Re: Communication to the Aarhus Convention Compliance Committee
ACCC/C/2016/142

SUBMISSIONS ON BEHALF OF THE PARTY CONCERNED
AND RESPONSE TO QUESTIONS DATED 29 OCTOBER 2020

Introduction

1. The Party Concerned, the United Kingdom, is grateful for the opportunity to make representations to the Committee in advance of its 68th meeting. As it has previously expressed to the Committee by email on 13 October 2020, the United Kingdom agrees to the Committee considering this Communication without a hearing. The United Kingdom however underlines its position that Communications should be considered by the Committee without a hearing only if both the Communicant and the Party Concerned consent to this.

2. This Communication, as clarified, amounts to a complaint that specific proceedings under a discrete statutory regime were prohibitively expensive. The United Kingdom contends that, seen in context, the Communication does not demonstrate non-compliance with the Convention.

3. This document follows this structure:
   - I. The applicable legal regime
   - II. The Communicant's litigation
   - III. The Communication, as clarified
   - IV. The applicable requirements of the Convention
   - V. The United Kingdom's arguments on compliance
   - VI. The United Kingdom's response to the Committee's questions dated 29 October 2020.
   - VII. Conclusions
   - VIII. Mr Niblock's Observer's Statement

I. The Applicable Legal Regime

4. The subject-matter of the Communication is a set of proceedings he brought under section 91 of the Environmental Protection Act 1990. The Communicant's proceedings related to a site in England. As it applies in England, section 91 provides:

> (1) A magistrates' court may act under this section on a complaint made by any person on the ground that he is aggrieved by the defacement, by litter or refuse, of—
> (a) any relevant highway;
> (b) any trunk road which is also a special road;
> (c) any relevant land of a principal litter authority;
> (d) any relevant Crown land;
> (e) any relevant land of a designated statutory undertaken; or
> (f) any relevant land of a designated educational institution.
> (2) A magistrates' court may also act under this section on a complaint made by any person on the ground that he is aggrieved by the want of cleanliness of any relevant highway or any trunk road which is a special road.
> (3) A principal litter authority shall not be treated as a person aggrieved for the purposes of proceedings under this section.
> (4) Proceedings under this section shall be brought against the person who has the duty to keep the land clear under section 89(1) above or to keep the highway clean under section 89(2) above, as the case may be.
> (5) Before instituting proceedings under this section against any person, the complainant shall give to the person not less than five days written notice of his intention to make the complaint and the notice shall specify the matter complained of.
> (6) If the magistrates' court is satisfied that the highway or land in question is defaced by litter or refuse or, in the case of a highway, is wanting in cleanliness, the court may, subject to subsections (7) and (8) below, make an order ("a litter abatement order") requiring the defendant to clear the litter or refuse away or, as the case may be, clean the highway within a time specified in the order.
> (7) The magistrates' court shall not make a litter abatement order if the defendant proves that he has complied, as respects the highway or land in question, with his duty under section 89(1) and (2) above.
> (8) The magistrates' court shall not make a litter abatement order where it appears that the matter complained of is the result of directions given to the local authority under section 89(6) above by the highway authority.
> (9) A person who, without reasonable excuse, fails to comply with a litter abatement order shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 4 on the standard scale together with a further fine of an amount equal to one-twentieth of that level for each day on which the offence continues after the conviction.
> (10) In any proceedings for an offence under subsection (9) above it shall be a defence for the defendant to prove that he has complied, as respects the highway or land in question, with his duty under section 89(1) and (2) above.
> (11) A code of practice under section 89(7) shall be admissible in evidence in any proceedings under this section and if any provision of such a code appears to the court to be relevant to any question in the proceedings it shall be taken into account in determining that question.
> (12) Where a magistrates' court is satisfied on the hearing of a complaint under this section—
> (a) that, when the complaint was made to it, the highway or land in question was defaced by litter or refuse or, as the case may be, was wanting in cleanliness, and
> (b) that there were reasonable grounds for bringing the complaint,

> the court shall order the defendant to pay such reasonable sum to the complainant as the court may determine in respect of the expenses incurred by the complainant in bringing the complaint and the proceedings before the court.

5. Section 89(1) of the Environmental Protection Act imposes a duty upon a local authority (in relation to a relevant highway) and a principal litter authority in relation to its relevant land to ensure that the land is, so far as is practicable, kept clear of litter and refuse.

6. As relevant to the Communication, section 91 permits a member of the public to issue proceedings before the Magistrates' Court against a principal litter authority on the basis that he or she is aggrieved by the defacement of land by litter or refuse. However, prior to bringing proceedings under this section, the member of the public must have given notice to the litter authority of the intention to make the complaint. If the land is defaced by litter or refuse, then the Magistrates' Court may make a litter abatement order against the principal litter authority. However, such an order cannot be made where the principal litter authority has complied, in relation to the land in question, with the duty under section 89(1).

7. As such, a Magistrates' Court may not make a litter abatement order where the land was affected by litter at the time that the member of the public institutes proceedings, but this has been cleared by the time the court determines the matter. However, sensitive to this possibility, section 91(12) makes provision for a member of the public to obtain his or her reasonable costs where, at the time the complaint was made to the court, the land was defaced by litter or refuse, and there were reasonable grounds for bringing the complaint. As such, this is not a situation in which "costs follow the event",[1] or applies a "loser pays" rule.

8. It is clear that section 91 relates to specific instances of defacement by litter and refuse:[2] hence the short period of notice given to the principal litter authority prior to the complainant instituting proceedings. It does not provide a forum for challenging a public authority's <u>policy</u> in relation to litter collection.

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[1] As considered by the Compliance Committee in relation to Communication ACCC/C/2008/33, and found not to be inherently objectionable under the Convention (Findings and recommendations ECE/MP.PP/C.1/2010/6/Add.3, para. 129,).

[2] This was the conclusion reached, correctly, by the Magistrates' Court in the Communicant's complaint. He did not challenge this conclusion in the High Court.

9. It is well-established that the procedure for challenging a public body's *policy* in relation to environmental matters is judicial review: *R (TW Logistics Ltd) v Tendring District Council* [2012] EWHC 1209 (Admin); *R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] 1 WLR 3923; *Stephenson v Secretary of State for Housing, Communities and Local Government* [2019] JPL 929.

