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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  
Switzerland  
(By email only)

1 April 2021

Dear Ms Marshall

**Re: Communication to the Aarhus Convention Compliance Committee  
concerning compliance by the United Kingdom PRE/ACCC/C/2021/185**

Please see attached the UK's submission on the case referred to above. I have sent nine annexes.

I would be grateful if you could confirm receipt.

Yours sincerely

David Knight  
United Kingdom National Focal Point to the UNECE Aarhus Convention

## United Kingdom comments on the preliminary admissibility of

### PRE/ACCC/C/2021/185 (United Kingdom)

April 2021

#### Summary

1. The United Kingdom consider the communication PRE/ACCC/C/2021/185 (“the Communication”) to be inadmissible for the following reasons:
  - a) The communication is being brought directly to the Aarhus Convention Compliance Committee (“the Committee”) before decisions have been taken by the relevant authority in relation to the two plans and one project in issue. The communication alleges that public consultation on the plans and project has been inadequate in violation of the Convention. However, the decision-making process for all three appears to be at such an early stage that the responses to the consultations have not yet been fully considered and final decisions have not been made or published. As such, neither the United Kingdom nor the Committee has sufficient evidence to show that the consultations were inadequate and or that the responses were not taken account of in the decision-making process. The allegations of the communicant are therefore **premature** and constitute **an abuse of the right to make such a communication** (Decision I/7 Paragraph 20 (b)).
  - b) The communication is **manifestly unreasonable** (Decision I/7 Paragraph 20 (c)) because it is premature and the allegations are not capable of amounting to a breach of Articles 6(3), 6(4), 6(8) or 7 of the Convention. For the reasons set out below, publicly available information indicates that those procedures have been followed to the extent they should be at an early stage of the decision-making process, or before the decision-making process has even begun.
  - c) The communicant’s allegations do not allege any conduct which would, even if made out, indicate **incompatibility with the provisions of the Convention** as required under paragraph 20 (d) of the annex to decision I/7. The communicant appears to be dissatisfied with the use of online consultations, but has not provided any facts to demonstrate that the notifications and consultation periods relevant to those processes were incompatible with the requirements of the Convention.
  - d) According to paragraph 21 of the annex to decision I/7, “the Committee should at all relevant stages **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”. Once a decision is taken in relation to any of the plans or projects in issue, if consultation and public participation requirements are not complied with, the complainant will have a number of routes

to dispute this including to an Ombudsman and in the domestic courts. These routes provide effective remedies for successful claimants. We urge the Committee to take the lack of use and exhaustion of domestic remedies into consideration in relation to this communication.

2. The United Kingdom therefore requests that the Committee finds the communication be inadmissible and closes the case.
3. In order to assist the Committee ahead of the meeting to discuss the preliminary admissibility of this communication on 12 April 2021, we have set out in advance of that meeting, the reasoning we will talk the Committee through. We are of course happy to provide any further information that the Committee feels that it needs in order to determine the issue.

#### **Comments on the admissibility of the communication**

4. The communication makes a number of allegations that the London Borough of Barnet (“LBB”) breached the requirements of Article 6(3), (4), (8) and Article 7 of the Convention. These allegations are set out in paragraphs 64-68 of the communication and are made against the decision-making process for two plans and a project, which are addressed in turn:
  - a. the preparation of a Local Plan (“the Local Plan”);
  - b. the preparation of a Supplementary Planning Document (“the SPD”); and
  - c. the promotion of a development project (“the Hendon Hub”).
5. We have set out below some background on the public participation requirements of each of these processes, focusing on the statutory and non-statutory process underpinning them. In summary, from the information publicly available, the process of determining each of these plans and projects appears to be ongoing and responses to the initial consultations have not yet been fully considered and final decisions have not been made or published. The communication **should therefore be considered premature**. Furthermore, the communication **does not demonstrate any issues with the consultations that are capable of constituting a breach of the Convention**. If at the time that decisions are taken in relation to each of these plans or programmes, any person who is dissatisfied with that decision, including the conduct or regard given to consultation, will be able to get recourse through either the Ombudsman or through domestic courts. **The Committee should take into account the fact that effective domestic remedies**
6. The communication alleges two further issues which are then addressed in turn, relating to:
  - d. prohibitive expense in obtaining domestic remedies; and
  - e. failure to comply with the Environmental Information Regulations (“EIRs”).

