

Economic Commission for Europe

Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Seventh session

Geneva, 18–20 October 2021

Excerpt from the addendum to the report of the seventh session of the Meeting of the Parties (ECE/MP.PP/2021/2/Add.1)*

Decision VII/8s concerning compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention*

Adopted by the Meeting of Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters at its seventh session

The Meeting of the Parties,

Acting under paragraph 37 of the annex to its decision I/7 on the review of compliance,¹

Mindful of the conclusions and recommendations set out in its decision VI/8k with regard to compliance by the United Kingdom of Great Britain and Northern Ireland,²

Taking note of the reports of the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters on the implementation of decision VI/8k concerning compliance by the United Kingdom of Great Britain and Northern Ireland,³ the findings of the Committee on communication ACCC/C/2013/90 in connection with a concrete production plant and associated settlement lagoons at a site adjacent to the River Faughan Special Area of Conservation,⁴ the findings of the Committee on communication ACCC/C/2015/131 regarding the redevelopment of a former hospital site,⁵ and the findings of the Committee on communication ACCC/C/2016/142 concerning access to justice relating to a public authority's alleged failure to clear up litter,⁶

Encouraged by the willingness of the United Kingdom of Great Britain and Northern Ireland to discuss in a constructive manner with the Committee the compliance issues in question,

* The full text of addendum to the report of the seventh session of the Meeting of the Parties (ECE/MP.PP/2021/2/Add.1) will, in due course, be available in English, French and Russian from https://unece.org/environmental-policy/events/Aarhus_Convention_MoP7.

* This document was submitted late owing to additional time required for its finalization.

¹ ECE/MP.PP/2/Add.8.

² ECE/MP.PP/2017/2/Add.1.

³ ECE/MP.PP/2021/59 and ECE/MP.PP/2021/60.

⁴ ECE/MP.PP/C.1/2021/14.

⁵ ECE/MP.PP/C.1/2021/23.

⁶ ECE/MP.PP/C.1/2021/27.

Decision VI/8k

1. *Endorses* the findings of the Committee with respect to decision VI/8k that:

(a) While welcoming the progress made in that direction, the Party concerned has not yet met the requirements of paragraphs 2 (a), (b) and (d) and 4 with respect to England and Wales;

(b) While welcoming the progress made in that direction, the Party concerned has not yet met the requirements of paragraph 2 (a), (b) and (d) with respect to Scotland;

(c) While welcoming the significant progress made in that direction, the Party concerned has not yet met the requirements of paragraph 2 (a), (b), (c) and (d) with respect to Northern Ireland;

(d) Since the Party concerned is no longer a member State of the European Union, the recommendation in paragraph 2 (e) is no longer applicable;

(e) The Party concerned has not yet met the requirements of paragraph 6, nor demonstrated any progress in that direction;

(f) While welcoming the steps taken in that direction, the Party concerned has not yet met the requirements of paragraph 8 (a) and (b);

2. *Reaffirms* decision VI/8k and requests the Party concerned to, as a matter of urgency, 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, including private nuisance claims, 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) Further review its rules regarding the time-frame for the bringing of applications for judicial review in Northern Ireland to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework;

(d) Establish a clear, transparent and consistent framework to implement article 9 (4) of the Convention;

(e) Put in place a clear requirement to ensure that:

(i) When selecting the means for notifying the public under article 6 (2), public authorities are required to select such means as will ensure effective notification of the public concerned in the territory outside of the Party concerned, bearing in mind the nature of the proposed activity, and the potential for transboundary impacts;

(ii) When identifying who is the public concerned by the environmental decision-making on ultra-hazardous activities, such as nuclear power plants, public authorities will apply the precautionary principle and consider the potential extent of the effects if an accident would indeed occur, even if the risk of an accident is very small;

Communication ACCC/C/2013/90

3. *Endorses* the findings of the Committee with respect to communication ACCC/C/2013/90 that:

(a) By only providing for public participation in the decision-making to permit the lagoons once they had already been constructed, the Party concerned failed to meet the requirement in article 6 (4) to provide for early public participation when all options are open;

(b) By not providing the communicant with access to the development control officer's report prior to the decision to grant planning permission, despite the communicant's multiple requests, the Party concerned failed to comply with article 6 (6) of the Convention;

(c) By having in place a system through the combined operation of articles 67B (3) and 83A of the Planning (Northern Ireland) Order 1991 whereby activities within the scope of article 6 of the Convention that are themselves in breach of national law relating to the environment are deemed to be lawful and permitted without public participation meeting

the Convention's requirements, the Party concerned failed to comply with article 6 of the Convention in its entirety;