10. Turning to the rules on costs, section 64 of the Magistrates' Courts Act 1980 applies where a public authority seeks that a member of the public, appearing as a complainant, pay its costs. This contrasts with section 91(12) of the Environmental Protection Act 1990, which relates to costs paid by the public authority to the member of the complainant who has initiated proceedings. If the public authority seeks that the member of the public pay its costs, then the relevant power is under section 64 of the Magistrates' Courts Act 1980. Section 64(1) states:

> "On the hearing of a complaint, a magistrates' court shall have power in its discretion to make such order as to costs—
> (a) on making the order for which the complaint is made, to be paid by the defendant to the complainant;
> (b) on dismissing the complaint, to be paid by the complainant to the defendant,
> as it thinks just and reasonable; but if the complaint is for an order for the variation of an order for the periodic payment of money, or for the enforcement of such an order, the court may, whatever adjudication it makes, order either party to pay the whole or any part of the other's costs."

11. Considering section 64, in *City of Bradford Metropolitan District Council v Booth* [2001] LLR 151, in which Lord Bingham CJ stated:

> "Where a complainant has successfully challenged before justices an administrative decision made by a police or regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appeared to be sound, in exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances, both (i) the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and (ii) the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged."

12. Therefore, in some contexts, section 64 of the Magistrates' Courts Act can be applied so that, even if a complainant has succeeded, the public authority may not have to pay its costs if it was acting reasonably. But in the environmental context of the Environmental Protection Act, section 91(12) provides that if the land was defaced by litter or refuse as at the date of the complaint, and there were reasonable grounds for bringing the complaint, then the Court shall order payment of a reasonable sum as determined by the Court.

13. Where a party to proceedings before the Magistrates' Court wishes to challenge the decision on legal grounds, he or she can request that the Court state a case. This involves the Court setting out the contentions of the parties, the facts found by the court, the opinion or decision of the Court, and the questions on which the opinion of the High Court is sought.

II. The Communicant's Litigation

14. In 2014, the Communicant was a Member of Parliament, specifically for the constituency of Birmingham, Yardley. On 4 May 2014, the Communicant gave Birmingham City Council notice of his intention to make a complaint under section 91 of the Environmental Protection Act. On 7 May 2014, the Council emailed the Complainant:[3]

> "I refer to recent emails regarding the above matter. As you are aware, the duty on the Local Authority to ensure that land is kept clear of litter and refuse stems from section 89 of the Environmental Protection Act 1990. The duty, however, is only "so far as is practicable" and is not therefore an absolute duty. I am aware that the department has a robust procedure in place for responding to reports of refuse/litter and am assured that these are being adhered to. The department would be willing to meet you to discuss the issue, however, if you feel that this would be beneficial."

15. The Communicant replied the same day, rejecting the offer of a meeting. He stated:[4]

> "I don't need a meeting. What I need is to be told what is being done about the 338 grade D dumps of refuse that I have referred to the Local Authority in its function as a litter authority."

16. The Communication states that the Council had previously told the Communicant both by telephone and by email that it would not leave the rubbish for ever.[5] Put another way, the Council had told the Communicant that the rubbish would be removed.

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[3] High Court decision, Communication Annex 1, para. 23. The United Kingdom notes that the text of the Case Stated provided by the Communicant (Reply to Committee's questions of 21 August 2020, Annex) seems to be different from the versions considered by the High Court and the Court of Appeal. The paragraph numbering is different, Wilkie J in the High Court and Beatson LJ in the Court of Appeal indicate that there were only two questions posed, and the phrasing of the questions posed is different in the Case Stated provided by the Communicant as that recorded by Beatson LJ in the Court of Appeal (para. 16). Having appeared in the proceedings, and having provided these documents to the Committee, the Communicant is invited to explain this discrepancy.

[4] High Court decision, Communication Annex 1, para. 24.

[5] Communication, para. 10.

The Proceedings before the Magistrates' Court

17. On 15 May 2014, the Communicant made a complaint under section 91. On 17-18 May 2014, the Council removed a large amount of litter.

18. A directions hearing was held before District Judge Zara of the Magistrates' Court on 4 July 2014. The Communicant narrowed the scope of his complaint. The Council provided witness evidence in the form of a witness statement (the Communicant has not produced this document in the present proceedings). At the hearing on 10 October 2014, having heard submissions from the Communicant and the Council, District Judge Zara did not make a litter abatement order. He made an order under section 64 of the Magistrates' Courts Act 1980 that the Communicant pay the Council's costs of the litigation in the sum of £13,101.56. The District Judge declined to make an order for the Council to make a payment to the Communicant in relation to his costs of the proceedings.

19. The Communicant has provided a copy of the Case Stated, dated November 2014. The Case Stated makes clear:

    (1) The District Judge resolved in favour of the Communicant the question of whether he had always sought an order to cover the whole of his constituency (para. 2).

    (2) The District Judge determined that the obligation on the Council under section 89 of the Environmental Protection Act was a qualified one, rather than an absolute one (para. 3).

    (3) The District Judge agreed with the Council that the breach of its duty under section 89 could be proved only by evidence of litter deposited at a particular place. As a matter of law, a litter abatement order could not be made in relation to an area as wide as an entire Parliamentary constituency (para. 4).

    (4) The District Judge found that the Communicant had accepted that litter had been cleared from the specific sites as identified in the directions hearing on 4 July 2014. The Court could not consider sites which the Communicant claimed to have identified

as not having been cleared, as notice would need to be given to the Council and a fresh application made for a litter abatement order (para. 5).

(5) The District Judge understood that the Communicant accepted the Court's ruling, and withdrew his application for a litter abatement order (para. 6).

(6) The District Judge dismissed the Communicant's application for costs under section 91(12) of the Environmental Protection Act, stating (para. 6):[6]

> "I was satisfied that at the time the complaint was made the land in question was defaced by litter or refuse, and accordingly the Appellant met the first test under the subsection. However, I was referred to correspondence between the Appellant and Defendant in which the City Council offered to meet him to discuss its policy of not removing garden refuse. The Appellant chose not to avail himself of that offer and instead issued proceedings. I took the view that that was unreasonable. I therefore refused to make an order for costs in his favour."

(7) The District Judge granted the Council's costs application against the Communicant under section 64 of the Magistrates' Courts Act, stating (para. 7):

> "I noted that the City Council had offered, in an open letter to the Appellant, to make no claim for costs if the proceedings were withdrawn before the hearing on 4 July. That offer had been ignored; the Appellant had proceeded in the full knowledge that he was at risk as to costs. The normal principle is that costs should follow the event and that even where a complainant had successfully challenged a decision by a public authority, the courts should be slow to penalise a public authority making honest, reasonable and apparently sound decisions in the public interest. Here, of course, there had been no such successful challenge. I therefore awarded the Defendant the costs which it claimed."

