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

OPENING SUBMISSIONS OF THE UNITED KINGDOM

Hearing: 26 November 2020

Introduction

1. These are the opening submissions of the United Kingdom for the hearing that will consider communication ACCC/C/2015/131 (**"the Communication"**).

2. The Communication arises out of the decision of the London Borough of Merton (**"the Council"**) on 18 December 2012 to grant planning permission for the redevelopment of the Nelson Hospital site on Kingston Road in south-west London. This followed the Council's previous decision 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[1].

3. Since the United Kingdom provided its full written response to the Communication on 13 May 2016 (**"the Response"**), both parties have filed further comments in writing:
   (1) The Communicant filed comments on the United Kingdom's response to the Communication on 6 June 2016.
   (2) The United Kingdom filed further comments in response on 31 October 2016.

[1] Commnication: Annex 1

(3) On 3 December 2018 and 31 January 2019, the Communicant and the United Kingdom respectively replied to questions from the Compliance Committee (**"the Committee"**), with the Communicant then filing further comments on 12 February 2019.

4. The purpose of these opening submissions is to distil, in a single document, the United Kingdom's case on the main issues that it identifies as arising from the Communication, taking account of the additional comments identified above.

5. In summary, the United Kingdom considers that the Communication alleges breaches of the following articles of the Aarhus Convention (**"the Convention"**): 5(1) and (2), 6(1)(b), 3(2), 3(8) and 9.

6. For the reasons given below, the United Kingdom submits that none of these articles has been breached in this case as claimed. The complaints in the Communication are without foundation and should be dismissed.

7. Below, **"R/*para.*"** refers to the numbered paragraphs of the Response to the Communication dated 13 May 2016.

The scope of the Communication

8. The Communicant takes issue with a number of decisions taken by the Council, the Secretary of State for Communities and Local Government (as the position was then called) (**"the Secretary of State"**) and the domestic UK courts. The matters challenged remain as set out at R/2, specifically:
   (1) the Council's negative EIA[2] screening decision of 12 March 2012;
   (2) the Council's grant of planning permission on 18 December 2012 for the redevelopment of the Nelson Hospital site (**"the 2012 Permission"**)[3];
   (3) the alleged 'failure' of the Council to require an EIA when the developers sought the Council's approval of various matters submitted pursuant to conditions imposed on the 2012 Permission;

[2] Environmental Impact Assessment
[3] Communication: Annex 3

(4) the Secretary of State's decision on 20 August 2014 not to issue an EIA screening opinion or direction in relation to the developer's application to discharge conditions imposed on the 2012 Permission[4];

(5) the decision of a High Court judge, Mr Justice Mitting, on 20 March 2015 to: (i) refuse to grant the Communicant permission to apply for judicial review of the Council in relation to matters (1) and (3) above; (ii) certify the Communicant's application for permission to apply for judicial review as "totally without merit"; and (iii) order the Communicant to pay the Council £5,000 in costs[5];

(6) the decision of a Court of Appeal judge, Lord Justice Sullivan, on 1 July 2015 to refuse to grant the Communicant permission to appeal against the order made by Mr Justice Mitting on 20 March 2015[6].

Context

9. At the heart of this Communication is the Communicant's disagreement with the Council's decision on 12 March 2012 that the proposed development did not need to be subject to EIA as it was not likely to have significant effects on the environment by virtue of factors such as its nature, size or location.

10. This Committee has made clear that it is not part of its 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/2004/24 (Spain)[7]:

> *"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*

[4] Communication: Annex 5
[5] Communication: Annex 9
[6] Communication: Annex 11
[7] Response to Communication: Annex 8(i)

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 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."

