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Your ref: PRE/ACCC/C/2021/190

7 December 2021

Dear Ms Marshall

PRE/ACCC/C/2021/190 (United Kingdom)

Ahead of the Committee's meeting to discuss the preliminary admissibility of the above communication, we attach the United Kingdom's observations.

We intend to dial into the meeting on 13 December 2021 and look forward to this meeting.

Yours sincerely

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United Kingdom's Comments on the Preliminary Admissibility of

PRE/ACCC/C/2021/190 (United Kingdom)

6 December 2021

Introduction

1. This communication is based on the same cases as those referred to in communication ACCC/C/2021/185. The Committee concluded the previous communication was inadmissible because the decision-making process had not yet ended, relying on paragraph 20(d) of the annex to decision I/7 of the Meeting of the Parties to the Convention. This requires communications to be compatible with decision I/7, which was not the case because paragraph 21 of the annex to decision I/7 provides that the Committee should take into account the use of any available domestic remedy.

2. It is the United Kingdom's case that communication PRE/ACCC/C/2021/190 is inadmissible for four reasons. Two are founded on paragraph 20(d) of the annex to decision I/7: (1) as with communication ACCC/C/2021/185 domestic remedies which would provide an effective and sufficient means of redress are available and have not been exhausted; (2) having regard to the matters raised in the communication, they do not pass the threshold of *de minimis* with respect to their relevance and importance in the light of the purpose and functions of the Committee. Further, the United Kingdom considers the communication is (3) an abuse of the right to make such communications because, when examined, it does not impugn the conduct of the United Kingdom (therefore contrary to paragraph 20(b) of the annex to decision I/7) and, (4) for the same reason, is manifestly unreasonable (therefore contrary to paragraph 20(c) of the annex to decision I/7).

Background

3. The three cases presented to the Committee are as follows:

   a) The Burroughs and Middlesex University Supplementary Planning Document ("the SPD");
   b) The Business Case for the Hendon Hub; and
   c) The Local Plan stage 1 (reg. 18); and stage 2 (reg. 19) publication documents ("the draft Local Plan").

4. The relevant consultation periods for all three cases have now ended and some of the resulting documents have been adopted by the relevant public authority (the London Borough of Barnet, "LBB").

5. The SPD consultation period ended 22 February 2021. The communicant asserts it was formally adopted as local planning guidance by LBB at a meeting of its Policy and Resources Committee on 20 July 2021, but this is not the case. A resolution to adopt was issued but the SPD has not yet been formally adopted. This is because some amendments require a delegated powers report and this has not, to date, been prepared.

6. The non-statutory consultation on the Business Case for the Hendon Hub ended 7 June 2021 and it was adopted by LBB at a meeting of its full Council on 27 July 2021. There is no planning consent for the Hendon Hub in place, as applications are only now (autumn 2021) starting to be submitted.

7. The final consultation on the draft Local Plan ended on 19 October 2021 and it has now been submitted to the Planning Inspectorate for independent examination by way of a process called "examination in public".

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8. Only one of the three impugned documents would have any formal planning status affecting rights in the determination of planning applications. That is the SPD, which would be adopted as formal guidance. As such, it would have to be taken into account when making relevant planning decisions but as guidance only this document may be departed from. Further, the SPD has not, to date, been adopted by LBB.

Availability of Domestic Remedies

9. Demonstrating the availability of adequate domestic remedies, the SPD is currently subject to a claim for judicial review (lodged 13 October 2021; it is understood permission from the High Court to proceed with the claim is outstanding). It is quite likely this claim, as with the earlier communication, and as with the present communication, will be rejected as premature in light of the fact that LBB has not actually adopted the SPD.

10. The Business Case for the Hendon Hub is a document to inform the decision to progress plans to regenerate the area through a large-scale mixed-use development project known as the Hendon Hub. None of the requisite planning applications to develop the Hendon Hub have been approved. These will be subject to mandatory statutory consultation (outlined in further detail in the section below), determination by LBB, and if the communicant is dissatisfied with the decision (whether for or against the development) there are various options available.

11. These options are as follows. If LBB refuses the application third parties such as the communicant may directly participate in the applicant's appeal to an independent inspector appointed by the Planning Inspectorate on behalf of the Secretary of State as a separate participant in their own right (what is known as a "Rule 6 Party", which refers to rule 6(6) of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000). Planning appeals, including the mode of appeal, are publicised with deadlines to submit further comments, though all representations made on the application are forwarded to the independent inspector in any event. It is unlikely any appeal concerning the current application would be determined by way of informal hearing or written representations as opposed to a full public inquiry, but even if that is the case third parties are entitled to make further written and oral submissions at hearings and make further written submissions to appeals determined by way of written representations. If the communicant is dissatisfied with the outcome of the applicant's appeal they may apply to the High Court for a review of that decision under s.288 of the Town and Country Planning Act 1990. If LBB approves the application and grants planning permission, as the communicant knows, that decision may be amenable to judicial review.

