I. Information on correspondent submitting the communication

The Kent Environment and Community Network ('KECN')
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i)Other members of KECN.
David Plumstead
Dr. Wendy Le-Las
Emily Shirley
ii)Contact Person
Name: Dr Geoff Meaden
Title/Position: Director
Number of the Communication: ACCC/C/2010/45

II. Party concerned

The United Kingdom

III. Facts of the communication

1) This communication is being submitted to include the omitted information in the first and second communications made by KECN to the Aarhus Convention Compliance Committee and originally submitted in January and March 2010 [pages 1-16].

2) The facts of this communication are based on planning application YO9/0627/SH concerning the proposal to construct a new Sainsbury's superstore in Hythe, Kent, UK submitted to Shepway District Council on 24th June 2009 [pages 17-22]. However, this complaint does not only apply to YO9/0627/SH. It applies necessarily to many similar applications where third parties feel aggrieved about the environmental impacts of a planning proposal but have such limited third party rights of appeal.

3) The proposal concerns the building of a Sainsbury's superstore with parking for circa 270 cars on a site of 1.83 hectares. The Development Control Committee resolved to grant planning permission on December 15 2009. Planning permission was formally granted on 12th February 2010 [pages 23-34].

4) The Shepway Environment and Community Network (SECN) is a Shepway district-based environmental organisation that was set up locally by one of the KECN directors, Mr David Plumstead, partly to campaign against the Sainsbury superstore. KECN agreed to assist SECN in its efforts to campaign against the proposal. KECN is a company limited by guarantee set up in 2008 to help local environmental and community groups in Kent to achieve environmental justice.

5) Despite the best efforts of SECN (and others) to persuade the Development Control Committee to refuse planning permission through written representations, holding public meetings in Hythe, by speaking at the Development Control Committee and by producing a well-researched booklet entitled "Death of a High Street - Decay of a Town" which was distributed to all councillors [pages 35-50], the Development Control Committee resolved to grant planning permission on December 15th 2009 despite a strong objection from English Heritage [page 39].

6) It was after the resolution to grant planning permission that KECN decided to complain to the Aarhus Compliance Committee. KECN knew that the best chance it had of getting a proper review of the merits of the planning application was by way of a public inquiry. KECN believes that it is only in a public inquiry that all the finer environmental points, and the full substance of a case can be properly argued including, importantly, the chance for third parties (those who would be adversely impacted by the proposal) to give oral evidence. Judicial review does not permit the substance of a case to be argued and is prohibitively expensive for all but the richest.

7) It was obvious to KECN members from past experience that it would be almost impossible to get the planning application called-in for a public inquiry. It was hoped that by complaining to the Aarhus Convention Compliance Committee that the Government would be persuaded to call-in the proposal so that a public inquiry could be held. It was also hoped that the complaint might persuade the UK Government to change its restrictive practice on call-ins based on the

Caborn Statement generally and introduce a better system for third party appeals in environmental planning cases.

8) Dr Wendy Le-Las, a director of KECN and a planning consultant drafted the call-in letter to the Secretary of State on behalf of SECN [pages 51-53]. The two key issues raised by Dr Le-Las were, (a) the potential harm to the viability and vitality of the historic town of Hythe and (b) the harm that would be caused by the proposal to the adjacent conservation area and settings of the nearby listed buildings. A Holding Direction was issued by the Government to allow it to consider whether to call-in the proposal. Not surprisingly, the Government did not call-in the proposal because presumably it considered the issues raised were of 'not more than local importance'.

9) At the same time, KECN director Emily Shirley asked for a Screening Opinion from the Secretary of State to determine whether the proposal should be subjected to an Environmental Impact Assessment (EIA) [pages 54-55]. The concerns she raised centred around traffic, air pollution and the overall carbon footprint of the proposal. A negative Screening Opinion had already been produced by the developers and adopted by the Council but despite this, there exists a procedure whereby anyone can ask the Secretary of State to undertake a Screening Opinion even if one already exists. Most people have no idea this procedure exists because there is no information before the public to say that it does. The Government found that the proposal did not require an EIA. A complaint about the failure to inform the public about the EIA procedure has been made to the European Commission by KECN. A response was received and a further submission was made by KECN [pages 56-60].