(8) The District Judge showed procedural latitude to the Communicant. Whilst the Communicant had made a misconceived attempt to appeal to the Crown Court, the District Judge treated this as an application to state a case (para. 8).

<u>The Appeal to the High Court</u>

20. The Communicant's appeal to the High Court was determined by Wilkie J on 11 March 2015. He was represented by a specialist barrister. The Communicant's barrister argued that the Case Stated needed to be sent back to District Judge Zara to be amended in two respects (para. 9):

(i) The Case Stated did not set out the chronology as clearly as it might, with dates attached;

[6] References to the "Appellant" are to the Communicant, and to the "Defendant" are to the Council.

(ii) The District Judge did not set out relevant submissions made by the Communicant, nor explained why he rejected those submissions (if indeed he did).

21. In relation to the Communicant's application for costs under section 91(12), the Communicant's barrister accepted that the District Judge had addressed himself to the two necessary questions posed in section 91(12).

22. On point (i) above, the Communicant's barrister conceded that the elements of the events referred to him were present in the Case Stated (para. 43). Wilkie J found that the objections did not "amount to anything more than minor drafting complaints" (para. 46).

23. On point (ii), Wilkie J found that the arguments which had not been set out by the District Judge were not relevant to the decision the District Judge had to make. Wilkie J stated at paras 53-57:

> "53. In my judgment, it is clear from the statutory scheme that the judge would have been wrong in law to consider matters which occurred after the complaint had been made when considering whether there were reasonable grounds for bringing the complaint, unless there were exceptional circumstances, such as evidencing a lack of good faith in something which had happened prior to the bringing of the complaint. But there was no question in this case of any allegation of lack of good faith.
>
> 54. The District Judge was obliged, in my judgment, to limit his consideration to events leading up to the bringing of the complaint. Those events included the offer of the meeting and its refusal in the terms I have described.
>
> 55. The facts that: it turned out that the "comprehensive clear up" to be undertaken on the 17th and 18th was not "comprehensive"; and that the litter at some of the sites identified by Mr Hemming on 4 July, as being the focus of his complaint, was not cleared up until after 4 July, were irrelevant for the District Judge's consideration of whether, at the time the complaint was brought, there were reasonable grounds for Mr Hemming so doing.
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> 56. The judge had to consider, as a matter of judgment, whether the offer by the Council of the meeting and its refusal by Mr Hemming, followed by his bringing the complaint, meant that there were not reasonable grounds for bringing the complaint there and then, notwithstanding the fact that, as of the date of the complaint, the sites were still defaced by litter.
>
> 57. In my judgment, the case stated, omitting as it did arguments which were irrelevant to the consideration by the judge of whether the second condition in section 91(12) was satisfied, was not deficient such as would require it to be sent back for amending. Nothing that the judge could have stated in relation to those subsequent, irrelevant, matters could effect [sic] the judgment of this court in determining whether the case stated disclosed that the judge was right, or wrong, in his conclusion that the Appellant did not have reasonable grounds for bringing the complaint."

24. Wilkie J therefore decided that there was no good reason to send the Case Stated back to District Judge Zara (para. 58).

25. The Communicant's barrister accepted that he could not challenge the conclusions which District Judge Zara had reached unless the Case Stated was amended (paras 8 and 59). Wilkie J therefore found:

> "The District Judge was entitled to decide that the Appellant did not have reasonable grounds for bringing the complaint. The decision to make an order for costs in favour of the Defendant was a lawful exercise of the Judge's discretionary powers. Accordingly this appeal by way of case stated is dismissed."

26. The Council sought its costs of the proceedings before the High Court (para. 60). The Communicant's barrister did not object (para. 63). Having checked in relation to costs (para. 89),[7] the Communicant's barrister did not oppose costs being awarded in the High Court. Wilkie J therefore ordered that the Communicant pay the Council's reasonable costs, to be assessed if not agreed (para. 92). This award of costs comes to "around £4,687".[8]

The Appeal to the Court of Appeal

27. The Communicant applied for permission to appeal to the Court of Appeal against Wilkie J's decision. Beatson LJ refused permission to appeal on 19 July 2016.[9] The Communicant was not legally represented before this hearing.

28. The Council did not seek its costs in relation to the appeal before Beatson LJ. As the Communicant was not represented, his costs were limited to the court fee of £265.[10]

[7] Presumably this refers to the Communicant's barrister checking with the Communicant as to whether there was any objection in relation to costs.
[8] Communication, para. 13.
[9] Communicant's Additional Information, Annex.
[10] Communication, para. 13.

III. The Communication, as Clarified

29. The Communicant no longer alleges non-compliance with Articles 9(2) and (3) of the Convention.[11]

The Complaint Under Article 9(4)

30. The Communicant raises a number of allegations of non-compliance under Article 9(4):
    (i) prohibitive expense;[12]
    (ii) fairness:
        (1) rubbish was cleared up because of the Communicant's complaint to the Magistrates' Court,[13]
        (2) the Council told the Communicant that it would not clear up the rubbish;[14]
        (3) unfairness in relation to costs and meeting with the Council;[15]
        (4) unfairness in not allowing the appeal in either the High Court or the Court of Appeal;[16]
        (5) unfairness in having a double hurdle, in terms of the drafting of the Case Stated and then the appeal;[17]
        (6) unfairness in ignoring the Aarhus Convention;[18]
        (7) unfairness to refuse an appeal because it was about costs;[19]
        (8) unfairness in allowing a judge to make up evidence;[20]
        (9) absurdity, and hence unfairness, in requiring an appellant to doubt what he has been told by a public authority;[21]
        (10) unfairness in terms of what was given sufficient judicial attention;[22]

[11] Addendum following discussion with Compliance Committee and response from Government, p.1.
[12] Communication, pp.6-7, para. a).
[13] Communication, p.7, para. b).
[14] Communication, p.7, para. c).
[15] Communication, p.7, para. d).
[16] Communication, p.7, para. e).
[17] Communication, p.7, para. f).
[18] Communication, p.7, para. i).
[19] Communication, p.7, para. j).
[20] Communication, p.7, para. k).
[21] Communication, p.8, para. m).
[22] Communication, p.8, para. n).