(d) By the court not undertaking its own assessment, based on all the evidence before it, of whether:

- (i) The development was "likely to have significant effects on the environment by virtue of factors such as its nature, size or location";⁷
- (ii) The permit conditions could be implemented in practice without adverse environmental impacts,

but instead relying on the assessment of the public authority that took the contested decisions, the Party concerned failed to provide for a review of the substantive legality of those decisions in accordance with the requirements of article 9 (2) of the Convention;

(e) By maintaining a legal framework under which developers of proposed activities subject to article 6 of the Convention are entitled to a full merits review of the decision on the proposed activity, but other members of the public seeking to challenge the same decision are not, the Party concerned fails to ensure that review procedures under article 9 (2) are fair as required by article 9 (4) of the Convention;

(f) By failing to take effective enforcement action against the operator's non-permitted activities for so long that those activities were deemed lawful and could no longer be subject to either public participation in decision-making under article 6, or access to justice under article 9 (3), the Party concerned failed to meet the requirements of article 3 (2) to endeavour to ensure that its officials and authorities facilitate the public's participation in decision-making and access to justice under the Convention;

(g) By not providing the communicant with access to the development control officer's report prior to the decision to grant planning permission, despite the communicant's multiple requests, the Party concerned failed to meet the requirements of article 3 (2) to endeavour to ensure that its officials and authorities assist the public in seeking access to information and facilitate its participation in decision-making under the Convention;

4. *Recommends* that the Party concerned take the necessary legislative, regulatory, administrative and practical measures to ensure that:

- (a) Decisions to permit activities subject to article 6 of the Convention cannot be taken after the activity has already commenced or has been constructed, save in highly exceptional cases and subject to strict and defined criteria;
- (b) Activities subject to article 6 of the Convention are not entitled, by law, to:
 - (i) Become immune from enforcement under article 67B (3) of the Planning (Northern Ireland) Order 1991 or any legislation that supersedes it;
 - (ii) Receive a certificate of lawful development under article 83A of the Planning (Northern Ireland) Order 1991 or any legislation that supersedes it;

Communication ACCC/C/2015/131

5. *Endorses* the findings of the Committee with respect to communication ACCC/C/2015/131 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 time-frame 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;

⁷ The Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999 (23 February 1999), regulation 2 (2).

(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 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;

(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) be 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;

6. *Recommends* that the Party concerned take the necessary legislative, regulatory, administrative and 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;

Communication ACCC/C/2016/142

7. *Endorses* the findings of the Committee with respect to communication ACCC/C/2016/142 that:

(a) By failing to ensure that applications for litter abatement orders under section 91 of the Environmental Protection Act 1990 are not prohibitively expensive, the Party concerned fails to comply with article 9 (4) of the Convention;

(b) By awarding significant costs against the communicant under section 64 (1) of the Magistrates' Courts Act because he refused the Council's offer to settle, in circumstances under which the communicant was entitled under section 91 (12) of the Environmental Protection Act to apply for the recovery of his costs, the Party concerned failed to provide for a fair and equitable review procedure under article 9 (3) as required by article 9 (4) of the Convention;

(c) By failing to consider the establishment of appropriate assistance mechanisms to remove or reduce financial barriers for members of the public to enforce contraventions of its law on litter, the Party concerned has failed to comply with article 9 (5) of the Convention;

8. *Recommends* that the Party concerned promptly take the necessary legislative, regulatory, administrative or other measures, such as establishing appropriate assistance mechanisms, to ensure that procedures to challenge acts and omissions by public authorities that contravene provisions of its law on litter are fair, equitable and not prohibitively expensive;

Follow-up procedure

9. *Requests* the Party concerned to:

(a) Submit a plan of action, including a time schedule, to the Committee by 1 July 2022 regarding the implementation of the recommendations in paragraphs 2, 4, 6 and 8 above;

(b) Provide detailed progress reports to the Committee by 1 October 2023 and 1 October 2024 on the measures taken and the results achieved in the implementation of the plan of action and the recommendations in paragraphs 2, 4, 6 and 8 above;

(c) Collect up-to-date data to demonstrate that the requirements in paragraph 2 (a), (b) and (d) above have been fulfilled with respect to the outstanding points of non-compliance in England and Wales, Scotland and Northern Ireland;

(d) Provide such further information as the Committee may request in order to assist it to review the progress by the Party concerned in implementing the recommendations in paragraphs 2, 4, 6 and 8 above;

(e) Participate (either in person or by virtual means) in the meetings of the Committee at which the progress of the Party concerned in implementing the recommendations in paragraphs 2, 4, 6 and 8 above is to be considered;

10. *Undertakes* to review the situation at its eighth session.