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

Adopted by the Compliance Committee on 26 July 2021¹

I. 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 (2) and (8), 5 (1) (a) and (2), 6 (1) (b) and 9 (2)-(4) of the Convention in connection with the redevelopment of a former hospital site.
2. On 28 September 2015, the Party concerned submitted comments regarding the communication's admissibility and on 2 October 2015, the communicant provided replies thereto.
3. At its fiftieth meeting (Geneva, 6-9 October 2015), the Committee determined the communication was admissible on a preliminary basis. 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.
4. On 13 May 2016, the Party concerned provided its response. On 6 June 2016, the communicant submitted comments thereon. On 31 October 2016, the Party concerned provided comments on her comments.
5. On 5 November 2018, the Committee sent questions to the parties and on 3 December 2018 and 31 January 2019, respectively, the communicant and Party concerned submitted their replies. On 12 February 2019, the communicant provided comments on the Party concerned's reply. On 21 February 2019, the Party concerned provided an explanatory note regarding its reply.
6. On 6 October 2020, the Committee sought the parties' views on whether a hearing was needed before the Committee commenced its deliberations.
7. On 19 October 2020, the communicant replied that she did not consider a hearing was needed. On 5 November 2020, the Party concerned indicated that it considered a hearing was needed.
8. On 6 November 2020, the secretariat informed the parties 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 an update on any relevant developments before 20 November 2020.
9. On 20 November 2020, the communicant submitted a final written submission.
10. 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.
11. On 9 December 2020, the Committee sent questions to the Party concerned. On 23 December 2020, the Party concerned provided its replies. On 13 January 2021, the communicant submitted comments thereon.

¹ This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes that have no impact on the findings and conclusions) may take place.

12. 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 communicant. Both were invited to provide comments by 23 July 2021.

13. The communicant and the Party concerned provided comments on the draft findings on 13 and 23 July 2017 respectively.

14. The Committee finalized its findings in closed session, taking account of the comments received, and adopted its findings through its electronic decision-making procedure on 26 July 2021. It agreed that the findings should be published as a formal pre-session document to its seventy-second meeting.

II. Summary of facts, evidence and issues²

A. Legal framework

EIA Regulations

15. At the time of the events at issue, regulation 2 (1) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (EIA Regulations) applied the following definitions:

(a) “EIA application” is: (a) an application for planning permission for EIA development; or (b) a subsequent application in respect of an EIA development.

(b) “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.

(c) “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.”³

16. Under Part 2 of the Regulations, a “screening opinion” may be adopted to determine whether a Schedule 2 development is EIA development.⁴

17. Paragraph 2 (10 (b)) of Schedule 2 of the Regulations includes urban development projects for which the area of the development exceeds 0.5 hectares.⁵

18. Regulation 4 (8) 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.⁶

19. Pursuant to regulation 9, read with regulation 5 (5), where it appears to a planning authority that an application is a “subsequent application” concerning Schedule 1 or Schedule 2 development, has not itself been subject to a screening opinion or direction, and neither it nor the original application was accompanied by an environmental

²This 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.

³ Communication, annex 1.

⁴ Ibid., pp. 10–11.

⁵ Ibid., p. 52.

⁶ Ibid., p. 9.

statement, the planning authority must adopt a screening opinion within 3 weeks of the subsequent application.⁷

20. 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) before granting planning permission. Article 16 (7) DMPO requires the relevant authority to have regard to any representations of the statutory consultees in determining the application.⁸

Local Government Act 1974

21. In accordance with sections 26 (1) and 26A (1) of the Local Government Act 1974, the Local Government Ombudsman (Ombudsman) investigates complaints about alleged maladministration and service failure, and, where it finds fault, may suggest a remedy.⁹

Access to justice

22. At the time of the events at issue:

(a) The time limits for bringing a judicial review were set by rule 54.5 (1) of the Civil Procedure Rules (CPR), 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.¹⁰

(b) Costs for claimants bringing “Aarhus cases” were subject to a costs cap for individuals of £5,000 in accordance with CPR Part 45.¹¹

B. Facts

Planning permission

23. In February 2012, planning application 12/P0418 was submitted to the London Borough of Merton Council (the Council) for redevelopment of the former Nelson Hospital site, including demolition of existing buildings and replacement with a new healthcare centre (site 1) and an assisted living development (site 2).¹²

24. The planning application included a request for screening opinion pursuant to regulation 5 of the EIA Regulations, as the development fell under paragraph 2 (10 (b)) of Schedule 2 of the Regulations (see paras. 15-17 above).¹³

25. The Council notified local residents of the planning application by letter and a notice in a local newspaper on 1 March 2012. The notification did not indicate the project was subject to a screening opinion. The public was given 21 days to comment. The communicant and 103 other residents responded to the consultation.¹⁴

26. On 12 March 2012, the Council issued a negative screening opinion.¹⁵ This was not uploaded onto the Council’s online planning register until 21 July 2014.¹⁶

⁷ Ibid, pp. 10 and 12.

