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26th March 2009

Mr Jeremy Wates
Secretary to the Aarhus Convention
Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Environment and Human Settlement Division
Room 332, Palais des Nations
Ch-1211 Geneva 10
SWITZERLAND

Dear Mr Wates

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom with the provisions of the Convention in connection with the expansion of George Best Belfast City Airport: Reference ACCC/C/2008/27
Replies to questions raised by the Compliance Committee in its letter dated 26th September 2008

The Communicant refers to your letter of 26th September 2008 regarding the above Communication and the further questions raised by the Secretariat to which you invited our response. These questions are addressed in turn below. In addressing these questions the Communicant also refers to the UK Government's response on behalf of the Northern Ireland Department of the Environment (the "Department") dated 26th February 2009 to questions raised by the Convention Compliance Committee in its letter also dated 26th September 2008.

Introduction

As has been expressed in our earlier correspondence, our Communication relates to issues arising under the Aarhus Convention in relation to breaches of Articles 3, 7 and 9 and in particular with regard to the regulation of airports in the United Kingdom; specifically, George Best Belfast City Airport in Belfast, Northern Ireland.

Whilst the Communicant's complaint relates to both public participation in decision making and access to justice in environmental matters, it is particularly the latter issue that raises significant concerns in terms of the UK's approach, since this inevitably impacts upon the former. A significant driver for adequate public participation ultimately must be the public's ability to challenge a decision maker where flaws are considered to exist in that decision; in other words the public must have adequate "access to justice". At present, the only means of challenge available to the public is through judicial review of the decision. This legal procedure is not without significant risk since in many cases (as will be elaborated upon below) the loser is required to meet the legal costs of the successful party. It is the Communicant's contention that by restricting access to justice through the risk of prohibitive cost, there exists the danger that a decision maker is given free reign to implement decisions that may impact on a broad section of the public without adequate redress afforded to the public.

In considering issues within the context of judicial review proceedings, the Court is restricted to identifying whether flaws exist in the decision making process itself rather than the merits of the decision made. Only in circumstances where the Court considers that a decision was manifestly unreasonable in all the circumstances of the case can the decision itself be subject to review. "Unreasonable" in this sense constitutes a departure so far from rational or logical thought that no sensible decision-maker could have arrived at that decision. This is a high bar to reach and generally the Court will not interfere with the professional

judgment of a decision maker unless there is clear evidence that the decision was manifestly unreasonable. In contrast, when acting as a decision maker within the forum of a public inquiry or appeal, Commissioners of the Planning Appeals Commission, are able to use their professional judgment and balance the merits of a case against relevant law and policy in reaching their decision.

Accordingly, limiting available challenges through the judicial review process to flaws in procedure rather than flaws in decision making *per se* provides little prospect of redress to ordinary citizens.

In the Communicant's view the above limits on access to justice have arisen in relation to the regulation of George Best Belfast City Airport since control of its operations is primarily achieved through the use of a private agreement between the regulator and the regulated to which the public has no means of redress other than placing significant sums of money at risk through the "judicial review" process. The Communicant expands upon this issue in its submissions below.

It must also be noted that access to justice without prohibitive cost is particularly important in the context of the regulation of airports in Northern Ireland. Airports are very much a 'special case' in terms of their ability to operate and expand notwithstanding their potential impact upon the quality of life of large numbers of people in the surrounding area. For example, as a matter of public policy and law Airports enjoy almost complete immunity from actions under 'nuisance' law (i.e. claims/actions arising from impacts upon the quality of life/amenity of local residents). Airports are also specifically designated as "competent authorities" under the EU Environmental Noise Directive (2002/49/EC) and as such are able to devise their own Noise Action Plans under the Directive. Coupled with the ability of the regulator to utilise private agreements to effectively licence an airport to impact upon its neighbours, the overall effect is one of near immunity of airports from substantial challenge to their operations.

