26 November 2020

Re: ACCC/C/2015/131 (United Kingdom)
Opening statement from the Communicant

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

2. I believe that all three pillars of the Convention have not been upheld in this case.

3. From the outset, our community raised concerns with the local Council about a variety of issues, including:

    - the huge increase in traffic that would be generated by the site, and the consequential increase in noise and air pollution;
    - the loss of many mature trees from around the site;
    - the visual impact of the development on the surrounding conservation areas; etc.

4. However, we felt that many issues had not been adequately addressed, prompting complaints to the Council and the Local Government Ombudsman, in an attempt to get these issues looked at before planning permission was granted.

5. Sadly though, the decision-making process went ahead regardless.

6. There was a lack of transparency from the start. The public were not informed that the project was potential EIA development or that it was subject to a screening process.

7. The Screening Opinion (dated 12 March 2012), was not placed on the planning register. Neither was the Noise Assessment (dated May 2012); nor the responses from the statutory consultees, including Natural England's response requesting mitigation for the impact on bats (dated 13 March 2012) and the Environment Agency's response requesting a sustainable water drainage scheme (15 May 2012).

8. As statutory consultees, there should also have been responses from English Heritage (now Historic England) and the Greater London Archaeological Advisory Service, but they each stated that they did not receive the notification from the Council, and therefore had not responded at all. The statutory consultees have a legal requirement to provide a substantive response. The Council had ample time to follow up and acquire these responses, but chose not to.

9. It is of particular note that, of all the many documents placed on the planning register, it is those few documents that were missing, that indicated that there may be a significant effect on the environment.

10. As a result, these documents were not available for scrutiny during the procedure to grant planning permission. The Screening Opinion was not updated before the decision was taken to grant planning permission. The public were not informed when planning permission was granted and the Decision Notice was not placed on the planning register until 9 months later.

11. **The party concerned does not appear to dispute these facts. I consider these failures to be in breach of Article 5(1) and 5(2).**

12. The UK considers that at the heart of my complaint is the fact that I disagreed with the Council's initial screening opinion.

13. I disagree. This is not at the heart of my case. To some extent it is irrelevant whether I agree with the outcome of the initial screening. This case is not the same as Case 24 (Spain). I am not asking the Committee to adjudicate on the adequacy of the initial screening decision.

14. **The main issue here is:**

During each subsequent decision-making event, did the Council address the question of whether those subsequent decisions on the development may, or may not, have a significant impact upon the environment? Addressing this question is a requirement of Article 6(1)(b).

15. So, even if it was decided at the initial screening stage that this project was unlikely to have significant effects on the environment, the only way to be certain that, in the course of the later stage, the project remained unlikely to have significant environmental effects, would have been to reconsider/rescreen the project at the stage of the subsequent decision.

16. In the domestic legislation, EIA Regulation 9 sets out the requirement for screening of subsequent applications, such as in this case. Screening at this stage would also serve to address the requirement of Article 6(1)(b) that the Party must determine whether those subsequent decisions on the activity should be subject to the provisions of Article 6.

17. Without a timely, fully reasoned and properly considered screening opinion, the public has been denied the opportunity to determine whether the Council has taken all relevant environmental issues into account, to be informed of any environmental effects that may impact upon them, and to consider whether any proposed mitigation will be adequate.

18. The UK claims that domestic legislation requires all "subsequent applications" to be subject to public participation procedures, regardless of whether the development is EIA development. But in this case, the majority of the subsequent applications were not subject to such procedures.

19. **As a consequence, I consider the UK has failed to meet its obligations under Article 6.**

Fairness and rules on timing

20. The UK considers that my opportunity to seek judicial review was lost primarily as a result of delay, and implies that I should have challenged the initial screening decision and planning permission at the time those decisions were made. This, of course, would have been impossible considering that those decisions were not published until many months after they were made.

21. I object strongly to the accusations that I have "waited" to challenge these decisions. This is absolutely not the case. The grounds for a challenge to those initial decisions were not revealed until July 2014, long after the decisions had been made; whereas a subsequent application (13/P2192) was already under consideration by the Council and the Secretary of State, and required screening itself under EIA Regulation 9.

22. I think it is unreasonable of the UK to expect that a member of the public should risk thousands of pounds to undertake a high-risk challenge to decisions that were more than 18 months old, when a subsequent application was, by that time, already under consideration by the local authority and the Secretary of State. My decision not to challenge those earlier decisions should not prevent me from challenging subsequent decisions.

23. The High Court refused permission to apply for judicial review because my challenge was considered to be too late to challenge those decisions that had already been made, but too early to challenge the failure to screen those subsequent applications that had not yet been determined, even though the development had already commenced. I was essentially left in limbo, waiting for a new decision to start the clock again for an in-time challenge.

24. This problem is made worse by the complicated manner in which conditions of the initial planning permission are submitted for approval. Although the requirement for screening is triggered by the submission of individual "subsequent applications", each subsequent application may contain multiple conditions. The Council may choose to approve just one or two conditions at any given time, leaving the others still to be determined.

25. The screening opinion must be issued within 21 days from the date that the subsequent application is submitted (or potentially longer by agreement). It is not clear at which point the 6-week time period in which to challenge the omission of screening begins. Logically, that would be the 6-week period following the 21 days. But once that period has elapsed, if the Council chooses not to determine the

conditions (as in this case), then a challenge cannot be made at all, even if building work is proceeding. Without a decision acting as a trigger event, the project essentially becomes immune to challenge.

26. This seems manifestly unfair and prevents the public from being able to challenge a decision at a time when it is still possible to have some influence, before "events on the ground" have effectively eliminated alternative options.

27. **I do not consider this to be compatible with Article 9(4).**

Other non-compliance issues

28. I also consider the UK has failed to comply with Article 9(4) for reasons concerning ineffective remedy, inequality of arms, unreasonable and prohibitively expensive costs, and profiteering. Full details of these allegations can be found in my earlier written submissions.

29. I find it particularly ironic that the Appeal Court Judge in my case was also the Chair of the Working Group on Access to Justice which reported to a Ministry of Justice consultation, that it considered it wrong in principle for a claimant to face more than minimal cost at the pre-permission stage. The report goes on to state that this stage is an important constitutional opportunity for members of the public to bring to the attention of a judge potential illegality by the state (see Annex 12 to my communication).

30. In my case, the Council front-loaded costs from their solicitor and barrister of £6,000, while we were still at the pre-permission stage. This came as quite a shock and was a serious deterrent to proceeding any further.

31. The average salary for a person in the UK in 2015 was just over £27,000 before tax. My mother's basic rate pension is just over £6,000 per year. Costs of £5,000 would cover the rent for a small family home for about six months. In my opinion, the £5,000 cap is far too high. Exposure to such high costs, in addition to substantial court fees, would serve as a serious deterrent to most individuals wishing to seek judicial review in environmental matters.

32. Further, I believe that certifying my claim as "totally without merit", the pursuit of punitive interest on the costs and the threat to involve a High Court Sheriff fail to comply with Article 3(8).

33. Finally, I would like to stress that the process of attempting to get the environmental impacts of this project properly addressed, has been extremely arduous. Every step was a struggle – I had to repeatedly telephone and write to the authorities, chase for responses and send reminders.

34. I never wanted to end up in the Courts. I tried very hard to engage the authorities but was met with extreme reluctance – to the point where I felt I had no choice but to apply for judicial review.

35. I consider the actions of the authorities, particularly those of the Council, have actively hindered my attempts to seek access to information, public participation and access to justice in environmental matters, contrary to the obligation in Article 3(2).