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

31 October 2016

Dear Ms Marshall

Re: UK response to the Communicant's letter of 6 June 2016 (ACCC/C/2015/131)

I write in response to the letter of the Communicant dated 6 June 2016.

The UK's position remains as set out in its response of 13 May 2016 to the communication. The Committee is referred to that response so far as relevant, and this further response should be read alongside it. To assist the Committee the UK has sought in this letter, by reference to articles of the Convention, to provide some comment on the Communicant's case as it is now put, including addressing any new allegations.

Article 3(2)

The Communicant complains:

a) the Council did not provide adequate assistance to her in ensuring that she had access to information, and

b) about the approach of the Local Government Ombudsman (LGO).

The procedures in place in the UK, detailed in the UK's previous response, are sufficient to discharge the UK's obligations under article 3(2). As set out in The Aarhus Convention: An Implementation Guide at page 62: *"…it is conceptually impossible for Parties to ensure that officials and authorities assist and provide guidance, because whether individual officers actually give assistance and guidance in a particular case is subjective. Under these circumstances, the word "endeavour to ensure" should be interpreted to require Parties to take firm steps towards ensuring that officials and authorities provide the assistance mentioned*."

Further, the allegations made about the LGO are entirely misplaced – the LGO was established to consider complaints about potential maladministration or other service

failures by local councils and certain other authorities, it is not within its remit to police compliance with obligations under the EIA Directive or the Aarhus Convention.

Article 3(8)

The Communicant's response focuses on the Council's pursuit of interest on costs awarded in its favour by the High Court, and its intention to involve the High Court Sheriff in order to enforce the debt.

This point can be dealt with briefly. Article 3(8) precludes anyone being penalized, persecuted or harassed in any way for exercising their rights under the Convention. The provision is expressed as not affecting the powers of national courts to award reasonable costs in judicial proceedings. As previously noted, the Committee has found that seeking reasonable 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). Similarly, neither the seeking by an authority of legitimate interest on such a debt, nor stating an intention to take lawful action in such circumstances to enforce a legitimate debt, would constitute a breach of the article. As stated in the UK's response, this allegation is an abuse of the right to bring a communication before to the Committee.

Article 5(1) and (2)

In respect of article 5, the Communicant complains that responses of statutory consultees, the EIA screening opinion and an environmental noise assessment were not placed on the Council's planning register in a timely manner. This is said by the Communicant to amount to a breach of article 5(1)(b) (rather than article 5(1)(a) as set out in her original communication), as she alleges that this means that the Council's planning committee would not have had access to the information at the time a substantive decision was taken. This is said to also be a breach of article 5(2) in that the information in question was not available to the public at the time of the decision on the planning application.

Article 5(1) - The UK's position is that reclassifying the complaint in this way makes no difference to its substance. Article 5, paragraph 1(b), requires mandatory systems to ensure an adequate flow of information to public authorities. The UK's response to the complaint set out at length the procedures in place regarding applications for planning permission, and for publicity and public consultation on such applications (see paragraph 22 onwards). The Communicant's complaint remains one that goes to the substantive decision making process, not to the flow of information to the authority, and should be deemed inadmissible on that basis. In any event, this complaint confuses the placement of information on the register with the availability of information to the planning committee.

Article 5(2) - The UK's response to the original communication set out (see paragraph 27) the requirements for local planning authorities to maintain a register of planning applications, and for relevant information and documentation to be placed upon that register. These are legal obligations which must be complied with, and a failure to do

so by an authority could be challenged by way of judicial review. It cannot be said that the UK is in breach of this article.

Article 6

The Communicant's complaint appears to remain, fundamentally, that neither the Council nor the Secretary of State were of the view that the proposed development was likely to have significant effects on the environment. The Communicant now explains her complaint, insofar as it relates to article 6(1)(b), as centring on the fact "that the Council failed to screen all subsequent decisions on [the] project". The complaint now made is that the UK's domestic regulations do not provide for screening where the decision concerns conditions that must be approved before development may be occupied/used.

The UK's requirements in respect of screening to determine whether proposed development requires EIA are set out, so far as relevant, in paragraphs 29-37 of its response, see in particular paragraphs 35-36. The relevant statutory instrument is the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (the "EIA regulations"), which transposes the EIA Directive into UK law. In summary, the domestic position is as follows:

a) Development which falls into Schedule 1 of the EIA regulations (which correlates with Annex I of the EIA Directive) must be subject to EIA. Development which falls within Schedule 2 of the EIA Regulations (materially the same as Annex II of the EIA Directive) and which either (1) meets thresholds or criteria set out in the regulations; or (2) is in a "sensitive" area must be screened to determine if EIA is necessary. Regulation 2(1) defines certain designated sites as sensitive areas, such as National Parks.

b) Regulation 7 of the EIA regulations requires an authority, when dealing with an application which appears to be for Schedule 1 or Schedule 2 development, and which has neither previously been screened nor is accompanied by an environmental statement, to issue a screening opinion in respect of that application.

c) Similarly, regulation 9 requires an authority to issue a screening opinion in the case of a "subsequent application" (which includes an application for approval of a matter where the approval is required by or under a condition to which a planning permission is subject, and which must be obtained before all or part of the development permitted by the planning permission may be begun) in respect of Schedule 1 or Schedule 2 development which has not itself been screened.

d) Screening must consider any likely significant environmental impacts of the proposed development, including where relevant, any such impact of the operation of the development.

Accordingly, there is comprehensive provision in UK law to ensure that development which is likely to have significant effects on the environment is subject to the EIA process.

As regards the case at hand, the complaint that the Council failed to screen any of the subsequent applications is not understood. The procedures in respect of development within scope, or potentially within scope of the EIA Directive were set out in paragraphs 29 to 37 of the UK's response. The Council had determined, in its screening opinion of March 2012, that the development in question was not likely to have significant effects on the environment. A further assessment was not required for the matters for which consent was sought, which was later confirmed, including by the Secretary of State who declined to issue a screening direction. For that reason it cannot be said that there is any failure in respect of the Convention; the system ensures that development cannot begin until it has been confirmed that there is no likelihood of significant effects. Whether a development is likely to have significant effects is fundamentally a question for the relevant authority, as the Committee has confirmed in ACCC/C/2008/24 (Spain). However, where any person considers that a proposed development requires an EIA, regulation 4(8)(b) provides that they can request a screening direction from the Secretary of State. They can also challenge a decision or failure to screen, as the case may be, before the domestic courts.

That is a complete answer to the complaint insofar as it relates to article 6 and the complaint should be deemed inadmissible on this point.

Article 9

As noted in paragraph 9 of the UK's response, 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.

Yours sincerely

Ahmed Azam
United Kingdom National Focal Point to the UNECE Aarhus Convention