Draft findings and recommendations with regard to communication ACCC/C/2015/131 concerning compliance by the United Kingdom

Adopted by the Compliance Committee on …

# Introduction

1. On 1 September 2015, Ms. Tracy Breakell (the communicant) submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging noncompliance by the United Kingdom with articles 3, 5, 6 and 9 of the Convention.
2. More specifically, the communicant alleges that the Party concerned failed to comply with articles 3(2), 3(8), 5(1)(a), 5(2), 6(1)(b) and 9(2)-(4) of the Convention in connection with a planning consent for the redevelopment of a former hospital site.
3. On 28 September 2015, the Party concerned submitted its comments on the preliminary admissibility of the communication.
4. On 2 October 2015, the communicant replied to the comments on preliminary admissibility made by the Party concerned.
5. At its fiftieth meeting (Geneva, 6-9 October 2015), the Committee determined on a preliminary basis that the communication was admissible in accordance with paragraph 20 of the annex to decision I/7 of the Meeting of the Parties to the Convention. Pursuant to paragraph 22 of the annex to decision I/7, the communication was forwarded to the Party concerned on 14 December 2015 for its response.
6. On 13 May 2016, the Party concerned provided its response to the communication, and on 6 June 2016, the communicant submitted comments thereon.
7. On 31 October 2016, the Party concerned provided comments on the communicant’s comments of 6 June 2016.
8. On 5 November 2018, the Committee sent questions to the Party concerned and the communicant and requested additional information.
9. On 3 December 2018 and 31 January 2019, the communicant and Party concerned submitted their replies to the Committee’s questions, respectively.
10. On 12 February 2019, the communicant provided comments on the Party concerned’s reply of 31 January 2019.
11. On 21 February 2019, the Party concerned provided an explanatory note regarding its reply of 31 January 2019.
12. On 6 October 2020, the Committee wrote to the parties to seek their views on whether they considered a hearing was needed to discuss the substance of the communication before the Committee commenced its deliberations.
13. On 19 October 2020, the communicant replied indicating that she did not consider a hearing was needed. On 20 October 2020, the Party requested an extension to provide its reply, which was granted by the Chair on 29 October 2020. On 5 November 2020, the Party concerned provided its reply indicating that it considered a hearing was needed.
14. On 6 November 2020, the secretariat wrote to the parties to inform them that, taking into account the views expressed, the Committee had decided to hold a hearing at its sixty-eighth meeting (Geneva, 23-27 November 2020) and invited them to provide a brief written update on any relevant developments before 20 November 2020.
15. On 20 November 2020, the communicant submitted a final written submission.
16. The Committee held a hearing to discuss the substance of the communication at its sixty-eighth meeting with the participation of the communicant and the Party concerned.
17. On 9 December 2020, the Committee sent questions to the Party concerned for its written reply. On 23 December 2020, the Party concerned provided its replies thereto and on 13 January 2021, the communicant submitted comments thereon.
18. The Committee completed its draft findings through its electronic decision-making procedure on 13 June 2021. In accordance with paragraph 34 of the annex to decision I/7, the draft findings were forwarded on 14 June 2021 for comments to the Party concerned and the communicants. Both were invited to provide comments by 23 July 2021.
19. *The communicants and the Party concerned provided comments on the draft findings on […] and […] respectively.*
20. *At its […] meeting (Geneva, […]), the Committee proceeded to finalize its findings in closed session, taking account of the comments received. The Committee then adopted its findings through its electronic decision-making procedure on […] and agreed that they should be published as a formal pre-session document to its […]. It requested the secretariat to send the findings to the Party concerned and the communicants.*

# Summary of facts, evidence and issues[[1]](#footnote-2)

## Legal framework

**The EIA Regulations**

1. At the time of the events in the present communication, regulation 2(1) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (EIA Regulations) applied the following definitions:[[2]](#footnote-3)
   1. “EIA application” is: (a) an application for planning permission for EIA development; or (b) a subsequent application in respect of an EIA development.[[3]](#footnote-4)
   2. “EIA development” means a development which is either: (a) a Schedule 1 development; or (b) a Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location.[[4]](#footnote-5)
   3. “subsequent application” is “an application for approval of a matter where the approval: (a) is required by or under a condition to which a planning permission is subject; and (b) must be obtained before all or part of the development permitted by the planning permission may be begun.”[[5]](#footnote-6)
2. Under Part 2 of the EIA Regulations, a “screening opinion” may be adopted in order to determine whether or not a Schedule 2 development is EIA development.[[6]](#footnote-7)
3. Paragraph 10(b) of Schedule 2 of the EIA Regulations includes urban development projects for which the area of the development exceeds 0.5 hectares.[[7]](#footnote-8)
4. Regulation 4(8) of the EIA Regulations provides that the Secretary of State may make a “screening direction” as to whether a development is EIA development either: (a) of the Secretary of State’s own volition; or (b) if requested to do so in writing by any person.[[8]](#footnote-9)
5. Under regulation 9 of the EIA Regulations, a decision-maker must consider whether a “subsequent application” made in relation to Schedule 1 or Schedule 2 development requires a screening opinion.[[9]](#footnote-10)
6. Article 16(1) of the Town and Country Planning (Development Management Procedure) (England) Order 2010 (the DMPO), read with Schedule 5, requires the local planning authority to consult specified statutory consultees (depending on the nature of the proposed development) prior to granting planning permission. Article 16(5) DMPO states that the application shall not be determined until a period of 21 days has expired following the statutory consultees being notified of the application. Article 16(7) DMPO requires the relevant authority to have regard to any representations of the statutory consultees in determining the application.[[10]](#footnote-11)

**The Local Government Act 1974**

1. In accordance with sections 26(1) and 26A(1) of the Local Government Act 1974, the Local Government Ombudsman (the Ombudsman) investigates complaints about alleged maladministration and service failure, and, where the Ombudsman finds fault, may suggest a remedy.[[11]](#footnote-12) The Ombudsman cannot question whether a decision is right or wrong simply because the complainant disagrees with it, but must rather consider whether there was fault in the way the decision was reached.[[12]](#footnote-13)

**Access to justice**

1. The Civil Procedure Rules (CPR) set out various matters governing judicial review that are relevant to the present communication. At the time of the events at issue in the communication:
   1. The time limits for bringing a judicial review were set by CPR r54.5(1), which stated that a claim must be filed promptly, and in any event not later than three months after the grounds to make the claim first arose. In 2013, a new rule (CPR r54.5(5)) was introduced which changed this time limit for planning decisions to six weeks.[[13]](#footnote-14)
   2. Costs for claimants bringing “Aarhus cases” were subject to a costs cap for individuals of £5,000 in accordance with CPR Part 45.[[14]](#footnote-15)
   3. Under CPR r54.12(7), a claim for judicial review could be certified by the court as “totally without merit”, which would preclude the applicant from seeking an oral hearing where a judge would re-consider whether to grant permission to apply for judicial review. The applicant might still appeal to the Court of Appeal.[[15]](#footnote-16)
2. **Facts**