That airports can be considered near 'untouchable', in flagrant violation of the Aarhus Convention, is also reflected in the response of the UK Government dated 26th February 2008 in which its position appears unequivocal and in the Communicant's view highlights the following issues:

- the Department has a clear policy of protecting the public purse by pursuing its full legal costs for legal challenges;
- the Department did not consider that an environmental impact assessment was necessary for an increase in seats for sale or flights at the airport;
- The Department did not consider that a public inquiry was required for such changes to an airport's operation even though they would have widespread environmental effects;
- the Department did not consider the Aarhus Convention and the context of claiming costs; and
- a Planning Agreement has no appeal mechanism for persons not party to it.

It is clear therefore that the Department pursued a course of action for the benefit of the airport through which both parties could remain reasonably confident of no substantial challenge.

Referring to the questions raised by the Aarhus Convention Compliance Committee in its letter of 26th September 2008:

I. General Question

1. Please could you elaborate on your allegation that there were breaches of articles 3,7 and 9 of the Convention?

In relation to an airport, its operations, and in particular the number of aircraft

movements (ATMs) and the size of permitted aircraft are the matter of primary concern, since aircraft cause noise disturbance and pollution.

Therefore it is a matter of great importance that there should be meaningful scrutiny of the environmental consequences of permitting the increased number of ATMs, the type and size of aircraft, the times of landing and take off and the permitted flight paths for aircraft. These should not be the subject of a private agreement over which the public has no influence and which the public can only challenge on restricted grounds and at prohibitive cost.

Article 3 of the Convention

Article 3 of the Aarhus Convention sets out in general terms how a Contracting Party to the Convention should assist and provide guidance to the public in seeking access to information, in facilitating participation in decision making and in seeking access to justice in environmental matters. Paragraphs 1 to 9 of Article 3 emphasise the responsibilities of the Contracting Parties to involve the public and to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention in relation to environmental matters.

It is the submission of the Communicant that the Department has conspicuously failed to meet its obligations under Article 3 of the Convention by seeking to control operations at George Best Belfast City Airport by a private Planning Agreement dated 22nd January 1997 and, notwithstanding the ratification of the Aarhus Convention in May 2005, by entering into a new Planning Agreement - dated 14 October 2008 with one other party, i.e. Belfast City Airport Limited[1]. It is surely wholly inappropriate that a commercial airport, whose operations affect a large proportion of the people of Northern Ireland, should be controlled by a private agreement between two parties. It is clear that such a private agreement has the

[1] Belfast City Airport Limited trades as George Best Belfast City Airport

unique advantage for the Department that it is free from the appellate jurisdiction of the Planning Appeals Commission. It is also explicit that any such Agreement will not create a public right, which would render the Agreement enforceable by the Attorney General. It must also be noted that, as the Agreement is made under seal, the Agreement can only be enforceable between the two parties to it as a Contract. Further, the two parties can alter the agreement at any time without requiring the consent of any other party. Clearly by selecting the process of a Planning Agreement to control operations at George Best Belfast City Airport the Department has very effectively excluded the public from having any influence in the decision making process. This is also acknowledged by the UK Government in its response of 26th February 2009 in which it clearly states that a planning agreement cannot be appealed.

The public, in effect, have only one course of action open to them to challenge a private Planning Agreement, which is to judicially review the actions of the Department in settling the terms of that agreement. This single option is unreasonable as it can only succeed on restricted grounds and is prohibitively costly. For example, when considering a judicial review challenge to a planning decision, such as a decision to amend a planning agreement, the UK Courts will not consider the substantive planning merits or environmental consequences of the proposal as these are considered to fall within the remit of 'planning judgment' – an area with which the Courts will not interfere save in circumstances in which the decision is considered to be so manifestly unreasonable that no right minded authority could have arrived at the decision (as per *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All ER 636 and *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223. This is clearly an extremely restrictive remit for the Courts and one which falls well short of the requirement to provide access to environmental justice.

