

7 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
RESPONSE TO UK DEPARTMENT FOR ENVIRONMENTAL FOOD AND RURAL AFFAIRS**

I am grateful to the Aarhus Convention Compliance Committee for this opportunity to comment on the preliminary admissibility of the above communication.

In June 2019, the London Borough of Barnet approved plans for a major redevelopment scheme¹ in two conservation areas 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:

- a) Anonymous;*
- b) An abuse of the right to make such communications;*
- c) Manifestly unreasonable;*
- d) 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

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. (ECE/MP.PP/C.1/2021/6). Available at: https://unece.org/sites/default/files/2021-02/ece_mp_pp.c.1.2021_6_eng.pdf

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 criteria listed.

In its letter of 1 April 2021, the UK Department for Environment, Food and Rural Affairs (hereafter 'the concerned party') alleges that our communication inadmissible. The claim that: 1) the communication is premature and constitutes an abuse of the right to make a communication; 2) the communication is manifestly unreasonable; 3) the allegations are incompatible with the provisions of the Convention; and, 4) we have not taken into account any available domestic remedy.

Let me respond to their criticisms below.

1. THE COMMUNICATION IS PREMATURE AND AN ABUSE OF THE RIGHT TO MAKE A COMMUNICATION

The concerned party writes that our allegations are premature because the decision-making process is at an early stage, responses to the consultations have not been fully considered, and final decisions have not been made or published. They therefore allege an abuse of the right to make such a communication.

We note Article 6(3) does **not** qualify the stages of the decision-making process -- whether early or ended -- but states:

The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

Further, Article 6(4) states:

Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

In our communication, we note that the London Borough of Barnet acknowledges that plans were approved in June 2019,⁵ and that these plans were then concealed from residents until January 2021.⁶ The claim that the communication is premature and an abuse of the right to make a communication, is **unfounded**. The Convention affirms the right to public participation, and not simply upon conclusion of a consultation as the UK party suggests. **Our communication does not constitute an abuse of the right to make a communication to the Committee.**

2. THE COMMUNICATION IS MANIFESTLY UNREASONABLE

The concerned party alleges that our communication is 'manifestly unreasonable' because, they assert it is premature, and that the allegations are not therefore capable of amounting to a breach of Articles 6(3), 6(4) and 7 of the Convention. As recorded above, **the claim that the communication is premature is unfounded**, as is the suggestion that the allegations are not capable of amounting to a breach of Articles 6(3), 6(4) and 7 of the Convention. The communication and attached documents provide considerable evidence where Articles 6(3), 6(4) and 7 of the Convention have been violated.

3. ALLEGATIONS ARE INCOMPATIBLE WITH THE PROVISIONS OF THE CONVENTION

The concerned party suggests that we are dissatisfied with the use of online consultations; however, our communication is more extensive. We records many instances when the London Borough of Barnet breached Article 6(3), 6(4), 6(8) and Article 7 of the Convention.

⁵ 'Following approval of the Strategic Outline Case (SOC) by Committee in June 2019, London Borough of Barnet (LBB) has progressed Hendon Hub, a mixed-use regeneration proposal on The Burroughs, Hendon, in conjunction with its key stakeholder Middlesex University (MU), to Outline Business Case (OBC).' See Outline Business Case, attached to the communication. *Attachment 2b.EIR.01_LBB Hendon Hub Outline Business Case [Redacted] [IMP]*

⁶ London Borough of Barnet, Housing and Growth Committee, 13 June 2019, *Supra 1*.

They also argue that we have not provided any facts to demonstrate that the notifications and consultations periods were incompatible with the requirements of the Convention. On this point, may I remind the concerned party of the Committee's recommendations to the government of Kazakhstan, adopted on 1 July 2020,⁷ and its 'Statement on the application of the Aarhus Convention during the COVID-19 pandemic and the economic recovery phase', adopted on 2 September 2020.⁸ These documents affirm the relevance of the Convention to the facts included in our communication.

In its recommendations to the Government of Kazakhstan, the Committee set out under heading 'B. Specific obligations' advice regarding the *Adequate, timely and effective notice - article 6 (2)* regarding the means of notification, the content, and the envisaged procedure. Technical advice is provided under paragraphs 36 and 37

36. Accordingly, the procedure for the virtual public hearing should be publicized sufficiently in advance of the hearing to enable the public to prepare and participate effectively. This includes the format, agenda and indicative timing. The public must be informed in advance of any changes in the procedure, and any such changes should not create any additional barriers to the public's participation.

37. In addition, the notice regarding the virtual public hearing should include all hyperlinks and telephone numbers needed for the public to join the hearing, as well as the contact details of whom the public can contact if they experience technical difficulties when attempting to join the hearing.

Regarding the Committee's Statement of 2 September 2020, under General Matters:

4. The Committee emphasises that even in the case of a crisis such as the COVID-19 pandemic and the subsequent economic recovery phase, the binding rights set out in the Convention cannot be reduced or curtailed. Rather, if the established practices for ensuring access to information, public participation in decision-making or access to justice in environmental matters cannot be used, any alternative means must fulfil the requirements of the Convention.

5. The Committee reminds the Parties that any shortcoming in ensuring effective access to information, public participation in decision-making or access to justice under the Convention during the COVID-19 pandemic or in the subsequent economic recovery phase may be subject to challenge by members of the public in accordance with the provisions of article 9 of the Convention.

6. The Committee also reminds the Parties that any shortcoming in ensuring effective access to information, public participation in decision-making or access to justice under the Convention during the COVID-19 pandemic or in the subsequent economic recovery phase may be subject to communications, submissions and referrals to the Committee in accordance with decision I/7 of the Meeting of the Parties.

