

5 April 2021

Ms. Fiona Marshall
Environmental Affairs Officer – Secretary to the Compliance Committee
Aarhus Convention Secretariat
United Nations Economic Commission for Europe
Palais des Nations
CH-1211 Geneva 10
Switzerland

Dear Ms. Marshall,

PRE/ACCC/C/2021/185 UNITED KINGDOM – STATEMENT ON PRELIMINARY ADMISSIBILITY

I would like to thank the Aarhus Convention Compliance Committee for this opportunity to make a statement on the preliminary admissibility of the above communication.

In June 2019, the London Borough of Barnet approved plans for a major redevelopment scheme¹ that were concealed from residents until January 2021, when, in the midst of a pandemic, the local authority launched *and* concluded a statutory consultation in rapid time.²

I will not elaborate on the substance of our communication but note the Committee has already provided a statement on the application of the Convention during the COVID-19 pandemic,³ and developed **helpful recommendations regarding the process for effective consultation during the pandemic.⁴**

***Decision I/7 - Review of Compliance* sets out the admissibility requirements for communications at para 20.**

20. The Committee shall consider any such communication unless it determined that the communication is:
- Anonymous;
 - An abuse of the right to make such communications;
 - Manifestly unreasonable;
 - Incompatible with the provisions of this decision or with the Convention.

Accordingly, **the Committee is obliged to consider this communication unless it meets the requirements in para 20 (a) – (d). We maintain that the communication and the supporting documentation do not fall under any of the four criteria** listed in paragraph 20 of the annex to decision I/7.

We note that **the Committee should take into account any available domestic remedy, unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress. The exhaustion of domestic remedies is therefore not a criterion for refusal,** and the above provisions do not supersede the Committee's obligation to consider admissibility against the four criteria listed.

¹ Audio recording of the meeting of the London Borough of Barnet, Housing and Growth Committee, 13 June 2019 – intervention by Gerrard Roots at 22 minutes. Available at:

<https://barnet.moderngov.co.uk/ieListDocuments.aspx?CIId=696&MIId=9928&Ver=4>

² London Borough of Barnet (2021), *The Burroughs and Middlesex University Supplementary Planning Document*. Available at: <https://engage.barnet.gov.uk/burroughs-middlesex-spd>

³ *Statement on the application of the Aarhus Convention during the COVID-19 pandemic and the economic recovery phase, Adopted 2 September 2020*. (ECE/MP.PP/C.1/2020/5/Add.1) Available at:

https://unece.org/fileadmin/DAM/env/pp/compliance/CC67/ece_mp_pp.c.1.2020.5.add.1_advance_unedited.pdf

⁴ *Recommendations with regard to request for advice ACCC/A/2020/2 by Kazakhstan*, Adopted by the Committee on 1 July 2020. Available at: https://unece.org/sites/default/files/2021-02/ece_mp_pp_c.1_2021_6_eng.pdf

As recorded in our consultation, **we have pursued domestic remedies**, using internal complaints mechanisms, by filing complaints with watchdogs, including the ICO Commissioner’s Office, **and found there is no effective or timely domestic remedy available** to us.

As the UK government found,⁵ the Local Government Ombudsman (LGO) was established to consider complaints about potential maladministration or other service failures by local councils and certain other authorities. It is not within the remit of the LGO to assess compliance with obligations under the Aarhus Convention and therefore does not provide a sufficient remedy to the matters cited in the communication.⁶

As we record in the communication, **the possibility of a judicial review raises costs, which we consider to be prohibitive** and a real barrier to the pursuit of a claim through UK courts. **A judicial review would not provide a timely or effective remedy to this matter for the reasons set out below.**

Limitations of the Cost Protection Rules

The UK authorities have introduced legislation by amending the Civil Procedure Rules (CPR) in respect of costs protection for certain cases that come within the scope of the Convention, which can be used to limit the potential liability of an unsuccessful claimant to pay the defendant’s litigation costs. In practice, however, the CPR have not reduced financial barriers for applicants seeking access to UK courts. This situation was affirmed by Committee decisions V/9n⁷ and VI/8k,⁸ which call upon the UK to:

1. address the allocation of costs in all such cases is fair and equitable and not prohibitively expensive
2. establish appropriate assistance mechanisms to remove or reduce financial barriers to access to justice;
3. put in place the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement article 9, paragraph 4, of the Convention.⁹

In decision VI/8k, the Committee found that UK was moving ‘further away from meeting the requirements of paragraphs 8 (a), (b) and (d) of decision V/9n’. Regrettably, progress reports from as recently as 2019¹⁰ and 2020¹¹, record a pattern of continued non-compliance with the requirements set out by the Committee.

The following barriers would make an application for judicial review prohibitively costly.

1. The application of cost caps of £10,000 to unincorporated associations and resident groups

Rule 45.43 of the CPR provides a cost cap of (a) £5,000 where the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person; and (b) £10,000 in all other cases.