(iii) the Court of Appeal's decision was not timely;[23]

(iv) the remedy was not effective;[24]

(v) absurdity in requiring people to meet in person or face adverse costs;[25]

(vi) "probably other problems with the process".[26]

The Complaint Under Article 9(5)

31. The Communicant alleges failure on the part of the United Kingdom to amend the rules for litter abatement orders pursuant to the Aarhus Convention.[27] He also argues that an absence of information in relation to the Aarhus Convention is material.[28]

The United Kingdom's Response

32. With the greatest respect to the Communicant, a number of the allegations made by him are misconceived or misleading (presumably unintentionally so). Prior to setting out its position in detail in relation to the allegations of non-compliance, the United Kingdom makes submissions in relation to the requirements of the Aarhus Convention.

IV. The Applicable Requirements of the Convention

33. Article 9 of the Convention concerns access to justice. Article 9(4) of the Convention provides:

> "In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and wherever possible of other bodies, shall be publicly accessible."

34. The Communicant's allegations under Article 9(4) relate to:

- effectiveness of remedy;
- fairness of procedure;

[23] Communication, p.7, para. g).
[24] Communication, p.7, para. h).
[25] Communication, p.7, para. l).
[26] Communication, p.8, para. o).
[27] Communication, p.8.
[28] Addendum following Admissibility, p.2.

- timeliness of procedure;
- prohibitive expense of procedure.

35. Allegations of absurdity and "other problems with the process" do not fall within the scope of the Convention.

36. In relation to effectiveness, *The Aarhus Convention: An Implementation Guide* (2nd edn) states on p.200 that "[t]he requirement that the remedies should be effective means that they should be capable of real and efficient enforcement".

37. In relation to fairness, as stated above, Article 9 concerns access to justice. It relates to the ability of members of the public to challenge alleged breaches of national environmental law. It does not lay down requirements as to the content of such environmental law. As such, the reference to fairness in Article 9(4) concerns the fairness of a procedure. The *Implementation Guide* states in relation to fair procedures (p.201):

> "Fair procedures require the process, including the final ruling of the decision-making body, to be impartial and free from prejudice, favouritism or self-interest. … Fair procedures must also apply equally to all persons, regardless of economic or social position, ethnicity, nationality or other such criteria (…although fairness may also require non-discrimination with respect to other criteria than those addressed in that provision, such as age, gender, religious affiliation, etc). Moreover, fairness requires that the public be duly informed about the review procedure, as well as informed about the outcome of the review."

38. In like manner, the Compliance Committee stated in its Findings and Recommendations for Communication ACCC/C/2011/57 at para. 44:[29]

> "the Committee holds that the requirement for fair procedures means that the process, including the final ruling of the decision-making body, must be impartial and free from prejudice, favouritism or self-interest."

39. In terms of an allegation of bias, evidence of bias would need to be demonstrated: see the Compliance Committee's Findings and Recommendations in relation to Communication ACCC/C/2013/81,[30] para. 105.

[29] ECE/MP.PP/C.1/2012/7.
[30] ECE/MP.PP/C.1/2017/4

40. In relation to prohibitive expense, the *Implementation Guide* notes (p.203) that the Convention does not impose a particular mechanism upon Parties. Indeed, by imposing an obligation of result, Parties have "great discretion in how to proceed".

V. The United Kingdom's Response to the Communication

Prohibitive Expense

41. The United Kingdom contends that it did not fail to comply with the requirement under Article 9(4) of the Convention that proceedings should not be prohibitively expensive. This is on two bases:
    (1) The Communicant's challenge to the Council's policy could have been made by way of judicial review, rather than under section 91 of the Environmental Protection Act 1990, and it is sufficient for compliance with the Convention for either procedure to be compliant with Article 9;
    (2) Even if it is correct to assess compliance by reference to Section 91 of the Environmental Protection Act, the proceedings were not prohibitively expensive.

The Availability of Judicial Review

42. The Communicant's objection is to the Council's amended policy in terms of the removal of garden waste.[31] He issued litigation in his capacity as a Member of Parliament:[32]

> "The Applicant is the Member of Parliament for Birmingham, Yardley. As part of his duties as a member of parliament in accordance with Article XIII of the 1688 Bill of Rights he has to deal with "all grievances".

43. The Communicant's core objection was generic: at heart, it was about the Council's approach, rather than about specific instances of littering:[33]

> "The applicant and his constituents are concerned about the fly tipped green waste covering the constituency of Birmingham, Yardley. There is an unusual situation in that the local authority (defendant) which is the litter authority generally instructs its officials not to collect fly tipped green waste (sometimes also not collecting other fly tipped waste if it has been dumped with green waste). Reports from the claimant's office to the local authority are normally responded to with the answer that the local authority will not clear up the waste. …

[31] Communication, para. 1, para. 4, p. 7 para. k), p.9 bullet 4.
[32] Witness Statement before the Magistrates' Court, Communication Annex 2, para. 3.
[33] Witness Statement before the Magistrates' Court, Communication Annex 2, paras 4-6.

> As part of a single process of a general report about Littering in the Yardley constituency he has identified hundreds of piles of fly tipped waste. At the directions hearing this was narrowed down to five particular small elements. Following the directions hearing the city council made a further stab at clearing up green waste and a further statement will be submitted looking at the then statement green waste in the Yardley constituency for the hearing itself. To obtain a litter abatement order for the Yardley constituency it will be necessary to prove that there remains a problem with Green Waste in the Yardley Constituency at the time of the hearing. This, of course, cannot be checked at the moment because the situation is likely to change before the hearing.
> For the avoidance of doubt it will be applicant's objective to prove that at the time of the hearing there remains green waste in the location of "The Constituency of Birmingham, Yardley" and that for that reason a litter abatement order should be granted for the whole of the Yardley constituency. Hence in evidence for the final hearing will be elements of litter that do not fall to be considered as part of the costs argument."

44. As District Judge Zara held in the Magistrates' Court, a conclusion not challenged by the Communicant on appeal, the litter abatement order procedure under section 91 of the Environmental Protection Act does not deal with wide and diverse areas. A breach of a principal litter authority's duties under section 89 could be proved under section 91 only "by evidence of litter deposited at a particular place, with an order correspondingly limited to those specific places".

45. As such, the Communicant's complaint for a broad litter abatement order was dismissed.[34] The procedure was inappropriate for the Communicant's purposes of challenging the Council's general policy in relation to litter.