The matter of transparency and consistency, and the need to make additional efforts to ensure the public are not disadvantaged in practice, which we reference in our communication, is addressed under para 7:

Clear, transparent and consistent framework – article 3(1)

7. The opportunities for the public to seek access to information, participate in decision-making and obtain access to justice in environmental matters during the COVID-19 pandemic and in the subsequent economic recovery phase shall be provided in a clear, transparent and consistent framework. The obligation to ensure a consistent framework means that these opportunities must be in line with and not reduced when compared to the opportunities available to the public in normal times. To that end, public authorities and courts may need to make additional efforts to ensure that the public are not disadvantaged in practice in the exercise of their rights under the Convention.

⁷ See: ECE/MP.PP/C.1/2021/6, *Supra* 4.

⁸ See: ECE/MP.PP/C.1/2020/5/Add.1, *Supra* 3.

On the question of timeliness, which we record in our communication, the Committee recommends extending consultations under extraordinary circumstances, is also noted in its advice to the Government of Kazakhstan and September statement. In its recommendations to Kazakhstan, the Committee explains how the question of timelines relates to the protection of rights enjoyed under Article 6(3):

Reasonable time frames – article 6 (3)

38. Since the public will not be able to prepare and to participate in the usual way, the standard time frames for each stage of the public participation procedure may need to be extended to enable the public to prepare and participate effectively. For example, the time frame for the public to prepare comments may need to be extended since it may take longer than usual for the public to access all information relevant to the decision-making.

Similarly, in paragraph 8 of its September 2020 statement on the pandemic, the Committee advises:

Assistance and guidance to the public – article 3(2)

8. During the COVID-19 pandemic and in the subsequent economic recovery phase, the officials and authorities of the Parties will need to make additional efforts and allow more time to assist and provide guidance to explain to the public how they can seek access to information, participate in decision-making and obtain access to justice in environmental matters. This is particularly the case if any regulation or practice is temporarily adapted, while ensuring the rights under the Convention.

Furthermore, the suggestion by the concerned party that there is no prescribed length for a regulation 18 consultation, ignores the HM Government Code of Practice on Consultation, which states *Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.*⁹

On the right to public participation in decision-making Articles 6-8, the Committee's September 2020 statement is clear:

13. The Committee emphasises that the requirements to ensure public participation in all forms of decision-making under the Convention apply with equal force during the COVID-19 pandemic and in the subsequent economic recovery phase.

14. The Committee reminds the Parties of the general obligation to provide for effective public participation in decision-making under articles 6-8 of the Convention. The obligation to ensure opportunities for the public to participate effectively is the fundamental standard against which all the elements of a public participation procedure under the Convention should be measured, and it applies with equal force to public participation procedures carried out during the COVID-19 pandemic and in the subsequent economic recovery phase.

As recorded in the above statement and recommendations to the Government of Kazakhstan, the Committee has addressed similar concerns to those raised in our communication. Therefore, the claim that the allegations are incompatible with the provisions of the convention is **unfounded**. The substance of our communication includes allegations that are **clearly compatible** with the provisions of the Convention.

4. WE HAVE NOT TAKEN INTO ACCOUNT ANY AVAILABLE DOMESTIC REMEDY

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.

The concerned party recommends having recourse to the Local Government Ombudsman (LGO), but as the United Kingdom National Focal Point to the UNECE Aarhus Convention previously,

⁹ See *HM Code on Consultation* attached to the communication, attachment 1e. *HM Code on Consultation*.

*the LGO was established to consider complaints about potential maladministration or other service failures by local councils and certain other authorities, it is not within its remit to police compliance with obligations under the EIA Directive or the Aarhus Convention.*¹⁰

The LGO does not provide a sufficient remedy to the matters cited in the communication.¹¹

Further, the concerned party recommends making an application to the High Court to judicially review a decision to adopt the SPD. 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 for the reasons set out below.

a) 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/9n¹² and VI/8k,¹³ which call upon the UK to:

- *address the allocation of costs in all such cases is fair and equitable and not prohibitively expensive*
- *establish appropriate assistance mechanisms to remove or reduce financial barriers to access to justice;*
- *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.*¹⁴

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'. Progress reports from as recently as 2019¹⁵ and 2020,¹⁶ 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.

i) 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.

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,¹⁷ and

¹⁰ 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

¹¹ 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>

¹² 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

¹³ 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

¹⁴ See decision V/9n, 2(a)-(e), 4, 6 and 8(a) and (b)

¹⁵ In its first progress review of 26 February 2019 of the implementation of Decision VI/8k, 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 VI/8k.

¹⁶ In its second progress review of 6 March 2020, on the implementation of Decision VI/8k, the Committee considered the UK had not yet met the requirements of paragraphs 2(a), (b) and (d), 4, 6 and 8(a) and (b) of VI/8k.

¹⁷ *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>

most likely at the request of the party concerned to deter the pursuit of a claim.¹⁸ For a small group of local residents an adverse cap of £10,000 would make our case prohibitively expensive.

ii) The refusal to vary cost caps downwards

The Committee recognised 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.¹⁹ While such measures now exist,²⁰ and courts may vary the cost caps, in practice they work in one direction, thus substantiating the Committee's 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.²¹ This uncertainty acts as a disincentive in seeking judicial review, as we find.

iii) The limitations of judicial review

The scope of judicial review is limited by reference to illegality, irrationality and procedural impropriety. It does 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 therefore 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

¹⁸ 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_communicants_and_observers/frCommC33_ClientEarthVI.8k_29.10.2020_.pdf

¹⁹ See: ECE/MP.PP/2014/2/Add.1 - Decision V/9n 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

²⁰ See Civil Procedure Rules (CPR) 45.44(1). Available at: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs#sectionVII>

²¹ 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