(a) the Local Plan

7. Local Planning Authorities (“LPAs”), such as LBB, must identify the strategic priorities for the development and use of land in their area. These priorities are typically set out in a Local Plan, alongside planning policies that are used when local planning applications are decided. National planning policy sets out that succinct and up-to-date local plans should provide a positive vision for the future of each area and a framework for addressing housing needs and other economic, social and environmental priorities.<sup>1</sup>
8. During the pandemic, the United Kingdom government has issued additional planning guidance on how LPAs should consider how they can continue to promote effective community engagement on the preparation of planning documents by means which are reasonably practicable, in particular to reach those sections of the community that do not have internet access.<sup>2</sup> The government has also temporarily removed the requirement for LPAs to make these documents available for inspection at their offices and other places, as well as the requirement for hard copies to be provided on request. However, LPAs do need to ensure that these documents are made available on their website.<sup>3</sup>
9. The local plan consultation carried out by LBB is an initial consultation, known as a ‘regulation 18 consultation’.<sup>4</sup> There is no prescribed length for a regulation 18 consultation, but it usually lasts at least 6 weeks and there is nothing to suggest on the evidence given in the communication that this period of time was unreasonable in the circumstances. The communicant has given very little detail about what documentation he was unable to access or why the 6-week period was not reasonable in this case. **For this reason, the communication does not appear to establish a breach of the Convention.**
10. Further, it is important to note that the regulation 18 consultation represents a very early stage in the decision-making process. There are subsequent stages that require further consultation, and allow for further public participation, including the opportunity to make oral representations at the public examination of the plan by an independent examiner.<sup>5</sup> These

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<sup>1</sup> [National Planning Policy Framework](#), February 2019, Chapter 3 – Annex 1.

<sup>2</sup> [Planning Policy Guidance: Plan Making](#), Paragraph: 080 Reference ID: 61-080-20200715

<sup>3</sup> See regulations 36A and 36B of the [Town and Country Planning \(Local Planning\) \(England\) Regulations 2012 \(“the 2012 Regulations”\)](#). These provisions were introduced by [the Town and Country Planning \(Local Planning\) \(England\) \(Coronavirus\) \(Amendment\) Regulations 2020](#), and applied from 6 July until 31 December 2020. The end date was later extended to 31 December 2021 by regulation 3 of [the Town and Country Planning \(Local Planning, Development Management Procedure, Listed Buildings etc.\) \(England\) \(Coronavirus\) \(Amendment\) Regulations 2020](#) – Annexes 2a, 2b and 2c, respectively.

<sup>4</sup> Regulation 18 of the 2012 Regulations sets out the procedure for the initial local plan consultation. Regulation 18 consultations take place early in the plan-making process. Some LPAs choose to carry out multiple regulation 18 consultations – Annex 2a.

<sup>5</sup> These stages are detailed in the 2012 Regulations and include additional consultation on a revised draft that takes account of responses to the regulation 18 consultation; preparation of and consultation on a sustainability appraisal (“SA”), encompassing the requirements for a Strategic Environmental Assessment; and public examination of the local plan by an independent examiner appointed by the Planning Inspectorate in a process that allows for further public participation. If material modifications are recommended by the examiner, these should again be consulted on. [This flowchart](#) sets out how the SA and local plan process

stages include the preparation of a sustainability appraisal, which encompasses the requirements for a Strategic Environmental Assessment and the consultation procedures therein.<sup>6</sup>

