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11 December 2021

Ms. Fiona Marshall
Aarhus Convention Secretariat
United Nations Economic Commission for Europe
Palais des Nations
CH-1211 Geneva 10, Switzerland

Dear Ms. Marshall,

PRE/ACCC/C/2021/190 UNITED KINGDOM – Statement On Preliminary Admissibility
Response to UK Department For Environmental Food And Rural Affairs

I am grateful for this opportunity to comment on the preliminary admissibility of our communication.

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

> *The Committee shall consider any such communication unless it determined that the communication is:*
> *a) Anonymous;*
> *b) An abuse of the right to make such communications;*
> *c) Manifestly unreasonable;*
> *d) Incompatible with the provisions of this decision or with the Convention.*

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

Response to the UK Government

In its letter of 6 December 2021, the UK Department for Environment, Food and Rural Affairs ('the party concerned') presents 'observations' on the substance of our communication, which do not bear on grounds for admissibility. They introduce much new information, unrelated to our claims of non-compliance with the Convention, and which are not therefore relevant for consideration. They also make many factually incorrect statements, [1] which cannot be relied upon by the Committee, and offer a fundamental misreading of the obligations on state parties under the Convention. Their response should be rejected by the Committee.

Their response introduces four charges, starting with the claim: i) domestic remedies have not been exhausted. From this they suggest: ii) matters raised in the communication do not pass the threshold of *de minimis*; iii) the communication is an abuse of the right to make communications, and iv) it is manifestly unreasonable.

Claim 1: Domestic Remedies Have Not Been Exhausted

Decision I/7 Paragraph 20(d) states, the Committee shall consider any such communication unless it is determined that the Communication is incompatible with the provisions of this decision or with the Convention. In the *Guide to the Aarhus Convention Compliance Committee* (2019), at para. 99. It states:

> *According to paragraph 21 of the annex to decision I/7, the Committee should also at all relevant stages take into account any available domestic remedy unless the application of the remedy is unreasonably prolonged or obviously does not provide an effective and sufficient means of redress. In this regard, the very high cost of the domestic procedures may be relevant when assessing whether a domestic remedy is in fact available in practice* (p. 28).[2]

The party concerned charges that we have not exhausted domestic remedies, but this is not a criterion for refusal, and the above provisions do not supersede the Committee's obligation to consider admissibility against

[1] Most important, the SPD *was* adopted on 20 July 2021, subject only to minor revisions – essentially the correction of typographical errors. Delegated powers do not extend to permit an officer adopting and approving a major development plan. This is material to our request for judicial review, submitted by Matrix Chambers on behalf of the claimant.
[2] See. *Guide to the Aarhus Convention Compliance Committee*, 2nd Edition, UNECE. Available at: https://unece.org/DAM/env/pp/Publications/Guide_to_the_Compliance_Committee__second_edition__2019_/English/Guide_to_the_Aarhus_Convention_Compliance_Committee__2019.pdf

the criteria listed. **There is no mention whatsoever that an applicant must have exhausted domestic remedies,** only that they should **take account of domestic remedies**, which is exactly what we have done. The Committee should also take into consideration the **very high costs associated with domestic procedures.**

The party concerned proposes four available options for domestic redress. The following are **not applicable** to matters raised in this communication, though we have then taken into account as noted in our communication.

i. The Office of Environmental Protection (OEP): does not have powers to investigate our complaints regarding environmental information, which was removed from the Environment Bill 2021. Its remit is limited to the natural environment, which is not central to this communication. Thus, the OEP does not offer an effective means of redress. Given the OEP operates as a division within Defra[3] where Ms. Adisa-Solanke is based, it is hard to understand why they put forward this inappropriate suggestion.

ii. The Local Government and Social Care Ombudsman is not an appeals body, and cannot deal with far-reaching issues that affect most people in a particular area, as is the case for the regional development plans we mention, and is not therefore an effective means of redress for the matters we raise.

iii. Information Commissioner's Office (ICO): we filed multiple complaints with the ICO. It is factually incorrect to suggest this matter relates to a single instance case. We describe unreasonably prolonged delays that fit with a current pattern where the **ICO is taking a year before investigating most cases**,[4] hence the ICO does not offer an effective remedy for the matters raised in the communication.