12. In relation to the draft Local Plan, which identifies strategic priorities for the development and use of land in LBB's area,[1] this has no formal planning status and could only legally amount to a material planning consideration. It is only capable of bearing little weight given the examination in public process has not even commenced. This process includes extensive opportunities for public participation, and specifically opportunities for the communicant, to have a say and influence the Local Plan: members of the public may make written representations to the independent inspector(s) appointed by the Planning Inspectorate on behalf of the Secretary of State;[2] there is then an oral hearing where members of the public must be given an opportunity to speak if they have submitted written representations.[3] Any

[1] For more information on the reasons for developing Local Plans and their role in the planning system see National Planning Policy Framework, 2021, Chapter 3.

[2] See procedure set out by Town and Country Planning (Local Planning) (England) Regulations 2012: at least six weeks' notice must be given of the examination in public (reg. 24); representations may be made to the independent inspector(s) appointed by the Planning Inspectorate on behalf of the Secretary of State (reg. 20); all representations must be taken into account by the appointed inspector (reg. 23).

[3] Section 20(6) of the Planning and Compulsory Purchase Act 2004.

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proposed material modifications to the draft Local Plan are subject to further consultation.[4] LBB's subsequent decision to adopt the Local Plan may then be challenged under s.113 of the Planning and Compulsory Purchase Act 2004. The public is informed of the possibility of legally challenging a local plan in the "adoption statement" published by the relevant local planning authority when it formally adopts the plan.

13. Further to the above, and as rightly acknowledged by the communicant, there are a number of other domestic mechanisms to air grievances which, unlike the Committee, do provide a means of redress. These are complaints to the Information Commissioner's Office ("the ICO"); the Local Government and Social Care Ombudsman ("the LGO"); and the Office for Environmental Protection ("the OEP") (established when the Environment Act 2021 was given royal assent on 9 November 2021). The communicant and those objecting to the Hendon Hub have made submissions to all of these bodies (in the case of the OEP, the communicant made his complaint to the interim OEP as it has only recently been made a legal body). Various complaints are made about the unsatisfactory nature of the remedies available under these bodies, but they are incapable of founding an admissible communication to the Committee for the following reasons.

14. The ICO complaint is outstanding. It is subject to delay. The delay is understandable when one considers the context. The matter complained of is a highly complex multi-million pound[5] project involving private sector partners, multiple landowners, and the exercise of compulsory purchase order powers. There are obvious issues the ICO must grapple with, not least commercial confidentiality and the potential compromise of LBB's legal obligations when purchasing land by way of compulsory purchase. Seen in this light a six-month delay is not unreasonably prolonged or indicative of an ineffective remedy. Moreover, if the communicant is dissatisfied with the decision of the ICO he may appeal that to the First-tier Tribunal (Information Rights) under s.57(1) of the Freedom of Information Act 2000.[6] The First-tier Tribunal is empowered to investigate the merits of the decision.

15. As to the complaint to the LGO, it is understood that too is ongoing and the outcome is awaited. The LGO is entitled to make recommendations concerning LBB's conduct.

16. The complaint to the interim OEP foundered, rightly, because the complainant had not exhausted LBB's internal complaints procedure. This is a legal requirement under what is now s.32(5) of the Environment Act 2021 (and was contained in the draft Environment Bill). As to the publication of the Environmental Statement, this has been done.[7]

17. It follows that because there are at least four pending domestic avenues providing for a review of LBB's conduct complained of by an independent body (judicial review, a complaint to the ICO, a complaint to the LGO, examination in public of the draft Local Plan), and three further options are available (a complaint to the newly established OEP, a challenge to the Local Plan under s.113 of the Planning and Compulsory Purchase Act 2004, a further judicial review), there are relevant administrative and judicial procedures available in the United Kingdom which would provide an effective and sufficient means of redress, they are not unreasonably prolonged in light of all the circumstances, and they have not been exhausted by the communicant.

[4] This is known as the "main modifications" consultation under s.20(7A) of the Planning and Compulsory Purchase Act 2004 (the inspector finds the plan would be unsound if unamended), and applying reg. 25(2) of the Town and Country Planning (Local Planning) (England) Regulations 2012.