**The planning permission**

1. In February 2012, a planning application was submitted to the London Borough of Merton Council (the Council) for the redevelopment of the former Nelson Hospital site, under reference number 12/P0418. The development entailed the demolition of existing hospital buildings on the eastern part of the site (Site 1) and replacement with a new healthcare centre. Buildings on the western part of the site (Site 2) would be demolished and replaced with an assisted living development.[[16]](#footnote-17)
2. The planning application for the development included a request for a screening opinion pursuant to regulation 5 of the EIA Regulations, as the proposed project fell under paragraph 10(b) of Schedule 2 of the EIA Regulations (see paras. ‎21-‎23 above).[[17]](#footnote-18)
3. The Council notified local residents of the planning application by letter and a notice was placed in a local newspaper dated 1 March 2012. The notification did not include the information that the project was subject to a screening opinion. The public was given 21 days to respond to the notice. The communicant was one of 104 local residents who responded to the consultation.[[18]](#footnote-19)
4. On 12 March 2012 the Council issued a negative screening opinion.[[19]](#footnote-20) The screening opinion was not uploaded onto and made available on the Council’s online planning register until 21 July 2014.[[20]](#footnote-21)
5. On 13 March 2012, Natural England submitted its consultation response to the Council.[[21]](#footnote-22) In May 2012 an environmental noise assessment was submitted to the Council but was only added to the Council’s online planning register on 15 July 2014.[[22]](#footnote-23)
6. The Council’s Planning Applications Committee (PAC) first considered the planning application on 19 July 2012. A report was prepared by officials for the meeting (the July 2012 Officer’s Report), which stated that a screening opinion had been required and that it had been determined that no EIA was required.[[23]](#footnote-24) This report was published on the Council’s website on 11 July 2012.[[24]](#footnote-25)
7. A further report dated 6 September 2012 was prepared for another meeting of the PAC (the September 2012 Officer’s Report). The report recommended to grant permission for the redevelopment project, subject to conditions.[[25]](#footnote-26) At its meeting of 6 September 2012, the PAC resolved to grant planning permission.[[26]](#footnote-27)
8. In October 2012, the communicant wrote to the Council alleging that the application had not been considered properly and requesting that the PAC’s decision be reconsidered.[[27]](#footnote-28)
9. On 18 December 2012, a Decision Notice was issued granting planning permission subject to 50 conditions, some of which required the developer to submit details to the Council for approval prior to carrying out specific aspects of the works.[[28]](#footnote-29) The Decision Notice was published on the Council’s website on 4 September 2013.[[29]](#footnote-30)
10. On 9 January 2013, the Council sent the communicant a letter explaining that it would not reconsider its decision. [[30]](#footnote-31)
11. On 12 May 2014, 11 July 2014 and February 2015, the communicant requested the Council to direct her to where information relating to the project could be found and to provide any documents that were not available on the planning register.[[31]](#footnote-32) In its reply of 3 March 2015, the Council stated that it was “not aware of any such documents being held by officers of the council. Any historical documents are held electronically and if relating to a planning application would be available on planning explorer.”[[32]](#footnote-33)

**The Ombudsman’s procedures**

1. On 21 January 2013, the communicant submitted a complaint to the Ombudsman with respect to the planning permission granted on 18 December 2012.[[33]](#footnote-34) The Ombudsman found some administrative faults in some aspects of the consideration of the application for the project by the Council. However, the Ombudsman found that, it could not conclude definitively that the Council would have reached a different decision without those faults.[[34]](#footnote-35)
2. The communicant subsequently sought a second investigation from the Ombudsman, claiming that the first one had made errors and oversights.[[35]](#footnote-36) Following a second investigation, the Ombudsman concluded that the Council was at fault regarding certain omissions but saw no reason to conclude that the planning permission would not have been granted. However, it recommended that the Council make a payment of £500 to the communicant “for the injustice caused, and for the time and trouble to which she has been put.”[[36]](#footnote-37)

**The developer’s applications for the discharge of conditions**

1. Between March 2013 and January 2015, the developer discharged a number of conditions attached to the development, some of which qualified as “subsequent applications” (see para ‎25 above).[[37]](#footnote-38) Among these were application 13/P2192 made in July 2013 and application 15/P0121 made in January 2015.[[38]](#footnote-39)
2. Building on Site 1 commenced in February 2013 and was completed in April 2015. Building on Site 2 commenced in April 2014.[[39]](#footnote-40)

**The communicant’s further screening requests**

1. In April 2014, the communicant wrote to the Secretary of State, noting that there was no screening opinion for application 12/P0418 and requesting that he make a screening direction for subsequent application 13/P2192 (see para. ‎24 above).[[40]](#footnote-41)
2. On 20 August 2014 the Secretary of State declined to issue a screening opinion on the basis that: (a) there were no issues from the initial screening opinion for 12/P0418 that required revisiting; and (b) any effects arising from application 13/P2192 had already formed part of the initial screening opinion.[[41]](#footnote-42)
3. On 28 August 2014, the communicant requested the Council to adopt a screening opinion for application 13/P2192.[[42]](#footnote-43) On 30 September 2014 the Council refused the communicant’s request, claiming that an Environmental Statement had accompanied the initial planning application.[[43]](#footnote-44) Suspecting that this was an error, the communicant sent a Letter Before Claim on 10 October 2014 to the Council challenging the decision not to undertake a screening and asking for confirmation of whether an Environmental Statement existed.[[44]](#footnote-45)
4. On 4 November 2014 the Council responded that its email of 30 September “should not be taken as indicating the Council’s definitive position” and nor should it “be taken as a formal decision of the Council” and agreed to review its position regarding the need for a screening opinion.[[45]](#footnote-46)
5. Following a failure to respond to further correspondence, the communicant sent another Letter Before Claim indicating that she would challenge the Council’s failure to adopt a screening opinion for application 13/P2192.[[46]](#footnote-47) She later added challenges to the “subsequent applications” to her claim for judicial review. [[47]](#footnote-48)

**The communicant’s legal challenges**

1. On 6 February 2015, the communicant challenged the screening opinion of 12 March 2012 and the Council’s subsequent failure to adopt screening opinions for a number of subsequent applications before the High Court.[[48]](#footnote-49)
2. On 20 March 2015, the court refused permission to seek judicial review for the following reasons:

(a) Challenges to the screening opinions for applications 12/P0418 and 13/P2192 were “hopelessly out of time”;

(b) No decision had yet been made relating to conditions 5, 6 and 8 of application 15/P0121;

(c) The remaining applications did not meet the definition of “subsequent application” under regulation 2(1) of the EIA Regulations.[[49]](#footnote-50)

1. The court also certified the claim as being “totally without merit” and ordered that the communicant pay the Council’s costs, which the court assessed at £6,000 but capped at £5,000 in accordance with CPR Part 45 (see para. ‎28 above).[[50]](#footnote-51)
2. The communicant appealed to the Court of Appeal, which was refused on 1 July 2015.[[51]](#footnote-52) The Court stated that since there was a lawful negative screening opinion in March 2012, the discharge of conditions pursuant to the planning permission did not need further screening.[[52]](#footnote-53) The Court stated that the communicant’s remedy was to apply to the Secretary of State for a screening direction, and that “it is clear in any event that relief would be refused as a matter of discretion given that the 2012 permission has been substantially implemented.”[[53]](#footnote-54)

**Demand for payment plus interest**

1. On 20 July 2015, the communicant received a request from the Council’s solicitor to pay £4,500 (the sum of the costs awarded by the court, less the £500 awarded by the Ombudsman). The communicant responded by requesting copies of the invoices from the Council’s lawyers.[[54]](#footnote-55)
2. On 20 August 2015, the communicant received an email from the Council’s solicitor demanding payment of the costs with interest of 8% on the entire sum of £5,000, backdated to 20 March 2015, the date of the court order.[[55]](#footnote-56) The communicant claims that the email “threatened” referral of the debt to the High Court Sheriff.[[56]](#footnote-57)
3. **Domestic remedies**
4. The communicant points to her request to the Council to reconsider its planning permission for the proposed redevelopment project, her complaints to the Ombudsman, and her judicial challenges (see paras. ‎36, ‎40-‎41 and ‎49-‎52 above).[[57]](#footnote-58)
5. The Party concerned submits that the communicant could have lodged a formal request for information. It claims that these mechanisms are well-known, well-publicized, and well-used, and claims that the communicant failed to use these and such failure constitutes a failure to exhaust domestic remedies, rendering such claims inadmissible under paragraph 21 of the annex to decision I/7.[[58]](#footnote-59)
6. **Substantive issues**