⁸ Party’s reply to questions, 31 January 2019, p. 3.

⁹ Communicant’s reply to questions, 3 December 2018, annex 1a, p. 1.

¹⁰ Party’s response to communication, para. 39.

¹¹ Ibid., para. 20.

¹² Communication, pp. 1-3, annex 4, p. 1.

¹³ Communication, p. 3.

¹⁴ Party’s response to communication, para. 13 and annex 2.

¹⁵ Communication, p. 4.

¹⁶ Party’s reply to questions, 31 January 2019, p. 2.

27. On 13 March and 16 May 2012, respectively, Natural England and the Environment Agency submitted consultation responses to the Council.¹⁷ Neither response was placed on the planning register. In May 2012, an environmental noise assessment was submitted to the Council but only added to the Council's online planning register on 15 July 2014.¹⁸

28. The Council's Planning Applications Committee (PAC) first considered the planning application on 19 July 2012. The planning officer's report for that meeting stated that a screening opinion had been required and had determined that no EIA was required.¹⁹ It was published on the PAC's website on 11 July 2012.²⁰

29. A further report was prepared for the PAC's September meeting (the September 2012 planning officer's report). The report recommended to grant planning permission, subject to conditions.²¹ On 6 September 2012, the PAC resolved to grant planning permission.²²

30. In October 2012, the communicant wrote to the Council requesting that the PAC's decision be reconsidered.²³

31. 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.²⁴ The Decision Notice was published on the Council's online planning register on 4 September 2013.²⁵

32. On 9 January 2013, the Council informed the communicant that it would not reconsider its decision.²⁶

33. In February 2015, the communicant requested the Council to provide any documents related to the project that were not available on the planning register. In its 3 March 2015 reply, the Council stated 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."²⁷

Ombudsman's procedures

34. On 21 January 2013, the communicant complained to the Ombudsman regarding the 18 December 2012 planning permission. The Ombudsman found some administrative faults in the Council's consideration of the planning application but also that it could not conclude definitively that the Council would have reached another decision without those faults.²⁸

35. The communicant sought a second investigation from the Ombudsman, claiming errors in the first one. The second investigation 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. 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."²⁹

¹⁷ Communication, p. 4.

¹⁸ Ibid., and annex 4, p. 1.

¹⁹ Party's reply to questions, 31 January 2019, p. 1, and annex 5, para. 8.2.

²⁰ Ibid., and annex 1.

²¹ Party's response to communication, annex 1.

²² Communication, p. 4.

²³ Ibid.

²⁴ Ibid., and annex 3.

²⁵ Party's reply to questions, 31 January 2019, p. 1, and annex 3.

²⁶ Communication, p. 5.

²⁷ Communicant's comments on Party's reply, 6 June 2016, annex 3, p. 1.

²⁸ Communicant's reply, 3 December 2018, annex 1a, p. 1.

²⁹ Ibid., annex 1b, p. 14.

Developer's applications for the discharge of conditions

36. Between March 2013 and January 2015, the developer discharged several conditions attached to the development, some of which qualified as "subsequent applications" (see para. 19 above). Among these were applications 13/P2192 in July 2013 and 15/P0121 in January 2015.³⁰

37. Building on site 1 commenced in February 2013 and was completed in April 2015. Building on site 2 commenced in April 2014.³¹

Communicant's further screening requests

38. In April 2014, the communicant wrote to the Secretary of State, noting there was no screening opinion for application 12/P0418 and requesting that he make a screening direction for subsequent application 13/P2192.³²

39. On 20 August 2014 the Secretary of State declined to issue a screening opinion stating that there were no issues from the screening opinion for 12/P0418 that required revisiting, and any effects arising from application 13/P2192 had already formed part of the initial screening opinion.³³

