

JUDGEMENT OF MR JUSTICE WEATHERUP DELIVERED 29TH MARCH 2007

His Lordship began by outlining the decisions that were being challenged by the Applicants. He listed them as follows:-

1. The Department's article 41 determination of 30th June 2003 which determined that BCA's proposals to increase the seats for sale did not amount to development which would require a formal planning application.
2. The challenge to the EIP report published on 12th December 2006.
3. The challenge to the 2005 regulations which the Applicants indicated failed to implement the EC directive.

Turning firstly to the final issue, namely the transposition of the EC directive into the domestic legislation, Mr Justice Weatherup confirmed that the EC directive concerned matters involving community airports. Article 5 referred to the rules of assessment. Article 6 referred to the rules on the introduction of operating controls. Article 10 referred to the transparency/consultation process and article 11 referred to prior notice. The Applicants refer in their argument to the fact that the articles have not been transposed. It seems to be common case that they are absent from the 2005 regulations. Stuart Beattie referred to the Aerodromes Regulations 2003. There was no challenge to the applicability of these regulations from the Applicants. When one reviews them, regulation 6 mirrors article 5, regulation 7 mirrors article 6, regulation 10 mirrors article 10 and regulation 11 mirrors article 11. It seems to me therefore that there has been implementation and on this issue I refuse leave.

Turning now to the article 41 and EIP report. It is necessary to refer to the factual background. In this regard, I will rely on the facts set out in the Applicants' skeleton argument.

In 1990 there was a public enquiry chaired by Mr Warke. His conclusions were adopted as policies and approved by the Planning Appeals Commission on 24th June 1991. In November 1991, the adoption statement was published. In 1997 there was a planning agreement. Including covenants and restrictions in relation to 1.5 million seats for sale.

In 1999 BCA applied for planning permission for a replacement terminal and planning permission was granted. In 2003 BCA made an article 41 determination (without the knowledge of the Applicants) and in June 2003, that determination was made by the Department who concluded that an increase of seats for sale did not constitute development and accordingly a planning application was not required.

The existence of the article 41 determination did not become public knowledge until 2006 - this is despite the letters sent to the Applicants in 2002 when he undertook to keep the Applicants advised should there be any planning applicants or matters of development in this regard.

On 6th July 2004 there was a formal review request from Belfast City Airport and the Minister in November issued a press statement and established the EIP. The panel reported on 12th December 2006.

In relation to the article 41 determination, this is a challenge to the decision made by the Department. One issue is whether there is a right of appeal. This has not been mentioned. I will assume at this stage that there is no other basis for challenge and an appeal cannot be brought. It may be that it could have

been brought but given that the decision was made in 2003 there may have been time limits. I have not been addressed in this issue so I will proceed on the basis that there is no other right of challenge. In addition to the article 41 decision, the Applicants are also seeking to challenge the procedures for same. Namely:-

1. The absence of notice re the application/decision to the interested parties.
2. The absence of notice of the Minister.

The Respondents say that there has been a delay in bringing this leave application and that the time delay from 2003 -2006 is unjustified. In response, the Applicants say that they only became aware of the article 41 determination in June 2006 and following correspondence with the Department determined that they would await the EiP decision before taking any action. I say that this was an entirely appropriate action to take and I rule against the Respondent on the issue of delay.

The Respondent also goes on to say that the article 41 determination was a recommendation only and that this application is premature and that the recommendation of the panel cannot be considered subject to judicial review given the character and the makeup of the EiP panel.

The Applicants make a challenge to the EiP report on the following basis:-

1. The fact that there had been an article 41 determination.
2. The assurances in relation to the existing agreement.
3. The retreat by BCA from those assurances.
4. Failure of the panel to evaluate the article 41 decision.

When the factual background is taken into account, there is significant and unavoidable interplay between the article 41 determination and the EiP.

The Respondent said that it is a recommendation only and that the panel had no statutory function. In this regard the Respondent refers to the broadcast cases. The Applicant refers to other cases. There are obviously agreements on both sides. It seems to me however that there is an arguable case. Accordingly, I hold that the recommendation of the EiP is capable of judicial review and furthermore it is clear that article 41 determination is interconnected although there are also distinct issues.

However I believe that it is arguable that the Department's decision to make the article 41 determination has influenced the panel therefore I consider that there is an arguable case in relation to the article 41 determination and the panel. The Applicants say that it is ground for challenge that the panel should have considered the article 41 determination as part of the agreement. I concluded that it should not. I do not accept that the panel should or would have been expected to look again at the article 41 determination.

I therefore grant leave in terms of the Applicants' amended Order 53 statement on the following grounds:-

1. 4 (i) & 4 (ii) (a) & (b)
2. 4 (iii) & 4 (iv) (a)(b) & (c)

I do not hold that there are grounds for leave on the basis of 4(ii)(c) and 4(iv).

Mr Justice Weatherup then sought clarification from Mr McCloskey QC as to whether there is an alternative route re article 41 determination. Mr McCloskey confirmed that the decision was not

imminent in that rather than it being a matter of weeks it is probably going to be a matter of months before the Minister makes his decision.

It was agreed that the Judicial Review hearing should take place before the summer and if possible in May. Mr Justice Weatherup accordingly set a timescale as follows:-

- 1.) The Respondent is to file a Notice and Amended Order 53 statement within 14 days.
- 2.) The Respondent and Belfast City Airport are to file Affidavits by 26th April.
- 3.) The Applicants are to have 14 days to file a rejoinder Affidavit if required (10th May) and
- 4.) the review hearing has been fixed for Wednesday 30th May as a one day hearing. Mr Justice Weatherup did indicate that in order to guarantee a listing date the matter would have to "double up" for listing.

In terms of other interested parties, Mr McCloskey QC confirmed that they believed that EiP should be put on notice. Mr Justice Weatherup directed that the Department notify them of the litigation.