In the matter of a communication to the Aarhus Convention Compliance Committee

(1) HS2 ACTION ALLIANCE LIMITED

(2) LONDON BOROUGH OF HILLINGDON

(3) CHARLOTTE JONES

Communicants

and

UNITED KINGDOM

Party Concerned

Appendix 1 - Detailed Submissions

I. Introduction and Summary

1. The first communicant, HS2 Action Alliance Limited ("**HS2AA**"), is a not-for-profit NGO working with over 100 affiliated action groups in opposition to the proposal by the United Kingdom Government for a new 'Y' shaped high speed railway from London to the West Midlands, Manchester and Leeds known as "High Speed 2" or "HS2".

2. The second communicant, the London Borough of Hillingdon ("**LBH**"), is an elected local authority in north-west London. Although it has regulatory powers, the capacity in which it acts in the present communication (and the capacity in which it acted in the domestic litigation referred to below) is to represent the interests of its residents who are adversely affected by HS2.[1]

3. The third communicant, Charlotte Jones, lives with her husband and three children in Ruislip, a suburban area within the London Borough of Hillingdon, where she has resided for the last 14 years. Her home is directly on the proposed route of Phase 1 of HS2. In 2011, she founded a residents' group known as Ruislip Against HS2, which has since expanded to become

[1] Its role is therefore analogous to the successful communicant in ACCC/C/2010/53 (see para. 1 of the Committee's findings in that case).

Hillingdon Against HS2.

4. This communication relates to the decisions issued by the Secretary of State for Transport ("**SST**") on 10 January 2012 in the Command Paper *High Speed Rail: Investing In Britain's Future - Decisions and Next Steps* (Cm 8247) ("**the DNS**") which sets out the UK Government's strategy for the promotion, construction and operation of HS2 and its detailed proposals for Phase 1 of the route from London to the West Midlands. The DNS is included at **Appendix 2**.

5. The communicants submit that the DNS is a *"plan or programme relating to the environment"* within the meaning of Article 7 of the Aarhus Convention, thereby requiring public participation in accordance with Article 6, paragraphs (3), (4) and (8). That public participation was required by Article 6, paragraphs (3) and (4), to be *"effective"* and by Article 7 to be *"within a transparent and fair framework, having provided the necessary information to the public"*. The public consultation on the DNS did not meet these requirements, for the reasons outlined below.

II. Background

6. HS2 is a major infrastructure project which is described by the Government as *"redrawing the map of the UK"*[2] and in the DNS as *"the largest transport infrastructure investment in the UK for a generation, and, with the exception of HS1, is the first major new railway line since the Victorian era"*.[3] If it proceeds, HS2 would have a major and adverse impact on the environment with significant adverse effects on ecology, biodiversity, habitat loss and water supplies. At least ten sites of special scientific interest, more than fifty ancient woodlands, four Wildlife Trust reserves, and numerous local wildlife sites lie in the route proposed by the DNS. Over 170,000 households lie within a kilometre of it.

7. An agreed summary and chronology of the key elements in the development of HS2 is set out in the "Statement of Facts and Issues" ("**SFI**") agreed between HS2AA, LBH and the SST prior to the Supreme Court hearing of the legal challenge to the DNS (discussed further below). This is included at

[2] Section 2.4 of the July 2013 Consultation Paper on Phase 2 of the route.
[3] DNS, p.11(1).

Appendix 3. It divides the process for convenience into a series of stages as follows:

(1) Stage 1: Initial development of the national strategy, culminating in the Labour Government's policy decision in March 2010 to proceed with high speed rail and to subject the strategy and details to formal public consultation (SFI paras. 5-17).

(2) Stage 2: The adoption by the new Coalition Government of the previous Government's March 2010 policy decision and commitment to formal public consultation (SFI paras. 18-24).

(3) Stage 3: the February 2011 consultation on the overall strategy for HS2 and the detailed route for Phase 1 (SFI paras. 25-36). The consultation paper, including the accompanying Appraisal of Sustainability ("**AoS**") is at **Appendix 4.**

(4) Stage 4: the January 2012 decisions on the overall strategy for HS2 and the detailed route for Phase 1, set out in the DNS (SFI paras. 37-44).

(5) Stage 5: the consultation on and subsequent adoption of safeguarding directions, as anticipated in the DNS, to protect the route corridor adopted in the DNS from conflicting development (SFI paras. 45-48). The principle of HS2 and the route corridor were outside the scope of this consultation, having been established in the DNS.

(6) Stage 6: consultation on the details of Phase 2 of HS2. Following the DNS, the principle of Phase 2 was assumed and was outside the scope of this consultation (SFI paras. 49-53).