[5] Sum set out at §6, Statement of Facts and Grounds, R (on the application of Mr Richard Lecoat) v London Borough of Barnet and Middlesex Univeristy (sic), found at Annex 2j to the communication.

[6] Regulation 18 of the Environmental Information Regulations 2004 applies the appeal regime established under the Freedom of Information Act 2000 to requests for environmental information.

[7] And the communicant has access to it: see Annexures to Reply from the Communicant dated 11 November 2021.

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18. Thus, in relation to all three cases communication PRE/ACCC/C/2021/190 does not accord with paragraph 21 of the annex to decision I/7. This forms part of decision I/7 and so the communication is inadmissible under paragraph 20(d) of the annex to decision I/7.

The Matters Raised are De Minimus

19. It follows from the above, and in light of the advance notice of this issue from the reasons for the rejection of his previous communication as inadmissible, the communicant was required to provide the Committee with clear reasons as to why, notwithstanding the various pending domestic review procedures, the Committee should nonetheless provisionally admit the communication. The information provided by the communicant does not provide clear reasons why the United Kingdom has failed to comply with the Convention such that the communication should be admitted.

20. In relation to the specific complaints made, we note that at this stage all statements should be strictly limited to the issue of admissibility and *leave aside* the substance of the communication. As such, on any preliminary view the communication relates to the procedures carried out by LBB and does not impugn the conduct of the United Kingdom as a party to the Convention.

21. It is accepted that specific acts or omissions that demonstrate a failure by public authorities of the United Kingdom to comply with or enforce the Convention are capable of forming the subject matter of a communication. However, it remains the case that LBB has no legal obligation under the Convention and none of the allegations relate to systemic issues for which the United Kingdom is responsible. In short, the Committee does not have jurisdiction to determine disputes regarding the activities of domestic public bodies where the United Kingdom has established procedures and mechanisms to ensure compliance with the Convention. That is the case here.

22. Under Article 3(2), Article 4(1) and Article 4(2) the complaint refers to LBB failing to assist with and/or provide access to environmental information. The communicant has not identified where the United Kingdom, as opposed to LBB, has failed to comply with the Convention. There is no identified breach by the United Kingdom because it has established mechanisms to comply with these provisions of the Convention. The ICO is an independent body tasked with hearing complaints from the public concerning failures to disclose information with a right of appeal to another independent body, the First-tier Tribunal (Information Rights). Opponents of the Hendon Hub proposals have already submitted a complaint to the ICO. A single instance of delay having regard to the circumstances does not disclose routine systemic delay and the regime as a whole secures the Convention rights set out under Articles 3(2), 4(1) and 4(2).

23. The complaints made in relation to Article 6(2), Article 6(3), Article 6(4), Article 6(8), again, all relate to conduct of LBB, not the United Kingdom. The allegation that a single planning authority failed to provide documents in an adequate, timely and effective manner does not relate to the conduct of the United Kingdom. This complaint is resolved either by way of complaint to the LGO or the courts if there is illegality. Opponents of the Hendon Hub proposals have already submitted a complaint to the LGO and they have also sought to legally challenge the SPD.

24. Further, an unlawful consultation carried out by a local planning authority is amenable to legal challenge in the domestic courts. Whether the requisite standard has been met will be measured against statutory and established common law standards,[8] as well as guidance

[8] For common law requirement to consult (relevant to the Business Case for Hendon Hub see: *R (Plantagenet Alliance Ltd) v Secretary of State for Justice and others* [2014] EWHC 1662 Admin at §§97-98; *R (Bhatt Murphy and others) v Independent Assessor* [2008] EWCA Civ 755 at §50; *R (Davies and another) v Revenue and Customs Commissioners* [2011]

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issued by the United Kingdom government. The latter includes express guidance on conducting fair and lawful consultations supporting public participation in decision-making more generally during the pandemic period.[9]

25. With respect to the actual conduct of the United Kingdom, it has put in place satisfactory requirements for public consultation. The SPD was subject to mandatory public consultation under reg.s 12 and 13 of the Town and Country Planning (Local Planning) (England) Regulations 2012. The Business Case for the Hendon Hub is not subject to a mandatory statutory consultation, but one was carried out by LBB. If a consultation was not carried out but ought to have been this could have formed the basis of a legal challenge (by way of judicial review) or a complaint to the LGO. The draft Local Plan was subject to mandatory public consultation under reg.s 18 and 19 of the Town and Country Planning (Local Planning) (England) Regulations 2012, and will be subject to further mandatory consultation. It will also be subject to additional consultation requirements arising from the United Kingdom's domestic transposition of the Strategic Environmental Assessment Directive.[10]