11. The Local Plan is still at an early stage of the consultation process. At the time of writing, LBB's website indicates that a regulation 18 consultation took place between 27 January and 16 March 2020<sup>7</sup>. The website states that LBB is now considering the responses to make revisions to the draft local plan. This process is ongoing and there is no indication that the subsequent stages have taken place. Given that the next iteration of the draft local plan has not been published, it is not possible to assess whether the consultation was ineffective or that there was a failure to take into account the responses received. **For these reasons this claim also appears premature.**
12. Further, LPAs are accountable for their actions to their electorate and there are procedures in place for making a complaint if a person has concerns over the conduct of the LPA in processing and reaching a decision. All LPAs have a complaints procedure and the first course of action should be to complain to the LPA directly. If a person is unable to resolve the matter after that initial complaint, they may wish to contact the Local Government Ombudsman.
13. The LBB local plan is some way from coming into force, but, in general terms, any person aggrieved by a local plan may make an application to the High Court to have the decision quashed, if the legal duties have not been complied with.<sup>8</sup> Members of the public are made aware of this route of challenge, the grounds on which a challenge can be made, and the period within which an application may be made in the 'adoption statement' which a LPA will publish alongside the local plan once it is adopted. **For these reasons the Committee should take into account the fact that effective domestic remedies will be available in future (if and when this local plan is adopted) in deeming the communication inadmissible.**

(b) The Supplementary Planning Document

14. The purpose of an SPD is to build upon and provide more detailed advice or guidance on policies in an adopted local plan. They cannot introduce new planning policies and must conform to, and supplement policy. They are however a material consideration in decision-

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interact. The flowchart can also be found at paragraph 13 of the following [Planning Policy Guidance: Strategic Environmental Assessment and Sustainability Appraisal](#) – Annex 3.

<sup>6</sup> [The Environmental Assessment of Plans and Programmes Regulations 2004](#), regulation 13. These regulations were modified by [the Environmental Assessment of Plans and Programmes \(Coronavirus\) \(Amendment\) Regulations 2020](#), from 16 July until 31 December 2020. These modifications were replaced by amendments introduced by [the Environmental Assessment of Plans and Programmes \(Amendment\) Regulations 2020](#) from 31 December 2020 onwards – Annexes 4a, 4b and 4c, respectively.

<sup>7</sup> <https://www.barnet.gov.uk/planning-and-building/planning-policies-and-local-plan/local-plan-review> - Annex 5.

<sup>8</sup> section 113 of the Planning and Compulsory Purchase Act 2004 – Annex 6.

making for individual proposals.<sup>9</sup> There are statutory requirements for a LPA to undertake public consultation on a SPD.<sup>10</sup>

15. **The communicant has not suggested that there has been a failure to follow the statutory procedures or produced any evidence to indicate why online consultation was flawed in a way that could constitute a breach of the Convention.** The LBB website indicates that the draft 'The Burroughs and Middlesex University Supplementary Planning Document' public consultation closed on 22 February 2021, with LBB feedback due in Spring 2021.<sup>11</sup> LBB's website sets out a clear period of time for consultation and says that views can be provided in a number of ways, including: by completing an online questionnaire, by requesting a paper copy of the questionnaire by email or by phone, or by making representations by post. An email address and a phone number are provided for anyone requiring further assistance. It would appear that consultation took place early in the decision-making process, the public was given notice of the consultation and reasonable time to respond to the consultation using various different means. The relevant information was made available to the public, since the draft SPD and supporting documents were available on the website, as well as the slides from online information presentations. **For these reasons the communication does not appear to establish a breach of the Convention.**
16. It is important to note that this communication was submitted to the Committee only six days after the conclusion of the SPD consultation period. At the time of writing the timeline on the website indicates the LBB feedback on this consultation is still due (i.e. has not been issued). **This claim is therefore premature as it is impossible to assess the adequacy of the public participation exercise or to assert that there has been a failure to take due account of it in a future decision-making process.**
17. If a person felt that the consultation requirements for the SPD had not been met, then they can apply to the High Court to judicially review the decision to adopt the SPD. If SPD is adopted, then a statement would be published alongside the adopted document which would specify that any person with sufficient interest in the decision to adopt the SPD may challenge it by way of judicial review. **The Committee should take into account the availability of domestic remedy in deeming the communication inadmissible.**