(7) Stage 7: the enactment by the UK Parliament of the High Speed Rail (Preparation) Act (the "**Act**"),[4] which authorises the SST to incur expenditure for a high speed railway network. Section 1(2) of the Act defines the network for these purposes in terms which are plainly influenced by the decision taken in the DNS, as is clear from para. 13 of the Explanatory Notes which stated that this clause *"authorises*

[4] Known as the High Speed Rail (Preparation) Bill prior to its enactment.

expenditure in preparation for the whole of the network which is proposed in the 2012 Command Paper." (SFI paras. 59-60).

(8) Stage 8: the legislative process before the UK Parliament by which project development consent is to be obtained for Phases 1 and 2 of HS2. This is known as the "Hybrid Bill" process and is described at SFI paras. 54-58 & 61-65. It should be noted that all members of the UK Government must also be members of either the House of Commons and House of Lords (the two chambers of the UK Parliament), and the party or parties comprising the UK Government almost always have a majority of the seats in the House of Commons.[5] As a consequence, the circumstances in which a Government in the UK is unable to obtain Parliament's consent to proposed new legislation are exceptional.

III. The status and effect of the DNS

8. In the judicial review proceedings before the domestic courts (discussed further below), the UK Government accepted that the DNS was a *"plan or programme"* for HS2.[6] That acknowledgment was plainly correct, since the DNS sets out a set of co-ordinated and timed objectives for the implementation of the Government's high speed rail strategy. Read fairly and as a whole, it is a formal statement of Government policy which goes beyond aspiration and sets out an intended course of future action for the promotion, construction and operation of HS2 which includes its future development consent process by Hybrid Bill and specific details of the project including its route, the proposed speed of the trains and the service frequency. It is was intended to guide, and has guided, the Government's further development of the HS2 project and of the proposals to be included in the Hybrid Bill for which development consent is to be sought, including the environmental impact assessment ("**EIA**") of the Hybrid Bill proposals which is already under way. The Government itself acknowledges that the DNS *"is intended to be persuasive"* in obtaining development consent for HS2

[5] This has been the case for all but 6 months of the last 35 years. Note that the House of Commons can enact legislation without the consent of the House of Lords, pursuant to the Parliament Acts of 1911 and 1949.

[6] See paragraph 147 of the Court of Appeal's judgment (at **Appendix 7**) and paragraph 24 of the Government's written submissions to the Supreme Court dated 27 September 2013 (at **Appendix 10**).

from Parliament[7] and that the majority of Members of Parliament who are members of the Government party/parties will be subject to a Government 'whip' requiring them to vote in accordance with the Government's proposal or otherwise face disadvantageous consequences within their party.[8]

9. A full description of the influence that the DNS has had and continues to have is set out in HS2AA's written submissions before the Supreme Court at paragraphs 5 and 65 (included at **Appendix 9**).

IV. The deficiencies in the public consultation

10. Despite the significance of the DNS as a plan or programme for nationally significant infrastructure with acknowledged environmental effects over a widespread area, the Government adopted it without first conducting an assessment of and public consultation on how the proposals compared in environmental terms to the reasonable alternatives, as is required even of local development plans affecting only one administrative area.[9]

11. In particular, the February 2011 consultation paper and the accompanying AoS, despite purporting to provide members of the public with full environmental information in order that they could make an informed judgment on the acceptability of the proposals,[10] did not provide information on the following matters in order that members of the public could understand the relative impacts of the HS2 proposals against the alternative options:

    (1) *The environmental effects of the whole "Y" network the principle of which was subsequently adopted in the DNS.* The only environmental information given in the AoS related to Phase 1 from London to the West Midlands. Members of the public were not given any information about the environmental impacts of Phase 2 (either in isolation or in combination with Phase 1) from the West Midlands to Leeds and Manchester, as

[7] Ibid at para. 43.
[8] See para. 61 of the SFI and paragraph 62 of the Supreme Court judgment (**Appendix 8**).
[9] The latter are required to be subject to strategic environmental assessment pursuant to the SEA Directive and the UK Environmental Assessment of Plans and Programmes 2004 which transpose the Directive. See e.g. *Save Historic Newmarket v. Forest Heath District Council* [2011] J.P.L. 1233.
[10] See e.g. paragraphs 4.11-4.13 of the February 2011 consultation paper.

well as the spur links to and from London Heathrow Airport. The exclusion of the environmental effects of Phase 2 contrasts with the reliance that the Government placed on the alleged economic benefits of the entire 'Y' network in the consultation documentation and the DNS. The result has been that the purported economic advantages of the whole network were weighed against the environmental disadvantages of Phase 1 only.