11. This is a complete answer to many of the Communicant's complaints, as explained more fully below.

Key facts

12. The facts relevant to the Communication are set out in detail at R/10-21. The key facts are these:

February 2012	The developer applied to the Council for planning permission for the redevelopment of the site known as The Nelson Hospital, 220 Kingston Road, London, SW20 9DB (**"the Site"**). The proposal was for a new, 2-3 storey local care centre, and another 2-3 storey building comprising 51 'assisted living' extra care apartments for senior citizens. The planning application included a request for an EIA screening opinion from the Council.
1 March 2012	The Council published a notice in a local newspaper to give publicity to the planning application[8]. On or around this date, the Council also sent hard-copy letters to local residents (418 in total), including the Communicant, notifying them of the application and inviting them to send any comments they wanted to make on the proposal to the Council within 21 days. The Communicant was one of 104 local residents who responded to the letters.

[8] Response to Communication: Annex 2

12 March 2012	The Council issued a negative EIA screening opinion: it did not consider that the proposal was likely to give rise to significant environmental effects (**"the 2012 Screening Opinion"**)[9].
June 2012	The developer submitted amendments to the proposals, leading the Council to undertake a further round of public consultation.
11 July 2012	The Council published on its website a report prepared by its officers on the application. The report recorded that the 2012 Screening Opinion was negative (para. 8.2).
19 July 2012	The Council's Planning Applications Committee met to consider officers' report on the application.
18 December 2012	Following a further meeting earlier in the month of its Planning Applications Committee, the Council granted planning permission for the development proposed on the Site (**"the 2012 Permission"**)[10]. The 2012 Permission was subject to 50 conditions, including several conditions requiring the developer to submit details to the Council for approval before carrying out specific aspects of the works.
February 2013	Building work for the new local care centre started on the Site.
March 2013 – January 2015	The developer made several applications to discharge various conditions on the 2012 Permission, most of which were discharged in November/December 2013 and March 2014.
4 September 2013	The Council published the 2012 Permission on its website.
April 2014	Building work for the new 'assisted living' extra care apartments started on the Site. In the same month, the Communicant wrote to the Secretary of State asking him to make an EIA "screening direction" in relation to the developer's application to discharge certain conditions relating to this building work.
21 July 2014	The Council published the 2012 Screening Opinion on its website.

[9] Communication: Annex 2
[10] Communication: Annex 3

20 August 2014	The Secretary of State wrote to the Communicant, notifying her that he was declining her request to issue an EIA screening opinion in this case[11]. He stated *inter alia* that he was satisfied that any likely significant effects arising from the developer's application to discharge the conditions had already been considered when the Council issued the 2012 Screening Opinion.
6 February 2015	The Communicant issued a claim for judicial review in the High Court of England and Wales. The Communicant sought to challenge the lawfulness of the Council's 2012 Screening Opinion and its subsequent 'failure' to reassess the potential environmental effects of the development before approving the applications to discharge conditions on the 2012 Permission.
20 March 2015	Mr Justice Mitting, a High Court judge, refused to grant permission for the claim for judicial review to proceed, certifying the claim as "totally without merit" and ordering the Communicant to pay the Council's costs of responding to the claim, capped at £5000[12].
April 2015	The new local care centre was completed.
1 July 2015	Lord Justice Sullivan, a judge in the Court of Appeal of England and Wales, dismissed the Communicant's application for permission to appeal against the order made by Mr Justice Mitting[13].

Relevant law: key propositions

13. The relevant domestic legal framework is set out in detail at R/22-41. This Communication requires consideration of two main areas of domestic English law:
    (1) the law relating to the publicity and public consultation requirements when an application is made for planning permission;

[11] Communication: Annex 6
[12] Communication: Annex 9
[13] Communication: Annex 11

(2) the law on environmental impact assessment.