(c) The Hendon Hub

18. The Hendon Hub appears to be a project for the delivery of mix-used development that implements a key aspect of the SPD. For consent for a project such as this to be granted, a planning application (or multiple planning applications) would typically need to be submitted. After a LPA has received a planning application, it will undertake a period of public consultation where views on the proposed development can be expressed and the LPA will

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<sup>9</sup> see [Planning Policy Guidance: Plan Making](#) Paragraph: 008 Reference ID: 61-008-20190315 for further background on the role of SPDs

<sup>10</sup> Part 5 of the 2012 Regulations sets out the requirements – Annex 2a.

<sup>11</sup> <https://engage.barnet.gov.uk/burroughs-middlesex-spd>

identify and consult a number of different groups. Once consultation has concluded, the LPA will consider the representations made by consultees, and proceed to decide the application.<sup>12</sup>

19. A public consultation on the Hendon Hub project appears to be ongoing, running from 26 February (two days before the communicant submitted his communication to the Committee) until 21 May 2021.<sup>13</sup> The project itself appears to be at an early stage and to our knowledge a formal planning application has not yet been submitted. **This claim is therefore premature as it is impossible to assess the adequacy of the public participation exercise or to assert that there has been a failure to take due account of it in a future decision-making process.**
20. **The communication does not allege any failures in the conduct of the consultation on the Hendon Hub that are capable on constituting a breach of the Convention.**
21. It should further be noted that the Hendon Hub consultation appears to be a voluntary consultation undertaken by the applicant prior to the submission of a planning application. The final page of the Hendon Hub consultation document indicates that a further round of local consultation will take place in May 2021, a planning application may be submitted in Summer 2021 and that statutory consultation will take place once it has been submitted.<sup>14</sup> Therefore the decision-making process relating to Hendon Hub project has not yet been initiated. For the statutory consultation the LPA should follow planning guidance issued by the UK government on how they can continue to support timely decision-making, and avoid delays to development as a result of the effects of the coronavirus pandemic, while maintaining public participation in the decision-making process.<sup>15</sup> **The consultation that is the subject of this communication therefore does not form part of a decision-making process within the scope of Article 6 of the Convention.**
22. Once a planning application has been submitted for the Hendon Hub and determined, if a decision is made to approve the development and the communicant feels that their representations were not taken into account in the decision making process, then, as with the local plan process, they can make a complaint to the Local Government Ombudsman, or make an application to the High Court to quash the approval and remit it for redetermination. **The Committee should take into account the availability of domestic remedy in deeming the communication inadmissible.**

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<sup>12</sup> [Planning Policy Guidance: Consultation and pre-decision matters](#)

<sup>13</sup> <https://hendonhub.co.uk/>

<sup>14</sup> [Annex 2z to the Communication](#)

<sup>15</sup> [Planning Policy Guidance: Consultation and Pre-decision Matters](#), Paragraph: 035 Reference ID: 15-035-20201204. These changes have been made through introduced through [the Town and Country Planning \(Development Management Procedure, Listed Buildings and Environmental Impact Assessment\) \(England\) \(Coronavirus\) \(Amendment\) Regulations 2020](#) and [the Town and Country Planning \(Local Planning, Development Management, Listed Buildings etc\) \(England\) Regulations 2020](#) – Annexes 8a and 8b, respectively.