**Article 3(2)**

1. The communicant claims that the actions of the Council, Ombudsman and Secretary of State actively hindered her attempts to seek access to justice contrary to article 3(2) of the Convention.[[59]](#footnote-60)
2. The communicant submits that the Council demonstrated a consistent lack of cooperation and an unwillingness to address her concerns about the proposed redevelopment project.[[60]](#footnote-61) She claims that the Council procrastinated, provided erroneous and misleading information, and failed to comply with the “pre-action protocol” of the Party concerned by not responding to her Letter Before Claim within 14 days.[[61]](#footnote-62) The pre-action protocol sets out the steps parties are expected to take, and the time-frames for doing so, before issuing a claim for judicial review.[[62]](#footnote-63)
3. The communicant submits that the actions of the Ombudsman also failed to comply with article 3(2), including that it took over a year to complete its first investigation and the second investigation was not concluded until April 2015, a year later.[[63]](#footnote-64)
4. The communicant also submits that the High Court designating her claim as “totally without merit” prevented her from presenting her case in person at a fair and public hearing.[[64]](#footnote-65)
5. Finally, the communicant claims that the Council’s demand for immediate payment of the costs awarded to it constitutes a breach of article 3(2).[[65]](#footnote-66)
6. The Party concerned claims that it has in place a number of well-published and well-established procedures, including statutory arrangements, to ensure that members of the public are assisted in exercising their rights under the Convention.[[66]](#footnote-67) It also submits that members of the public were aware of, and able to respond intelligently to, the application for the planning permission, including the communicant.[[67]](#footnote-68)
7. The Party concerned submits that, should a member of the public be concerned that certain information held by the Council has not been made available, he or she can request that the information be provided, including via a formal request under the Environmental Information Regulations.[[68]](#footnote-69) It submits that these mechanisms are long established, well-known, well-publicized, and well-used.[[69]](#footnote-70)
8. As to the communicant’s judicial review proceedings, the Party concerned states that whilst parties are encouraged to comply with the pre-action protocol, this is not necessary to ensure protection of the rights conferred by the Convention.[[70]](#footnote-71) The Party concerned also submits that a designation of being “totally without merit” does not deny a claimant access to the courts, but is a safeguard designed to avoid the time and resources of public authorities and courts being taken up with claims which are clearly without merit and in no way impedes a member of the public from obtaining appropriate redress or remedy. The Party concerned emphasises that there is a right of appeal against a designation of “totally without merit”, as exercised in the current case.[[71]](#footnote-72)
9. In this regard, the Party concerned submits that the communicant’s allegations concerning breach of article 3(2) of the Convention are baseless.[[72]](#footnote-73) It adds that, in its view, article 3(2) does not apply to courts, given the exclusion of bodies performing a judicial function from the definition of article 2(2) of the Convention.[[73]](#footnote-74)
10. The Party concerned submits that the communicant’s complaints of an alleged breach of article 3(2) with respect to the Ombudsman is misplaced.[[74]](#footnote-75) It submits that the Ombudsman was the wholly incorrect forum to seek the desired remedy and that judicial review should have been sought in a more timely fashion.[[75]](#footnote-76)

**Article 3(8)**

1. The communicant submits that the designation of her claim as “totally without merit” resulted in a greater proportion of costs being awarded against her than would have been the case otherwise and that this effectively penalized her in a manner contrary to article 3(8) of the Convention.[[76]](#footnote-77)
2. The communicant further considers that the interest rate of 8% applied to the costs awarded against her and the threat to involve a High Court bailiff to enforce the costs order may amount to penalisation or harassment within the meaning of article 3(8).[[77]](#footnote-78)
3. The Party concerned points out that the Committee has previously found that seeking reasonable costs does not “penalize” a communicant contrary to article 3(8) and submits that the communicant’s allegations in this regard are utterly without merit and entail an abuse of the right to bring a communication before the Committee.[[78]](#footnote-79)
4. The Party concerned notes that the 8% interest rate for High Court judgment debts has been in place since April 1993 and that it is fixed by legislation and thus not open to variation by the courts.[[79]](#footnote-80)

**Article 5(1)**

1. The communicant claims that the negative screening opinion, comments of the statutory consultees, noise assessment and information relating to the Conservation Areas and neighbourhood amenity were not available to the PAC at the time it granted planning permission on 18 December 2012, in violation of article 5(1) of the Convention.[[80]](#footnote-81)
2. The communicant further argues that the Council’s failure to rescreen the project following the Ombudsman’s finding of maladministration also breaches article 5(1) of the Convention.[[81]](#footnote-82)
3. The Party concerned states that the PAC was aware of these documents at the same time as the public, namely via the September 2012 Officer’s Report, which contained summaries of consultation responses, the results of the screening opinion and a summary of the noise survey.[[82]](#footnote-83)

**Article 5(2)**

1. The communicant claims that the failure to publish the responses of the statutory consultees, the screening opinion, the noise assessment, and the Decision Notice in a timely manner meant this information was withheld from the public, infringing article 5(2) of the Convention.[[83]](#footnote-84)
2. The Party concerned submits that article 5(2) of the Convention is not concerned as to whether or not the information available to the decision-maker was adequate, but rather whether environmental information available to the decision-maker in reaching its decision was available to the public.[[84]](#footnote-85)
3. The Party concerned submits in this regard that it has requirements for local authorities to maintain a register of planning applications, and the information and documents which must be contained thereon.[[85]](#footnote-86)

**Article 6(1)(b)**

1. The communicant claims that the screening process was undertaken incorrectly and that decisions on the project should have fallen under the remit of article 6.[[86]](#footnote-87) She claims further that the failure to adopt screening opinions for the subsequent applications is a failure to comply with article 6(1)(b).[[87]](#footnote-88)
2. The Party concerned submits that the communicant’s article 6(1)(b) allegations should be inadmissible, as the communicant is claiming that the Council reached erroneous decisions in the screening opinion of March 2012 and in the decisions on the subsequent applications, which is not a matter for the Committee to consider.[[88]](#footnote-89)

**Article 9(2) and (3)**

1. The communicant asserts that the Party concerned has failed to comply with article 9(2) and (3) of the Convention, though she does not specify in which way those articles have been violated.[[89]](#footnote-90)
2. The Party concerned submits that article 9(2) was not engaged as the decision-making processes were not subject to article 6 of the Convention.[[90]](#footnote-91)
3. The Party concerned further claims that the communicant was not deprived of an opportunity to seek redress from the courts, and that insofar as she lost any opportunity to raise her concerns at a substantive hearing, this was primarily due to her delay in seeking judicial review.[[91]](#footnote-92)

**Article 9(4)**

*Adequate and effective remedy*

1. The communicant submits that a request to the Secretary of State for a screening direction is not an effective remedy in line with article 9(4) of the Convention.[[92]](#footnote-93)
2. The communicant further submits that the refusal of permission to apply for judicial review on the basis that any relief would in any case be refused since the development had been substantially implemented failed to meet the requirement of article 9(4) for the provision of an adequate and effective remedy.[[93]](#footnote-94)

*Fairness and rules on timing*

1. The communicant claims that six weeks is a very short time to prepare and apply for judicial review and that the Secretary of State took four months to respond to her request for a screening direction.[[94]](#footnote-95)
2. The Party concerned submits there is no merit in the contention that six weeks is too short a period in which to bring proceedings. It claims that the court retains discretion to extend the period in appropriate circumstances, and that the communicant did not bring her claim until over two years after the date of the screening opinion and Decision Notice.[[95]](#footnote-96)

*“Equality of arms”*

1. The communicant points out that if successful a claimant representing themselves can only claim costs at a rate of £19 per hour, and that a claimant must also pay court fees (of £375). The communicant notes that on the other hand, the Council submitted costs to the court of £6,000, including £3,500 in solicitor’s fees charged at £250 per hour. The communicant questions whether this level of expenditure was needed, particularly where she was acting as a litigant in person and the claim was still at the permission stage.[[96]](#footnote-97)
2. The communicant claims moreover that the discrepancy between the recoverable costs puts the communicant and the Party concerned on an inequitable footing and seems manifestly unfair.[[97]](#footnote-98)
3. The Party concerned submits that its costs caps ensure that judicial reviews engaging the Convention are not prohibitively expensive and points out that the court may limit the award of costs liability for an applicant to what the judge considers appropriate, and that costs orders can be appealed.[[98]](#footnote-99) The Party concerned claims that in any event, there is no need to consider these aspects of the communication, as the costs rules are already subject to the Committee’s review of the implementation of decision VI/8k.[[99]](#footnote-100)

*“Profiteering”*

1. The communicant alleges profiteering by the Council.[[100]](#footnote-101) The statement of costs submitted to the court by the Council listed a total of £6,000, including solicitor’s fees calculated at £250/hr.[[101]](#footnote-102)
2. The communicant asserts that the Council had an agreement in place with South London Legal Partnership (SLLP) to receive legal services at a rate of £55/hr[[102]](#footnote-103) and that the total charge made by SLLP for her case was £3,432 (62.4hrs at £55/hr).[[103]](#footnote-104) The communicant claims this is “profiteering” and is unfair and serves to increase the allegedly prohibitive expense she incurred in a manner contrary to article 9(4) of the Convention.[[104]](#footnote-105)
3. The Party concerned’s submissions on this issue are summarized in paragraph ‎88 above.