10) SECN then contemplated judicial review of the planning decision after receiving pro bono advice from counsel. A letter Before Action was sent to Shepway District Council on 13th February 2010[pages 61-62]. The aim of the letter was to force the Council to bring the matter back to the Development Control Committee before the grant of planning permission because of the failure to consider new guidance issued by the government on the planning approach to be given to superstores (PPS4). SECN did not receive a response

to that letter and unbeknown to SECN, planning permission had already been granted on a day before the Letter Before Action was sent. Subsequently, when SECN did find out about the grant of planning permission, it decided to send a further similarly worded Letter Before Action to the Council in the hope that the Council would nonetheless review its decision. The Council did not agree to do so [pages 63-66] and a letter was also received from the developers [pages 67].

11) The only 'option' left to SECN was judicial review. Although there were legal procedural grounds (failing to consider PPS4 and a failure to properly discharge the conservation duty), the high risks of losing and having to pay the other side's costs and the costs of the developers meant that there was really no option at all. Facing a bill for costs which could easily amount to over a hundred thousand pounds,[1] was considered to be out of the question. Many of the SECN members are retired and on modest pensions. There was also insufficient time to raise the thousands of pounds necessary to cover the potential costs of the judicial review claim from the community.

12) Applying for a Protective Costs Order (PCO) was also considered. PCOs can in theory be applied for at anytime during legal proceedings. A PCO can, in some very limited circumstances protect the loser from paying all of the other side's costs. They are rarely granted. SECN was advised against this course of action by counsel. The restrictive and difficult rules on granting PCOs are found in the Court of Appeal case, *R(Corner House Research) v Secretary for Trade and Industry* [2005] 1 WLR 2600 [pages 100-181 at paragraph 74].

13) Complaining to the LGO was not pursued for four main reasons. Firstly, because legal remedies are available but usually not undertaken because of the risk of paying the other side's costs such as in this case. The LGO will

[1] KECN director and secretary Emily Shirley issued judicial review proceedings against the Secretary of State in 2001 with regard to a planning application (Emily Shirley v Secretary of State, Transport, Local Government and the Regions (1),Canterbury City Council (2), Canterbury College (unreported). She was threatened with costs of £136,000 by one of the parties after a hearing lasting one day. Fortunately, she continued with the claim and won but how many individuals or groups would do so? Evidence shows that most would abandon the claim at this stage. See recent report published in 2010 by the Environmental Law Foundation submitted as part of this communication [pages 68-99] .

normally refuse jurisdiction because legal remedies are available [pages 182-183]. Secondly, complaining to the LGO is usually not an effective remedy because the complainant has to exhaust the local authority complaints procedure first before the LGO will look at the case and then 80% of the LGO cases take over 6 months for full investigation and it is likely that the implementation of the planning permission would have started by then. Thirdly, the remit of the LGO is correcting maladministration in local authorities and other bodies, rather than the substantive aspects of their decisions. Thus even if the LGO recommends that a decision is retaken, the environment wins or loses by default: the LGO is satisfied if the correct procedures have been observed. Finally and most importantly, the LGO has no power to overturn or override a decision and cannot stop the development taking place. To sum up, the function of the LDO is to improve local authority procedures not giving access to environmental justice. Thus complaining to the LGO about planning decisions is a waste of time. Emily Shirley and Geoff Meaden have made complaints to the LGO over the years regarding other planning decisions. Considerable time and effort had been spent in so doing but none of these complaints were fully investigated for the reasons described above.

14) The first breach of the Aarhus Convention is of Article 9 (2) (b) because of the UK's failure to provide a third party right of appeal to projects listed in Annex 1 and other proposals which may have a significant effect on the environment. Article 9 (2) (b) requires that "members of the public having a sufficient interest must 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 and, where so provided under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention". Under Article 6 (1) (b), it says: … "in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions".

15) The second breach is of Article 9 (3) which is a catch all for those environmental decisions not falling within Article 6 and requires review procedures for members of the public to challenge the 'acts and omissions of private persons and public authorities which contravene provisions of its national law relating to the environment'. The arguments advanced in relation to Article 9 (2) (b) and (4) will necessarily apply equally here.