40. On 28 August 2014, the communicant requested the Council to adopt a screening opinion pursuant to regulation 9 for subsequent application 13/P2192.³⁴ On 30 September 2014, the Council refused that request, claiming that an Environmental Statement had accompanied the initial planning application. Suspecting this was an error, the communicant sent a Letter Before Claim on 10 October 2014 to the Council, challenging the decision not to undertake screening opinion and asking for confirmation of whether an Environmental Statement existed.³⁵

41. On 4 November 2014, the Council responded that its 30 September email "should not be taken as indicating the Council's definitive position" nor should it "be taken as a formal decision" and agreed to review its position regarding the need for a screening opinion.³⁶

42. Following a lack of 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. She later added challenges regarding the "subsequent applications" to her judicial review claim.³⁷

Communicant's legal challenges

43. On 6 February 2015, the communicant challenged the March 2012 screening opinion and the Council's failure to adopt screening opinions for the subsequent applications before the High Court.³⁸

44. On 20 March 2015, the court refused permission to seek judicial review as follows:

(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;

³⁰ Communication, p. 5, and annex 4, pp. 1-2.

³¹ Party's response to communication, para. 16.

³² Communication, p. 6, and annex 5.

³³ Communication, annex 6.

³⁴ Communication, p. 6.

³⁵ Communicant's comments on Party's response to communication, 6 June 2016, pp. 4-5, and annex 4, p. 2.

³⁶ *Ibid.*, p. 5, and annex 4, p. 3.

³⁷ *Ibid.*, p. 5.

³⁸ Communication, annex 7.

(c) The remaining applications did not meet the definition of “subsequent application” under regulation 2 (1) of the EIA Regulations.³⁹

45. The court certified the claim as “totally without merit” and ordered the communicant to pay the Council’s costs, which it assessed at £6,000 but capped at £5,000 under CPR Part 45 (see para. 22 above).⁴⁰

46. The communicant sought leave to appeal, which was refused on 1 July 2015.⁴¹ 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.⁴² The court stated that the communicant’s remedy was to apply to the Secretary of State for a screening direction.⁴³

Demand for payment plus interest

47. On 20 July 2015, the Council’s solicitor requested the communicant to pay £4,500 (the court’s cost order less the £500 awarded by the Ombudsman). The communicant responded by requesting copies of the Council’s lawyers’ invoices.⁴⁴

48. On 20 August 2015, the Council’s solicitor demanded the communicant pay the costs plus 8% interest backdated to the date of the court order. The communicant claims that the email “threatened” referral of the debt to the High Court Sheriff.⁴⁵

C. Domestic remedies

49. The communicant points to her request to the Council to reconsider its planning permission, her Ombudsman complaints and her judicial challenges (see paras. 30, 34-35 and 43-46 above).⁴⁶

50. The Party concerned submits that, by failing to lodge a formal request for information, the communicant failed to exhaust domestic remedies, rendering those claims inadmissible under paragraph 21 of the annex to decision I/7.⁴⁷

D. Substantive issues

Article 3 (2)

51. The communicant claims the Council, Ombudsman and Secretary of State’s actions actively hindered her attempts to seek access to justice, contrary to article 3 (2).⁴⁸

52. The communicant submits the Council demonstrated a consistent lack of cooperation and an unwillingness to address her concerns.⁴⁹ She claims the Council procrastinated, provided erroneous and misleading information, and failed to comply with the Party concerned’s “pre-action protocol” by not responding to her Letter Before Claim within 14 days. 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.⁵⁰

³⁹ Communication, annex 9.

⁴⁰ Communication, p. 8.

⁴¹ Ibid.

⁴² Communication, annex 11.

⁴³ Ibid., para. (vi).

⁴⁴ Communication, p. 10.

⁴⁵ Ibid.

⁴⁶ Communication, p. 16.

⁴⁷ Party’s response to communication, paras. 53-59.

⁴⁸ Communication, p. 9.

⁴⁹ Ibid.

⁵⁰ Communication, pp. 7-9.

