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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

21 July 2023

Dear Ms Marshall,

Re: Communication ACCC/C/2022/196

Please see attached the United Kingdom's submission on the case referred to above. I have sent 24 annexes.

I would be grateful if you could confirm safe receipt of this response.

Yours sincerely,

Tom Fuller
UK Focal Point to the UNECE Aarhus Convention
Department for Environment, Food and Rural Affairs (DEFRA)
UK Government

THE AARHUS CONVENTION COMPLIANCE COMMITTEE

UNITED NATIONS, ECONOMIC COMMISSION FOR EUROPE

RE: COMMUNICATION ACCC/C/2022/196

(concerning compliance by the United Kingdom of Great Britain and Northern Ireland

in connection with access to justice regarding planning decisions)

RESPONSE ON BEHALF OF THE UNITED KINGDOM

Introduction

1. By way of a communication ("the Communication") received by the Aarhus Convention Compliance Committee ("the Committee") on 29th August 2022 complaint is made by the Environmental Rights Centre for Scotland, the RSPB, Planning Democracy and Friends of the Earth Scotland ("the Communicants") in relation to what is alleged to be the United Kingdom of Great Britain and Northern Ireland's ("the Party") failure to comply with article 9(4) of the Aarhus Convention ("the Convention") in that the procedures referred to in Article 9(2-3) must be "fair". It is based on the inequality of planning appeal rights between applicants for planning permission and other members of the public in Scotland.

2. On 22nd December 2022 the Committee reached a preliminary determination, subject to review following any comments received from the Party concerned, that the Communication was admissible.

3. By letter dated 21st February 2023 the Party was given the opportunity to provide any written explanations or statements clarifying the matter referred to in the Communication.

4. In summary, the Communication asserts that planning appeal rights in Scotland do not comply with the Article 9(4) requirement that the procedures referred to in Article 9(2-3) must be fair. In so doing it asserts that:-

   (a) The provisions which provide applicants for planning permission in Scotland with statutory appeal rights, which enable them to have a full merits review of planning decisions whereas other members of the public do not enjoy equivalent rights, are procedures within the scope of Article 9(2) or (3) and so engage Article 9(4).
   (b) The only legal recourse for other members of the public is statutory review or judicial review in the Court of Session.
   (c) Statutory review and judicial review procedures in Scotland (i) do not allow for full merits reviews of planning decisions and (ii) are prohibitively expensive.

5. The Party submits that the Communication is without merit. In summary:-

(a) The Communication fails to distinguish on the one hand between public participation in the Scottish planning decision making process, in respect of which the applicant's statutory right of appeal forms part, and on the other hand the Access to Justice provisions of Article 9, in respect of which it does not. Article 9(2) is concerned (as relevant) with "*access to a review procedure before a court of law and/or another independent and impartial body established by law*" to challenge the "*substantive and procedural legality of any decision*" subject to the provisions of Article 6. Article 9(3) is likewise about challenging (as relevant) acts by public authorities before such a body on the same basis. The applicant's right of appeal is not to such a body, nor is it concerned with the legality of the decision appealed. Instead, the right of appeal is to an executive body on the planning merits of the proposal, and is a part of the administrative process of decision-making. The requirement for, inter alia, fairness in Article 9(4) relates to the procedures referred to in Articles 9(2) and (3). It does not relate to the procedures concerned in the prior decision-making process itself.

(b) The decision-making process, which includes any reconsideration on appeal, is part of the administrative as opposed to the judicial process and is primarily a matter for the Party, and is in any event fair.

(c) In so far as statutory review and judicial review procedures in Scotland are relevant to this Communication, which is not accepted save that there is a right of challenge by both parties to any final administrative decision, and as to the ambit of review which is provided for by such procedures and whether or not they are prohibitively expensive - they are matters which are already subject to other Communications before the Committee, and upon which the Party has made extensive submissions. It would be inappropriate for them to be considered further under this Communication. In any event Article 9 does not require a full merits review.

6. The Party will deal with each matter identified above in turn.

<u>Relevance of Article 9 to the Communication</u>

7. Under this section, the Party will address:-

(a) The proper framework within which an appeal on the merits can be undertaken as part of the administrative process within the framework provided primarily by the Town and Country Planning (Scotland) Act 1997 (as amended) ("the 1997 Act").