(2) *The relative environmental effects, compared to HS2, of strategic alternatives to high speed rail,* such as improvements to existing railway networks, and a lower but still high speed rail network.

(3) *The relative environmental effects, compared to HS2, of the alternative configurations for a high speed railway network.* Three alternative configurations, known as the 'inverted A', 'reverse 'E and 'S' networks considered and rejected by the Government as alternatives to the 'Y' network which forms HS2. But the DNS was adopted without members of the public being consulted about their relative environmental effects compared to those of the 'Y' network.

(4) *The relative environmental effects, compared to HS2, of alternative route corridors for the proposed 'Y' network,* such as a route between London and Birmingham alongside the existing infrastructure corridor containing the M40 motorway, which would avoid any substantial impact on the Chilterns Area of Outstanding Natural Beauty[11] through which the proposed HS2 route will cut. The AoS only provided information about alternatives within the proposed route corridor for Phase 1.

12. As a consequence of these omissions, the public consultation was not effective because members of the public were not provided with sufficient information for them to make an informed judgment as to the relative environmental and other advantages and disadvantages of HS2 compared to the alternative options.

[11] An Area of Outstanding Natural Beauty is the highest landscape designation in the UK.

V. The litigation before the domestic courts

13. HS2AA and LBH (amongst others) challenged the DNS by way of a judicial review claim commenced in April 2012. The grounds of claim included that the DNS was a *"plan or programme"* which *"set the framework for development consent"* and was *"required by administrative provisions"* within the meaning of the Strategic Environmental Assessment Directive 2001/42/EC (**"the SEA Directive"**), and that its adoption had been in breach of the obligation under Article 5 and Annex I of the SEA Directive to subject such plans or programmes, together with the reasonable alternatives to them, to environmental assessment and effective public consultation prior to their adoption. HS2AA's skeleton argument before the High Court of England and Wales is included at **Appendix 5**.

14. LBH supported HS2AA's submissions in relation to the SEA Directive. They also argued that the intended procedure by which the development consent is to be obtained from Parliament was incompatible with the EIA Directive 2011/92/EU. That argument does not bear upon the present communication.

15. The High Court (Mr Justice Ouseley) agreed with HS2AA that the DNS had failed in significant respects to subject the reasonable alternatives to the HS2 proposal to environmental assessment or public consultation. The High Court's judgment is included at **Appendix 6**. The Committee is asked to refer to paragraphs 160-172 in particular.

16. The claim was dismissed, however, because the Court held that the DNS did not *"set the framework for development consent"* nor was it *"required by administrative provisions"* within the meaning of the SEA Directive. Accordingly, there was no requirement under directly effective EU law to assess the proposals in the DNS, together with the reasonable alternatives to them, to environmental assessment and effective public consultation, prior to its adoption.

17. HS2AA and LBH (amongst others) appealed to the Court of Appeal. In a judgment dated 24 July 2013, the Court of Appeal dismissed the appeal by a 2-1 majority, interpreting the term *"set the framework for development consent"*

in a way that excluded the DNS, although they were inclined to hold that it was *"required by administrative provisions"*. The Court unanimously dismissed the SST's cross-appeal against the High Court's finding that the DNS had failed in significant respects to subject the reasonable alternatives to the HS2 proposal to environmental assessment or public consultation.

18. The Court of Appeal's judgment is included at **Appendix 7**. The Committee is asked to refer in particular to the dissenting judgment of Lord Justice Sullivan, a judge with very considerable experience of planning and environmental law, who held at paragraphs 177-178 that Article 7 of the Aarhus Convention supported a broad interpretation of the SEA Directive which would include the DNS. At paragraph 187 he concluded: *"it would be difficult to think of a more egregious breach of the Directive given the scale of the HS2 project and the likely extent of its effects on the environment"*. The communicants adopt and rely upon Lord Justice Sullivan's judgment for the purpose of this communication.

19. A further appeal was heard before the UK Supreme Court in October 2013. This appeal was focused upon the scope of the SEA Directive; the Government did not pursue its failed attempt to reverse the High Court's finding that the DNS had failed in significant respects to subject the reasonable alternatives to the HS2 proposal to environmental assessment or public consultation.