46. There is a well-established procedure for challenging a public authority's policies: judicial review. As stated above, it is well-established that judicial review can be used to challenge policies relating to environmental matters. The Communicant's objection to the legality of the Council's policy in relation to litter could have been challenged by way of judicial review. This would have provided an access to a review procedure, as required by Article 9(4) of the Convention. The question under the Convention is whether there is a lack of <u>any</u> process to challenge the act or omission of the public authority.[35] As the Compliance Committee has previously stated:[36]

> "it is apparent to the Committee that if the legal system of the Party concerned provides for more than one procedure through which members of the public can challenge a particular act or omission contravening national law related to environment, it is sufficient

[34] Reply to Committee's questions of 21 August 2020, Annex, paras 5-6.
[35] See Compliance Committee's Findings and Recommendations in relation to Communications ACCC/C/2013/85 and ACCC/C/2013/86, ECE/MP.PP/C.1/2016/10, paras 76-77.
[36] Ibid, para. 78.

> for compliance with the Convention that at least one of these procedures meets all the requirements of article 9, paragraphs 3 and 4."

47. In bringing a claim by way of judicial review, the Communicant could have availed himself of the costs protection regime for environmental judicial review under Part 45, rules 41-45 of the Civil Procedure Rules.

48. There was a Convention-compliant avenue of review of the target of the Communicant's objection, in the form of judicial review of the Council's policy. Judicial review is a widely-known procedure, which the Communicant could have employed. As such, the Communicant's objections in relation to the expense of the proceedings he launched under section 91 fall away. They are irrelevant, as there was an alternative route to access to justice.

Section 91 and Prohibitive Expense

49. Even if the correct analysis is to scrutinise the costs of the proceedings which the Communicant did issue, there was no breach of the requirement that proceedings not be prohibitively expensive. This requires an analysis of all the facts,[37] including:
    (1) The Communicant has not claimed that he argued at any time before District Judge Zara that the proceedings would be prohibitively expensive were costs awarded as they were, which indicates that they were not prohibitively expensive on a subjective basis;
    (2) The Communicant's unsuccessful appeals to the High Court and the Court of Appeal did not concern compliance with national principles of environmental law, but costs.

50. Article 9(4) of the Aarhus Convention is not breached by requiring an individual to pay costs, when he can personally afford them, and he has acted unreasonably in bringing proceedings. Access to justice, which Article 9(4) protects, is not affected in those circumstances.

51. District Judge Zara considered that it was just and reasonable for the Communicant to pay the Council's costs of the proceedings before him. This was a conclusion which was open to the Judge. The Communicant had not contended that he did not have the means to

[37] In its Findings and Recommendations in response to Communication ACCC/C/2012/77, ECE/MP.PP/C.1/2015/3, the Compliance Committee considered the context of the claim (para. 73).

pay. The Court had not granted a litter abatement order as sought by the Communicant. The Communicant had ignored an offer by the Council which would have meant that he avoided paying their costs.

52. Likewise, District Judge Zara considered that the Communicant had not acted reasonably in bringing the proceedings before the Magistrates' Court. Again, this was a conclusion open to the Judge. The Judge heard the submissions of the Communicant and the Council. The Council had offered to meet with the Communicant to discuss the matter. The Communicant's response was not about the mode of discussion: he did not say that he would prefer to discuss the matter by telephone or email. The Communicant states that the Council told him, at some point, that it had plans to remove the litter.[38] Requiring the Communicant to pay the costs of the Magistrates' Court proceedings was not prohibitively expensive in all of the circumstances.

53. In the High Court, the Communicant challenged the decision of District Judge Zara in relation to costs. His challenge failed: the points his lawyer sought to raise were either detailed drafting complaints, or irrelevant to the refusal to award him costs. On two occasions, the lawyer made it clear that he did not oppose the Council's application for costs. The sums paid by the Communicant to his own barrister in relation to the High Court proceedings were £7,500.[39] This is approaching double the sum of £4,687 which he had to pay the Council in relation to the High Court proceedings.[40]

54. In the Court of Appeal, it appears that the only costs the Communicant incurred were a £265 court fee.[41]

55. The Communicant claims that he "won".[42] This is not correct: no litter abatement order was imposed; the Council cleared away litter, but this does not mean it was because of the Communicant's action. It is also not determinative. Whilst the Court did not issue a litter abatement order, Section 91 of the Environmental Protection Act makes specific provision for a situation in which a court does not issue a litter abatement order, but the complainant

[38] Communication, para. 10.
[39] Communication, para. 13.
[40] Communication, para. 13.
[41] Communication, para. 13.
[42] E.g. Communication, para. 13.

should still be granted his costs. This is the effect of section 91(12). However, the Communicant's complaint did not satisfy section 91(12). The Communicant was refused his costs not because of whether he "won", but because he did not act reasonably.

56. The Communicant has recently provided[43] a link to a webpage by a Mr Silverman in relation to litter litigation.[44] Furthermore, only very recently (18 November 2020) has the United Kingdom been provided with an Observer Statement from Mr Silverman. Mr Silverman's website refers to eight instances in which remedial action was taken following notice being given to the relevant authority, and therefore it was not necessary to make a complaint to the court. He refers to seven complaints made to the Magistrates' Court:[45]

- A complaint by Mr Kip Waistell against Herefordshire Council in relation to Hereford City centre; following the complaint the areas subject to the complaint were cleared. The complaint was therefore withdrawn, and Mr Waistell was awarded his costs.
- A complaint by Mr Silverman in relation to the M40 road. There was a considerable increase in cleaning activity following the warning notice, and Mr Silverman was awarded costs by the Magistrates.
- A complaint by Mr Silverman against South Buckinghamshire Council in relation to the A355 road. South Buckinghamshire cleaned up litter only after receiving a summons; they settled out of court agreeing to pay Mr Silverman's costs, and Mr Silverman withdrew his complaint.
- A complaint by Mr Silverman in relation to the M40 Junction 1 slip roads (2010). The complaint was withdrawn in court following a letter from the Under-Secretary of State, which offered a meeting with senior officials. Mr Silverman was awarded costs.
- A complaint by Mr Silverman in relation to Ruislip Manor embankments (2011). Mr Silverman was awarded his costs.
- A complaint by Mr Silverman in relation to the M40 Junction 1 slip roads and roundabout (2012). The Judge found that the area was not defaced by litter at the time of the application. The Court awarded costs to the Secretary of State. However, the Secretary of State recovered only £2,000 out of the £8,100 incurred. The website states that this was "on the grounds that I [Mr Silverman] had acted responsibly and, to do

[43] Email of 31 October 2020.
[44] https://www.cleanhighways.co.uk/legislation/epa-s91-litter-abatement-orders/litter-abatement-orders-scorecard
[45] He also refers to a complaint by Mr Niblock to the Sheriff's Court in Scotland, which is addressed below.

otherwise, would put decent people off from using the legislation". Mr Silverman was not awarded his own costs, in the sum of £8,811.