(b) The Scottish Government's consideration of introduction of third party rights of appeal as part of that framework.

(c) Previous decisions of the ACCC and their proper application.

Administrative decision-making and full merits review

8. The Convention distinguishes between public participation in decision-making and access to justice to challenge such decisions. See for example the pre-amble to the Convention at

paragraphs 8-9, and noticeably quite separate treatment at paragraphs 14 and 18. See also in the provisions of Article 3(1-3).

9. Article 6 makes provision for public participation in decision-making. It is to be noted that there is quite correctly no complaint that the Party, whether in Scotland or elsewhere, fails to comply with these provisions – see paragraphs 8-10 of the Communication.

10. In Scotland an applicant's right to have an independent reconsideration of its application is part of the decision-making process. It is provided for by way of appeal to the Scottish Ministers by virtue of section 47 of the 1997 Act or for certain local developments taken under delegated powers to a Local Review Body by virtue of section 43A(8) of the 1997 Act, the provisions being in Annex 1. The procedure, whichever route is chosen, results in the decision being re-taken afresh. The first decision is then replaced by the second decision.

11. In this sense the use of the word "appeal" whilst accurate has the potential to mislead.

12. First, an *appeal* by an applicant for planning permission is not an appeal to a court of law and/or another independent and impartial body established by law. Nor, indeed, is it a review of the first decision in the sense that the focus is on the first decision. In fact, it gives rise to a reconsideration on the merits by the second decision maker, and gives rise to a replacement decision. In that sense it is both conceptually and practically quite different from an appeal to a court of law, in which the court would scrutinise the decision under challenge, not reconsider it. That would also be the case if an equivalent third party right of appeal were present as the Communicants contend should be the case.

13. By way of illustration of the point in paragraph 12 above, when an application is redetermined pursuant to an appeal by an applicant, the decision-maker considers matters as they are as at the date of the new decision. For example, if the policy framework has changed since the first decision, the decision will be made against the new policy framework. Likewise, if other material circumstances have changed the decision will be made in the context of those new material circumstances. This is by way of direct contrast to a review procedure that would be undertaken by a court or equivalent body as might occur pursuant to Article 9(2-3), which would be reviewing the legality of the decision and in so doing would be considering the policy and material circumstances at the time the original decision was made and whether they had been properly applied.

14. This is so whether the appeal is to Scottish Ministers, whether determined by them or by a Reporter appointed by them, or to a Local Review Body:-

    (a) In the case of an appeal to Scottish Ministers section 48(1) of the 1997 Act provides that Scottish Ministers "*may deal with the application as if it had been made to [them] in the*

first instance" – "may" in the context being directory rather than imparting a discretion.[1] The original jurisdiction conferred on Scottish Ministers means that their decision is not even necessarily tainted by any invalidity in the decision appealed from, see *Stringer v Minister of Housing and Local Government* [1970] 1 W.L.R. 1281 - a case on similar provisions in England and Wales which predate the current Town and Country Planning Act 1990 (Annex 2).

(b) In the case of an appeal to a Local Review Body, the exercise they should undertake was succinctly described by Lord Menzies in *Sally Carroll v Scottish Borders Council* [2015] CSIH 73 at paragraph 55(6) (Annex 3) (emphasis added):-

> *"… What is required is that the LRB should apply its collective mind afresh to the materials which were before the appointed person, together with any further materials or information properly before it. It is not merely considering whether the appointed person's decision was reasonable in Wednesbury terms,* ***but rather it is looking at the materials afresh. …****"*

15. Importantly this is all under what can be described as the administrative provisions of the statutory planning framework within Scotland. There is no judicial process involved. As noted above, there is no complaint that third parties are not properly involved in this stage of the procedure – whether it be in terms of a first decision or one on appeal.

16. The distinction between the administrative function and judicial process is well illustrated by the decision of the United Kingdom House of Lords in *R (Alconbury Developments Ltd & others) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 (Annex 4). Whilst a case deriving from England, the statutory framework in Scotland (as relevant) remains broadly similar to that under discussion in the case, and indeed the Scottish Lord Advocate intervened in the case in respect of a Scottish challenge raising a similar point to that under consideration (see e.g., paragraph [3]).