It is also evident from lengthy correspondence between the Residents' Groups and

the Department that the Department has frequently been evasive and unhelpful in its written responses to the correspondence from the Residents' Groups. This negative attitude by the Department was noted by the EiP Panel who at paragraph 6.4.5 (page 91) of their Report stated that "some of the earlier replies they (i.e. the Residents' Groups) received from the Departments were, in the Communicant's view, rather vague, evasive and not very helpful. This will have done little to encourage development of the openness and trust on which the success of the whole consultative process of BCA depends". It also has to be recorded that the EiP panel at paragraph *1.3.2* (page 8) of their Report stated: - "We have however been struck by the strength of feeling and to a degree the lack of trust that has developed, particularly on the part of the local residents groups. At the moment they have very little confidence in the overall system and doubt that anyone is really concerned about fairness and their interests. This is a major weakness in the overall setup and it will need to be resolved if any fair, sensible and workable system of control is to be successful at BCA." It is the submission of the Communicant that the EIP Panel clearly recognised that the Communicant had not received adequate cc-operation and assistance from the Department when information relating to environmental matters involving the City Airport was sought and that the Department's approach was wholly inadequate for a Contracting Party to the Aarhus Convention.

It is further submitted that the Department in seeking full costs at the conclusion of the Judicial Review Hearing were intent in penalising the Communicant as the sum sought was clearly a very severe burden on private residents' groups and did not appear to take into consideration the fact that the Communicant had been successful at a "leave" hearing, which was a clear indication that the proceedings could not be regarded as trivial, vexatious or of no consequence and were regarded as worthy of being fully presented to the Court and that the applicants had shown a case which merited consideration by the Court. The amount of costs claimed was so prohibitive as to be a strong deterrent against any future

action by the Communicant in respect of environmental matters. In its response of 26th February 2009, the UK Government states that it is the Department's policy to seek costs in order to protect the public purse. The Communicant would argue that protection of the public purse cannot be the only factor that the Department should take into account in determining whether to seek a costs order, particularly in the light of the principles of the Aarhus Convention. Put simply, the UK Government did not have to seek an order for costs against the Communicant but chose to do so. In doing so, it rendered the process prohibitively expensive and any appeal against the decision unrealistic in financial terms.

Article 7 of the Convention

The Communicant submits that the Department has purposely and consciously set out to exclude public participation in the preparation of policies relating to the environment contrary to Article 7 of the Convention by seeking to control operations at George Best Belfast City Airport by a private agreement involving only two parties, leaving the public with only the option of judicial review to challenge its decision. This selection by the Department of a private agreement process is the clearest evidence of a desire to exclude the public from participation in environmental matters. By taking this route, the Department successfully avoided the need for an Environmental Impact Assessment (as the UK Government notes in its response of 26th February 2009), thus restricting the ability of the public to properly scrutinize and comment upon the environmental impacts of the proposal to increase seats for sale and ATMs.

From 1983 (the first year of commercial operation) to 1989, ATMs at the airport increased from 5,700 to 19,100 per year. Following adoption of the Department's Belfast Harbour Local Plan 1990-2005 in 1991, ATMs have continued to increase as sanctioned by successive Planning Agreements in

1994, 1997 and 2008; from 38,000 in 1994 to 45,000 in 1997 and 48,000 in 2008. Over the same period, seats for sale, which effectively controls aircraft sizes, have increased from 1.5M to 2M. These incremental but extremely significant increases since 1991 have all been permitted without any detailed consideration of environmental effects by way of an Environmental Impact Assessment on those changes.

Article 9 of the Convention

The Communicant accepts that there is "Access to Justice" available in Northern Ireland but the availability of the Courts is largely negated if the Contracting Party (i.e. the Department of the Environment) seeks full costs against residents' groups at the conclusion of a judicial review. Costs at the level sought by the Department at the conclusion of the Judicial Review are clearly a major deterrent against residents' groups seeking to protect their environment by legal action. It is therefore submitted that the Department's claim for costs at the level sought by them is contrary to the provisions of Article 9 of the Convention.