53. The communicant submits the Ombudsman's actions failed to comply with article 3 (2), including that it took a year for each of its investigations.⁵¹

54. 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.⁵²

55. Finally, the communicant claims the Council's demand for immediate payment of the costs order breaches article 3 (2).⁵³

56. The Party concerned claims that it has in place several well-known and well-established procedures to ensure the public is assisted in exercising its rights under the Convention. It also submits that the public was aware of, and able to respond to, the planning application, including the communicant.⁵⁴

57. The Party concerned submits that, should members of the public be concerned that certain information held by the Council has not been made available, they can request that the information be provided, including via a formal request under the Environmental Information Regulations.⁵⁵

58. Concerning 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 Convention's rights. It also submits a designation of being "totally without merit" does not deny a claimant access to courts but avoids public authorities and courts' time and resources being taken up with claims which are clearly without merit. It emphasises that a designation of "totally without merit" can be appealed, as the communicant indeed did.⁵⁶

59. The Party concerned contends that the communicant's allegations regarding article 3 (2) are baseless. It submits that article 3 (2) does not apply to courts, given the exclusion of bodies performing a judicial function from article 2 (2) of the Convention.⁵⁷ It also submits that any alleged breach of article 3 (2) concerning the Ombudsman is misplaced. The Ombudsman was the wholly incorrect forum to seek the desired remedy and judicial review should have been sought in a timelier fashion.⁵⁸

Article 3 (8)

60. 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 happened otherwise, thus penalizing her contrary to article 3 (8) of the Convention.⁵⁹

61. The communicant further considers that the 8% interest and the threat to involve a High Court bailiff to enforce the costs order may amount to penalisation or harassment under article 3 (8).⁶⁰

62. The Party concerned submits that the Committee has previously found that seeking reasonable costs is not contrary to article 3 (8) and that the communicant's allegations on this point are utterly without merit and an abuse of the right to make a communication.⁶¹

⁵¹ Communication, p. 9.

⁵² Communication, p. 10.

⁵³ Ibid.

⁵⁴ Party's response to communication, paras. 50-52.

⁵⁵ Ibid., paras. 53-54.

⁵⁶ Ibid., paras. 40-41, 65 and 67.

⁵⁷ Ibid., para. 68.

⁵⁸ Ibid., paras. 69-71.

⁵⁹ Communication, p. 10.

⁶⁰ Communication, p. 10.

⁶¹ Party's response to communication, para. 74.

63. The Party concerned notes that the 8% interest rate for High Court judgment debts is fixed by legislation and not open to variation by the courts.⁶²

Article 5 (1)

64. The communicant claims that the screening opinion, the statutory consultees' responses, the 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, in violation of article 5 (1).⁶³

65. The communicant further claims that the Council's failure to rescreen the project following the Ombudsman's finding of maladministration breaches article 5 (1).⁶⁴

66. 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 the consultation responses, the noise survey and the screening opinion.⁶⁵

Article 5 (2)

67. The communicant claims that the failure to publish the statutory consultees' responses, 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).⁶⁶

68. The Party concerned submits article 5 (2) does not concern whether the information available to the decision-maker was adequate, but whether it was available to the public.⁶⁷

69. The Party concerned submits that it has requirements for local authorities to maintain a register of planning applications, and the information and documents to be contained thereon.⁶⁸

Article 6 (1) (b)

70. The communicant claims that the screening process was undertaken incorrectly and that decisions on the project should have fallen under article 6.⁶⁹ She also submits that the failure to adopt screening opinions for the subsequent applications breaches article 6 (1) (b).⁷⁰

71. 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 March 2012 screening opinion and in the decisions on the subsequent applications, which is not a matter for the Committee to consider.⁷¹

Article 9 (2) and (3)

72. The communicant asserts the Party concerned failed to comply with article 9 (2) and (3) but does not specify in which respects.⁷²

73. The Party concerned submits that article 9 (2) is not engaged as the decision-making was not subject to article 6.⁷³ Moreover, the communicant was not deprived

⁶² Party's reply to questions, 31 January 2019, p. 3.

⁶³ Communication, pp. 10-11; communicant's comments, 6 June 2016, pp. 1-2, 6-7.

⁶⁴ Communication, p. 11; communicant's comments, 6 June 2016, p. 6.

⁶⁵ Party's reply to questions, 31 January 2019, pp. 1-2.

⁶⁶ Communication, pp. 10-11.

⁶⁷ Party's response to communication, para. 44.

⁶⁸ *Ibid.*, para. 45.

⁶⁹ Communication, p. 11.

⁷⁰ Communication, p. 11.

⁷¹ Party's response to communication, paras. 46-47.

⁷² Communication, p. 12.