- A complaint by Mr Silverman in relation to the Ruislip Manor embankments (2012). The Magistrates found that the land was not defaced at the time of the complaint, and Mr Silverman was ordered to pay adverse costs in the sum of £4,645.

57. This material (dating from many years ago) has been provided at a late stage of these proceedings; the United Kingdom keeps its comments brief. The material in no way demonstrates a systemic breach of Article 9(4) in relation to the operation of section 91 of the Environmental Protection Act giving rise to prohibitive expense. Indeed, it suggests the opposite. Of the two situations in which Mr Silverman was ordered to pay another party's costs, they were both under £5,000. In the example of the M40 J1 slip roads and roundabout (2012), the Secretary of State's costs were reduced to a fraction of the Secretary of State's actual costs. In the case of the Ruislip Manor embankments (2012), the costs were only £4,645.[46]

58. For all these reasons, the United Kingdom was not in non-compliance with the requirements of Article 9(4) in relation to prohibitive expense.

Fairness

59. As in relation to the question of prohibitive expense, the United Kingdom contends that the Communicant had access to a fair means of challenging the Council's policy, by the procedure of judicial review. That this procedure would have been fair means that the Communicant's objections in relation to the fairness of the process under section 91 of the Environmental Protection Act fall away. However, as will be explained, the Communicant's arguments in relation to the fairness of the process under Section 91 do not demonstrate non-compliance in any event.

[46] Indeed, in the circumstances of this case, Mr Silverman states that "[d]ue to my own ineptitude I failed to draw the magistrates attention to [a piece of evidence]". (This was included on Mr Silverman's website, but not in his Observer Statement.) It may be that this could have affected the Magistrates' Court's assessment.

60. The United Kingdom restates its position above, drawing on the *Implementation Guide* and the Compliance Committee's previous finding, in relation to the meaning of "fairness" in the context of the Aarhus Convention.

Rubbish Cleared Up Because of the Complaint

61. The fact that rubbish was cleared as a result of the Communicant's complaint – even if this is proved on the evidence before the Compliance Committee, which it is not – does not mean that the decision of District Judge Zara was unfair. Section 91 of the Environmental Protection Act permits the making of a litter abatement order only if the litter was present at the time of the hearing into the making of an order.

62. However, as previously explained, Section 91 permits a court to make an order for a complainant's costs even if a litter abatement order is not made. However, this requires two conditions to be met: the litter to be present at the time of the complaint, and the complainant acting reasonably in relation to making the complaint. Whilst the first requirement was made out in the present case, District Judge Zara found that the second was not. This was a conclusion open to him.

The Council told the Communicant that it would not clear up the rubbish

63. This contention relates to the decision reached by the United Kingdom courts, rather than whether the court process was unfair. With all respect to the Communicant (and, indeed, the Compliance Committee), it is not the place of a communication to the Compliance Committee to dispute the substantive outcome of court litigation.

64. The Council told the Communicant that it would not leave the rubbish in place for ever.[47] The Communicant has provided evidence of an email dated 15 May 2014 in which Emma Stuart of the Council stated that "As per the Council policy the garden waste will not be picked up". The Communicant has provided a subsequent email, dated 27 June 2014, in which Shaid Ali of the Council stated "I assume once the waste prevention team have exhausted all enquiries and it still cannot be established where these came from then eventually it will have to be picked up as it was recently all over the city, but I honestly

[47] Communication, para. 10.

cannot say how long this will take as Environmental Health are not responsible for collecting green waste".

65. The Communicant was offered a chance to discuss the matter with the Council. The Communicant considered that the offer of the meeting was "a standard political ploy of offering a meeting when you do not intend to do anything".[48] Indeed, the Communicant appears to have considered that the offer of a meeting was essentially a sham.[49]

66. That District Judge Zara took into account the fact that the Communicant refused the Council's offer of a meeting, when deciding whether the Communicant had acted reasonably in launching proceedings, does not demonstrate unfairness within the sense of Article 9(4).

Unfairness in relation to costs and meeting with the Council

67. The text of the Communication says:

> "It is unfair to require applicants to ask for a meeting and be fined £25,000 if they don't ask for a meeting. Costs were awarded against me because I did not ask for a meeting. The council's witness statement did not claim that I would have been told of an intended attempt to clear up the rubbish (which in fact did not clear up the rubbish that the case was about)."

68. This paragraph is misleading.

69. There is no indication in the decision of the Magistrates' Court, the High Court or the Court of Appeal that the Communicant was required to ask for a meeting. It would have been open to the Communicant to ask the Council for a meeting, and indeed this would seem to have been a sensible and collaborative approach for a Member of Parliament to take with a public authority. However, the point does not relate to the Communicant failing to *request* a meeting: in fact *he refused to attend* a meeting which he was offered, by the public authority he was about to challenge, in relation to the matter he was about to challenge them about.

[48] Court of Appeal decision, Communicant's Additional Information, Annex, para. 22.
[49] Ibid, para. 30.

70. The Communicant was not "fined £25,000". He launched proceedings under section 91 of the Environmental Protection Act when the proper method of challenging the Council's policy was by way of judicial review. He was ordered to pay the Council's costs on the basis that he had ignored an offer to settle the case. He did not obtain his own costs, on the basis that he had acted unreasonably in refusing an offer to meet to discuss the issue. He brought an unsuccessful appeal to the High Court in which, having failed, his representative accepted that he should have to pay the Council's reasonable costs. He incurred his own legal costs in an unsuccessful appeal. The costs in relation to the Court of Appeal proceedings were only £265. None of this was a "fine".

71. District Judge Zara did not refuse to award costs against the Communicant because he failed to ask for a meeting. The award of costs in the Magistrates' Court against the Communicant was on the basis of ignoring an offer to settle the litigation. This adverse costs award did not relate to the meeting at all.

72. The Communicant refers to the alleged contents of Mr Wallis's witness statement, specifically claiming that it did not say that he would have been told of the attempt to clear up rubbish. The Communicant has however not provided a copy of Mr Wallis's witness statement. If the Communicant wishes to allege that a document states something different to what the High Court (para. 27) and the Court of Appeal (para. 10) say it says, then it is his responsibility to provide a copy of it.[50]

73. The Communicant refers to the rubbish which "the case was about". However, the offer of the meeting came before the Communicant's launch of proceedings. When those proceedings were launched, they were about the whole constituency of Birmingham, Yardley. In his email rejecting the offer of a meeting, the Communicant stated that he was referring to 338 dumps of litter.

