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

FURTHER QUESTIONS BY THE COMMITTEE:

ANSWERS OF THE PARTY CONCERNED

Introduction

1. By letter dated 9 December 2020, the Committee asked additional questions of the United Kingdom as the Party Concerned in communication ACCC/C/2015/131 (**"the Communication"**) and invited a written reply. The answers to those questions follow below.

Answers to the Committee's further questions

(1) During the hearing during the Committee's 68th meeting on 26 November 2020, the Party concerned's legal representative referred to the London Borough of Merton's "acknowledgement of service". Please clarify whether this is the document provided by the communicant as annex 2 to her reply to the Committee of 6 June 2016, available on the Committee's website at [full website address given].

2. The document at Annex 2 to the Communicant's reply dated 6 June 2016 is not the 'Acknowledgment of Service' that the London Borough of Merton (**"the Council"**) filed in response to the Communicant's claim for judicial review. The document at Annex 2 (an email from Mr George Chesman dated 5 February 2015) is the *pre-action* response that the Council filed in response to the Communicant's pre-action letter (see the preceding Annex 1). The

Communicant sent this pre-action letter *before* issuing her claim in the High Court for judicial review. After this claim was issued, the Council was required to file a formal 'Acknowledgment of Service' in response. This was required on a court form, not in the form of a letter or email.

3. Neither the Communicant's claim form for judicial review, nor the Council's acknowledgment of service in response to that claim, have been included in the papers filed with the Committee to date. The most important part of the claim form – the Communicant's 'Statement of Facts and Grounds' that is appended to the claim form – was included with the original communication sent to the Committee on 1 September 2015 (see Annex 7), but the claim form itself was not included.

4. In an effort to assist the Committee, the United Kingdom has now obtained from the Council (i) the claim form filed by the Communicant when she issued her claim for judicial review (see Annex 1 to this document); and (ii) the Council's formal acknowledgement of service in response to that claim (see Annex 2 to this document). Should the Committee have any further questions in relation to these documents, it should not hesitate to contact those acting for the United Kingdom.

(2) In paragraph 39 of its response to the communication dated 13 May 2015, the Party concerned stated that:

> ***"in respect of decisions made under the planning acts (for example, a grant of planning permission under the Town and Country Planning Act 1990), 'the claim form must be filed not later than six weeks after the grounds to make the claim first arose' (CPR r. 54.5(5))"***

In accordance with CPR r. 54.5(5), on what date did the grounds for the communicant to challenge the negative screening opinion adopted in March 2012, but not published until July 2014, first arise? Please provide the text of the relevant rules, directions or case law to support your answer."

5. The Council made its negative screening opinion on 12 March 2012. It is important to stress that CPR r. 54.5(5) – the rule identified in the question above – was not introduced until 2013: see paragraph 39 of the 'Response on Behalf of the United Kingdom' to this communication, sent to the Committee on 13 May 2016. On 12 March 2012, planning decisions (which would include a negative screening opinion) were still subject to the general time limit for bringing a claim for judicial review of any administrative decision made in England and Wales, as set out in CPR r. 54.5(1):

"54.5 – (1) The claim form must be filed –

(a) promptly; and

(b) in any event not later than 3 months after the grounds to make the claim first arose."

6. In 2013, CPR r. 54.5(5) was added as a new provision within CPR r. 54.5 to require that, in respect of planning decisions, "the claim form must be filed not later than six weeks after the grounds to make the claim first arose". As the United Kingdom's response to the original communication explained, this change reflected some concern on the part of the CJEU that the requirement to bring a claim "promptly" was insufficiently certain, and that a specific timescale was to be preferred.

7. It follows that, applying the relevant rule at the time - CPR r. 54.5(1) – the Communicant was required to challenge the negative screening decision of 12 March 2012 "promptly" and "in any event not later than 3 months after the grounds to make the claim first arose". These grounds arose when the decision was made, on 12 March 2012, as "a judicial review [claimant] must move against the substantive act or decision which is the real basis of his complaint": ***R v Secretary of State for Trade and Industry, ex p. Greenpeace Ltd*** [1998] Env LR 415 at 424 (see Annex 3 to this response).