17. *Alconbury* concerned the right to a fair trial and to a determination by an independent and impartial tribunal under the Human Rights Act 1998 in the context, inter alia, of the planning system in England and Wales and had regard to the jurisprudence of the European Court of Human Rights and, in particular, Article 6(1) of the European Convention of Human Rights. Whilst the context is different to that under consideration by the Committee, it is related to the requirement of fairness and access to justice in terms of review of an administrative decision. Further,

    - Whilst the House of Lords was primarily concerned with the ambit of the right of review in the Courts (which is of relevance to the issue identified at paragraph 5(c) above), its decision contains an analysis of the planning framework, and makes it clear

[1] Whilst section 47A provides a procedural limitation on what material an applicant may raise on appeal, s.47A(2) expressly reserves the requirement to have regard to the provisions of the development plan and any other material consideration (and that means at the time of the decision on appeal).

that the applicant's right of appeal falls within the administrative framework and is not part of judicial control.

- The Court was strongly of the view that decisions concerning policy, such as those which are taken on an applicant's appeal under provisions akin to those referred to at paragraph 10 above, should be taken by ministers accountable (as relevant here) to the Scottish Parliament and not by a court, which would be contrary to the democratic principle.

18. Importantly, *Alconbury* confirmed, if not determined, that applicants' right of appeal to the Secretary of State in England (akin to those under s.47 of the 1997 Act in Scotland) fell within the administrative framework, and was not itself part of judicial process or procedure. Hence it need not be determined by an independent and impartial tribunal. It follows that, whoever reconsiders the merits of an application and determines an applicant's appeal in Scotland under the provisions referred to in paragraph 10 above, is not and does not purport to be a body which falls within Article 9(2).

19. Lord Slynn, giving the first Opinion, identified that the European Court of Human Rights has recognised that there is often a two stage process – first an administrative decision, that is then, secondly, subject to review by a court, see paragraph [29]. The Communication here raises issues which relate to the first stage, not the second.

20. The same distinction was referred to by other judges, e.g:-

    (a) Lord Hoffmann at paragraph [74-6]. He endorsed the view that the function being exercised on a planning appeal is fundamentally administrative.
    (b) Lord Clyde at paragraphs [139-141].
    (c) Lord Hutton at paragraph [175].

21. Further, the Court was strongly of the view that these stages should not be confused. Decisions concerning policy, such as those which are taken on an applicant's appeal, should be taken by ministers accountable to (as relevant here) the Scottish Parliament and not by a court, which would be contrary to the democratic principle. This was expressly most strongly by Lord Nolan at paragraph [61], who stated that "*to substitute for the Secretary of State an independent and impartial body with no central electoral accountability would not only be a recipe for chaos: it would be profoundly undemocratic*". In the same vein, the Court emphasised the distinction between the first and second stages identified when identifying the limits as to what was required for the purpose of the second stage:-

    (a) At paragraph [31] of Lord Slynn's Opinion he noted the Commission's view that "*An interpretation of article 6(1) under which it was held to provide a right to a full appeal on the merits of every administrative decision affecting private rights would therefore lead to a result which was inconsistent with the existing, and long-standing, legal position in most contracting states*".
    (b) At paragraph [49] Lord Slynn noted that *"… the question as the European Court has shown, is whether there is a sufficient judicial control to ensure a determination by an*

independent and impartial tribunal subsequently. The judgements to which I have referred do not require that this should constitute a rehearing on an application by an appeal on the merits. … What is required … is that there should be a sufficient review of the legality of the decisions and of the procedures followed".

22. Planning decisions, including those affecting the environment, involve the application of policy which is the responsibility of democratically elected governments accountable to Parliaments. Whilst it is important that they are subject to review by the Courts, it is also important not to confuse the two stages involved – first the taking of the administrative decision which is primarily a matter of administrative process and is undertaken by emanations of the state, whether planning authorities or Scottish Ministers, and then its possible review by the Courts.

23. The administrative decision-making process is primarily a matter for the State to determine. That an applicant for planning permission has a right to appeal the refusal of its application by a local planning authority (whether to Scottish Ministers or a Local Review Body) is part of such administrative decision-making process and is not to be confused, as the Communication does, with the access to justice and control by the Courts. The Convention provides for effective public participation in relevant decisions, including on such appeals, by Article 6 not Article 9.