74. This allegation of unfairness on the part of the Communicant is unjustified.

[50] To be clear: the Department for Environment, Food and Rural Affairs, representing the United Kingdom in this Communication, does not have a copy of this witness statement. Central Government was not a party to the Communicant's litigation. Mr Wallis's witness statement is apparently from more than six years ago.

Unfairness on Appeal in the High Court and Court of Appeal

75. The Communicant makes two complaints:
    (1) Wilkie J's consideration of the appeal with the question of whether to permit the stated case to be amended;
    (2) The refusal of permission to appeal by the Court of Appeal.

76. The first argument demonstrates no unfairness. The Communicant's barrister, representing him before Wilkie J, made clear that if the Stated Case could not be amended, then the appeal would have to fail. As Wilkie J considered that the Stated Case should not be varied, it was not unfair to dismiss the appeal. As Beatson LJ stated in his judgment in the Court of Appeal at para. 26:

> "In a context in which it had been conceded by Mr Hemming's then counsel that on the face of paragraphs 5 and 6 of the case stated unamplified by any amendment that the substantive appeal would fail, Mr Hemming's argument in his recent statement for permission and oral submissions that the position might have been different because in effect, in delicate terms, he and his counsel may not have been in agreement as to how to proceed, is a point he is entitled to make. But it is difficult to see that Wilkie J, who was not aware of these points but was aware of the fact that counsel had conceded that the substantive appeal would fail on the face of paragraphs 5 and 6 of the case stated if it was not amended, what point there was to proceed."

77. The second argument is unparticularised. It is not possible for the United Kingdom to respond to it. The fact that the Communicant does not agree with the Court of Appeal's conclusion does not make that conclusion unfair.

Unfairness in having a "double hurdle"

78. The Communicant's representative accepted that the appeal would fail unless the Stated Case was amended. The High Court determined that the proposed amendments were either trivial, or legally irrelevant. The Communicant's barrister accepted that the appeal must fail in those circumstances.

79. This does not constitute an unfair "double hurdle".

Unfairness in ignoring the Aarhus Convention

80. The approach taken by the Court of Appeal does not constitute unfairness, as defined in the *Implementation Guide* or previously interpreted by the Compliance Committee.

81. The Court of Appeal did not ignore the issue of the Aarhus Convention when raised before it. It does not appear that the Communicant was prevented from raising arguments in relation to the Aarhus Convention at earlier stages of his litigation.

Unfairness to refuse an appeal because it was about costs

82. Neither the High Court nor the Court of Appeal dismissed the Communicant's appeal because it was about costs.

Unfairness in allowing a judge to make up evidence

83. In relation to this point, the Communicant relies upon the contents of the witness statement of Mr Wallis before the Magistrates' Court. He has not provided this document, and therefore his argument is not substantiated. The United Kingdom restates its position, made above, in relation to this.

84. Furthermore, the assessment of evidence is a matter for the national courts. The *Implementation Guide* indicates that fairness concerns access to an impartial tribunal, prevention of unlawful discrimination, and keeping a member of the public informed of proceedings. There is no basis for an argument that District Judge Zara, Wilkie J or Beatson LJ were biased in favour of the Council. There is no indication that the Communicant was the subject of unlawful discrimination. He was kept informed of the proceedings. There was no unfairness within the sense of Article 9(4). The Communicant may not have agreed with the outcome, but this does not indicate non-compliance with the requirements of the Convention.

Unfairness in requiring an appellant to doubt the word of a public authority

85. The question of fairness for the purposes of this Communication is not whether the Council behaved unfairly, but whether the judicial procedures to which the Communicant had access were fair. Fairness means fairness of the procedure, as explained above.

86. District Judge Zara considered that, in the circumstances, the Communicant had acted unreasonably in bringing the proceedings. This was based on an analysis of the facts. The Communicant has said in the Communication that "I had previously been told by [the Council] on the phone and via email that they wouldn't leave [the rubbish] forever".[51] The proceedings were not unfair.

Unfairness in terms of what was given sufficient judicial attention

87. The Communicant states:

> "It is unfair to give insufficient judicial attention to the key issue which determines the case (the issue of the meeting) which shouldn't determine the case anyway".

88. With respect to the Communicant, this is difficult to understand. District Judge Zara declined to issue a litter abatement order on the basis that rubbish had been cleared from the specific sites identified by the Communicant, and he did not have jurisdiction to consider other sites (Stated Case, para. 5). District Judge Zara gave clear reasons for not awarding costs to the Communicant on the basis that he had not acted reasonably (Stated Case, para. 6); he likewise gave clear reasons for awarding the Council its costs (Stated Case, para. 7).

89. The Communicant was informed of the decision made in relation to his case; this was sufficient to comply with the requirements of Article 9(4).

Timeliness

90. The Communicant made his complaint to the Magistrates' Court on 15 May 2014. A directions hearing was held on 4 July 2014, and his complaint was dismissed on 10 October

[51] Communication, para. 10.

2014. The Communicant's appeal to the High Court was determined on 11 March 2015. His second appeal was determined by the Court of Appeal on 19 July 2016. This was timely, in the circumstances that:

(a) The challenge to the Court of Appeal concerned costs, and there were no live issues regarding the protection of the environment;[52]

(b) The Communicant had already had an appeal to the High Court.

91. A period of around 16 months to determine a *second* appeal, in a matter which concerned only costs (and without live issues concerning the environment) was not in breach of the requirement for timeliness in Article 9(4). The United Kingdom notes that in its Findings and Recommendation in response to Communication ACCC/C/2011/62, the Compliance Committee stated at para. 38:[53]

> "As regards the allegations of non-compliance with article 9, paragraph 4, of the Convention, on the grounds that procedures are not timely, the Committee considers that one year is not a particularly long time for a supreme court to deliver a decision in this case, and that the allegations were not sufficiently substantiated. Hence, the Committee does not find the Party concerned to be in non-compliance with article 9, paragraph 4, of the Convention, in this respect."

Effectiveness of Remedy

92. This aspect of the communication is unparticularised. It is not possible for the United Kingdom to respond to it. In any event, the litter which the Communicant had specified following the 4 July 2014 directions hearing was cleared away (Stated Case, para. 5).