⁷³ Party's response to communication, para. 76.

of opportunities for judicial redress. Insofar as she lost any opportunity for a substantive hearing, this was primarily due to her delay in seeking judicial review.⁷⁴

Article 9 (4)

Adequate and effective remedy

74. The communicant submits that a request to the Secretary of State for a screening direction is not an effective remedy under article 9 (4).⁷⁵

75. The communicant further submits that the refusal of permission for judicial review due to the development having been substantially implemented breached the requirement of article 9 (4) for an adequate and effective remedy.⁷⁶

Fairness and rules on timing

76. The communicant claims that six weeks is very short 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.⁷⁷

77. The Party concerned submits there is no merit in the contention that six weeks is too short to bring proceedings. The court has discretion to extend the period in appropriate circumstances and the communicant did not bring her claim until over two years after the date of the screening opinion and Decision Notice.⁷⁸

“Equality of arms”

78. The communicant submits that a successful litigant in person can only claim costs of £19 per hour. In contrast, the Council submitted costs to the court of £6,000, including £3,500 in solicitor’s fees at £250 per hour. She questions whether this level of expenditure was needed, particularly at the permission stage and where she was acting as a litigant in person. She claims that the discrepancy between the costs recoverable puts the communicant and the Party concerned on an inequitable footing and seems manifestly unfair.⁷⁹

79. The Party concerned submits that its costs caps ensure that judicial reviews under 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. It claims there is anyway no need to consider these aspects of the communication, as the costs rules are already subject to the Committee’s review under decision VI/8k.⁸⁰

“Profiteering”

80. The communicant alleges profiteering by the Council.⁸¹ She 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.⁸² However, the Council’s statement of costs for the court listed solicitor’s fees at £250/hr.⁸³ She claims this is unfair and serves to increase the prohibitive expense she incurred contrary to article 9 (4).⁸⁴

81. The Party concerned’s submissions are summarized in paragraph 79 above.

⁷⁴ Ibid., para. 77.

⁷⁵ Communication, p. 12.

⁷⁶ Communication, p. 12.

⁷⁷ Communication, pp. 12-13.

⁷⁸ Party’s response to the communication, para. 78.

⁷⁹ Communication, p. 13.

⁸⁰ Party’s response to communication, paras. 79-81.

⁸¹ Communication, p. 13.

⁸² Communicant’s reply, 3 December 2018, p.1 and annex 3a.

⁸³ Ibid., annex 3b, p. 5.

⁸⁴ Communication, pp. 13-14.

Prohibitively expensive costs

82. The communicant claims that exposing individual claimants to the maximum costs of £5,000 is a serious deterrent and not compatible with article 9 (4).⁸⁵ 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, and the obligation that access to justice be fair, equitable, and not prohibitively expensive.⁸⁶

83. The Party concerned's submissions are summarized in paragraph 79 above.

III. Consideration and evaluation by the Committee

108. 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.

Admissibility and exhaustion of domestic remedies

109. As set out in paragraphs 30, 34-35 and 43-46 above, the communicant extensively used domestic remedies to challenge the alleged noncompliance. The Committee thus determines the communication to be admissible.

Initial observations

110. This communication to a considerable extent concerns the actions, or inactions, of London Borough of Merton Council. The Committee underlines that under international law, a Party is responsible under the Convention for the acts of all organs and emanations of the State, including local government, their planning authorities, and the courts.⁸⁷

Article 5 (1)

111. The communicant makes two allegations under article 5 (1). First, that relevant documents were not available to the PAC at the time of the decision to grant planning permission. Second, that the Council failed to undertake a second EIA screening following the Ombudsman's investigation.

Documents available to the PAC

112. 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.

113. 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 EIA, article 5 (1) (a) requires that the decisionmaker possesses the environmental impact assessment at the time it takes the decision to permit the activity.

114. 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

⁸⁵ Communication, pp. 14-15.

⁸⁶ Communication, p. 15.

⁸⁷ See, for example, article 4 of the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, Report of the ILC on the Work of its Fifty-third Session, UN GAOR, 56th Sess, Supp No 10, p 43, UN Doc A/56/10 (2001).

Committee that the Council was obliged to possess the screening opinion under article 5 (1) (a).

115. Regarding the statutory consultees' responses, the Committee understands these were required under article 16 (1) of the DMPO. Accordingly, the Council was obliged by article 5 (1) (a) of the Convention to possess these responses also.

116. Concerning the supplementary noise assessment, since the Committee has not been pointed to any provision of national law requiring the Council to obtain it, the Committee does not examine this issue.

117. While neither the screening opinion nor the statutory consultees' responses were on the planning register at the time the PAC granted planning permission, each of these documents was summarized in the July and September 2012 planning officers' reports. It is common ground that those reports were before the PAC when it granted planning permission.