24. The Communication asserts at paragraph 3 that "applicants for planning permission enjoy statutory appeal rights which enable them to have the full merits of planning decisions reviewed …". That language lacks sufficient precision. As noted above, the process of appeal does not involve a review of planning decisions but a retaking of them afresh. The appeal decision maker does not start out with the first decision and determine whether it is correct but reconsiders the whole circumstances in the light of any fresh considerations and arrives at a wholly new decision. The first decision is substituted by the second. (The same imprecise language persists in the Communication, e.g., at paragraph 13 and the suggestion that "This right of appeal is a full merits review".) This inaccuracy is reinforced by the immediate reference in paragraph 3 to challenging planning decisions.

25. It is important to note in terms of the second part of two stage process alluded to above that there is no material difference as to the grounds upon which both applicants and third parties can *challenge* planning decisions before a court of law, no other independent/impartial tribunal being provided for in Scotland. Whilst there are standing requirements that third party challengers have to meet, the reality is that if the challenge concerns protection of the environment, that is no barrier. The substantive approach of the Court will be the same.

26. In summary on this point, the Communication proceeds on a false basis that rights of appeal either to Scottish Ministers or to a Local Review Body as provided for in Scotland, whether by an applicant or as contended for by the Communicants third parties, engage Article 9. Both on an analysis of the Convention and of the Scottish planning regime, they do not.

The Scottish Parliament's (anxious) consideration of third party rights of appeal as part of the framework under the 1997 Act

27. Decisions as to the content and framework of the administrative decision-making process, including the introduction of a third party right of appeal as a part of this, are primarily a matter for the State to determine. The Scottish Parliament has twice this century given anxious consideration to the concept of third party appeals but has determined against providing it for good reason.

28. In 2003, as part of a Scottish Government White Paper on Public Involvement in Planning, a commitment was given to consult on the rights of appeal in planning. In 2004 such a consultation, specifically on third party rights of appeal the subject of this Communication, duly took place. Reference is made to the Consultation paper (Annex 5) which fully sets out the arguments for and against third party rights of appeal and asks for responses.

29. Consequent upon that process the Scottish Government decided not to introduce provisions for third party rights of appeal when it proposed the Planning etc. (Scotland) Bill in 2005. However, the issue of third party rights of appeal arose at all stages in the progress of the Bill and the issue was hotly debated. Reference is made to:-

    (a) Communities Committee Stage 1 Report published 10th May 2006 (Annex 6), which dealt with third party rights of appeal in the following paragraphs:

        26. The Committee recognises the strength of feeling amongst certain groups and organisations representing the public that the current planning system has appeared unfairly balanced in favour of applicants and lacking in opportunity for effective community participation. It acknowledges that a limited third party right of appeal is viewed by many of those groups and organisations as a potential method of redressing the balance. A minority of the Committee supports the call for a third party right of appeal.

        27. A majority of the Committee agrees with the view expressed by the Deputy Minister that the package of measures proposed in the Bill will more effectively address the frustrations felt by many of those who have considered the operation of the current planning system to be inequitable.

    (b) Stage 1 Chamber Proceedings Official Report 17 May 2006 (Annex 7), in which the then Planning Minister, Johann Lamont, is recorded as stating during debate on the Bill, inter alia, that:

        "The issues have been wrestled with by us, the committee, stakeholders and others. Ultimately, our judgment is that a third-party right of appeal—that is the issue that Mike Rumbles highlighted—would slow down and extend the system without necessarily improving it. I want a faster system and I want to get rid of the institutional lag that is built into it."

(c) Further reference is made to the Stage 2 Official Reports of business on 13th and 27th September 2006, which contain extensive debates on the issue (Annexes 8 and 9).

30. Ultimately, no third party right of appeal was included in the Planning etc. (Scotland) Act 2006, but what that Act did do was to introduce a hierarchy of developments for purposes of development management. Applications for proposed developments were to be identified as falling within one of the designated categories (national, major, local) to be subject to different procedures for submission, processing and determining. The purpose was to allow for a more proportionate approach, focusing engagement and scrutiny on more complex development management issues, which would include those decisions likely to be subject to the Convention. Moreover, pre-application consultation was introduced to strengthen public participation in the planning system, allowing interested parties to express their views on a development proposal before an application is submitted to the planning authority. These provisions strengthened the ability of third parties to participate in decision-making.