20. The Supreme Court's judgment was delivered on 22 January 2014 and is at **Appendix 8.** The written submissions of HS2AA (supported by LBH) and the SST are at **Appendices 9-10**. The unanimous judgment of the Court was that the DNS did not *"set the framework for development consent"* within the meaning of the Directive because this term connoted a plan or programme which constrains a subsequent decision on development consent by setting criteria by which the development consent decision is required to be determined (see in particular the judgment of Lord Carnwath JSC at paragraphs 36-42). Because the UK Parliament is sovereign, it cannot be subject to any *de iure* constraint, even if the *de facto* reality is that Members of Parliament are intended to be, and will be, influenced by the DNS to grant development consent for the HS2 proposal that it adopts.

21. The consequence of this, as Lord Justice Sullivan noted in the Court of Appeal, is that whenever a plan or programme relates to development for which development consent is to be sought from a sovereign legislature, the SEA Directive does not apply. This means that a Government, by choosing to promote a proposal by a legislative development consent procedure, can adopt a plan or programme for the development in question without any prior need for assessment and consultation on its environmental effects, regardless of how substantial they may be. The provisions of Article 1(5) for the EIA Directive, which provide an exemption from the need for EIA of projects at the development consent stage when the decision-making body is a national legislature, mean that in such circumstances there may be no need for EIA at the development consent stage either.

22. HS2AA submitted that, as Lord Justice Sullivan had held, this restrictive interpretation of the SEA Directive would not be consistent with Article 7 of the Aarhus Convention, since the latter requires effective public participation in all *"plans and programmes relating to the environment"*, whether or not they set the framework for development consent in the way defined by the Supreme Court (see further below). At paragraph 52, Lord Carnwath JSC rejected this submission in the following terms:

> "There is no reason to assume that article 7 and the SEA Directive are intended to cover exactly the same ground. The differences in wording are clear and must be assumed to be deliberate. Indeed the UNECE guidance on the Convention (*The Aarhus Convention: An Implementation Guide* 2nd Ed 2013 p 118-119) accepts that its reference to plans and programmes relating to the environment is broader than the equivalent definition in the SEA Directive. The SEA Directive must be interpreted and applied in its own terms. If this falls short of full compliance with the Aarhus Convention, it does not invalidate the directive so far as it goes. It simply means that a possible breach of the Convention may have to be considered as a separate and additional issue...."

23. In other words, the Supreme Court held that even if the DNS was within the scope of Article 7 of the Aarhus Convention, that did not bring it within the scope of the SEA Directive since the latter was acknowledged not to apply to all plans and programmes caught by Article 7.

24. What the Supreme Court did not address, was whether the acknowledged deficiencies in the environmental information provided to members of the public as part of the consultation that led to the DNS resulted in a breach of

Article 7 of the Aarhus Convention, even if the SEA Directive was not engaged. At the end of paragraph 52 of his judgment, Lord Carnwath said that *"no such breach is alleged"*. That is not accurate. It is well established that international treaties, including the Aarhus Convention, do not have direct effect in the UK legal system and non-compliance with a treaty cannot in itself form a ground for judicial review.[12] Therefore the only means by which HS2AA and LBH could ventilate their complaint about the ineffective consultation on the DNS was by relying on the SEA Directive and submitting that it should be interpreted harmoniously with Article 7 of the Aarhus Convention, which is what they did. Direct reliance on Article 7 of the Aarhus Convention was legally impossible within the domestic legal system.

VI. Non-compliance with Article 7 of the Aarhus Convention

25. Article 7 of the Aarhus Convention provides:

> **"Public participation concerning plans, programmes and policies relating to the environment**
>
> Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Aarhus Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment."

26. The term *"plans and programmes"* in Article 7 of the Aarhus Convention is not defined. Importantly, unlike the SEA Directive, there is no proviso that only those plans and programmes that are *"required by legislative, regulatory or administrative provisions"* and *"set the framework for future development consent of projects"* need be subject to public participation. There is a clear obligation on states parties to provide for public participation during the preparation of all *"plans and programmes relating to the environment"*. That obligation is not contingent upon the adoption of any subsequent measure by the UNECE or

[12] In relation to the Aarhus Convention, see e.g. *Morgan v. Hinton Organics (Wessex) Ltd.* [2009] Env. L.R. 30 at paragraph 22.

the Aarhus Convention institutions. Art 7 of itself requires action to be taken.

27. The UNECE's Guidance to the Aarhus Convention, *The Aarhus Convention: An Implementation Guide* (2nd Edition, 2013), states at p. 181 that *"a plan, programme or policy may be considered as "relating to the environment"* [for the purposes of Article 7] *regardless of whether it "sets the framework" for a development consent for any project or not"*.