118. Based on 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

119. The communicant alleges that the Council's failure to carry out a second screening following the Ombudsman's investigations breaches article 5 (1) (a).

120. 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) in this respect.

Article 5 (3)

121. The communicant alleges noncompliance with article 5 (2) due to:

- (a) The Council's failure to include the statutory consultees' responses, 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.

122. Since the communicant's allegations relate to the availability of environmental information through electronic means, and recalling its mandate to examine compliance issues if and as appropriate,⁸⁸ the Committee examines them under article 5 (3) rather than article 5 (2).

123. 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".

124. The word "progressively" in article 5 (3) must be construed in the context that more than two decades have passed since the Convention's adoption. Compared to the early, emerging state of electronic information tools at that time, the primary means through which environmental information is now disseminated by public authorities in most, if not all, Parties is through electronic means, namely public authorities' websites.

125. The requirement that electronic databases be "easily accessible" has several components including that: access is free of charge; registration requirements,

⁸⁸ ECE/MP.PP/2/Add.8, para. 14.

if any, are kept to a minimum without the need for 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.

126. “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 the public effectively has to make an access to information request under article 4 of the Convention to gain access to the information in the database.

127. 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).

128. 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 a similar vein to the word “progressively” in article 5 (3), first sentence, 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 Convention’s adoption. 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).

129. 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]”.⁸⁹ The Committee examines the extent to which the Council’s assertion is borne out in practice.

130. The parties do not dispute 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;⁹⁰

(b) Supplementary noise assessment, issued May 2012, posted on the planning register 15 July 2014;⁹¹

(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 2013.⁹²

⁸⁹ https://unece.org/fileadmin/DAM/env/pp/compliance/C2015-131_UK/frCommC131_06.06.2016/frCommC131_06.06.2016_att3_response_to_request.pdf

⁹⁰ Party’s reply to questions, 1 January 2019, annex 2.

⁹¹ Ibid., annex 4.

⁹² Ibid., annex 3.

131. 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:

(a) The information that was available on the planning register *prior* to the 18 December 2012 planning permission being granted;

(b) The availability on the planning register of the screening opinion and the Decision Notice;

(c) Whether all information relating to planning applications was indeed systematically made available on the online planning register.

(a) Information on the planning register prior to the 18 December 2012 planning permission being granted

132. 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.

133. As pointed out in paragraph 126 above, “easily accessible” means that documents must be available promptly. However, the screening opinion was posted on the planning register over 18 months after planning permission was granted. The statutory consultees’ responses are still not available on the planning register.

134. Based on 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.

(b) Publication of the screening opinion and the Decision Notice

135. The Council was required under article 5 (1) (a) to possess the 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 to facilitate the application of national law implementing article 9 (2).

136. At the time these decisions were taken, the Party concerned’s law required a judicial review application 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 planning register until over two years after it was taken; the Decision Notice was published approximately nine months after it was issued.

137. Based on 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), the Party concerned failed to comply with article 5 (3) (d) of the Convention.

(c) Information relating to planning applications being systematically available on the planning register

138. 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 PAC’s decisions are available online.

139. 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). As such, they must also be easily accessible to the public in an electronic database under article 5 (3) (d).

140. 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 review the webpages relating to particular PAC meetings in addition to the planning register. This does not amount to making the relevant information "easily accessible".

141. 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".⁹³

142. 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.

143. 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) is "easily accessible".

144. Since it has no information to indicate that the noncompliance found in paragraphs 134, 137 and 143 above is of a wide or systemic nature in the Party concerned, and recognizing that it did not invite the parties' observations on article 5 (3), the Committee does not make recommendations on these points.

Article 6 (1) (b)

12 March 2012 screening opinion

145. A negative screening opinion is 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. The Committee therefore 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).

Need to screen applications to discharge conditions

146. 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 the Party concerned in breach of article 6 (1) (b) on this point.

Article 9 – applicability

147. In its findings on communications ACCC/C/2010/45 and ACCC/C/2011/60 (United Kingdom), the Committee held that "the outcome of an

⁹³ Communicant's comments, 6 June 2016, annex 3, p. 1.

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”.⁹⁴ Since article 9 (4) applies to all review procedures referred to in article 9, 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) below.

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

Date when timeframe starts to run

148. 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”.

149. 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. The public, however, did not have access to those decisions until much later.