14. As regards (1) above, the key propositions are these:
    (1) In England, the procedures which must be followed as regards publicity and public consultation on applications for planning permission are prescribed by secondary legislation. At the relevant time, these procedures were set out in the Town and Country Planning (Development Management Procedure) Order 2010 (**"the DMPO"**)[14].
    (2) Article 13 of the DMPO set out the publicity requirements for applications for planning permission: see R/22 for the full citation. This is the provision that imposes obligations in relation to notices on or near the proposed development site and in newspapers.
    (3) Article 31 of the DMPO required the local planning authority (here, the Council) to give written notice of its decision on a planning application, including a requirement to give reasons for that decision (a "summary" of reasons being sufficient if the decision was to grant planning permission): see R/26.
    (4) Article 36 of the DMPO required the local planning authority to keep a register of all planning applications made in its area, with the register containing all the information specified by Article 36(4).

15. As for the domestic law on environmental impact assessment, the key propositions are these:
    (1) At the relevant time, the EIA Directive was implemented in domestic law by the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (**"the EIA Regulations"**)[15].
    (2) Regulation 4 of the EIA Regulations stipulated when a development was to be treated as "EIA development": see R/31 for a full citation.
    (3) Regulation 5 enabled the applicant for planning permission to ask the local planning authority to adopt a "screening opinion", defined as "a written statement of the opinion of the relevant planning authority as to whether development is EIA development" (reg. 2(1)). The authority then had 21 days to provide the opinion (or such longer period as could be agreed).
    (4) The applicant could ask the Secretary of State to make a "screening direction", defined as "a direction made by the Secretary of State as to whether development is EIA

[14] Response to Communication: Annex 3(ii)
[15] Communication: Annex 1

development" (reg. 2(1)), if *inter alia* the local planning authority did not adopt a screening opinion within the timescales.

(5) Regulation 23 required a local planning authority to take steps to secure that *inter alia* any screening opinion/direction issued, and any environmental statement submitted, was placed on its planning register.

(6) The requirement to consider the potential significant environmental effects of a proposed development was not limited to the initial application for planning permission. Regulation 3(4) prohibited a decision-maker from granting planning permission or "subsequent consent" unless they had first taken the environmental information into account. A "subsequent consent" was granted pursuant to a "subsequent application", defined in turn (reg. 2(1)) as "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."

(7) Similarly, regulations 8 and 9 made provision for a decision-maker to consider, when presented with a "subsequent application", whether *inter alia* the environmental information that had already been submitted prior to obtaining the main planning permission was sufficient to enable a decision to be made as to whether EIA was required.

16. The UK Government has published guidance on the approach to be taken to considering whether EIA is required when a consent procedure involves more than one stage[16]: see R/37 for a full citation.

17. It is well-established that a person who is concerned about a negative EIA screening opinion may challenge that decision by way of judicial review in the domestic courts: R/38.

Submissions

18. None of the various complaints made in the Communication is well-founded.

Article 5(1) and (2)

[16] Response to Communication: Annex 5(i)

19. Article 5(1) and (2) concerns the collection and dissemination of environmental information by public authorities.

20. By reference to Article 5(1), 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 about the substantive decision-making process in an individual case, and thus not a matter for this Committee's consideration: ACCC/C/2008/24 (Spain). It is beyond the scope of the Convention.

21. As for the complaint that the Council failed to make important information available to members of the public, in breach of Article 5(2), the Committee has previously made clear that it is concerned with ensuring that environmental information that *was* available to a decision-maker in reaching its decision was available to the public, not with whether the information available to the decision-maker was adequate: see the Committee's decision in ACCC/C/2006/16 (Lithuania)[17] at [79], cited at R/44.

22. The obligation under Article 5(2) is to 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" *(emphasis added).* As set out fully at R/27, the United Kingdom has prescribed clear requirements in law for local authorities to maintain a register of planning applications, and to include specific information and documents on that register. A failure to comply with these requirements can be challenged by judicial review.

23. There is no merit in the suggestion that the United Kingdom is in breach of Article 5(2).

Article 6(1)(b)

24. Article 6 concerns public participation in decisions on specific activities. In particular, 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.