28. On p. 182, the following observation is made (emphasis added):

> **"Plans, programmes and policies relating to the environment**
>
> The following types of plans, programmes and policies may be considered as "relating to the environment":
>
> - Those which "may have a significant effect on the environment" and require SEA *[pursuant to the SEA Directive]*.
> - Those which "may have a significant effect on the environment" but do not require SEA, <u>for example, those that do not set the framework for a development consent</u>.
> - Those which "may have effect on the environment" but the effect is not "significant", for example, those that determine the use of small areas.
> - Those intended to help to protect the environment."

29. On p.180, referring to the above passage, the Implementation Guide expresses the view that, given the wider terms of Article 7, the SEA Directive *"cannot be considered as fully implementing"* Article 7 and needs to be *"supplemented by other procedures"*.

30. Moreover, the case-law of the Compliance Committee indicates that, in its view, Article 7 applies to plans and programmes regardless of whether they *"set the framework for future development consent"* or are *"required by legislative, regulatory or administrative provisions"*. See in particular:

(1) The Committee's Findings in ACCC/C/2012/68 concerning the compliance by the United Kingdom and the European Union (30 July 2013), in relation to the adoption by the UK of a National Renewable Energy Plan (**"NREAP"**) to increase the use of energy from renewable resources, as required by Directive 2009/28/EU. At para. 59, the

Committee noted the UK Government's uncontested observation that *"the NREAP does not set the framework for the determination of consent applications for renewable energy projects and an SEA is not required"* but at para. 100 it nonetheless went on to hold that *"NREAPs are plans or programmes under article 7 of the Convention"*, before concluding on the facts that the UK had failed to comply with Article 7 of the Aarhus Convention prior to adopting the NREAP.

(2) The Committee's Findings in ACCC/C/2010/54 concerning compliance by the European Union (29 June 2012), upholding a complaint that the EU was in breach by not having *"a proper regulatory framework and/or other instructions to ensure implementation of article 7 of the Convention by its member States... with respect to the adoption of NREAPs"* pursuant to Directive 2009/28/EU (see [85]), noting at [77] that the EU *"chose not to apply the SEA Directive to NREAPs by its member States"*.

(3) The Committee's Findings in ACCC/C/2005/12 with regard to compliance by Albania (31 July 2007), which concerned *inter alia* Decision No. 8 of the Council of Territorial Adjustment of the Republic of Albania instructing various Ministries to co-ordinate work to progress certain projects within an industrial and energy park (see [31]). There was no suggestion that this Decision was required by legislative, regulatory or administrative provisions, or that it set the framework for future development consent of the projects in question. At [72]-[74] the ACCC considered that the Decision was nonetheless subject to Article 7 of the Aarhus Convention because *"this was a decision by a public authority that a particular piece of land should be used for a particular purpose, even if further decisions would be needed before any of the planned activities could go ahead"* [72]. This was due to the Decision's importance *"both in paving the way for more specific decisions on future projects and in preventing other potentially conflicting uses of the land"* [ibid.]. (This is an equally apt description of the DNS, which paves the way for more specific decisions on HS2 and, by heralding the safeguarding directions which are now in place, prevents potentially

conflicting uses of the land along the proposed route).

31. The communicants therefore submit that the DNS is a plan or programme relating to the environment within the scope of Article 7 of the Aarhus Convention.

32. It follows that the public consultation prior to the adoption of the DNS had to comply with the requirements of Article 6, paragraphs (3), (4) and (8) of the Aarhus Convention. Further, the consultation had to be *"within a transparent and fair framework, having provided the necessary information to the public"* as required by Article 7.

33. It failed to do so. For the reasons already outlined above, the public consultation was not effective because members of the public were not provided with sufficient information for them to make an informed judgment as to the relative environmental and other advantages and disadvantages of HS2 compared to the alternative options. Members of the public were given an incomplete picture of the environmental effects of HS2 (the AoS relating only to Phase 1 despite the DNS being a plan for the whole network and the Government relying upon the economic advantages of the whole network to justify adopting the DNS) and no information about how alternatives to the principle, configuration and route corridor compared to HS2 in environmental terms. Given the scale of the proposal, members of the public could not be expected to undertake this work themselves before responding to the consultation.

34. Information on environmental effects of HS2 and how they compared to the alternative options were fundamental to an effective consultation in the circumstances of this case. Therefore, the inadequacies described above mean that the consultation cannot be considered to have been *"effective"* nor was it *"within a transparent and fair framework, having provided the necessary information to the public"*. The result is a breach by the UK of Article 7 and Article 6, paragraphs (3) and (4), of the Aarhus Convention.

VII. Conclusion

35. For all these reasons, the communicants respectfully ask the Committee to find that the UK has breached Article 7 of the Aarhus Convention and Article 6, paragraphs (3) and (4).

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