150. The communicant submitted her application for permission to bring judicial review in February 2015, seven months after she received the screening opinion. Accordingly, whether the maximum three-month timeframe to seek judicial review ran from March 2012, December 2012 or July 2014, the communicant would still have been out of time.

151. More generally, 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 may create 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.

152. The date from when the decision became known to the public is a clear and certain date: it is the date that the contested decision was publicly notified and the text of the decision made accessible to the public (see article 6 (9) of the Convention).

153. 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 to apply for judicial review. It has not however provided evidence that a court is *required* to grant such an extension. The fact that the court may grant an extension of time, 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.

154. Based on 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 decision became known to the public, 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

155. The communicant claims the six-week time limit on seeking judicial review of planning decisions fails to meet the requirement in article 9 (4) that review

⁹⁴ ECE/MP.PP/C.1/2013/12, para. 83.

procedures be timely and fair. The communicant filed her application for permission seven months after the screening opinion became publicly available.

156. 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) is as long as seven months. Without precluding the possibility to examine the six-week time limit in a future case, the Committee finds that the communicant has not substantiated her allegation that the six-week 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

157. The communicant claims that a request to the Secretary of State for a screening direction does not provide an adequate and effective remedy under article 9 (4), since the decision whether to make a screening direction is at the Secretary of State's discretion.

158. 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).

159. However, members of the public also have the possibility to challenge a screening opinion and an alleged failure to undertake screening through judicial review. Accordingly, 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).

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

Quantum of order of costs at the permission stage

160. 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.

161. 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”.⁹⁵ The Committee will not re-examine here issues already subject to its review under decision VI/8k.

162. However, the costs order against the communicant was £5,000, the maximum amount possible for an Aarhus claim brought by an individual and 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

⁹⁵ ECE/MP.PP/2014/23, para. 47.

cap of £5,000 is “frontloaded” at such an early stage. Moreover, based on the information before the Committee, the communicant’s experience is not an isolated occurrence.⁹⁶

163. 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.

164. 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 on which costs order is calculated

165. 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, regarding the communicant’s claim was 62.4 hours at £55 per hour (£3,432).

166. 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 at the Committee’s sixty-eighth meeting, 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. 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.

167. 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.

168. Based on 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) are fair and equitable in accordance with article 9 (4) of the Convention.

169. Given, however, that no evidence has been put before the Committee that the unfair and inequitable hourly rate 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.

⁹⁶ Party’s comments on draft findings, para. 28.

Recovery of costs for litigants in person

170. 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”.⁹⁷

171. 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.⁹⁸ This stands in stark contrast to the £250 per hour that the court approved the Council’s solicitor 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.

172. 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,⁹⁹ 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, 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

173. Having found in paragraphs 164 and 168 above that 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”

174. The communicant submits the High Court’s designation of her claim as “totally without merit” amounted to penalization under article 3 (8). She claims that this designation meant she was not afforded a fair and public hearing before a judge and resulted in a greater portion of costs being awarded against her.

175. 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 regarding applications for permission for judicial review generally, not only in cases falling under the Convention. The Committee accordingly finds that the Party concerned is not in noncompliance in this respect.

Demand for payment plus interest

176. The communicant claims that the Council’s efforts 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.

177. While not precluding the possibility that efforts to enforce a costs order against a claimant in proceedings under article 9 of the Convention could, in certain circumstances, constitute penalization or harassment under article 3 (8), the

⁹⁷ ECE/MP.PP/C.1/2010/6/Add.3, para. 132.

⁹⁸ Party’s reply to questions, 31 January 2019, p. 3.

⁹⁹ 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.

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 unsubstantiated.

Article 3 (2)

178. The communicant alleges that the Party concerned 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 article 3 (2).

179. In its findings on communication ACCC/C/2013/92 (Germany), the Committee held that:¹⁰⁰

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

180. 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

181. The communicant claims that the flaws and delays in the Ombudsman's investigations together breach article 3 (2).

182. The Committee points out that the timeliness, adequacy and effectiveness of review procedures is explicitly dealt with in article 9 (4) 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).

The Council's conduct

183. The communicant submits that the Council demonstrated a consistent lack of cooperation and an unwillingness to address her concerns about the project's environmental impacts. She claims the Council procrastinated, provided erroneous and misleading information, promised to review its decision not to adopt a new screening opinion and then failed to do so, and failed to comply with the pre-action protocol.

184. 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 planning register

185. 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

¹⁰⁰ ECE/MP.PP/C.1/2017/15, para. 88.

two-year delay in placing the screening opinion on the planning register clearly runs counter to assisting the public to seek access to justice regarding that opinion.

