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Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10
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Your ref: ACCC/C/2017/156

19 August 2020

Dear Ms Marshall

ACCC/C/2017/156 (United Kingdom)

We write in response to the Communicants' further correspondence dated 4th August 2020 in relation to the English Court of Appeal's judgment in the judicial review claim brought by Chris Packham and others. We keep this letter brief in the hope that this will lead to finality in the correspondence between the parties.

The Communicants' letter overlooks some fundamentally important features of the case.

First, this was not a challenge to a decision to grant consent for the HS2 railway, engaging Article 6 of the Aarhus Convention, or a plan or programme for the HS2 railway, engaging Article 7 of the Convention. The plan or programme for the HS2 railway within the meaning of Article 7 of the Convention was the Command Paper 'HS2: Decisions and Next Steps' published in January 2012. This was the subject of two unsuccessful communications to the Compliance Committee: ACCC/C/2014/100&101. The development consent for the first phase of the HS2 railway (which is the phase about which Mr Packham complained) within the meaning of Article 6 of the Convention was set out in the High Speed Two (London to West Midlands) Act 2017 ("the 2017 Act").

The decision under challenge was instead the decision to continue with the project – i.e. to continue with the practical implementation of the development consent that had already been granted – following a cost/benefit review led by Mr Douglas Oakervee.

Thus, as the Court of Appeal observed at para. 4 (a passage regrettably not referred to by the Communicants in their correspondence to the Committee):

"Here, however, the challenge is to the Government's decision to proceed with the HS2 project itself, for part of which Parliamentary approval has long since been given. It does not touch any of the statutory processes by which that part of the project has been approved in principle, or any present or future decision-making under the statutory regime in place for subsequent approvals. It is directed to the Government's commitment to the implementation of HS2. But neither case involves us, the court, in the political controversy and debate surrounding HS2. To echo what a different constitution of the Court of Appeal said in its judgment on the recent appeal in the Heathrow third runway case – *R. (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 (at paragraphs 2 and 281 to 285) – our task in adjudicating on these claims for

judicial review has nothing at all to do with the merits of HS2 as a project. That is the Government's responsibility, not the court's."

The decision under challenge was therefore a purely political decision. It was not a development consent decision, a decision to adopt a plan or programme, or any other kind of environmental decision. It was not a decision that was within the scope of the Aarhus Convention. It is therefore of no relevance to the current communication.

Further, and in any event, the Court's consideration of how the *Wednesbury* principle was to be applied in the context of this case – i.e. how broad was the range of reasonable (and thus lawful) responses open to the decision-maker – was expressly stated to be informed by the the political nature of the decision. Discretionary political decisions of this nature have, in the English legal system, a wide range of reasonable (and lawful) responses open to the decision-maker. This is for entirely legitimate reasons – it would undermine democratic accountability and the separation of powers if the Courts could interfere with discretionary political judgments of elected politicians.

This was the Court of Appeal's point at paragraphs 51-53 of the judgment:

51. "In our view, however, this is unquestionably the kind of case in which the court should refrain from anything beyond a "light touch" approach, applying the traditional test of "irrationality". It is, of course, fundamental that both the intensity of review and the extent to which a court will accord a margin of judgment or discretion to a decision-maker will always depend on fact and context. The intensity of the review and the breadth of the margin of discretion accorded are conceptually different. The court may closely scrutinise the reasoning for a decision yet still conclude it is proper to accord the decision-maker a broad margin of discretion.

52. If one is to apply the test of irrationality in this case, we are in no doubt that the Cabinet, as the effective decision-maker, was entitled to a broad margin of discretion in handling the content of the review report. The reasons for this can be stated shortly. First, the decision to proceed with HS2 was taken at the very highest level of Government. It was largely a matter of political judgment. Secondly, at the date of the decision the Cabinet can be taken to have been aware, at least, of the existence of the 2017 Act and the fact that in the course of the passage of the Phase One Bill through Parliament a detailed assessment of environmental impacts had already been carried out. That assessment had not precluded the coming into force of the statute. It remained lawful and valid at the time of the Oakervee review, and at the time of the decision. So did the statutory approval process itself. And that will remain so regardless of the outcome of these proceedings. Thirdly, it is not said that, in the period between Royal Assent and the Cabinet's decision, there had been any physical change in circumstances bearing on the assessment of environmental effects that was either capable of undermining the assessment or of affecting the operation of the 2017 Act. Fourthly, in arriving at the decision, the Cabinet had to balance a number of significant – and potentially conflicting – political, economic, social and environmental considerations. Fifthly, largely for that reason, there was not a single "right" decision. A decision either way might be perfectly reasonable. And sixthly, the review report had obvious limitations, and did not gain full support even from the whole panel – as the dissent of Lord Berkeley shows.

53. All these factors, in one way or another, manifest the essentially political quality of the decision under challenge, and the need for the Government, as decision-maker, to be accorded a wide margin of discretion. That is how we shall proceed."

There is therefore nothing in the Packham case indicative of any breach by the UK of the Aarhus Convention , even if (which is manifestly not the case) it was a case falling within the scope of the Convention despite the purely political nature of the decision under challenge which did not engage any of the Convention's provisions.

The Packham case is therefore of no utility to the Committee's consideration of the issues before it in the current communication.

Yours sincerely

Grace Adisa-Solanke

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