[17] Response to Communication: Annex 8(ii)

25. In the present case, in the 2012 Screening Opinion, the Council determined that the proposed development was not likely to have significant effects on the environment. The Communicant disagrees with that decision, but 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 unlawful: see R/46. There is no merit in the submission that the United Kingdom is in breach of Article 6(1)(b).

Article 3(2)

26. 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".

27. Against this standard, the Communicant raises complaints in relation to:
    (1) the Council's handling of the planning application;
    (2) the alleged 'failure' of the Secretary of State to issue a screening direction;
    (3) the Council's failure to comply with the pre-action protocol in respect of her claim for judicial review;
    (4) the designation of her claim as being "totally without merit";
    (5) the Council's pursuit of a costs order against her;
    (6) the time taken by the Local Government Ombudsman (**"LGO"**) to determine her complaint.

28. None of the Communicant's arguments in relation to these matters comes close to demonstrating that the United Kingdom is in breach of Article 3(2).

Matter (1): the Council's handling of the planning application;
Matter (2): the alleged 'failure of the Secretary of State to issue a screening direction

29. Matters (1) and (2) can be taken together.

30. At R/21-34, the United Kingdom has set out in detail 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) that they are provided with prescribed information in respect of that proposed development and directed to where they can obtain further information;
    (3) that a register is compiled containing 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.

31. These procedures are sufficient to discharge the obligations of the United Kingdom 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 words 'endeavour to ensure' should be interpreted to require Parties to take firm steps towards ensuring that officials and authorities provide the assistance mentioned."

32. In any event, it is clear from the Officer's Report to the Council's Planning Applications Committee that 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.

33. If a member of the public is concerned that certain information held by the Council has not been made available, that person can, if necessary, make a formal request for that information pursuant to the Environmental Information Regulations 2004[18]. The 2004 Regulations require information requested to be provided within 20 working days of the request, unless one of the specified exceptions applies[19]. There is a review process[20], a complaints process to the

[18] Response to Communication: Annex 3(iii)
[19] Regulation 5
[20] Regulation 11

Information Commissioner, and the possibility of a further appeal, if necessary, to the First-tier Tribunal (General Regulatory Chamber).

34. The Communicant did not pursue these avenues in the present case, and so failed to exhaust her domestic remedies in this regard: see R/55-59.

35. As for the subsequent consents in which the Council approved the discharge of conditions on the 2012 Permission, the EIA Regulations and published guidance provide for the possibility that a subsequent application for consent, required before development may be commenced, may require the assessment of potential environmental effects which were not identified, or were not foreseeable, when the initial application was considered.

36. In the present case, the matters for which subsequent consent was required did not reveal a need for a further assessment, as the Secretary of State confirmed in declining to issue a screening direction, and as the Court of Appeal further confirmed in dismissing the Communicant's appeal against the High Court's refusal to grant permission to apply for judicial review.

37. Insofar as the complaint in relation to the handling of subsequent consents is, in reality, a disagreement with the judgment reached by the relevant decision-makers as to whether those consents should alter the assessment made of the likely environmental effects of the proposed development, that is again a complaint relating to substantive decision-making that the Committee made clear it would not entertain in ACCC/C/2008/24 (Spain).

Matter (3): the Council's failure to comply with the pre-action protocol

38. Compliance with the pre-action protocol for judicial review is not necessary to ensure that the rights conferred by the Convention are protected. If it is suggested that the Council's alleged non-compliance with the pre-action protocol was to blame for the Communicant's delay in issuing her claim for judicial review, that is not substantiated on the facts. It was the Communicant's responsibility to issue a timely claim for judicial review and her ability to do so was not contingent on obtaining a pre-action response from the Council.

39. The Communicant has not been able to identify what she would have done differently had she received a pre-action response from the Council. She had already obtained copies of the 2012 Permission and the 2012 Screening Opinion before she commenced proceedings, alongside other information that she relied upon in formulating her complaints to the court.