Reports on Access to Justice in the UK

The Communicant notes a report produced on behalf of and published by the European Commission (*Measures on Access to Justice in Environmental Matters (Article 9(3)) – Country Report for United Kingdom, April 2007*), which identifies distinct flaws in the UK's approach on access to justice and reflect the concerns of the Communicant. In its conclusions the report states:

- "Studies have shown that the possibility of having to pay the other side's costs is a major deterrent to pursuing an application for judicial review";
- "the court always has a discretion as to any award of costs and, indeed it is possible that the court will make no order as to costs…the problem for

the potential applicant is that the issue of costs is decided at the end of the case.";

- "The net result is that bringing an application for judicial review is prohibitively expensive for most people, unless they are either [sufficiently poor] to qualify for public legal assistance or are so rich so as to be able to undertake an open-ended commitment to expenditure running into tens or hundreds of thousands of pounds."; and
- "In conclusion it can be said that the potential costs of bringing an application for judicial review to challenge the acts or omissions of public authorities is a significant obstacle to access to justice in the United Kingdom";.

In the UK, a report was produced by the "Working Group on Access to Environmental Justice" (*Ensuring Access to Environmental Justice in England and Wales, May 2008*) consisting of, amongst others, Mr Justice Sullivan, Ric Navarro (Director of Legal Services, Environment Agency England & Wales), Professor Richard Macrory QC and Colin Stutt (head of Funding Policy, Legal Services Commission). The Report noted the following:

- "costs, whether actual or risked, would be 'prohibitively expensive' if they would reasonably prevent an 'ordinary' member of the public…from embarking on the challenge falling within the terms of Aarhus";
- "Our view concurs with [the EU Commission's report noted above] which concluded that the UK was one of only five Member States whose provisions on access to environmental justice under Aarhus were unsatisfactory";
- "the key issue limiting access to environmental justice and inhibiting compliance with Article 9(4) of Aarhus is that of costs and the potential exposure to costs";
- "what is notable about the problem [of costs] is that…it flows from the

application of ordinary costs principles of private law to judicial review and, within that, of ordinary principles of judicial review to environmental judicial review"; and

- "the Aarhus obligation must be taken into account in exercising the discretion on whether to depart from the usual rule that [the loser pays costs]".

It is clear that the UK Government did not have any regard to the Aarhus obligation when exercising its discretion to pursue full costs from the Communicant. Its response of 26th February 2009 confirms that it merely had regard to the issue of the public purse.

II Regarding the allegation concerning the prohibitive nature of costs:

2 Was the Order of Lord Girvan (dated 7 November 2007) appealed? Can it be appealed?

The Order of Lord Justice Girvan dated 7 November 2007 was not appealed. The decision of the UK Government to seek full costs against the Communicant in the judicial review proceedings rendered those further proceedings prohibitively expensive and any appeal of the Order financially unrealistic – the Communicant and its associated Residents' Groups could not afford the costs of the judicial review never mind the costs of an appeal of the Order. It is contended that this is a graphic demonstration of the fact that judicial review, as the only remedy available to the Communicant in UK law, is a remedy which is prohibitively expensive.

Any Appeal of the Order must be brought within 3 months of the date of the Judgment and thereof an appeal is no longer possible.

Costs are a matter which lies within the discretion of the judge. As Mr Turner on behalf of the UK Government points out in the letter of 26th February 2009, the Rules of the Supreme Court state that "If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears that in the circumstances of the case some other order should be made as to the whole or any part of the costs". The UK Government did not have to seek an order for costs against the Communicant but chose to do so.

3 Please could you provide the Committee with a copy of the leave hearing minutes?

The Communicant encloses a Summary of the Judgment of Mr Justice Weatherup after the "leave" hearing which we believe sets out, with some clarity the issues involved.

4 Is the methodology for calculation of the litigation-related costs by the Department of Environment publicly available? Is it laid down in a general document or does the amount depend on the specifics of a case and on the hoc agreement with the attorney's office?