16) The Secretary of State has a wide power which includes the power to call-in planning applications under s.77 of the Town and Country Planning Act 1990 [pages 184-186]. The Caborn Statement 1999 is the policy the UK applies to call-ins [pages 187-188].It is made clear by this policy that the Secretary of State will be very selective in deciding when to call-in applications and indeed this is the case with so few ever being called-in (under 50 a year). As a result of this statement, most third party attempts to get a planning application called-in fail such as in this case. It is only by way of a public inquiry that the full substance of the case is heard. This allows all the finer environmental points to be properly aired and the process, although admittedly expensive for the government/taxpayers, is not prohibitively expensive for the third parties because there are not the same risks of paying the other side' costs. Therefore, the UK has failed to provide a review procedure of the legal substance of the matter for the majority of third parties and is in breach of Articles 9 (2) (b) and (3) of the Convention.

17) Judicial review and complaining to the Local Government Ombudsman are not adequate alternatives. Judicial review cannot review the legal substance of the matter. The LGO does look at the substance of the matter but will rarely provide a suitable review in environmental planning matters or provide an adequate remedy as explained above at paragraph 13.

18) The third breach is of Article 9 (4). This Article requires that review procedures established in compliance with the Convention must provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Judicial review is

usually the only way a decision can be challenged by any party. The purpose of judicial review is to challenge the procedural legality of any act, decision or omission made by a public body. However the reason why parties take cases to judicial review is *not* that they are concerned about the legality of the decision, but that it is a necessary first stage in achieving a "favourable result" in substantive terms: the decision could be quashed and the decision retaken. There are obvious parallels with the LGO: whereas the latter is concerned with maladministration, the focus of the courts in judicial review proceedings is the legality of the decision not environmental justice. The implementation of the Aarhus Convention would relieve the courts of inappropriate cases, thus enabling them to focus on genuine miscarriages of justice.

19) As well as the inadequacy of the judicial review procedure in itself, the risk of paying the other side's costs means that one could face a bill for over £100,000 or much more. This risk obviously debars many meritorious cases from this necessary first stage in achieving environmental justice under the current system. I refer the committee to a report on Cost Barriers to Justice, published by the Environmental Law Foundation in January 2010 [pages 68-99].

20) The fourth breach is of Article 9 (5). This article requires that information is provided to the public on access to administrative and legal review procedures. There is no information before the public regarding the potential administrative review procedure by the Secretary of State into whether a particular proposal requires an EIA or not. Only planning lawyers, planners and a specialist organisation like KECN would be aware of this administrative review procedure, the ordinary public are not. This is a serious omission because in cases where it is argued by third parties that a proposal does require an EIA, there is no information made available to them by the Secretary of State or local authorities to explain to the public that they can seek a second opinion (or first) from the Secretary of State. This lack of information is a barrier to achieving an administrative review.

21) With regard to the Sainsbury's case, third parties as is often the case, were at a distinct disadvantage from the start. The limited time scale afforded to the

community to respond to the planning application against a long established pre-application relationship of over a year between the developers and planning officers at Shepway Council, illustrates why. The public had no idea about the proposal until it was submitted and had no chance to comment, participate, prepare its case, etc, until the application was officially submitted. This essentially means that the planning officers involved in the case who recommended that permission be granted to the elected members of the Development Control Committee were more likely to be predisposed towards the developers for the simple reason that a prior relationship had been built up with the developers whereas there was no possibility for such a relationship with third parties.

IV. Nature of alleged non-compliance

This communication concerns the general failure of the UK to properly implement Articles 9 (2) (b), 9 (3), 9 (4) and 9 (5) of the Convention. To illustrate this failure this communication involves a specific example of the Sainsbury's superstore planning application that KECN was involved with.

V. Provisions of the Convention relevant for the communication

The provisions that are relevant for the communication are set out below:

9 (2) Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest
or, alternatively,
(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,
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 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.
What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.
The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of

exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.
3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.
4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.
5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

VI. Use of domestic remedies or other international procedures

As explained above, a number of possible remedies were pursued and/or contemplated but none of these provided access to justice in light of Article 9 of the Convention.

VII. Confidentiality

Not applicable.

VIII. Supporting documentation

INDEX OF SUBMITTED DOCUMENTS

14. *R(Corner House Research) v Secretary for Trade and Industry* [2005] 1 WLR 2600 100-181

15. Information from the LGO website 182-183

16. Extract from The Town and Country Planning Act 1990 184-186

17. The Caborn Statement 1999 187-188

IX. Summary
Attached.

X. Signature
Dr Geoff Meaden…….

XI. Address
Please send the communication by email AND by registered post to the following address:

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Clearly indicate: “Communication to the Aarhus Convention’s Compliance Committee”