Requirement to Meet in Person

93. The Communication states:

> "It is absurd to require people to meet in person or otherwise face adverse costs. Email, letters and phone calls have to be acceptable as a mechanism of communication."

94. The Aarhus Convention does not refer to absurdity.

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[52] The Compliance Committee has held in relation to Communication ACCC/C/2012/69, ECE/MP.PP/C1/2015/10 at para. 87 that the "issue at stake for the applicant" can be relevant to the question of timeliness. In relation to access to information, it is relevant that the information was to be used in an ongoing environmental decision-making process (para. 88).

[53] ECE/MP.PP/C.1/2013/14

95. Furthermore, the point does not arise on the facts. When offered a meeting, the Communicant did not suggest a phone call or request that the Council tell him what it would have said by email.

Other Problems with the Process

96. It is said that there "are probably other problems with the process" (Communication, para. 8).

97. Given that this allegation is unparticularised, the United Kingdom cannot respond to it.

Article 9(5)

98. As stated above, the Communicant's challenge to the Council's policy regarding the removal of litter could have been brought by way of judicial review. There were established costs protection rules in relation to environmental judicial reviews at the time that he launched proceedings. The judicial review process is well-known. As such, the complaints in relation to Article 9(5) of the Convention fall away.

99. In any event, looking at the requirement of Article 9(5) itself, the requirement upon Parties is to consider steps such as "to remove or reduce financial…barriers to access to justice".[54]

100. In the Litter Strategy for England (April 2017), the United Kingdom Government stated, in relation to England:[55]

> "By the end of this Parliament, we will also review the mechanism by which councils and other land-managers can be held to account for maintaining their land to the standards set out in the Code of Practice [on Litter and Refuse], considering a range of options to make it easier for citizens to hold land-managers to account for delivering their responsibilities."

101. Work remains ongoing in relation to reviewing the mechanism by which litter duty bodies can be held to account in England.

[54] Compliance Committee findings, Communication ACCC/C/2008/33, para. 142.
[55] At 5.1.4, p.60.

102. The Communicant has stated that "[i]t is a matter for the UK Party to cite where in the civil procedure rules reference is made to the Aarhus convention in respect of applications for a litter abatement order".[56] The Civil Procedure Rules do not apply to proceedings under section 91, such proceedings being before the Magistrates' Courts.

103. The requirements of the Convention in Article 9(5) regarding the provision of information are as follows:

> "…each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures…"

104. The Communicant was clearly aware of the provisions of Section 91 of the Environmental Protection Act.

VI. The United Kingdom's Response to the Committee's Questions

Question 1: Section 91 of the Environmental Protection Act and the scope of Article 9(3) of the Convention

105. The United Kingdom does not contest that an application made by a member of the public under section 91 of the Environmental Protection Act falls within the scope of Article 9(3) of the Convention.

Question 2: Fairness and the costs award against the Communicant

106. The Committee's question applies the test in section 91(12) to the order that the Communicant pay the Council's costs, and refers to the failure to attend a meeting.

107. The United Kingdom respectfully submits that, on the basis of what has been said above, the question does not arise on the facts of the Communication. The order that the Communicant pay the Council's costs was made under section 64 of the Magistrates' Courts Act, and was made on the basis that the Communicant had ignored the Council's offer to settle the proceedings with the Council not seeking its costs.

[56] Communicant's 'Addendum following discussion with Compliance Committee and response from Government', p.2.

108. As explained above, the requirement in the Convention that the proceedings be fair relates to having recourse to an impartial procedure. There can be no doubt, on the material before the Committee, that District Judge Zara was not biased, and had not engaged in unlawful discrimination.

109. This is determinative of the question of fairness.

110. Nevertheless, for the sake of completeness, the United Kingdom submits that it was undoubtedly appropriate for the Magistrates' Court, in determining whether it was just and reasonable to make an award of costs against the Communicant, to take into account that the Communicant had ignored an offer to settle the proceedings which would have avoided him having to pay costs to the Council. This does not appear to have been challenged by the Communicant in the High Court.

111. If the question in fact relates to the Communicant obtaining his own costs from the Council, it is a requirement of Section 91 of the Environmental Protection Act that, in order for a complainant to recover such costs, there must have been reasonable grounds for bringing the complaint. It was open to District Judge Zara to consider that, in all of the circumstances, it was not reasonable for the Communicant to reject the Council's offer of a meeting and to proceed to launch legal proceedings. District Judge Zara's decision did not fail to meet the requirements of fairness, as it applies in the Aarhus Convention. It is notable that the Communicant's specialist barrister did not challenge in the High Court District Judge Zara's refusal to award costs, once it was clear that the proposed amendments to the Case Stated were legally irrelevant.

Question 3: the mechanisms to limit the Communicant's costs, as at May 2014

112. As explained above, a challenge to the Council's *policy* in relation to litter collection could have been brought by judicial review, rather than under section 91 of the Environmental Protection Act. The Compliance Committee is familiar with the United Kingdom's costs protection rules for judicial review proceedings under Part 45 of the Civil Procedure Rules, and has carried out a review in relation to decision VI/8k on compliance. The United Kingdom does not suggest that such matters are reopened here. The application of the rules in force at the time would have prevented a judicial review claim

brought by the Communicant from being prohibitively expensive. Indeed, the Communicant does not suggest otherwise.

113. There is no mechanism by which a Complainant can apply for an order for its costs to be capped in civil proceedings before the Magistrates' Court. However, any award of costs under Section 64 of the Magistrates' Courts Act against a member of the public bringing a complaint under Section 91 of the Environmental Protection Act must be "just and reasonable".

Question 4: the mechanisms to limit a complainant's costs, as at the present date

114. There have been amendments to the costs rules for judicial review since May 2014. The current rules would still prevent a claim in judicial review from being prohibitively expensive. Other than that, the United Kingdom is aware of no material changes since May 2014.

Conclusions

115. For the above reasons, the United Kingdom respectfully invites the Compliance Committee to make the finding that no non-compliance has been demonstrated.

Mr Niblock's Observer's Statement

116. The United Kingdom is aware of comments from a Mr Niblock in relation to proceedings in which he was involved. However, these comments have been provided at a very late stage in the consideration of this Communication, do not relate to the questions posed by the Compliance Committee, and concern a different legal system (Scotland, rather than England). With the greatest of respect to Mr Niblock, the United Kingdom does not propose to address the allegations he raises, unless the Compliance Committee requests this.

ALISTAIR MILLS
Landmark Chambers
Tuesday, 24 November 2020