*Prohibitively expensive costs*

1. The communicant claims that exposing an individual claimant to the maximum costs of £5,000 is a serious deterrent and not compatible with article 9(4) of the Convention.[[105]](#footnote-106) She submits further that the High Court failed to take into account the pre-action conduct of the Council, the public interest nature of the claim, or the obligation that access to justice must be fair, equitable, and not prohibitively expensive.[[106]](#footnote-107)
2. The Party concerned’s submissions on this issue are summarized in paragraph ‎88 above.
3. Consideration and evaluation by the Committee
4. The United Kingdom deposited its instrument of ratification of the Convention on 23 February 2005, meaning that the Convention entered into force for the Party concerned on 24 May 2005, i.e. ninety days after the date of deposit of the instrument of ratification.

**Admissibility and exhaustion of domestic remedies**

1. As set out in paragraphs ‎36, ‎40-‎41 and ‎49-‎52 above, the communicant extensively used domestic remedies to challenge the alleged noncompliance in her case. The Committee thus determines the communication to be admissible.

**Article 5(1)**

1. The communicant makes two allegations under article 5(1). First, that relevant documents, in particular, the negative screening opinion, the responses of the statutory consultees and the noise assessment, were not available to the PAC at the time the decision to grant planning permission was taken. Second, that the Council failed to undertake a second EIA screening following the Ombudsman’s investigation.

*Documents available to the PAC*

1. The Committee considers that article 5(1)(a) imposes an obligation on Parties to ensure that their public authorities possess and update at least the environmental information that they are required to collect and maintain under national law.
2. Moreover, it is implicit in article 5(1)(a) that the public authority possesses the required environmental information at the relevant time. For example, for a proposed activity that is subject to environmental impact assessment, article 5(1)(a) requires that the decisionmaker possesses the environmental impact assessment at the time it takes the decision to permit the activity.
3. In the present case, since the Council was required to carry out the screening pursuant to regulation 5 of the EIA Regulations, it is obvious to the Committee that the Council was obliged to possess the screening opinion under article 5(1)(a) of the Convention.
4. Regarding the responses of the statutory consultees, the Committee understands that these were required to be consulted under article 16(1) of the Town and Country Planning (Development Management Procedure) (England) Order (the DMPO). Accordingly, the Council was obliged by article 5(1)(a) of the Convention to possess these responses also.
5. As regards the supplementary noise assessment, since the Committee has not been pointed to any provision of national law which required the Council to obtain it, the Committee does not examine this issue further.
6. The Committee notes that while neither the negative screening opinion nor the statutory consultees’ responses were on the planning register at the time that the PAC granted planning permission in December 2012, each of these documents was summarized in the July and September 2012 Officers’ Reports. It is common ground between the parties that the Officers’ Reports were before the PAC before it granted planning permission.
7. In the light of the above, the Committee finds the allegation that the PAC failed to possess environmental information relevant to its functions, and that the Party concerned was thus in noncompliance with article 5(1)(a), to be unsubstantiated.

*Failure to undertake second screening*

1. The communicant alleges that the Council’s failure to carry out a second screening following the Ombudsman’s investigations amounts to noncompliance with article 5(1)(a).
2. However, article 5(1)(a) does not impose an obligation to carry out an EIA screening or an EIA procedure. Thus, the Party concerned is not in non-compliance with article 5(1)(a) of the Convention in this respect.

**Article 5(3)**

1. The communicant alleges noncompliance with article 5(2) of the Convention due to:

(a) The Council’s failure to include the responses of the statutory consultees, the screening opinion and the supplementary noise assessment on its online “planning register”.

(b) The Council’s failure to put the Decision Notice on the planning register in a timely manner.

1. Since the communicant’s allegations relate to the availability of environmental information through electronic means, the Committee examines them against the requirements of article 5(3) rather than article 5(2).
2. Article 5(3) requires each Party to “ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks”.
3. The word “progressively” in article 5(3) must be construed in the context that more than two decades have passed since the Convention was adopted. Compared to the early, emerging state of electronic information tools at that time, the primary means through which information, including environmental information, is now disseminated to the public by public authorities in most, if not all, Parties is through electronic means, namely the public authorities’ websites.
4. The requirement in article 5(3) that electronic databases be “easily accessible” has several components including that: access is free of charge; registration requirements, if any, are kept to a minimum without the need for providing personal identification; databases have a user-friendly interface with easy to use search functions including, where relevant, the possibility to easily identify all documents relevant to particular procedures; and the databases are systematically organized and well-structured.
5. “Easily accessible” also entails that the information is accessible in a timely fashion. This has at least two aspects. First, the information must be promptly uploaded onto websites once it comes into the public authority’s possession. Second, the information must be immediately retrievable when using the database. Information cannot be “easily accessible” from a website if members of the public effectively have to make an access to information request under article 4 of the Convention to gain access to the information in the database.
6. Article 5(3)(d) stipulates that information accessible in electronic databases should include “other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention”, provided that such information is already available in electronic form. The Committee considers that this must include, as a minimum, the environmental information relevant to their functions that public authorities are required to possess and update in accordance with article 5(1)(a) of the Convention.
7. This means that in those Parties where national law requires that all documents are submitted to public authorities in electronic form, those documents must be available promptly through electronic databases. However, the obligation in article 5(3)(d) goes beyond that. In similar vein as to the word “progressively” in the first sentence of article 5(3), the phrase “provided that such information is already available in electronic form” in the final clause of article 5(3) must be read in light of the general availability of electronic documentation and communication in the present day, more than two decades after the adoption of the Convention. It is clear to the Committee that this reference should no longer constitute a valid reason for not making available all environmental information that is otherwise covered by article 5(3)(d).
8. In the present case, the Council maintains an online planning register. According to the Council, “any historical documents are held electronically and if relating to a planning application would be available on planning explorer [the Council’s online planning register]”.[[107]](#footnote-108) The Committee examines below the extent to which the Council’s assertion is borne out in practice.
9. It is not disputed between the parties that the Council possessed the information below either at, or shortly after, the date each document was issued:

(a) Screening opinion, issued 12 March 2012, posted on the planning register 21 July 2014;[[108]](#footnote-109)

(b) Supplementary noise assessment, issued May 2012, posted on the planning register 15 July 2014;[[109]](#footnote-110)

(c) Statutory consultation response from Environment Agency, dated 15 May 2012, to date not posted on the planning register;

(d) Statutory consultation response from Natural England, dated 13 March 2012, to date not posted on the planning register;

(e) Decision Notice, issued 18 December 2012, posted on the planning register 4 September 2013.[[110]](#footnote-111)