Matter (4): the designation of her claim as "totally without merit"

40. The ability of a judge of the High Court to certify a claim for judicial review as "totally without merit" is only exercised when the claim is "bound to fail". This is an important safeguard, designed to ensure that hopeless claims do not place disproportionate demands on public resources. The discretion of a judge to certify a claim as totally without merit does not impede a member of the public from obtaining an appropriate remedy where there has been non-compliance with (for example) the EIA Directive, as the designation can only be used where there is no prospect of the claimant obtaining any such remedy. Critically, there is a right of appeal against the certification of a claim as totally without merit, which safeguards against the risk of erroneous certification.

41. There is nothing, therefore, in this point. In any event, Article 3(2) does not apply to the courts given the express exclusion of bodies performing a judicial function from the definition of "public authority" in Article 2 of the Convention.

Matter (5): the Council's pursuit of a costs order against her

42. This matter is more appropriately dealt with under the aegis of Article 3(8) below.

Matter (6): the time taken by the LGO to determine her complaint

43. 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. 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, participation in decision-making or access to justice. Any complaint that Article 3(2) of the Convention was breached by the LGO's investigation of the Communicant's complaint is entirely misplaced.

44. Accordingly, none of the six matters identified above comes close to demonstrating that the United Kingdom is in breach of Article 3(2) of the Convention.

Article 3(8)

45. Article 3(8) states:

> "8. Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings."

46. The Committee has previously confirmed that a defendant seeking its costs for responding to an unsuccessful claim for judicial review does not 'penalise' a communicant within the meaning of Article 3(8): ACCC/C/2008/27 (United Kingdom)[21]. *A fortiori*, a defendant seeking to recover costs *already ordered by a court in its favour* could not conceivably be described as engaging in the conduct proscribed by Article 3(8). Moreover, that would be tantamount to attempting to bring orders of the court within the scope of the Convention, contrary to the explicit exclusion of judicial authorities from that scope: see para. 41 above.

47. The Communicant's case in relation to Article 3(8) is not improved by her subsequent focus on the statutory interest that is due on the costs awarded against her. A public authority pursuing the interest due legitimately on an outstanding debt owed to it is not remotely engaging in behaviour that seeks to 'penalize', 'persecute' or 'harass' the individual.

Article 9

48. Article 9 concerns access to justice.

49. The key points to make in relation to Article 9 are these:

[21] Response to Communication: Annex 8(iii)

(1) As the Council determined that the development at issue in this case was not likely to have significant effects on the environment, the decision-making processes were not subject to Article 6 of the Convention. Accordingly, Article 9(2) was not engaged.

(2) The Communicant was not deprived of an opportunity to seek redress from the courts by reason of procedures or rules which unreasonably or disproportionately impeded access to justice in cases concerning environmental decision-making. Permission to apply for judicial review was refused, in large part, because of the Communicant's own inexcusable delay in availing herself of that process.

(3) The 6-week period in which to bring a claim for judicial review did not preclude the Communicant from obtaining a remedy in this case. The Communicant did not seek to challenge the Council's decision that the proposal was not EIA development until nearly 3 years from the date of the 2012 Screening Opinion, and over 2 years after the 2012 Planning Permission was granted. There was no reasonable excuse for this substantial delay.

(4) The costs order that the High Court made in the Council's favour (which was upheld by the Court of Appeal) complied with the 'costs caps' set by the United Kingdom to ensure that litigation that engages rights under the Convention is not prohibitively expensive. The High Court judge concluded that the appropriate order to make in this case, were this not an Aarhus Convention claim, would be for the Communicant to pay the Council £6,000, but the judge limited the award to £5,000 in accordance with the caps.

50. The United Kingdom is not in breach of Article 9.

Conclusion

51. For these reasons, the United Kingdom denies that it is in breach of the Convention as alleged. The complaints in the Communication should be dismissed.

GWION LEWIS

Landmark Chambers

London

19 November 2020