The Communicant encloses photocopies of Accounts submitted by the Departmental Solicitor's Office showing details of the claim for costs and also copies of correspondence between the respective solicitors when the total amount of costs payable was agreed at £39, 454.00.

5 What is the basis of your conclusion that the costs asked by the Government are "prohibitive"?

The costs claimed were regarded as "prohibitive" as the Communicant is fully

aware from years of practical experience how difficult it is to raise such a sum from private individuals, particularly in the present difficult financial climate. When there is no commercial interest or property ownership issue the sum is very expensive for individuals simply trying to protect their environment against officially permitted interference, when Government should be protecting it.

The Committee will be interested to know that following the award of costs the Communicant was contacted by the well-known environmental body “Friends of the Earth” which strongly encouraged us to contact the Convention Compliance Committee because of the detrimental effect the award would have. The fact that the Communicant was unable to appeal the order for costs against it, in circumstances in which it considered the Order to be inappropriate and unjust, demonstrates that the costs sought by the UK Government are ‘prohibitive’.

6 Under UK law, does the court, after having been asked to award full costs against one party, have to discuss the matter of costs with both parties to the case?

Under UK law when at the conclusion of a case one party asks for an award of costs against the other party, the Judge will always give the other party the opportunity to argue the matter. The Communicant would reiterate that the UK Government did not have to seek an order for costs against the Communicant, but chose to do so.

7 Are you aware of any provisions in the UK law which grant the court the discretion, in advance of the hearing on the substantive issues, to exempt one party in a litigation from liability for costs incurred by the other party?

The Court has a discretion whether to award costs against a party which has been unsuccessful in the proceedings. In cases in which there is a public interest

element there are some examples in which costs have not been awarded. The Communicant is aware of the following cases which do not deal with planning agreements but touch on the issue of costs in public interest cases;

(i) In New Zealand, Maori Council v. Attorney General of New Zealand (1994) 1 AC 466, 485G-H, Lord Woolf made no order as to costs on the appeal since "the [claimants] were not bringing the proceedings out of any motive of personal gain (but)... in the interest of taonga which is an important part of the heritage of New Zealand.... [This was] an important area of the law which it was important that their Lordships examine."

(ii) R. v. Secretary of State for the Environment, ex p Challenger (2001) Env LR 209— no order was made for costs where it was considered to be a genuine case of potential importance and claimants were of limited means; bearing in mind also that it was a human rights case.

(iii) R v. Secretary of State for the Environment ex p Greenhouse Ltd (1994) 4 AER 352. No order of costs was made because (inter alia) the challenge, though unsuccessful, was in the public interest and, the claimant had succeeded on the issue of applicability of the justification test.

(iv) Liversidge v. Anderson (1942) AC 206, 283 per Lord Atkin; "This is a matter of very general importance, and I think the majority of their Lordships...are rather of the opinion that it is not a case in which costs should be asked for"

(v) Oshlack v. Richmond River Council (1998) HCA 11 25th February 1998 unreported. High Court of Australia upheld refusal to award costs against unsuccessful environmentalist in "public interest litigation".

(vi) There is jurisdiction to make a pre-emptive costs order as shown by R. v. Chancellor, ex p Child Poverty Action Group (1999), WLR 347. Dyson J. said at 358C-E; “I conclude therefore that the necessary conditions for the making of a pre-emptive costs order in public interest challenge cases are that the Court is satisfied that the issues raised are truly ones of general public importance, and that it has a sufficient appreciation of the merits of the claim that it can conclude that it is in the public interest to make the order. It is only in an exceptional case that such an order will be made. [The Court] will be more likely to make the order where [the defendant] clearly has a superior capacity to meet the costs of the proceedings than the [claimant], and when it is satisfied that, unless the order is made, the [claimant] will probably discontinue the proceedings, and will be acting reasonably in so doing”.

8 Are you aware of any UK legal provisions or jurisprudence which specify liability for costs incurred because of a party’s actions on the one hand and in relation to a court’s order/decision on the other hand (where part of the costs originate due to a court’s decision not to dismiss the application a the “leave” state)?