8. The domestic case law is clear that grounds arise for the purposes of CPR r. 54.5(1) when the substantive decision is made, not when an individual claimant becomes aware of the decision: ***R v Department of Transport, ex p. Presvac Engineering Ltd*** (1992) 4 Admin LR 1221 at 133D-H (see Annex 4 to this response). However, "the [claimant's] subjective experience and state of knowledge… may… be relevant when the court comes to consider" whether to exercise its discretion under CPR r. 3.1(2)(a) to extend time for bringing a claim for judicial review: ***Presvac Engineering Ltd*** at 133H-134A. CPR 3.1(2)(a) states (and did state in 2012):

"3.1

[…]

(2) Except where these Rules provide otherwise, the court may –

(a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);"

9. In the present case, although the Communicant relies on the late publication of the negative screening decision on the Council's website on July 2014, she did not issue her claim for judicial review until 6 February 2015, some 7 months later. Even taking her case at its highest, therefore, she failed to issue her claim promptly and certainly did not issue it within 3 months of the date of publication on the website (taking that as an alternative starting point in the exercise of discretion under CPR r. 3.1(2)(a)). In these circumstances, the United Kingdom submits that there was never a realistic prospect of the High Court granting permission for the Communicant's late challenge to the negative screening decision. The High Court (and subsequently the Court of Appeal) correctly refused permission for this challenge to proceed.

10. In any event, as the United Kingdom submitted at the recent hearing before the Committee, the Communicant cannot fairly claim that she was unaware of the negative screening opinion until July 2014. The fact of the negative decision was recorded in the report prepared by the Council's officers for the meeting of the Council's Planning Applications Committee on 6 September 2012 that was to determine the planning application for the development: see Annex 1 to the United Kingdom's response to the original communication sent to the Committee on 13 May 2016, at para. 8.2. There was no delay in the publication of this report, nor has it been part of the Communicant's case that she did not read this report promptly after its publication.

(3) Also in paragraph 39 of its response to the communication, the Party concerned states:

> ***"A classic example of when the courts have been prepared to extend time, historically, is where the claimant did not become aware that planning permission had been granted until more than 3 months from the date of grant due to (for example) a failure by the Council to comply with publicity requirements for the application, and where the court was satisfied that the claimant had acted promptly on becoming aware of the challenged decision."***

Following the publication of the negative screening opinion in July 2014, what timeframe for seeking permission to apply for judicial review would have amounted to acting "promptly"? Please provide the text of the relevant rules, directions or case law to support your answer.

11. This question appears now to have been superseded by the response to question (2) above, which the United Kingdom hopes is instructive. As time started to run from the date of the decision on 12 March 2012 for the purposes of CPR r. 54.5(1) (which then applied), the

requirement to issue a claim for judicial review "promptly", and in any event within 3 months, applied from 12 March 2012, not July 2014. In terms of the CPR, the publication of the negative screening opinion on July 2014 would have been relevant only to the discretion to extend time under CPR r. 3.1(2)(a).

12. Insofar as the Committee might have a residual concern about a requirement under the CPR to issue a claim for judicial review "promptly", it is important to stress again that this requirement has not applied to planning decisions in England and Wales since 2013, when the CPR were amended to include a new rule 54.5(5) imposing a more certain 6-week period for challenges to planning decisions (still subject, of course, to a residual discretion to extend time, when justified, under CPR r. 3.1(2)(a)).

(4) By order of 20 March 2015, Mr Justice Mitting ordered the communicant to pay £5,000 towards London Borough of Merton's costs regarding her unsuccessful application for permission to apply for judicial review.

(a) Was there a rule or direction in place in March 2015 that required the judge, when deciding the appropriate sum of costs to be awarded against an unsuccessful claimant in an Aarhus claim, to take into account the procedural stage(s) covered by that particular costs award? If so, please provide the text of that rule or direction.

(b) If such a rule or direction is currently in place, please provide the text of the rule of direction presently in force, together with the date of its entry into effect.

13. In March 2015, and in the present day, CPR r. 1.1 has set out the "overriding objective" of the Civil Procedure Rules, which is to enable courts "to deal with cases justly *and at proportionate cost"*. A general principle of proportionality in costs decisions is therefore a golden thread running through the entire CPR. To cite CPR r. 1.1 in full:

> "1.1
>
> (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
>
> (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders."

