local councils and certain other authorities. If the LGO finds that there has been a service failure, or maladministration, and there has been an injustice caused to the complainant as a result, it may recommend that the local authority provide a remedy.[44] As it makes clear in its guidance, in the planning context, it would only be in 'exceptional' circumstances that it would suggest that a planning permission be revoked. It does not have the power to compel compliance with any remedy it recommends, although there is a 'convention' that authorities will be bound by their failings.[45]

70. The LGO is not, and not intended to be, an 'official' or 'authority' providing assistance or guidance to members of the public in seeking access to environmental information (cf the role of the Information Commissioner, referred to above), participation in decision making or access to justice. Any complaint of a breach of Article 3(2) in respect of the LGO's investigation of the complaint in this case is wholly misplaced.

[43] *R (on the application of Grace) v Secretary of State for the Home Department* [2014] EWCA Civ 1091. Annex 4(ii)

[44] Local Government Ombudsman Guidance on Good Practice: Remedies (January 2016) is annexed hereto at Annex 5(ii).

[45] *R (Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36. (Annex 4(iv)

71. In the present case, it appears that the 'remedy' the Communicant was seeking from the LGO was a finding that the Council's Screening Opinion was unlawful or invalid and that the likely significant effects of the Proposed Development should be reassessed – and subject to a full environmental impact assessment. The LGO was the wholly incorrect forum in which to seek to ventilate that complaint, or obtain that kind of remedy. As set out above (§7), the correct procedure for the Communicant would have been to apply for judicial review – as soon as she became aware of the matters of which she wished to complain – and to request that relief from the Court.

72. This complaint is therefore wholly misconceived, and should be deemed inadmissible on this point.

Article 3(8)

73. This relates to the Council having sought to enforce the costs award made by the Administrative Court in refusing the Communicant's application for permission to apply for judicial review.

74. The Committee has previously found that the seeking of costs by a defendant in a claim for judicial review does not 'penalise' a communicant, contrary to Article 3(8): ACCC/C/2008/27 (United Kingdom).[46] A fortiori, seeking to recover monies so ordered clearly does not constitute conduct of the sort prohibited by Article 3(8). Indeed, it is the United Kingdom's submission that the allegation that the awarding of costs is "penalization, persecution or harassment" is an abuse of the right to bring a communication. The Committee's limited time should not be taken up with allegations that are so utterly without merit, and which would not be seriously entertained in any other forum. If this allegation is not considered inadmissible it would, in our respectful submission, view, devalue article 3(8) and risk seriously undermining the credibility of the compliance mechanism.

Article 9

75. As noted above (§9) the United Kingdom respectfully maintains that there is no need for the Committee to consider the costs aspect of the Communicant, given the ongoing discussions in respect of V/9n. In any event, these complaints are also wholly misplaced.

76. Firstly, this is not a case in which Article 9(2) is engaged. The Council having determined that the Proposed Development was not likely to have significant effects on the environment, the decision making processes were not subject to Article 6 of the Convention.

77. Secondly, this is not a case in which the Communicant was deprived of an opportunity to seek redress from the Courts by reason of procedures or rules which unreasonably or

[46] Annex 8(iii)

disproportionately impeded access to justice in cases concerning environmental decision-making. Insofar as she lost any opportunity to seek to ventilate her concerns at a substantive hearing, this was primarily due to her delay in availing herself of the judicial procedures available – in electing to pursue alternative (erroneous) avenues before seeking redress from the Courts.

78. Thirdly, there is no merit in the contention that '6 weeks' is too short a period in which to expect an individual to bring proceedings before a Court. As set out above, there are a number of mechanisms in place to ensure public participation and access to information during the decision-making process – it is not the case where the aggrieved individual is starting blind on day 1 of the 6 week period – and the Court retains a discretion to extend that period in appropriate circumstances. The 6 week period did not preclude the Communicant obtaining redress in the present case. It was the fact that she waited nearly 3 years from the date of the negative Screening Opinion – and over 2 years from the date of Planning Permission – before seeking to challenge the Council's decision that the Proposed Development was not EIA development before the Courts. The rationale in the ***Noble*** case (see above at §38) - namely that it is in the public interest on grounds of good administration and legal certainty that decisions cannot be challenged several years after they are made, and that this is fully consistent with the effective protection of individual rights - applies with equal or similar force here.

79. Fourthly, as to costs, the United Kingdom has provided for statutory 'costs caps' to ensure that for judicial reviews engaging rights under the Aarhus Convention ("Aarhus convention claims") the costs to members of the public are not prohibitively expensive.[47] That does not displace the fact that in every case it will be for the judge to assess what he considers the appropriate costs to be, but if those costs are assessed at a figure higher than the costs cap (£5000 in the case of an individual claimant), then the sum which the claimant has to pay will be limited to the cap. That cap applies whatever the stage the proceedings reach in the Administrative Court (i.e had the matter proceeded to a substantive hearing, the claimant's liability for costs would not have exceeded £5,000). Rule 52.9A of the Civil Procedure Rules provides that an appeal court can also order that recoverable costs of an appeal be limited in (inter alia) an Aarhus Convention claim.

80. In the present case, the Judge who considered the claim, the Council's response, and that of the interested parties, concluded that the appropriate award to make in respect of the Council's costs was £6,000. However, as it was an Aarhus Convention claim, he limited the costs payable by the Communicant to £5,000. She was entitled to, and did in fact, appeal against that order to the Court of Appeal which concluded that the order was one it was within the Judge's discretion to make.

[47] Part 45 VII of the Civil Procedure Rules 1998 (as amended) and Practice Direction 45

81. As set out above, the United Kingdom respectfully maintains that there is no need for the Committee to consider the costs aspect of the Communicant, given the ongoing discussions in respect of V/9n. In light of the Committee's heavy workload, the fact that this communication raises nothing new in this area and that discussions on the issue remain ongoing under decision V/9n, it would not be the best use of the Committee's time to revisit this same issue again here. For these reasons, the UK submits that the complaint should be deemed inadmissible.

Conclusion

82. For the reasons set out above, the UK Government strongly denies that there has been any non-compliance with its obligations under the Convention as alleged, and respectfully asks the Committee to dismiss this complaint as inadmissible, alternatively, as without foundation.