26. The planning applications for the development which comprises the Hendon Hub are subject to mandatory public consultation requirements. As EIA development, for the present application all environmental information is subject to the public consultation requirements set out in article 15 of the Town and Country Planning (Development Management Procedure) (England) Order 2015.[11] Publicity is also required for all further environmental information received by LBB in the course of determining the application under reg. 25 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017. Domestic law requires that any representations – including those made by members of the public – are taken into account by the decision-maker.[12] Regulation 19(3)(d) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 requires that

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UKSC 47 at §49). For common law standard for consultation see: *R v North and East Devon Health Authority ex p Coughlin* [2001] QB 213 at §108 and §112; and *R (Moseley) v Haringey LBC* [2014] UKSC 56 at §23, §25 and §35 (irrespective of how the duty to consult has been generated, the same common law duty of procedural fairness will inform the manner in which the consultation should be conducted). However, there is *obiter* commentary from the High Court and Court of Appeal that a duty to consult arising from the common law is capable of being overridden in certain circumstances: *R (Christian Concern) v Secretary of State for Health and Social Care* [2020] EWHC 1546 (Admin) at §74 (considering the impact of Covid-19) and Laws LJ in *Bhatt Murphy* at §29. Because at this stage the Committee is only considering the matter of admissibility and the Party considers the communication to be patently inadmissible the Party does not propose to annex this case law for reasons of proportionality.

[9] See Code of Practice on Consultation issued by HM (Her Majesty's) Government dated July 2008, found at Annex 1e to the communication, and updated Planning Policy Guidance: Consultation and Pre-decision Matters at §035, reference ID: 15-035-20201204.

[10] Environmental Assessment of Plans and Programmes Regulations 2004, reg. 13. These regulations have also been amended in light of the pandemic: see Environmental Assessment of Plans and Programmes Regulations (Coronavirus) (Amendment) Regulations 2020 with effect until 31 December 2020 and thereafter by the Environmental Assessment of Plans and Programmes Regulations (Amendment) Regulations 2020 with effect from 31 December 2020.

[11] This has taken place: see §1.27 of the ES at Annex 1 of the communicant's Reply to request from the Acting Chair of the Compliance Committee dated 11 November 2021.

[12] Reg. 26(1)(a) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 requires that all *"environmental information*" is taken into account when determining an application in relation to which an environmental statement has been submitted, environmental information is defined by reg. 2(1)(c) as: "*the environmental statement, including any further information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development*"; further, public representations within the criteria set by article 33(2) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 must be taken into account by the decision-maker.

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where the relevant planning authority is aware of any particular person who is or is likely to be affected by, or has an interest in, the planning application, but are unlikely to become aware of it by means of a site notice or by local advertisement, to send a notice to that person containing the details of the application, including the environmental statement, and where the person may access that information as well as the name and address of the relevant planning authority.[13]

27. It is worth noting the Committee's response dated 1 July 2020 to a request for advice from Kazakhstan (ACCC/A/2020/2) on how other countries solved the problem of organizing public hearings, including those in the form of a video conference, and whether that was contrary to the provisions of the Convention during the pandemic (declared as a state of emergency). The Committee confirmed (at paragraphs 17 and 70) that the Convention does not preclude public hearings on decision-making under the Convention being held through videoconferencing or other virtual means, provided that in practice all the requirements of the Convention are fully met. Paragraph 34 confirms that notification by way of publicity on the website of the relevant public authority can constitute notice provided in an adequate, timely and effective manner under Article 6(2). This is subject to a case by case assessment, and here the communicant does not allege he himself was unaware of the documents, nor does he identify anyone else who was prejudiced, and he does not provide any details of anyone being unable to submit consultation responses. The United Kingdom paid specific regard to the impact of the pandemic on public participation in environmental decision-making, and amended legislation accordingly.[14] As demonstrated by the lack of specified prejudice, these safeguards were adequate to ensure Convention rights were protected.

28. No public meetings subject to a time restriction will allow for everyone who wishes to have a say to speak; that is impossible. But consultees were given multiple opportunities to submit consultation responses in writing to LBB before and after the virtual public meetings, entirely in line with paragraph 52 of the Committee's advice in ACCC/A/2020/2.[15] These consultations included promotion on LBB's social media accounts, press releases issued to local newspapers, dedicated websites, emails sent directly to known stakeholders, and hand-delivered leaflets to local residents.[16]

29. As to the complaint made under Article 6(8), whether a local planning authority was biased is a matter for domestic courts, not the Committee.