⁵ Letter from Ahmed Azam, United Kingdom National Focal Point to the UNECE Aarhus Convention to Ms. Fiona Marshall, Secretary to the Aarhus Convention Compliance Committee, 31 October 2016. Available at: https://unece.org/fileadmin/DAM/env/pp/compliance/C2015-131_UK/frPartyC131_31.10.2016_response_to_Communicant_s_comments.pdf

⁶ See Local Government and Social Care Ombudsman, Guidance on Jurisdiction, March 2021. Available at: <https://www.lgo.org.uk/information-centre/staff-guidance/guidance-on-jurisdiction>

⁷ Decision V/9n, ECE/MP.PP/2014/2/Add.1, 30 June and 1 July 2014. Available at: https://unece.org/DAM/env/pp/mop5/Documents/Post_session_docs/Decision_excerpts_in_English/Decision_V_9n_on_compliance_by_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland.pdf

⁸ Decision VI/8k, ECE/MP/2017/2/ADD.1, 11-13 September 2017. Available at: https://unece.org/DAM/env/pp/compliance/MoP6decisions/Compliance_by_United_Kingdom_VI-8k.pdf

⁹ See decision V/9n, 2(a)-(e), 4, 6 and 8(a) and (b)

¹⁰ In its first progress review of 26 February 2019 of the implementation of Decision VI/8k on compliance by the United Kingdom, the Committee found that the United Kingdom had not yet met the requirements of paragraphs 2(a)-(e), 4, 6 and 8(a) and (b) of Decision VI/8k –which repeated the above requirements of decision V/9n.

¹¹ In its second progress review of 6 March 2020, on the implementation of Decision VI/8k on compliance by the United Kingdom, the Committee considered that the UK had not yet met the requirements of paragraphs 2(a), (b) and (d), 4, 6 and 8(a) and (b) of Decision VI/8k.

The Hendon Residents Planning Forum is an unincorporated association. It does not have a legal personality. **Recent decisions suggest that the cost cap could be increased to £10,000** by the court,¹² and most likely at the request of the party concerned to deter the pursuit of a claim.¹³ **For a small group of local residents an adverse cap of £10,000 would make our case prohibitively expensive.**

2. The refusal to vary cost caps downwards

The Committee has advised that previously fixed costs caps of £5000 and £10,000 may be prohibitively expensive for many individuals and organizations. It considered that these levels would therefore only be acceptable if there were measures enabling the costs caps to be varied downwards in order to take into account the financial capacity of individuals or organizations.¹⁴ While such measures now exist,¹⁵ and courts may vary the cost caps, in practice they work in one direction only, thus substantiating the Committee's earlier concern that this provision may be used more often to increase, rather than decrease, the caps.

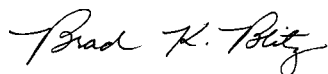
There is a demonstrable trend of courts increasing caps at the request of defendants. **In their submission of 29 October 2020** regarding the UK's 3rd Progress Report on Aarhus Convention Decision VI/8k, **the RSPB et al. reported they were not aware of a single successful variation downwards by a claimant.**¹⁶ **This uncertainty acts as a disincentive in seeking judicial review, as we find.**

3. The limitations of judicial review

The scope of judicial review is limited and would not clarify the broader questions about the protection of rights enjoyed under the Convention, in the circumstances of the pandemic. We note that the draft Implementation Report for period 2017-21, submitted by the UK government, contains no mention of the pandemic whatsoever, even though the UK government even though it has affected the operation of courts, the UK parliament, and public authorities. We also note that the Committee has provided guidance in its statement of 2 September 2020 and in its recommendations to another state party and that this information may be useful to other parties.

We have given due consideration to any and all domestic remedies but for the reasons above find they do not provide an effective and sufficient means of redress. We, therefore, request that the Committee consider our communication preliminarily admissible.

Yours sincerely,



Professor Brad Blitz, on behalf of the Hendon Residents' Planning Forum

¹² *Aireborough Neighbourhood Development Forum v Leeds City Council* (Rev 2) [2020] EWHC 45 (Admin) (14 January 2020). Available at: <http://www.bailii.org/ew/cases/EWHC/Admin/2020/45.html>

¹³ ClientEarth found defendants are making applications to increase the claimant's costs caps at a rate over five times more than such applications are actually granted by the court, which 'may indicate that defendants are using such applications for a tactical advantage to deter claimants and increase costs'. *VI/8k: UK's final progress report – ClientEarth's response* 29 October 2020. Available at: [https://unece.org/fileadmin/DAM/env/pp/compliance/MoP6decisions/VI.8k_UK/Correspondence with communications and observers/frCommC33_ClientEarthVI.8k_29.10.2020_.pdf](https://unece.org/fileadmin/DAM/env/pp/compliance/MoP6decisions/VI.8k_UK/Correspondence_with_communications_and_observers/frCommC33_ClientEarthVI.8k_29.10.2020_.pdf)

¹⁴ See: Excerpt from the addendum to the report of the fifth session of the Meeting of the Parties (ECE/MP.PP/2014/2/Add.1) - Decision V/9n on compliance by the United Kingdom of Great Britain and Northern Ireland Available at: https://unece.org/DAM/env/pp/mop5/Documents/Post_session_docs/Decision_excerpts_in_English/Decision_V_9n_on_compliance_by_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland.pdf

¹⁵ See Civil Procedure Rules (CPR) 45.44(1). Available at: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs#sectionVII>

¹⁶ Letter to Ms. Fiona Marshall, Re: UK's 3rd Progress Report on Aarhus Convention Decision VI/8k 29, dated 29 October 2020. Available at: [https://unece.org/fileadmin/DAM/env/pp/compliance/MoP6decisions/VI.8k_UK/Correspondence with Observer/frObs_RSPB etc VI.8k 29.10.2020/frObs_RSPB etc VI.8k 29.10.2020 cover letter.pdf](https://unece.org/fileadmin/DAM/env/pp/compliance/MoP6decisions/VI.8k_UK/Correspondence_with_Observer/frObs_RSPB_etc_VI.8k_29.10.2020/frObs_RSPB_etc_VI.8k_29.10.2020_cover_letter.pdf)