31. In September 2015 the Scottish Ministers appointed a group to undertake an independent review of the Scottish planning system, which produced a report in May 2016 having first consulted widely (Annex 10). It considered the matter of third party appeals at paragraphs 8.8-8.13 and Recommendation 46. Its conclusion in Recommendation 46 was that:

> *"The evidence shows that a third party right of appeal would add time, complexity and conflict to the process, and have the unintended consequence of centralising decisions, undermining confidence and deterring investment. We believe that using time and resources to focus on improved early engagement would provide much greater benefits."*

32. In 2018 a further Planning Bill was introduced, again without a provision for third party rights of appeal. Again, the issue of third party rights of appeal was nevertheless debated at some length but the outcome was that no such rights were included. Provision was though made further to strengthen pre-application consultation:-

(a) There was consideration of both as to the introduction of third party rights of appeal but also removal of the applicant's right of appeal – see for example the Planning Bill, stage 1 briefing on equal rights of appeal (Annex 11).
(b) That there was considerable debate on the issue appears from the Stage 1 Committee Report (Annex 12) and the Official Report of meetings of Parliament on 29th May 2018 (Stage 1), and on 7th November 2018 (Stage 2) and on 19th June 2019 (Stage 3), (Annex 13-15).
(c) In the Stage 3 debate the Planning Minister stated in opposing amendments to introduce a third party right of appeal that (at page 141):-

> *"I am convinced that introducing new rights of appeal or restricting the current right of appeal would be counterproductive. It would create conflict and undermine efforts that improve trust in the planning system. It would add uncertainty, undermine local democracy and be divisive, and there would be no impetus to engage earlier.*

Crucially, restricting current appeals could deny our communities much of the investment that they need. Many of our much-needed homes and the places where we work and spend our leisure time exist only because they have been approved on appeal."

And

"An additional right of appeal may, on the face of it, appear to promise a lot to communities and individuals, but I am concerned that those claims are misguided. The reality is that an additional right of appeal will simply add time, cost, procedure and conflict to an already stretched planning service, and there are better options for people. At the end of the day, all that an equal right of appeal would mean is that reporters—who have been cited today as all bad, it seems—would take the decisions, or I would. I would be much happier for people to become involved at the beginning and for there to be no conflict at the end. I therefore urge members to reject all the amendments."

33. In summary, the issue of third party rights of appeal (and variations on the same) has been directly considered at length by the Scottish Parliament on two occasions – one very recently, and, notwithstanding impassioned debate, Parliament determined not to adopt such provisions for cogent reasons. That was a decision of and for Parliament, requiring it to weigh in the balance many competing considerations. But that decision does not impinge upon the ambit of the Access to Justice provisions of the Convention.

34. One outcome of such debate has been the increasing provision made for involvement of individuals in both plan making and decision making processes in Scotland:-

    (a) In terms of involvement in development management decisions, the current framework is set out in Circular 3/2022 Development Management Procedures (Annex 16). Of note are the provision for pre-application consultation with communities (in section 2) and the opportunity for persons to be involved in planning decisions (in section 4).
    (b) In terms of involvement on appeals, the framework is set out in Planning Circular 4/2013 Planning appeals (Annex 17).
    (c) In terms of development planning, the framework is set out in Local Development Planning Guidance May 2023 (see in particular paragraphs 28-38) (Annex 18), whilst there is also guidance on Local Place Plans, Circular 1/2022 (Annex 19).

35. Third party rights of appeal should not be considered in isolation but as part of the broader system of plan making and decision making. In that context, the absence of a third party right of appeal is not unfair for the reasons set out above and extensively discussed in the debates referred to.

36. Moreover, it is necessary to understand the position of applicants at the administrative stage of the process. They will be advancing proposals for development that they have prepared to an elected body, the planning authority, who will have their own policies as well as being required to consider national policies. These policies reflect the need to accord the protection

of the environment significant weight, see for example the recently introduced NPF4 (Annex 20). In February 2023 its policies not only become part of the development plan for the purposes of decision making but they give considerable emphasis to environmental matters, see for example the identification of a climate and nature crisis at Policy 1 and Biodiversity at Policy 3.

Previous decisions of the ACCC and their proper application.

