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Ms Fiona Marshall  
Secretary to the Aarhus Convention Compliance Committee  
UN Economic Commission for Europe  
Environment Division  
Palais des Nations  
CH-1211 Geneva 10  
Switzerland

09 December 2022

Dear Ms Marshall,

## Re: Communication PRE/ACCC/C/2022/196

I write in response to your email of 15 November 2022, regarding a new communication submitted by Environmental Rights Scotland and others with the above reference.

Please find attached the United Kingdom's observations. I would be grateful if you could confirm safe receipt of this response.

We look forward to attending the session on this communication on 13 December.

Yours sincerely

Justine Solomons-Moat  
UK Focal Point  
Department for Environment, Food and Rural Affairs  
UK Government

## **OBSERVATIONS ON BEHALF OF THE GOVERNMENT OF THE UNITED KINGDOM ON PRELIMINARY ADMISSIBILITY**

### **Summary**

1. The United Kingdom (the “UK”) submits that communication PRE/ACCC/C/2022/196 is inadmissible within the meaning of paragraphs 20(c) and 20(d) of the annex to Decision I/7 for the following reasons:
  - a. The communication is incompatible with the provisions of the Convention - the communication alleges non-compliance with the Article 9(4) requirement that the procedures referred to in Article 9(2-3) must be ‘fair’. Specifically, the communicant considers there is an inequality in planning appeal rights between applicants for planning permission and other members of the public in Scotland. It is the UK case that administrative third party right of appeal is not required in the planning system for compliance with the Aarhus Convention;
  - b. The communication is manifestly unreasonable - it is the UK’s case that the evidence drawn on to support the allegations is misleading.

### **Incompatible with the Provisions of the Convention**

2. It is the UK’s case that administrative third party right of appeal is not required in the planning system for compliance with the Aarhus Convention. Whilst it is the right of developers to appeal planning decisions, this is a full merits appeal and a re-determination of the case on its planning merits. It is not a right “to challenge the substantive or procedural legality of any decision” as required by article 9(2) of the Convention.
3. The Scottish planning system is inclusive, engaging all interests as early and effectively as possible, including on Local Development Plans, individual planning applications and individual appeals. It is also the case that third parties have recourse to the Courts to challenge a point of law.
4. Article 9 of the Convention concerns access to justice and challenges to the legality of decisions rather than to how decisions on the merits of applications are taken. Those seeking planning permission do have the right to appeal certain decisions made by planning authorities and this is an important feature of the Scottish Planning system.
5. The Communicant refers to the Town and Country Planning (Scotland) Act 1997, as amended, as our main legal framework for the planning system in Scotland. Rights of appeal to the Scottish Ministers under section 47 of the 1997 Act in Scotland are the same in substance as the right of appeal to the Secretary of State in England under section 78 of the Town and Country Planning Act 1990. This is recognised in paragraph 84 of the Committee’s Findings and recommendations with regard to communications ACCC/C/2010/45 and ACCC/C/2011/60 as not being procedures under article 9(2) of the Convention.

## **Manifestly Unreasonable**

6. The communication quotes from paragraph 145 of the Findings and Recommendations in case ACCC/C/2013/90<sup>1</sup> but omits to quote the text of paragraph 144 which states: *“In its findings on communications ACCC/C/2010/45 and ACCC/C/2011/60 (United Kingdom), the Committee held that the right of a developer in England and Wales to appeal a refusal to grant planning permission to the Secretary of State for Communities and Local Government or to the Secretary of State’s Planning Inspectors was not a review procedure under article 9(2) of the Convention because the appeal was “before an executive body, not constituting a court of law or independent and impartial body established by law”.*
7. It is further submitted that matters relating to UK compliance with article 9(2) of the Convention are separately the subject of consideration in communication ACCC/C/2017/156<sup>2</sup> (United Kingdom), including the right of developers - but not other members of the public - to a full merits review. Therefore, it would be unreasonable to admit this further case. Paragraph 147 of the Findings and Recommendations in case ACCC/C/2013/90 refers.

The Scottish Parliament considered rights of appeal during the passage of the Planning (Scotland) Act 2019. Amendments seeking to introduce third party rights of appeal were not supported by the Scottish Parliament at that time, with reasoning including concerns it would increase delays and uncertainty; could discourage investment; and, could be used to block or delay development which is needed in the public interest. We trust this democratic process provides further reassurance of those ways in which key principles of transparency and accountability, including in establishing the regulatory processes to be applied to decision making, can be demonstrated.

## **Conclusions**

8. For these reasons the UK therefore respectfully requests that the Committee finds the communication inadmissible and closes the case.
9. 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 2022, make brief oral submissions and answer any questions on the admissibility of communication PRE/ACCC/C/2022/196.

**9 DECEMBER 2022**

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<sup>1</sup> [ECE MP.PP C.1 2021 14 E.pdf \(unece.org\)](#)

<sup>2</sup> [ACCC/C/2017/156 United Kingdom | UNECE](#)