Judicial Review and the limitations of cost protection rules:
As we record, Richard Lecoat, has submitted a request for judicial review. This application addresses only one of the matters mentioned in the communication (the SPD). There are still many limitations of judicial reviews, not least that they are limited in scope and do not touch on the substantive rights included in the Convention. Although the UK introduced legislation in respect of costs protection for certain cases that come within the scope of the Convention, in practice, this has not reduced financial barriers for applicants seeking access to UK courts, as affirmed in Committee decisions V/9n [5] and VI/8k[6]. While courts may vary cost caps,[7] in practice they work in one direction and courts are tending to increase caps at the request of defendants. [8] We note:

a) In decision VI/8k, the Committee found that UK was **moving 'further away from meeting the requirements of paragraphs 8 (a), (b) and (d) of decision V/9n**';
b) Progress reports from as recently as 2019[9] and 2020,[10] record a **pattern of continued non-compliance** with the requirements set out by the Committee;
c) In their submission of 29 October 2020 regarding the UK's 3rd Progress Report on Aarhus Convention Decision VI/8k, the RSPB et al. reported they were **not aware of a single successful variation downwards by a claimant**;[11]
d) ClientEarth found defendants **intimidating applicants seeking judicial review**, as a tactical advantage to deter claimants and increase costs'.[12]

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[3] See description of the OEP at: https://www.defrajobs.co.uk/roles/the-office-for-environmental-protection-oep/
[4] See: Campaign for Freedom of Information, 'ICO freedom of information backlog', October 27, 2021 https://www.cfoi.org.uk/2021/10/ico-freedom-of-information-backlog/
[5] Decision V/9n, ECE/MP.PP/2014/2/Add.1, 30 June and 1 July 2014. Available at: https://unece.org/DAM/env/pp/mop5/Documents/Post_session_docs/Decision_excerpts_in_English/Decision_V_9n_on_compliance_by_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland.pdf
[6] Decision VI/8k, ECE/MP/2017/2/ADD.1, 11-13 September 2017. Available at: https://unece.org/DAM/env/pp/compliance/MoP6decisions/Compliance_by_United_Kingdom_VI-8k.pdf
[7] See Civil Procedure Rules (CPR) 45.44(1). Available at: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs#sectionVII
[8] *Aireborough Neighbourhood Development Forum v Leeds City Council* (Rev 2) [2020] EWHC 45 (Admin) (14 January 2020). Available at: http://www.bailii.org/ew/cases/EWHC/Admin/2020/45.html
[9] In its first progress review of 26 February 2019 of the implementation of Decision VI/8k, the Committee found that the United Kingdom had not yet met the requirements of paragraphs 2(a)-(e), 4, 6 and 8(a) and (b) of VI/8k.
[10] In its second progress review of 6 March 2020, on the implementation of Decision VI/8k, the Committee considered the UK had not yet met the requirements of paragraphs 2(a), (b) and (d), 4, 6 and 8(a) and (b) of VI/8k.
[11] Letter to Ms. Fiona Marshall, Re: UK's 3rd Progress Report on Aarhus Convention Decision VI/8k 29, dated 29 October 2020. Available at: https://unece.org/fileadmin/DAM/env/pp/compliance/MoP6decisions/VI.8k_UK/Correspondence_with_Observer/frObs_RSPB_etc_VI.8k_29.10.2020/frObs_RSPB_etc_VI.8k_29.10.2020_cover_letter.pdf
[12] See: VI/8k: UK's final progress report –ClientEarth's response 29 October 2020. Available at: https://unece.org/fileadmin/DAM/env/pp/compliance/MoP6decisions/VI.8k_UK/Correspondence_with_communicants_and_observers/frCommC33_ClientEarthVI.8k_29.10.2020_.pdf

The above actions serve as a disincentive in seeking judicial review for all but the very wealthy.

