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13 January 2021

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

Copy by email to: Danielle Angelopoulou

Dear Ms Marshall,

Re: ACCC/C/2015/131 (United Kingdom)

Comments on the United Kingdom's response to questions from the Committee

Firstly, I would like to thank the Committee for their time and careful consideration of the issues regarding this case at the hearing last month. I hope that I was able to articulate my position clearly and would be happy to answer any further questions if required.

Regarding the response from the UK to questions from the Committee (dated 23 December 2020), I would like to comment on their answer to the question asking for the date on which grounds to challenge the negative screening opinion first arose. At paragraph 7, the UK refers to *R. v Secretary of State for Trade and Industry ex parte Greenpeace Ltd* [1998], which raises the principle that "a judicial review [claimant] must move against the substantive act or decision which is the real basis of his complaint".

However, this principle was reconsidered at length in the House of Lords in *R. (Burkett) v Hammersmith and Fulham London Borough Council* [2002] 1 WLR 1593, at paragraphs 39 to 50 (see Annex 1).

Mrs Burkett had attempted to challenge planning permission for a development scheme in London, relying on inadequacies in the Environmental Statement which had been submitted by the developer. In this case, the judges in the lower courts had adopted the same reasoning as the Greenpeace case mentioned above, and had held that Mrs Burkett should have challenged the Council's "resolution" to grant planning permission, which had occurred several months before the actual Decision Notice had been issued.

But the House of Lords held that, although the Claimant could have challenged the first decision, had she been in time, fresh grounds arose when planning permission was granted. They said that the first resolution could have been superseded because circumstances changed, a condition could not be met, negotiations on associated agreements broke down, the decision required review because it was flawed, or the Council simply changed its mind.

Lord Steyn said there were three public policy issues. First, time limits depriving citizens of a right of challenge should be straightforward and easy to understand. Second, simplicity and certainty should be preferred to complexity and uncertainty. Third, he explained how burdensome it was for a local resident to mount a judicial review. He said "These considerations reinforce the view that it is unreasonable to require an applicant to apply for judicial review when the resolution may never take effect. They further reinforce the view that it is unfair to subject a judicial review applicant to the

uncertainty of a retrospective decision by a judge as to the date of the triggering of the time limit under the rules of court." As a House of Lords decision, this became the leading case.

Other later cases adopted the reasoning of the House of Lords, including *R. (Catt) v Brighton and Hove City Council* [2007] EWCA Civ 298, paragraph 39 to 49 (see Annex 2).

Mr Catt challenged the Council's grant of planning permission for an extension to Brighton Football Club, as he considered the Council had erred in adopting a negative screening opinion. The Council resisted the challenge on the ground of delay and alleged that the grounds had arisen, and time began to run, on the date of issue of the screening opinion.

At paragraph 49, the Appeal Court Judge states "…To deprive a citizen of the right to challenge a planning permission by way of judicial review would be a major and a retrograde step. The screening opinion certainly has a formality and status in the statutory planning scheme. It may itself be challenged and that may be the appropriate course in some situations. However, the opportunity to challenge does not affect the right to challenge by judicial review a subsequent planning decision. The opinion does not create, or inevitably lead, to a planning permission and the right to challenge a subsequent planning permission relating to the same proposed development is not, in my judgment, defeated by the passage of time between the screening opinion and the planning permission..."

Hence a subsequent decision, which flows from the faulty decision but is not an inevitable or certain consequence of it, gives rise to fresh grounds and time starts to run again.

In my particular case before the Committee, the situation is complicated by the fact that the negative Screening Opinion was not published until many months after the initial conditional planning permission had been granted. The deficiencies in the Screening Opinion could not have been seen until that document was published.

It appears to me that, in order to make a direct challenge to the negative Screening Opinion itself, I would have had to rely on the discretion of the judge under CPR 3.1(2)(a). Alternatively, I could rely on the decisions in Burkett and Catt to challenge subsequent decisions instead.

In the case of Wells [2004] EUECJ C-201/02, it was determined that the planning consent procedure is not completed until the last of the subsequent consents has been granted, and that a challenge should not be prevented because of the passage of time:

> *59. The United Kingdom Government further submits that the considerable period which has elapsed since the decision determining new conditions in 1997 renders revocation of that decision contrary to the principle of legal certainty. The claimant in the main proceedings should have challenged the decision in due time before the competent court.*
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> *60. As to that submission, the final stage of the planning consent procedure was not completed when the claimant in the main proceedings submitted her request to the Secretary of State. It cannot therefore be contended that revocation of the consent would have been contrary to the principle of legal certainty.*

Similarly, in this case before the Committee, there were still outstanding subsequent applications which had not been approved at the time of the judicial review challenge. Therefore, the developers' decision to proceed with demolition and building work was entirely at their own risk and should have no bearing on an individual's right to challenge the planning consent procedures.

Yours sincerely,

Tracy Breakell