1. The question for the Committee is whether the Council was required by article 5(3)(d) to make those documents available on its online planning register. The Committee focuses on the following issues:
2. The information that was available on the planning register *prior* to the 18 December 2012 planning permission being granted;
3. The availability on the online planning register of the 12 March 2012 screening opinion and the 18 December 2012 Decision Notice;
4. Whether all information relating to planning applications was indeed systematically made available on the online planning register.
5. *Information on the online planning register prior to the 18 December 2012 planning permission being granted*
6. The Council possessed the statutory consultee responses and the screening opinion prior to the planning permission being granted. Moreover, it was required by law, and thus by article 5(1)(a) of the Convention, to do so. These documents were not however available on the planning register prior to the decision to grant planning permission.
7. As pointed out in paragraph ‎125 above, “easily accessible” means that documents must be available promptly. However, in the present case, the screening opinion was posted on the planning register more than 18 months after the planning permission was granted. The statutory consultees’ responses are still not available on the planning register.
8. In the light of the foregoing, the Committee finds that, by failing to promptly make accessible through its online planning register the documents related to a planning application that the Council was required by law to possess, the Party concerned failed to comply with article 5(3)(d) of the Convention.
9. *Publication of the screening opinion and the Decision Notice*
10. The Council was required under article 5(1)(a) of the Convention to possess the 12 March 2012 screening opinion and the Decision Notice of the planning permission that it itself had taken. Both the screening opinion and Decision Notice were determinations subject to challenge under article 9(2) of the Convention. The easy accessibility of those decisions was thus necessary in order to facilitate the application of national law implementing article 9(2) of the Convention.
11. At the time that these decisions were taken, the law of the Party concerned required an application for judicial review to be submitted promptly and at the latest within three months of those decisions being taken. However, the screening opinion was not published on the online planning register until more than two years after it was taken and the Decision Notice was published approximately nine months after it was issued.
12. In the light of the foregoing, the Committee finds that, by failing to make the screening opinion and planning permission easily accessible on the Council’s online planning register in a timeframe that would facilitate the application of national law implementing article 9(2) of the Convention, the Party concerned failed to comply with article 5(3)(d) of the Convention.
13. *Information relating to planning applications being systematically available on the planning register*
14. Separate from its online planning register, the Council has a section of its website dedicated to the PAC. For each PAC meeting, relevant officer’s reports and minutes recording the decisions taken by the PAC are available online.
15. The Committee considers that both the planning officer’s report on a planning application and the minutes of the PAC recording its decision regarding an application are information related to the Council’s planning functions that it was required to possess under article 5(1)(a) of the Convention. As such, they must also be easily accessible to the public in an electronic database under article 5(3)(d) of the Convention.
16. When members of the public wish to find documentation relating to a planning application, they cannot be expected without any guidance to know that they must also review the webpages relating to particular PAC meetings in addition to the planning register. This approach does not amount to making the relevant information “easily accessible”.
17. In the present case, the problem is compounded by the Council’s assertion, in response to the communicant’s request as to how she may access any other documents relating to planning applications, that “any historical documents are held electronically and if relating to a planning application would be available on planning explorer [the planning register]”.[[111]](#footnote-112)
18. Having examined the Council’s website and the online planning register, the Committee notes that the failure to include planning officers’ reports and PAC minutes in the planning register is a systemic issue of the Council’s practice, not just limited to the Nelson Hospital application.
19. Based on the foregoing, the Committee finds that, by maintaining an electronic database that the Council holds out to be a “one-stop shop” to access all documents related to planning applications, when it in fact is not, the Party concerned fails to comply with the requirement in article 5(3) of the Convention to ensure that the environmental information within the scope of article 5(3)(d) of the Convention is “easily accessible”.
20. Since it has no information before it to indicate that the noncompliance found in paragraphs ‎133, ‎136 and ‎142 above is of a wide or systemic nature in the Party concerned, the Committee does not make recommendations on these points.

**Article 6(1)(b)**

*12 March 2012 screening opinion*

1. A negative screening opinion amounts to a determination by the Party concerned under article 6(1)(b) that the provisions on public participation in article 6 do not apply to the proposed activity. Based on the foregoing, the Committee does not find the fact that the Party concerned did not provide for public participation in the decision-making at the screening stage to be in noncompliance with article 6(1)(b) of the Convention.

*Need to screen applications to discharge conditions*

1. The communicant claims that the applications to discharge conditions should have also been subject to screening and that the public should have had the opportunity to participate thereon. As noted above, article 6(1)(b) does not require public participation in decision-making at the screening stage. Moreover, whether an application to discharge a condition should be subject to screening is a matter of domestic law. The Committee accordingly does not find a failure by the Party concerned to comply with article 6(1)(b) of the Convention on this point.

**Article 9 - applicability**

1. In its findings on communications ACCC/C/2010/45 and ACCC/C/2011/60 (United Kingdom), the Committee held that “the outcome of an EIA screening decision is a determination under article 6, paragraph 1(b), of the Convention. These determinations thus are subject to the requirements of article 9, paragraph 2, of the Convention”.[[112]](#footnote-113) Since article 9(4) applies to all review procedures referred to in article 9 of the Convention, the Party concerned is required to ensure that the requirements of article 9(4) are met with respect to a challenge against a screening decision (“screening opinion”) under article 9(2). The Committee examines the communicant’s allegations under article 9(4) of the Convention below.

**Article 9(4) – Fair time frame to bring claim for judicial review**

*Date when timeframe starts to run*

1. Civil Procedure Rule 54.5(1) requires claims for judicial review to be brought “(a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose”. In 2013, a new provision was added in CPR 54.5(5) to require that, for planning decisions, “the claim form must be filed not later than six weeks after the grounds to make the claim first arose”.
2. Under both provisions, the timeframe starts to run from the date that “the ground to make the claim first arose”. According to the Party concerned, in the communicant’s case, that was 12 March 2012 when the screening opinion was made or 18 December 2012 when planning permission was granted, even though the public did not have access to those decisions until much later.
3. In the present case, the communicant submitted her application for permission to bring judicial review in February 2015, seven months after she became aware of the screening opinion. Accordingly, whether the maximum three-month timeframe to seek judicial review ran from March 2012, December 2012 or July 2014 would not change anything since the communicant would still have been out of time.
4. However, the Committee considers that a rule that the timeframe for the public to challenge a decision is calculated from the date the decision was taken, and not the date when the decision became known to the public, is manifestly unfair. Moreover, it creates an incentive for public authorities not to make decisions under article 6 of the Convention promptly available, knowing that there will then be less opportunity for those decisions to be challenged.
5. The Party concerned contends that, in case of a delay by the public authority in making the screening opinion promptly available, claimants can seek an extension of time from the court to bring their application for judicial review. The Party concerned has not however provided evidence that a court is *required* to grant an extension in such a case. The fact that the court may grant an extension of time in a particular case, at its discretion, is not at all the same as establishing a fair rule on the timeframe for bringing a challenge in the first place.
6. In the light of the foregoing, the Committee finds that, by maintaining a legal framework in which the time limit to bring judicial review is calculated from the date when the contested decision was taken, rather than from when the claimant knew or ought to have known of that decision, the Party concerned fails to comply with the requirement that review procedures in article 9(2) be fair in accordance with article 9(4) of the Convention.

*Six-week time limit*

1. The communicant claims that the six-week time limit on seeking judicial review of planning decisions fails to meet the requirement in article 9(4) that review procedures be timely and fair. The communicant filed her application for permission seven months after the negative screening opinion became publicly available.
2. The Committee does not consider that the obligation in article 9(4) of the Convention to ensure timely and fair review procedures requires that the time limit for bringing judicial review in a claim under article 9(2) of the Convention is as long as seven months. Without precluding the possibility to examine the six-week time limit again in a future case if relevant evidence is put before it, the Committee finds that, in the circumstances of the present case, the communicant has not substantiated her allegation that the time limit for bringing judicial review fails to meet the requirement in article 9(4) that such procedures be timely and fair.