No.

III Regarding the allegation concerning failure to comply with Article 7 of the Convention

9 How long is the runway of the City Airport?

The existing runway at George Best Belfast City Airport is 1829 metres long. Because of this length and its close proximity to the centre of Belfast, this causes the airport to be classified as a ‘City airport’ under European Union Directive

2002/30/EU.

Immediately following the signing of the new Private Planning Agreement between the Department and the Belfast City Airport Ltd on 14th October 2008 (allowing more ATMs, seats for sale and average noise) a Planning Application was made to extend the runway. This application is for an extension of 590 metres to the North East end and a retraction of 120 metres at the South West end. If permission is granted the runway will then have a length of 2,299 metres and no longer be classified as a 'City Airport'.

10 How does the 'private agreement' between the public authorities and the owner of the Airport affect the rights of the public?

The private agreement takes key aspects of the expansion of the airport outside the normal planning process which would ordinarily require a planning application, Environmental Statement and, potentially a public inquiry.

The private agreement amounts to a licence to the Airport permitting a specified number of ATMs per annum, the types of aircraft to be used, the times when ATMs may be permitted, the number of seats for sale, the acceptable noise contour and other activities of the Airport which affect the public. These key control parameters can be changed by agreement solely between the two parties and this is what has occurred.

It is submitted by the Communicant that the existence of a private agreement between the public authorities and the owner of the Airport clearly undermines the rights of the public as it restricts the rights of access to information (it was even difficult for Residents' Groups to obtain a copy of the 1997 Planning Agreement from the Planning Service) and also makes it extremely difficult for

public participation in decision making (the manifest reluctance of the Planning Service to set up a Public Inquiry relating to the dramatic development of the City Airport is a clear example of reluctance on the part of a public authority to permit the involvement of the public in the decision making process relating to the City Airport). As the private agreement is made under seal, the agreement can only be enforceable between the parties to it as a contract. It also has the advantage to the Department that it is free from the appellate jurisdiction of the Planning Appeals Commission in Northern Ireland. It is further explicit that any such Agreement will not create a public right which would render the Agreement enforceable by the Attorney General.

This leaves the public with only the option of judicial review if the Agreement is either (a) changed in a manner which is defective or (b) not enforced. The instant case and costs resulted from the EiP process which the Communicant, representing members of the public, considered to be defective. It also coincided with a period (2004-2008) in which the clause in the Agreement relating to seats for sale was not being enforced by the Department despite the number of seats for sale exceeding the limit in the agreement. This non-enforcement was a factor in the case brought by the residents as they anticipated, correctly, that the new planning agreement would legitimize the breach, which had not been corrected through enforcement action.

In the view of the Communicant, a private agreement is totally inappropriate for the control of operations at George Best Belfast City Airport which is a rapidly growing commercial airport affecting a large proportion of the people of Northern Ireland. The fact that the Department of the Environment deliberately selected a “private agreement’ process for the control of operations at the City Airport seems to be grossly unfair to the public, contrary to natural justice and wholly incompatible with the provisions of the Aarhus Convention. It is the considered opinion of the Communicant that such a private agreement should not have been

considered by the Department on 14 October 2008, some three years after the UK had ratified the Convention. It is also contended by the Communicant that the decision by the UK Government to regulate a commercial airport by way of a planning agreement circumvents the obligations of the Aarhus Convention as it enables huge growth in air traffic movements to take place at the airport (with inevitable environmental consequences) without any requirement for the environmental impact of these increased movements to be assessed by way of an Environmental Statement/Environmental Impact Assessment.

11 Are you aware of any clear rules in UK law for differentiation of cases where and Examination-in-Public procedure is applicable and those where public authorities have to apply the Public Inquiry procedure? Or is the question left to be decided according to a discretionary power delegated to the relevant public authority?