37. The Committee has already made findings consistent with the above analysis in respect of the English planning system, see Committee's Findings and recommendations with regard to communications ACCC/C/2010/45 and ACCC/C/2011/60 at paragraphs (Annex 21).

    (a) In both cases third party rights of appeal were directly in issue. See Communication ACCC/C/2010/45 at paragraphs 14 and 15 and Communication ACCC/C/2011/60 under the heading "Third Party Objector's Rights of Appeal". (Annexes 22 and 23)
    (b) In both cases the Responses dealt directly with the point.

38. In the ACCC's Findings and recommendations the issue of third party rights of appeal was identified at paragraphs 57-59 and at 64-65. Its findings on these issues are as follows (emphasis added):-

> ***Review procedures — article 9, paragraph 2, in conjunction with article 6, paragraph 1 (b)***
> *83. As mentioned above, the outcome of an 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. This entails that members of the public concerned, as defined in article 9, paragraph 2, of the Convention, "shall have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6."*
>
> *84.* ***The Committee notes that the right of an applicant to appeal to the Secretary of State for Communities and Local Government or to the Secretary of State's Planning Inspectors are not procedures under article 9, paragraph 2, of the Convention. They are instead procedures by way of which an applicant whose planning decision has been refused may appeal that decision before an executive body, not constituting a court of law or independent and impartial body established by law.*** *This is so even though in the course of such an appeal members of the public concerned may be heard.* ***If the procedure results in a retaking of the decision at stake, then, depending on the proposed activity under consideration, it engages article 6 of the Convention. Similarly, the latter would be the case if the Secretary of State calls in an application for its own determination.***
>
> *85. The Committee notes that the communicants in communication ACCC/C/2010/45 did not pursue judicial review of the screening decision at stake in the communication for reasons of the expenses probably involved in such a review procedure, as well as the likelihood that only the procedural legality of the screening decision could be raised in such a review.*

86. The Committee has addressed the issue of the costs involved in procedures for judicial review with respect to the Party concerned in ACCC/C/2008/33, and has found the Party concerned not to comply with article 9, paragraph 4, of the Convention. Thus, the Committee maintains its findings on that communication regarding costs (ECE/MP.PP/C.1/2010/6/Add.3, para. 136). As to the possibility to obtain a review of substantive legality in a procedure for judicial review, which was also addressed in findings in ACCC/C/2008/33, no new facts have been brought before the Committee. ***Therefore, the Committee, while maintaining its concerns regarding substantive review expressed in paragraph 127 of communication ACCC/C/2008/33, does not conclude that the Party concerned fails to comply with article 9, paragraph 2 in this respect.***

39. This reflects and supports the Party's analysis set out above. In particular the analysis at paragraph 84 is entirely accurate.

40. The Communication refers refer to and rely upon the findings in ACCC/C/2013/90 (Annex 24) at paragraph 145, particularly that underlined below. But the Communication does not set out the decision in full, in particular that part emphasised in bold.

Article 9(4) – third party appeal rights

143. Under the Party concerned's legal framework, applicants for planning permission for an activity subject to article 6 of the Convention can appeal the planning decision, and any conditions thereof, to the Planning Appeals Commission (PAC). PAC undertakes a full merits review. In contrast, other members of the public seeking to challenge the same decision must apply for permission to the High Court to bring judicial review. While, if the planning applicant brings an appeal to PAC, other members of the public can participate in that proceeding, they cannot bring a case to PAC themselves.

144. ***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".***

*145****. The Committee does not examine in the present case whether the right of a developer in Northern Ireland to appeal a planning decision, or any conditions thereof, to the Planning Appeal Commission is a review procedure under article 9(2) of the Convention.*** *However, it is clear that for a planning decision in Northern Ireland subject to article 6 of the Convention, the developer is entitled to a full merits review of that decision by a specialist planning body, whereas other members of the public seeking to exercise their rights under article 9(2) are not. <u>This situation is clearly not fair within the meaning of article 9(4) of the Convention</u>.*

146. ***The Committee finds that, 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.

147. Noting that the standard of review under article 9(2) in the Party concerned is also before the Committee at a wider level in communication ACCC/C/2017/156 (United Kingdom), including the right of developers, but not other members of the public, to a full merits review, the Committee does not make a recommendation on this issue in the present case.