**Article 9(4) – adequate and effective remedies**

1. The communicant claims that a request for a screening direction by the Secretary of State does not provide an adequate and effective remedy under article 9(4) of the Convention, since the decision as to whether or not to make a screening direction is at the discretion of the Secretary of State.
2. It is clear to the Committee that, if the request for a screening direction was the only review procedure through which members of the public could challenge a negative screening opinion, the discretionary nature of a screening direction by the Secretary of State would indeed fail to meet the requirement to ensure an adequate and effective remedy under article 9(4) of the Convention.
3. However, as demonstrated by the present case, members of the public also have the possibility to challenge a negative screening opinion and an alleged failure to undertake screening through judicial review. Accordingly, based on the evidence before it, the Committee does not find the discretionary nature of a request for a screening direction from the Secretary of State to amount to a failure to provide adequate and effective remedies under article 9(4) of the Convention.

**Article 9(4) – fair, equitable and not prohibitively expensive**

*Quantum of order of costs at the permission stage*

1. In paragraph 2(a), (b) and (d) of decision VI/8k of the Meeting of the Parties, the Party concerned is recommended, as a matter of urgency, to take the necessary legislative, regulatory, administrative and practical measures to:

(a) Ensure that the allocation of costs in all court procedures subject to article 9 is fair and equitable and not prohibitively expensive;

(b) Further consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice;

(c) Establish a clear, transparent and consistent framework to implement article 9, paragraph 4, of the Convention.

1. In its follow-up to decision VI/8k, the Committee has set out that “it is not convinced that the sum of £5,000 for individuals and £10,000 for organizations will not be prohibitively expensive for many individuals and organizations”.[[113]](#footnote-114) The Committee will not re-examine here issues that are already subject to its review in its follow-up on decision VI/8k.
2. However, the Committee notes that the costs order against the communicant in the present case was £5,000, the maximum amount possible for an Aarhus claim brought by an individual and that this sum was awarded only for the permission (i.e. a very early) stage in proceedings. The Committee does not consider it fair and equitable that the full amount up to the costs cap of £5,000 is “frontloaded” at such an early stage.
3. The Committee considers that courts should adopt a proportionate approach in the light of the stage of the proceedings. A failure to do so may create uncertainty and act as a deterrent for potential claimants.
4. Based on the above, the Committee finds that, by not ensuring that courts take into account the stage of the proceedings when calculating the sum of costs to be awarded against an unsuccessful claimant in a procedure subject to article 9 of the Convention, the Party concerned fails to comply with the requirement in article 9(4) for such procedures to be fair, equitable and not prohibitively expensive.

*Hourly rate from which the costs order is calculated*

1. In its statement of costs to the Court, the Council claimed solicitor’s fees for 14 hours at £250 per hour (£3,500). However, in response to a freedom of information request by the communicant, the Council stated that the total charge made by its solicitors, SLLP, with respect to the communicant’s claim was 62.4 hours at £55 per hour (£3,432).
2. The judge approved the Council’s Statement of Costs, including the claimed solicitor’s fees of 14 hours at £250 per hour. At the hearing to discuss the substance of the communication at the Committee’s sixty-eighth meeting (23-27 November 2020), the Party concerned explained that the judge would have approved the costs based on his knowledge and experience of what would be a proportionate and reasonable amount of work for the case in question. The Party concerned stated that 10 hours of legal work would have been appropriate to prepare the acknowledgement of service for the present case. The Committee notes that this estimate is approximately in line with the 14 hours of work approved by the judge.
3. Given that SLLP’s contracted hourly rate to the Council was £55 per hour, the Committee considers that this is the maximum hourly rate that the communicant should have been required to pay. It is therefore of concern that there is such a difference between the SLLP’s hourly rate of £250 put before the court and the £55 actually charged. It is not for the Committee to investigate this discrepancy nor to examine why SLLP charged the Council for 62.4 hours to do legal work that the Party concerned itself says should have taken 10 hours. Nevertheless, the Committee considers that it is neither fair nor equitable that the costs order awarded against the communicant is calculated using an hourly rate so much in excess of the hourly rate SLLP actually charged.
4. In the light of the foregoing the Committee finds that, since the communicant was ordered to pay a costs order calculated on the basis of an hourly rate that was considerably higher than the actual contracted rate, the Party concerned failed to comply with the requirement that cost orders in procedures within the scope of article 9(2) of the Convention are fair and equitable in accordance with article 9(4) of the Convention.
5. Given, however, that no evidence has been put before the Committee that the unfair and inequitable hourly rate included in the Council’s Statement of Costs indicates a widespread practice in the Party concerned, the Committee does not make a recommendation on this point.

*Recovery of costs for litigants in person*

1. In its findings on communication ACCC/C/2008/33 (United Kingdom), the Committee found that “it is essential that, where costs are concerned, the equality of arms between parties to a case should be secured”.
2. In the Party concerned, the rate at which a successful “litigant in person” can recover their costs is £19 per hour unless they can prove financial loss.[[114]](#footnote-115) This stands in stark contrast to the £250 per hour that the Council’s solicitor was approved by the court to charge in this case. The communicant claims that the fact that she may be liable for a solicitor’s costs of £250 per hour plus a barrister’s fee, while the Council would only be liable for costs at £19 per hour puts the communicant and the Party concerned on an inequitable footing and is manifestly unfair.
3. The Committee can see that, even taking into account the costs caps for “Aarhus claims”, such unequal costs exposure may have a chilling effect and add uncertainty for a “litigant in person” during the course of proceedings. Based on the foregoing,[[115]](#footnote-116) the Committee finds that, by setting a significantly lower hourly rate (i.e. less than one-tenth of the sum of a legally-represented party) at which successful “litigants in person” are entitled to recover their costs in procedures subject to article 9 of the Convention, the Party concerned fails to ensure that such procedures are fair and equitable as required by article 9(4) of the Convention.

*8% interest on unpaid costs order*

1. Having already found in paragraphs ‎161 and ‎165 above that the quantum of the costs order of £5,000 against the claimant in this case was prohibitively expensive and not fair or equitable, the Committee does not consider it necessary to make a separate finding on the interest calculated on that amount.

**Article 3(8)**

*Designation of “totally without merit”*

1. The communicant claims that the designation by the High Court judge that her claim was “totally without merit” amounted to penalization under article 3(8) of the Convention. According to her, this designation meant she was not afforded a fair and public hearing before a judge and also resulted in a greater portion of costs being awarded against her.
2. Article 3(8) requires that persons exercising their rights under the Convention not be penalized, persecuted or harassed in any way for their involvement. This implies that those persons have in some way been “targeted” for exercising their rights under the Convention. This is not the situation in the present case. Rather, the designation “totally without merit” is provided for in the CPR with respect to applications for permission for judicial review generally, not only in cases falling within the scope of the Convention. The Committee accordingly finds that the Party concerned is not in noncompliance in this respect.

*Demand for payment plus interest*

1. The communicant claims that the efforts by the Council to enforce payment of the costs order constitutes penalization or harassment in the exercise of her right to seek access to justice under the Convention.
2. While not precluding the possibility that efforts to enforce an order for costs against a claimant in proceedings under article 9 of the Convention could, in certain circumstances, constitute penalization or harassment under article 3(8) of the Convention, the Committee does not have evidence before it to indicate that that is the case here. The Committee therefore finds the communicant’s allegation that the Council’s efforts to enforce the costs order are a breach of article 3(8) to be not substantiated.

**Article 3(2)**

1. The communicant alleges that the Party concerned has failed to meet its obligation under article 3(2) to “endeavour to ensure that officials and authorities assist and provide guidance to the public in … seeking access to justice in environmental matters”. According to the communicant, the actions of the Council, the Ombudsman and the Secretary of State actively hindered her attempts to seek access to justice in environmental matters, contrary to the obligation in article 3(2).
2. In its findings on communication ACCC/C/2013/92 (Germany) the Committee held that:[[116]](#footnote-117)

While this is an obligation of effort, rather than of the result, nevertheless the efforts taken may be subject to due diligence scrutiny. Moreover, while the obligation to “endeavour to ensure”, just like all other obligations in the Convention, is addressed to the Party concerned, the Committee may examine in specific cases whether a public authority or an official, as a representative of the Party concerned, took the efforts needed to meet the requirement of this provision.