So far as the Communicant is aware, the Department has a discretionary power as to whether it directs an Examination in Public or elects for a Public Local Inquiry to be held by the Planning Appeals Commission. Clearly one of the considerations most involved is whether or not the application is, in the opinion of the Department, a major application i.e. of significance to the whole or a substantial part of Northern Ireland or affects the whole of a neighbourhood. In the view of the Communicant both the application to change the Planning Agreement which was referred to an EiP and the more recent application to extent the runway clearly are a major issues which affect a substantial part of Northern Ireland and which therefore call unequivocally for a Public Local inquiry. The Communicant believes that the Department was gravely in error by opting for an Examination in Public in the case of the application to change the Planning Agreement. One has only to look at the Terms of Reference for the EiP Panel to

realise how restricted the Panel was in its examination. The Terms of Reference largely confined the Panel to a scrutiny of the existing Planning Agreement and prevented any cross examination or any consideration or discussion of economic or other factors that might be relevant to the future development of the City Airport. Air transport is clearly a major issue in the lives of the people of Northern Ireland and therefore the people should be given the opportunity to express their opinions. It was grossly misleading of the Planning Service of the Department of the Environment to claim in a letter dated 18th November 2005 (see copy herewith) "that the Examination in Public (EiP) process will not be in any way limited when compared to a public inquiry" and that the EiP process "will better facilitate" the issues that the residents' groups wish to raise.

However, the subsequent Hearing by the EiP Panel confirmed how restricted their terms of reference were and how impossible it was for the public to test evidence by cross examination or introduce discussion on economic and other vital issues relating to the rapid development of a commercial airport which is situated in an area of high density housing and is one of only four airports in Europe which have been classified by a European Directive as "City Airports". Consideration of these wider but critical issues including the potential for cross examination on all issues would, and indeed should have been more appropriately considered within the context of a public inquiry.

12 <u>What is the legal status of a planning agreement under UK law? Can it be appealed? Should the Environmental Statement precede the Planning Agreement or is it the other way round? Where does a Planning Permission fit in the sequence of these legally provided steps (Planning Agreement and Environmental Statement)?</u>

The Planning Agreement dated 14th October 2008 between Belfast City Airport Limited and the Department of the Environment has been executed in

accordance with Article 40(A)(1)(a) of the Planning (Northern Ireland) Order 1991. You will note that Article 40 of the 1991 Order empowers the Department to enter an agreement with any person having an interest in land for the purpose of facilitating, regulating or restricting the development or use of land.

The advantages of a Planning Agreement to the Department are generally as follows: -

(i) An agreement may simplify the procedural aspects of the planning process.

(ii) An agreement has the advantages of flexibility in that it is negotiable in contrast to a condition which is imposed unilaterally.

(iii) An agreement is less vulnerable to the risk of a judicial review.

A very significant result of the Planning Agreement route being taken by the Department is that an Environmental Statement is not required and therefore the environmental information, which should be in the public domain for its consideration and comment, will not be available to the public.

A Planning Agreement cannot be appealed by a member of the public or any person not party to it. In effect, the only remedy is judicial review where the member of the public wants to prove a flaw in the administrative procedure. A flaw in planning judgment simply would not suffice. To attempt judicial review a member of the public has to risk an award of costs as already illustrated.

13 <u>How do the procedures for Examination-in-Public, Public Inquiry and Environmental Statement relate to the Aarhus Convention articles 6 and 7?</u>

The Communicant submits that to achieve the public participation in environmental matters as envisaged by Articles 6 and 7 of the Aarhus Convention where the issues relate to a commercial airport affecting a large proportion of the Northern Ireland public, the Department of the Environment must proceed by way of a public local inquiry covering the future operations of the City Airport.

In the terms of the proposed changes to the Planning Agreement It was wholly inappropriate for the Department to select an Examination in Public as the way forward as the Terms of Reference for the EiP Panel clearly restricted the Panel in the examination of operations at the City Airport and prevented them from discussing factors which are vitally relevant to the growth of a commercial airport in a city setting. A clear example of this is that the EiP process did not require the production of an Environmental Impact Statement although changes in the Planning Agreement would clearly have significant environmental impacts. The attached report by Bickerdyke Allen Partners on the increase in noise levels around the airport between 2007 and 2008 shows clearly, at paras 4.2 and 5, how the non-enforcement of the seats for sale limit and its eventual change in the 2008 Agreement lead to a big increase in the number of large plans and thus 122% more people being effected by significant noise disturbance.