30. The complaint under Article 9(3) unfortunately misunderstands the domestic legal regime. It is said that the communicant "*has sought to exhaust domestic remedies, including applications for judicial review, but has been prevented by the refusal by LB Barnet to recognise Aarhus cost claims and by their unwillingness to agree to a cost cap*".[17] There is no requirement that LBB agrees either that a claim falls within the remit of the Aarhus costs rules of the CPR or agrees to any costs cap. The rules are set out in the CPR and are applied by the courts. It follows that there is no substance to the complaint made under Article 9(3).

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[13] Under reg. 19(3)(d) all of the information required by reg. 20(2)(b) to (k) must be sent to that person.

[14] See reg.s 36A and 36B of the of the Town and Country Planning (Local Planning) (England) Regulations 2012 (inserted and amended by the Town and Country Planning (Local Planning) (England) (Coronavirus) (Amendment) Regulations 2020 and reg. 3 of the Town and Country Planning (Local Planning, Development Management Procedure, Listed Buildings etc.) (England) (Coronavirus) (Amendment) Regulations 2020 (the latter extending the implementation period to 31 December 2021).

[15] See chronologies provided by LBB relating to production of the SPD at Annex , pre-application consultation on the Hendon Hub at Annex , and Local Plan at Annex .

[16] Press release and direct emails to stakeholders issued for all three cases; social media includes publicity via Twitter and Facebook for all three cases; 16,628 leaflets distributed regarding the SPD, see Annex , and 15,000 leaflets distributed regarding the Hendon Hub proposals, see Annex. Dedicated websites: SPD and Local Plan consultations on engagebarnet.gov.uk; hendonhub.co.uk.

[17] Paragraph 91 of the communication.

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31. It should be noted that judicial review, claims under s.288 of the Town and Country Planning Act 1990, and claims under s.113 of the Planning and Compulsory Purchase Act 2004 are all covered by the Aarhus costs rules in the CPR.[18] Further, there is nothing which precludes the communicant from lodging a claim in his own right as an individual, thereby benefitting from the £5,000 cost cap (referring to the claimant's total liability, inclusive of VAT, to pay the other side's costs if they lost the case) with an option to apply to the court to vary the cap downwards. It is incorrect to assert that variations to cost caps work only in one direction (upwards). For example, in *R (Steer) v SSHCLG* [2018] EWCA Civ 1697 the claimant's cost cap was varied downwards from £5,000 to £1,000 and this covered both the High Court and Court of Appeal proceedings (therefore the claimant's total liability for adverse costs for the entirety of the litigation was £1,000).

Conclusion

32. The communication is inadmissible under paragraph20(b), (c) and (d) of the annex to decision I/7 for the following four reasons.

33. Firstly, domestic remedies which would provide an effective and sufficient means of redress are available and have not been exhausted. There are ongoing processes under three domestic regimes (complaint to the ICO, complaint to the LGO, a judicial review), a high likelihood of the communicant availing himself of a fourth (making submissions and appearing at the examination in public of the draft Local Plan), and a further three domestic remedies available to the communicant (complaint to the OEP, a claim under s.113 of the Planning and Compulsory Purchase Act 2004, further judicial review).

34. Secondly, the matters raised in the communication do not pass the threshold of *de minimis* with respect to their relevance and importance in the light of the purpose and functions of the Committee. The Committee is not a redress mechanism and the communication does not provide sufficient evidence of a wider problem with the legal framework or judicial practice of the United Kingdom with respect to the implementation of the Convention.

35. Finally, because the United Kingdom has put in place adequate procedures to safeguard rights conferred by the Convention before, during, and after the pandemic the communication is unfounded and is therefore an abuse of the right to make such communications, contrary to paragraph 20(b) of the annex to decision I/7, and is manifestly unreasonable, and therefore also contrary to paragraph 20(c) of the annex to decision I/7.

36. For these reasons the United Kingdom therefore respectfully requests that the Committee finds the communication inadmissible and closes the case.

37. We would be happy to provide further clarification to assist the Committee during its deliberations and will, in any event, remotely attend the open session on 13 December 2021, make brief oral submissions and answer any questions on the admissibility of communication PRE/ACCC/C/2021/190.

[18] See Civil Procedure Rules Part 45, and Civil Procedure Rules Practice Direction 8C, §1.1(b) and (e).

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