(d) Access to Justice

23. The communication does not specifically allege non-compliance with Article 9 of the Convention, but nevertheless claims that “the only remaining domestic remedy is to request a full judicial review and going to court would be prohibitively expensive.”<sup>16</sup> Rule 45.41 of the Civil Procedure Rules (CPR) provides cost limits in Aarhus Convention Claims in both judicial reviews and reviews under statute.<sup>17</sup> A list of statutory reviews of planning matters can be found at paragraph 1.1 of Practice Direction 8C of the CPR and includes both the route of a possible domestic challenge against the adoption of a local plan and the grant of planning permission.<sup>18</sup>
24. It is important to note that the domestic remedies available to the communicant through the High Court, such as quashing a decision that has been taken, would not be available via the Committee. **The Committee should therefore consider the availability of domestic remedies to be efficient and sufficient means of redress and deem the communication inadmissible.**

(e) Environmental Information Regulations

25. The communicant has not provided evidence that the UK's procedures under the EIRs are not compliant with the Aarhus Convention or that, in respect of an information request made by an associate, the statutory stages had, at the time of the communication, been completed.
26. The communicant has included in his supporting documents references to Tony Mason's requests for information to LBB. In response to one of these requests, Mr Mason received a heavily redacted copy of information and requested an internal review. The communicant notes that LBB failed to complete the internal review within 20 working days. However, the statutory deadline for an internal review in the EIRs is 40 working days.<sup>19</sup>
27. The supporting documents do not show how Mr Mason's case has progressed since the communicant submitted his communication. Significantly, the communicant does not include evidence that a substantive response has been received from LBB on its internal review or of any investigation conducted by the Information Commissioner. Where an applicant does not receive a satisfactory internal review, the next stage in the scheme that operates in the UK requires a complaint to be submitted to the Information Commissioner's Office (“ICO”).
28. The matter of the alleged data breach reported to the ICO does not appear to be within the scope of the Convention. It is our understanding that this is a live matter which has been raised with the appropriate body and is still being investigated.

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<sup>16</sup> Communication, paragraph 71

<sup>17</sup> [Civil Procedure Rules, Part 45 – Fixed Costs](#)

<sup>18</sup> [Civil Procedure Rules, Practice Direction 8C \(Alternative Procedure for Statutory Review of Certain Planning Matters\)](#), at paragraphs 1.1(b) and (e)

<sup>19</sup> regulation 11(4) of [the Environmental Information Regulations 2004](#) – Annex 9.



## Conclusion

29. For the reasons set out above this communication is an **abuse of the right to make such a communication**, it is **manifestly unreasonable**, it **does not indicate incompatibility with the provisions of the Convention**, and in any event the Committee should take into account any **available domestic remedy** in each of the alleged activities. Fundamentally, **this communication is premature**.
30. The communicant alleges that the LBB's consultation processes failed to comply with Articles 6(3) and 6(4) of the Convention, however there is no evidence capable of amounting to such a breach. The stage of the decision-making process where each of these consultations is early, and in two instances there will be at least two further consultations. There is no evidence that the time periods given for making representations were inadequate, and where these processes are governed by statutory time limits these appears to have been followed. There is no evidence that relevant documents were not adequately available to the public in order to make informed representations.
31. The communicant alleges that the LBB's consultation processes failed to comply with Article 6(8) of the Convention, however it would be impossible to evidence such allegations at this stage. Contrary the allegations that public participation was a pro forma and that due regard was not given to the consultation responses in the decision-making, it is impossible to judge this as the responses to the consultations have yet to be fully considered and final decisions have not been made or published and no decisions have yet been made to determine the applications themselves.
32. In reaching its conclusions the Committee is asked to take into account that as an alternative to making this communication, use could be made of domestic remedies for seeking redress.
33. Given the mounting pressures on the Committee's limited resources, and the reasoning we have laid out above, we therefore respectfully request that the Committee finds the communication as whole to be inadmissible and closes the case.

We would be happy to provide further clarification on any points to assist the Committee in its deliberations.