14. CPR r. 1.2(a) then states that the court "must seek to give effect to the overriding objective" when it exercises any power given to it by the CPR.

15. Furthermore, in March 2015 and in the present day, Part 44 of the CPR ("General Rules about Costs") has reinforced this general principle of proportionate costs. In particular, CPR r. 44.3 and 44.4 have made provision for costs assessed on the "standard basis" (i.e. the basis upon which the vast majority of costs awards are made, including the present case). Costs may alternatively be assessed on the "indemnity" basis to include a punitive element for unreasonable conduct, but this only applies to a small minority of cases, and did not apply in the present case. CPR r. 44.3-44.4 state, so far as relevant:

"**Basis of assessment**

44.3

(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –

(a) on the standard basis; or

(b) on the indemnity basis,

but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

(Rule 44.5 sets out how the court decides the amount of costs payable under a contract.)

(2) Where the amount of costs is to be assessed on the standard basis, the court will –

(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and

(b) resolve any doubt which it may have as to whether the costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

(Factors which the court may take into account are set out in rule 44.4.)

(3) *[deals with indemnity costs]*

(4) Where –

(a) the court makes an order about costs without indicating the basis on which the costs are to be assessed; or

(b) the court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis,

the costs will be assessed on the standard basis.

(5) Costs incurred are proportionate if they bear a reasonable relationship to –

(a) the sums in issue in the proceedings;

(b) the value of any non-monetary relief in issue in the proceedings;

(c) the complexity of the litigation;

(d) any additional work generated by the conduct of the paying party; and

(e) any wider factors involving in the proceedings, such as reputation or public importance.

(6) *[deals with point relating to the Solicitors Act 1974, irrelevant to the present case]*

(7) Paragraphs (2)(a) and (5) do not apply in relation to –

(a) cases commenced before 1st April 2013; or

(b) costs incurred in respect of work done before 1st April 2013.

and in relation to such cases or costs, rule 44.4(2)(a) as it was in force immediately before 1st April 2013 will applied instead.

Factors to be taken into account in deciding the amount of costs

44.4

(1) The court will have regard to all the circumstances in deciding whether costs were –

(a) if it assessing costs on the standard basis –

(i) proportionately and reasonably incurred or

(ii) proportionate and reasonable in amount;

[remainder of the provision deals with indemnity costs]

(2) In particular, the court will give effect to any orders which have already been made.

(3) The court will also have regard to –

(a) the conduct of the parties, including in particular –

(i) conduct before, as well as during, the proceedings; and

(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;

(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) the skill, effort, specialised knowledge and responsibility involved;

(f) the time spent on the case;

(g) the place where and the circumstances in which work or any part of it was done; and

(h) the receiving party's last approved or agreed budget."

16. In response to the Committee's question (4), the United Kingdom would particularly highlight CPR r. 44.3(5)(c) and 44.4(3)(d) (the need for costs to be proportionate to the complexity of the litigation), and r. 44.4(3)(f) (the need to have regard to the time spent on the case when assessing the proportionality of the costs incurred). By virtue of these rules, a judge refusing permission to apply for judicial review is necessarily required, when assessing costs, to have regard to the fact that the permission stage is intended to be a summary process which does not require the defendant to spend time setting out a detailed defence.

17. Nevertheless, even at the permission stage, claims for judicial review vary considerably in their factual and legal complexity. As the United Kingdom submitted at the hearing before the Committee, there was a detailed planning and administrative history in this case which gave

rise to issues under the law on environmental impact assessment, which is not straightforward. These facts needed to be investigated and reviewed by the Council before being set out, alongside the relevant law, in an acknowledgment of service for the benefit of the court. The United Kingdom submits that it can be understood how combined costs of at least £5k could reasonably be incurred by two lawyers (a barrister and a solicitor) working on a case of this nature at the permission stage. The costs order made by the court in this case was not unreasonable and complied with the costs cap set by the CPR for an Aarhus Convention claim.

Conclusion

18. This completes the United Kingdom's answers to the Committee's further questions. The Committee should not hesitate to contact the United Kingdom's representatives if they can be of any further assistance in this matter.

GWION LEWIS

Landmark Chambers

London

23 December 2020