41. The findings in ACCC/C/2013/90 as to fairness does not stand up to internal analysis – there is an inconsistency in particular between paragraphs 145 and 146 without any reasoning to justify it. Further, it is inconsistent with the Committee's earlier findings in ACCC/C/2010/45 and ACCC/C/2011/60 referred to above. Article 9(4) clearly only applies to review procedures that concern access to justice. For the reasons set out above and as found by the Committee an appeal by a third party, akin to an appeal by an applicant, would not fall within Article 9, and so the absence of such an appeal cannot render Party in breach of Article 9(4) as that Article is not engaged.

42. Article 9(4) does not provide for a general free-standing right but is concerned with the procedures referred to in paragraphs 1- 3 of Article 9.

43. Moreover, the Committee had no regard in its determination as to fairness to the very many factors considered, for example, by the Scottish Parliament in determining whether to introduce a third party right of appeal in determining whether or not it was fair and gave no consideration to the different position of Applicants and objectors and the relationship of members of the public to the planning authority.

44. Further, the Committee had no regard to the other provisions of Article 9(4) that might apply to such a right of appeal as is sought by the Communicants, e.g. that it not be prohibitively expensive. The requirements in Article 9(4) are not appropriate for application to the administrative stage of the decision-making process but are only properly applicable to the judicial stage.

45. It is accepted the Party's Response to Communication ACCC/C/2013/90 concentrated, as relevant, mainly on the issue of whether a full merits review was required to satisfy Article 9(2) and (3) and not whether an appeal akin to an applicant's right of appeal fell in any event within Article 9. This may have contributed to the Committee's approach. In any event, for the reasons set out above Article 9 is not engaged.

46. As to the ambit of statutory review and Judicial Review, that will be briefly dealt with below, but it is a conceptually separate point as, as stated above and subject to standing issues, there is no distinction between the rights of applicants or third parties in terms of the Scottish provisions for Access to Justice in terms of statutory review or Judicial Review.

<u>Ambit of review under statutory review or judicial review procedures and prohibitive expense.</u>

47. As to the whether the ambit of statutory review or judicial review is sufficient for the purposes of Article 9, this issue is squarely raised by Communication ACCC/C/2017/156 (raised by the RSPB and Friends of the Earth Scotland as in this Communication as well as Friends of the Earth

(England, Wales and NI) and Leigh Day). Extensive submissions have been made by both the communicants and the Party. In so far as it is necessary to do so, the Party relies upon its submissions in that Communication.

48. In the circumstances it would not be appropriate for the Committee to make any findings or recommendations on that issue in this case.

49. In any event, Article 9 does not require a full merits review. For the reasons set out in *Alconbury* (see above) it would be inconsistent with the democratic principle for a court or other independent body to determine issues of policy.. This is recognised in ACCC/C/2013/90 at paragraph 121:-

> *121. To be clear, the Convention does not require the court to undertake a completely fresh analysis of all matters arising in the case and to substitute its decision for the decision taken by the competent authority. Nevertheless, the court must undertake its own assessment of all the evidence before it to determine whether the applicable legal requirements were met. The Committee considers that this requires the court to perform a review function over findings of fact and the weight to be given to evidence where those may have a direct impact on the determination as to whether the applicable legal test (for example, likely significant effects) has been met.*

50. As to prohibitive expense, the issue is also squarely before the Committee and subject of a series of decisions, i.e., Decisions VI/8k and, most recently, VII/8s. A plan of action has been submitted in response to Decision VII/8s with an implementation timescale extending until 1 October 2024. A progress report by the Party is due by 1st October 2023.

51. In the circumstances it would also not be appropriate for the Committee to make any findings or recommendations on that issue in this case.

Conclusion

52. The Convention is there to underpin and support representative democracy, not to control it. Detailed deliberation under the democratic process has taken place on whether to include third party rights of appeal and the decision not to is underpinned by sound policy reasons which have been discussed at length in the Scottish Parliament. This is evidence of a healthy and well-functioning democratic process which places the participation of the public at the heart of policymaking and law-making, notwithstanding that the decision the Scottish Parliament took on this issue is not the decision the communications would have preferred.

53. There is no non-compliance as asserted in the Communication and it should be dismissed.

James Findlay K.C.

21 July 2023