*Secretary of State’s decision not to issue a screening direction*

1. It is clear to the Committee that a decision by the Secretary of State not to exercise his or her discretion in favour of issuing a screening direction does not entail a breach of article 3(2) of the Convention.

*Review procedure before the Ombudsman*

1. The communicant claims that the flaws and delays in the Ombudsman’s investigations together amount to a breach of article 3(2).
2. The Committee points out that the timeliness, adequacy and effectiveness of review procedures is explicitly dealt with in article 9(4) of the Convention and it is not the case that a failure in a particular case to meet the requirements in article 9(4) will necessarily also result in a breach of article 3(2). However, the communicant has neither raised these matters under article 9(4) nor substantiated how the Ombudsman’s procedure amounted to a breach of article 3(2) in her case.

*Conduct of the Council*

1. The communicant submits that the Council demonstrated a consistent lack of cooperation and an unwillingness to address her concerns about the environmental impacts of the development. She claims that the Council procrastinated, provided erroneous and misleading information, promised to review its decision to adopt a new screening opinion and then failed to do so, and failed to comply with the pre-action protocol.
2. Having reviewed the documents provided, the Committee considers that the Council failed to assist the communicant in seeking access to justice in this case in three respects. These are examined below.

Two-year delay in placing screening opinion on the online planning register

1. Given that, under the legal framework of the Party concerned, the timeframe to bring judicial review starts to run from the date a decision is taken, the two year delay in placing the negative screening opinion on the planning register clearly runs counter to assisting members of the public to seek access to justice with respect to that opinion.
2. The Party concerned submits that, at the relevant time, article 36 DMPO required planning authorities to keep a register of planning applications and associated information as set out in the legislation.[[117]](#footnote-118) In addition, regulation 23 of the EIA Regulations required that “where a planning application is placed on … the planning register, the local authority is to take steps to secure that … any screening opinion / screening direction, scoping opinion / scoping direction, or environmental statement is also placed on that register”.[[118]](#footnote-119) Although not explicitly mentioned by the Party concerned, the Committee also notes that article 36(10) DMPO provided that “… every entry in the register shall be made within 14 days of the receipt of an application, or of the giving or making of the relevant direction, decision or approval as the case may.”
3. However, despite these requirements, the Council, in its response to the communicant’s Letter Before Claim stated that “Regulation 23 of the EA Regulations 2011 does not prescribe a period during which [the screening opinion being placed on the Planning Register] must be taken”.[[119]](#footnote-120) Likewise, in its Acknowledgment of Service it contended that “no time limit for [the screening opinion’s] publication is set out in the Regulations”.[[120]](#footnote-121) The Council’s statement indicates to the Committee that it was apparently not aware that it was required to place screening opinions on the planning register with 14 days.

*Council’s conduct following the communicant’s Letter Before Claim*

1. The Committee also considers that the correspondence between the communicant and the Council and its legal representatives between 17 October 2014 and 4 February 2015[[121]](#footnote-122) demonstrates the Council’s noncooperative approach regarding the communicant’s efforts to seek access to justice.
2. For example, under the Party concerned’s pre-action protocol, the Council should have provided its reply to the communicant’s Letter Before Claim within 14 days, but in fact only did so nearly two months later, on 4 February 2015.[[122]](#footnote-123)
3. This correspondence demonstrates the “Catch-22” situation faced by members of the public seeking access to justice in environmental matters in the Party concerned. On one hand, if they commence legal proceedings without sufficient consultation in accordance with the pre-action protocol, they may be faced with an adverse costs order if their court proceedings are later unsuccessful.[[123]](#footnote-124) On the other hand, if they do follow the pre-action protocol, but the public authority concerned does not, they may find them themselves out of time to bring legal proceedings at all. This clearly runs counter to assisting the public in seeking access to justice under the Convention.

*Incorrect and misleading reply to communicant’s access to information request*

1. On 3 March 2015, in reply to the communicant’s access to information requests on how members of the public can view any documents related to planning applications not on the planning register, the Council stated that it was “not aware of any such documents being held by officers of the council. Any historical documents are held electronically and if relating to a planning application would be available on planning explorer”. As is clear from paragraph ‎129(c) and (d) above this was not an accurate statement with respect to the Nelson Hospital application. As is clear from paragraph ‎141 above, this was not an accurate statement with respect to planning applications in general either.
2. The Committee considers that the provision by public authorities of inaccurate or misleading information to the public is contrary to the obligation in article 3(2) for Parties to endeavour to assist members of the public to exercise their rights under the Convention. In the present case, this is particularly apposite, given that this inaccurate statement was made one day after the Council’s acknowledgement of service of the communicant’s application for judicial review.

*Concluding remarks*

1. In the light of the foregoing, the Committee finds that, by failing to ensure that the Council was aware that it was required to place screening opinions on the planning register within 14 days, by failing to ensure that the Council abided by the Party concerned’s own pre-action protocol, and by the Council’s incorrect and misleading reply to the communicant’s access to information request, the Party concerned has failed to meet the requirement in article 3(2) to endeavour to ensure that public authorities assist the public to seek access to justice in environmental matters.
2. Conclusions and recommendations
3. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.
4. Main findings with regard to non-compliance
5. The Committee finds that:
6. By failing to promptly make accessible through its online planning register the documents related to a planning application that the Council was required by law to possess, the Party concerned failed to comply with article 5(3)(d) of the Convention;
7. By failing to make the screening opinion and planning permission easily accessible on the Council’s online planning register in a timeframe that would facilitate the application of national law implementing article 9(2) of the Convention, the Party concerned failed to comply with article 5(3)(d) of the Convention;
8. By maintaining an electronic database that the Council holds out to be a “one-stop shop” to access all documents related to planning applications, when it in fact is not, the Party concerned fails to comply with the requirement in article 5(3) of the Convention to ensure that the environmental information within the scope of article 5(3)(d) of the Convention is “easily accessible”;
9. By maintaining a legal framework in which the time limit to bring judicial review is calculated from the date when the contested decision was taken, rather than from when the claimant knew or ought to have known of that decision, the Party concerned fails to comply with the requirement that review procedures in article 9(2) be fair in accordance with article 9(4) of the Convention;
10. By not ensuring that courts take into account the stage of the proceedings when calculating the sum of costs to be awarded against an unsuccessful claimant in a procedure subject to article 9 of the Convention, the Party concerned fails to comply with the requirement in article 9(4) for such procedures to be fair, equitable and not prohibitively expensive;
11. Since the communicant was ordered to pay a costs order calculated on the basis of an hourly rate that was considerably higher than the actual contracted rate, the Party concerned failed to comply with the requirement that cost orders in procedures within the scope of article 9(2) of the Convention are fair and equitable in accordance with article 9(4) of the Convention;
12. By setting a significantly lower hourly rate (i.e. less than one-tenth of the sum of a legally-represented party) at which successful “litigants in person” are entitled to recover their costs in procedures subject to article 9 of the Convention, the Party concerned fails to ensure that such procedures are fair and equitable as required by article 9(4) of the Convention;
13. By failing to ensure that the Council was aware that it was required to place screening opinions on the planning register within 14 days, by failing to ensure that the Council abided by the Party concerned’s own pre-action protocol, and by the Council’s incorrect and misleading reply to the communicant’s access to information request, the Party concerned has failed to meet the requirement in article 3(2) to endeavour to ensure that public authorities assist the public to seek access to justice in environmental matters.
14. Recommendations
15. The Committee pursuant to paragraph 35 of the annex to decision I/7 of the Meeting of the Parties[, and noting the agreement of the Party concerned that the Committee take the measures in paragraph 36(b) of the annex to decision I/7,] recommends that the Party concerned take the necessary legislative, regulatory, administrative or practical measures to ensure that:
16. The time-frame for bringing an application for judicial review of any planning-related decision within the scope of article 9 of the Convention is calculated from the date the claimant knew or ought to have known of the decision and not from the date that the contested decision was taken;
17. When calculating the sum of costs to be awarded against an unsuccessful claimant in a procedure subject to article 9 of the Convention, the courts, inter alia, take into account the stage of the judicial procedure to which the costs relate;
18. In judicial procedures within the scope of article 9 of the Convention, successful “litigants in person” are entitled to recover a fair and equitable hourly rate;
19. In proceedings within the scope of article 9 of the Convention in which the applicant follows the Party concerned’s pre-action protocol, the public authority concerned is required to comply with that protocol.