For the reasons set out in the communication it has proven prohibitively expensive to rely on the option of judicial review. Should the Committee read the exchange of letters between Mr. Lecoat's lawyers, and those acting for the London Borough of Barnet (Annex 2i), then it would be immediately clear that the proposal put forward by the party concerned is not viable, and we cannot benefit from the cost cap of £5,000, as they advise. The evidence we submitted to the Committee, confirms the climate of intimidation identified by ClientEarth and in the Committee's own progress reports. In our case, **the defendant is threatening to increase costs to £10,000; and refused to cooperate so we could pursue a second claim** alongside the one filed on 13 October 2021. Given the high costs, we were unable to submit a second claim for judicial review. For this reason, we maintain **our Convention rights to access to justice have been violated** and advise the Committee to reject the suggestion by the party concerned that we may benefit from a cost cap of £5000 -- which we cannot.

The Committee must also be aware of the UK's past record, and why statements asserting access to domestic remedies ring hollow given the government's intentions to introduce legislation to undermine access to justice:

- The *Judicial Review and Courts Bill 2021* is rapidly coursing through the House of Commons and is now at committee stage and would reduce access to seek judicial review, even retrospectively.[13]
- The *Interpretation Bill 2021*, if passed, would allow ministers to throw out legal rulings.[14]

These legislative reforms pose a serious threat to accountability and the rule of law in the UK, and reaffirm the importance of international treaty bodies for the protection of rights and access to justice, including the ACCC.

The Committee must reasonably accept that the proposed domestic options have proven unreasonably prolonged and obviously do not provide an effective and sufficient means of redress.

Claim 2: Matters Raised in the Communication do not Pass the Threshold of De Minimis

We note a failure by a UK public authority to fulfil the Convention amounts to a failure by the party concerned and set out our reasons under *Section V Alleged Nature of Non-Compliance* (pp. 7-8). As party to the Convention the UK is obligated to ensure the general provisions of the Convention have been satisfied, but this is not the case because the party concerned cannot provide an effective and sufficient means of redress for the reasons above. Hence we identify violations of Art. 3, Art. 4(1), 4(2), Art. 6(2), Art. 6(3), Art. 6(8), and Art. 7. The claims made by the party concerned amount to a perverse understanding of the Convention, and its application under international law. **The communication demonstrably passes the threshold of *de minimis*.**

Claim 3: The Communication is an Abuse of the Right to Make Communications

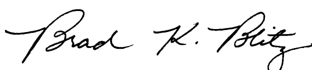
The party concerned writes at para 34, that 'the matters raised in the communication do not pass the threshold of *de minimis* with respect to their relevance, and importance in light of the purpose and functions of the Committee.' This assertion is based on the mistaken charges raised in their claims 1 and 2, addressed above, and is at odds with the extensive body of case law produced by the Committee, which affirms the relevance of the very matters mentioned in the communication, namely violations of Convention rights to access to information, and public participation. The arguments made by the party concerned should be rejected and declared **unfounded**. **The communication is not an abuse of the right to make communications.**

Claim 4: The Communication is Manifestly Unreasonable

The party concerned alleges our communication is 'manifestly unreasonable', on the basis that domestic remedies would provide effective and sufficient means of relief. However, this is not the case. **The claim our communication is manifestly unreasonable is based on an error of fact and should be rejected**.

We therefore reject the observations by the United Kingdom and request that the Committee consider our communication preliminarily admissible.

Yours sincerely,



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

[13] *Judicial Review and Courts Bill*, Available at: https://bills.parliament.uk/bills/3035

[14] Jonathan Ames, 'Boris Johnson plans to let ministers throw out legal rulings', *The Times*, 6 December 2021. Available at: https://www.thetimes.co.uk/article/boris-johnson-plans-to-let-ministers-throw-out-legal-rulings-qxdwm0jw5