186. 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.¹⁰¹ 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”.¹⁰² Although not explicitly mentioned by the Party concerned, the Committee 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.”

187. 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”.¹⁰³ Likewise, in its Acknowledgment of Service it contended that “no time limit for [the screening opinion’s] publication is set out in the Regulations”.¹⁰⁴ 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 within 14 days. To fulfil a Party’s obligations under article 3 (2), it is not enough that it merely puts in place a legal framework. It has equally an obligation to take efforts to ensure that the responsible public authorities follow the relevant rules.

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

188. The Committee considers that the correspondence between the communicant and the Council and its legal representatives between 17 October 2014 and 4 February 2015¹⁰⁵ further demonstrates the Council’s noncooperative approach regarding the communicant’s efforts to seek access to justice.

189. For example, under the Party concerned’s pre-action protocol, the Council should have replied to the communicant’s Letter Before Claim within 14 days, but in fact only did so nearly two months later, on 4 February 2015.¹⁰⁶

190. The pre-action protocol states that the court “will normally expect all parties to have complied with it in good time” and “will take into account compliance or non-compliance when...making orders for costs”.¹⁰⁷ Despite this, the Council in this case did not comply, and yet the court ordered the communicant to pay the maximum possible sum of costs.

191. The correspondence between the communicant and the Council demonstrates the “Catch-22”¹⁰⁸ 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 even if their court proceedings are later successful.¹⁰⁹ On the other hand, if they do follow the pre-action protocol, but the public authority concerned does not, they may find 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.

¹⁰¹ Party’s response to communication, para. 27.

¹⁰² *Ibid.*, para. 34.

¹⁰³ Communicant’s comments, 6 June 2016, annex 2, p. 2.

¹⁰⁴ Party’s reply to questions, 23 December 2020, annex 2, p. 8.

¹⁰⁵ Communicant’s comments, 6 June 2016, annex 4.

¹⁰⁶ *Ibid.*, annexes 2 and 3.

¹⁰⁷ Party’s comments on Committee’s draft findings, para. 42.

¹⁰⁸ *Catch-22*, Joseph Heller (1961).

¹⁰⁹ Communication, p. 8.

Incorrect and misleading reply to communicant's access to information request

192. On 3 March 2015, in reply to the communicant's access to information request on how 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 130 (c) and (d) above, this was not an accurate statement regarding the Nelson Hospital application. As is clear from paragraph 142 above, this was not an accurate statement for planning applications in general either.

193. The Committee considers that the provision by public authorities, being emanations of the Party concerned, of inaccurate or misleading information to the public is contrary to the obligation in article 3 (2) for Parties to endeavour to assist the public to exercise its rights under the Convention. In the present case, this is particularly apposite, given that this inaccurate statement was made one day after the Council had filed its acknowledgement of service in response to the communicant's application for judicial review.

Concluding remarks

194. Based on the foregoing, the Committee finds that, since the Council was not aware that it was required to place screening opinions on the planning register within 14 days, it failed to abide by the Party concerned's own pre-action protocol, and it incorrectly and misleadingly replied to the communicant's access to information request, the Party concerned failed to meet the requirement in article 3 (2) to endeavour to ensure that its public authorities assist the public to seek access to justice in environmental matters.

IV. Conclusions and recommendations

195. Having considered the above, the Committee adopts the findings and recommendations set out in the following paragraphs.

A. Main findings with regard to non-compliance

196. The Committee finds that:

(a) 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;

(b) 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), the Party concerned failed to comply with article 5 (3) (d) of the Convention;

(c) 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) is "easily accessible";

(d) 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;

(e) 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;

(f) 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) are fair and equitable in accordance with article 9 (4) of the Convention;

(g) 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, the Party concerned fails to ensure that such procedures are fair and equitable as required by article 9 (4) of the Convention;

(h) Since the Council was not aware that it was required to place screening opinions on the planning register within 14 days, it failed to abide by the Party concerned’s own pre-action protocol, and it incorrectly and misleadingly replied to the communicant’s access to information request, the Party concerned failed to meet the requirement in article 3 (2) to endeavour to ensure that its public authorities assist the public to seek access to justice in environmental matters.

B. Recommendations

197. 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:

(a) 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 decision became known to the public and not from the date that the contested decision was taken;

(b) 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;

(c) 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;

(d) 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.