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1. This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee. [↑](#footnote-ref-2)
2. Communication, p. 2, and annex 1. [↑](#footnote-ref-3)
3. Communication, annex 1, p. 5. [↑](#footnote-ref-4)
4. Communication, annex 1, p. 5. [↑](#footnote-ref-5)
5. Communication, annex 1, p. 5, and Party’s response to the communication, para. 35. [↑](#footnote-ref-6)
6. Communication, annex 1, pp. 10-11. [↑](#footnote-ref-7)
7. Communication, annex 1, p. 52. [↑](#footnote-ref-8)
8. Communication, annex 1, p. 9, and Party’s response to the communication, para. 17. [↑](#footnote-ref-9)
9. Party’s response to the communication, paras. 36-37. [↑](#footnote-ref-10)
10. Party’s reply to the Committee’s questions, 31 January 2019, p. 3. [↑](#footnote-ref-11)
11. Communicant’s reply to the Committee’s questions, 3 December 2018, annex 1a, p. 1. [↑](#footnote-ref-12)
12. Communicant’s reply to the Committee’s questions, 3 December 2018, annex 1a, p. 1. [↑](#footnote-ref-13)
13. Party’s response to the communication, para. 39. [↑](#footnote-ref-14)
14. Party’s response to the communication, para. 20. [↑](#footnote-ref-15)
15. Party’s response to the communication, para. 40. [↑](#footnote-ref-16)
16. Communication, pp. 1-3, annex 4, p. 1 and Party’s response to the communication, para. 10. [↑](#footnote-ref-17)
17. Communication, p. 3; Party’s response to the communication, para. 11. [↑](#footnote-ref-18)
18. Communication, p. 3; Party’s response to the communication, para. 13 and annex 2. [↑](#footnote-ref-19)
19. Communication, p. 4, and Party’s response to the communication, para. 12. [↑](#footnote-ref-20)
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21. Communication, p. 4; Party’s response to the communication, annex 1, pp. 8-9; Communicant’s comments on the Party’s reply to Committee’s questions, 12 February 2019, annex 2, pp. 6-7. [↑](#footnote-ref-22)
22. Communication, p. 4, and annex 4, p. 1. [↑](#footnote-ref-23)
23. Party’s reply to Committee’s questions, 31 January 2019, p. 1, and annex 5 para. 8.2. [↑](#footnote-ref-24)
24. Party’s reply to Committee’s questions, 31 January 2019, p. 1, and annex 1. [↑](#footnote-ref-25)
25. Party’s response to the communication, annex 1. [↑](#footnote-ref-26)
26. Communication, p. 4. [↑](#footnote-ref-27)
27. Communication, p. 4. [↑](#footnote-ref-28)
28. Communication, p. 4 and annex 3; Party’s response to the communication, para. 15. [↑](#footnote-ref-29)
29. Communication, p. 4, and Party’s reply to the Committee’s questions, 31 January 2019, p. 1, and annex 3. [↑](#footnote-ref-30)
30. Communication, p. 5 [↑](#footnote-ref-31)
31. Communicant’s reply to Committee’s questions, 3 December 2018, annex 2 and Communicant’s comments on Party’s reply to questions, 6 June 2016, p. 9. [↑](#footnote-ref-32)
32. Communicant’s comments on Party’s reply to questions, 6 June 2016, annex 3, p. 1. [↑](#footnote-ref-33)
33. Communication, p. 5. [↑](#footnote-ref-34)
34. Communicant’s reply to the Committee’s questions, 3 December 2018, annex 1a, p. 1. [↑](#footnote-ref-35)
35. Communication, p. 5. [↑](#footnote-ref-36)
36. Communicant’s reply to the Committee’s questions, 3 December 2018, annex 1b, p. 14. [↑](#footnote-ref-37)
37. Communication, p. 5, annex 4, and Party’s response to the communication, para. 16. [↑](#footnote-ref-38)
38. Communication, annex 4, pp. 1-2. [↑](#footnote-ref-39)
39. Party’s response to the communication, para. 16. [↑](#footnote-ref-40)
40. Communication, p. 6, annex 5, and Party’s response to the communication, para. 17. [↑](#footnote-ref-41)
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43. Communicant’s comments on the Party’s response to the communication, p. 4, annex 4, p. 2. [↑](#footnote-ref-44)
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50. Communication, p. 8, and Party’s response to the communication, para. 20. [↑](#footnote-ref-51)
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56. Communication, p. 10. [↑](#footnote-ref-57)
57. Communication, p. 16. [↑](#footnote-ref-58)
58. Party’s response to the communication, paras. 53-59. [↑](#footnote-ref-59)
59. Communication, p. 9. [↑](#footnote-ref-60)
60. Communication, p. 9. [↑](#footnote-ref-61)
61. Communication, pp. 7-9. [↑](#footnote-ref-62)
62. Communication, p. 8. [↑](#footnote-ref-63)
63. Communication, p. 9. [↑](#footnote-ref-64)
64. Communication, p. 10. [↑](#footnote-ref-65)
65. Communication, p. 10. [↑](#footnote-ref-66)
66. Party’s response to the communication, paras. 50-51. [↑](#footnote-ref-67)
67. Party’s response to the communication, para. 52. [↑](#footnote-ref-68)
68. Party’s response to the communication, para. 53. [↑](#footnote-ref-69)
69. Party’s response to the communication, para. 54. [↑](#footnote-ref-70)
70. Party’s response to the communication, paras. 40-41, 65. [↑](#footnote-ref-71)
71. Party’s response to the communication, para. 67. [↑](#footnote-ref-72)
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80. Communication, pp. 10-11; Communicant’s comments of 6 June 2016, pp. 1-2, 6-7. [↑](#footnote-ref-81)
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82. Party’s reply to Committee’s questions, 31 January 2019, pp. 1-2. [↑](#footnote-ref-83)
83. Communication, pp. 10-11. [↑](#footnote-ref-84)
84. Party’s response to the communication, para. 44. [↑](#footnote-ref-85)
85. Party’s response to the communication, para. 45. [↑](#footnote-ref-86)
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87. Communication, p. 11. [↑](#footnote-ref-88)
88. Party’s response to the communication, paras. 46-47, 64. [↑](#footnote-ref-89)
89. Communication, p. 12. [↑](#footnote-ref-90)
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93. Communication, p. 12. [↑](#footnote-ref-94)
94. Communication, pp. 12-13. [↑](#footnote-ref-95)
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96. Communication, p. 13. [↑](#footnote-ref-97)
97. Communication, p. 13. [↑](#footnote-ref-98)
98. Party’s response to the communication, paras. 79-80 [↑](#footnote-ref-99)
99. Party’s response to the communication, para. 81. [↑](#footnote-ref-100)
100. Communication, p. 13. [↑](#footnote-ref-101)
101. Communicant’s reply to Committee’s questions, annex 3b, p. 5. [↑](#footnote-ref-102)
102. Communication, p. 13. [↑](#footnote-ref-103)
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113. ECE/MP.PP/2014/23, para. 47. [↑](#footnote-ref-114)
114. Party concerned’s reply to Committee’s questions, 31 January 2019, p. 3. [↑](#footnote-ref-115)
115. See also relevant jurisprudence of the European Court of Human Rights on the “equality of arms”, such as *Feldbrugge v. the Netherlands*, 29 May 1986, Series A no. 99. [↑](#footnote-ref-116)
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121. Communicant’s comments of 6 June 2016, annex 4. [↑](#footnote-ref-122)
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