It is further submitted that to comply with the requirements of Articles 6 and 7 of the Convention, the Department when considering any development at a commercial airport must set up a Public Local Inquiry and be seen to be complying with the provisions of the Convention. The Communicant believes that the public is entitled to more helpful co-operation and assistance from the Department than has been on offer up to date.

14 Comments on Questions put to Philip Turner

The Communicant refers in its submissions above to the response by the UK Government to the questions put to Philip Turner. Again the Communicant reiterates the point raised above that the UK Government and Department's position is quite unequivocal; the Department had a stated policy of protecting the public purse by pursuing its full legal costs for legal challenges; the Department did not consider its obligations under the Aarhus Convention at any point; the Department did not consider that an environmental impact assessment was necessary for an increase in seats for sale or ATMs at the airport notwithstanding the significant incremental increases that have occurred since 1983; a public inquiry was not required for such changes to an airport's operation; and, a Planning Agreement had no appeal mechanism for persons not party to it.

The Communicant also wishes to take issue with the UK Government's reply to Question 8 which states (inter alia) that:

"The Department of the Environment does not consider that the increase in seats for sale constituted development which required planning permission under the Planning (Northern Ireland) Order 1991".

In the opinion of the Communicant the in-house determination of 30th June 2003 by the Planning Service was wholly wrong in law as the proposed increase in seats for sale represented a 66% growth in intensification of use of the Airport and was one which was capable of completely changing the character of the Airport.

The Communicant believes that such a significant increase in intensification of use at the Airport would be regarded by most independent lawyers as "development" as defined by Article 11 of the Planning (Northern Ireland) Order

1991 and should therefore require a formal planning application for permission for such development. At the "leave" hearing before Mr Justice Weatherup the Judge clearly recognized the significance of the determination of 30th June 2003 and the fact that its existence had not been revealed to the Applicants despite probing correspondence from the Applicants, which incidentally also disclosed that there were no minutes in existence of the Planning Service's meetings through which the determination of 30th June 2003 was concluded. You will note that on Page 2 of his judgment (enclosed), Mr Justice Weatherup states:

"When the factual background is taken into account there is significant and unavoidable interplay between the Article 41 Determination and the EiP". Unfortunately however, when the Communicant's application for judicial review was dismissed on the grounds of prematurity, the Article 41 Determination was one of the substantive issues which escaped detailed scrutiny.

The Communicant submits that the Department, by concluding an in-house determination and by operating within the conditions of the private Planning Agreement enabled the Airport to avoid a formal planning application for the proposed development. Such actions by the Department appear to be contrary to natural justice and also to the provisions of the Aarhus Convention.

The Communicant also takes direct issue with the UK reply to Question 9 which claims that an increase in the seats for sale was not considered to have "significant environmental impact". It is submitted that even a cursory examination of the facts would reveal that an increase of seats for sale of the magnitude stated must have an environmental impact of some significance and one which requires detailed consideration.

In any case, in the absence of an Environmental Statement expressly covering an increase in seats for sale how can the UK Government be so dogmatic and

infallible in their statement?

Further, even if incremental changes in ATMs and seats for sale since 1983 did not constitute development, significant growth has nevertheless occurred by way of private planning agreements –which themselves have not been subject to an Environmental Impact Assessment.

The Communicant trusts that the above responses satisfactorily answer the questions raised by the Aarhus Convention Compliance Committee and look forward to its further consideration of this matter. To further assist the Committee, we also submit as enclosures, further documents and correspondence as referred to above detailed overleaf.

In the meantime, should you or the Committee require further information, do not hesitate to contact us.

Yours sincerely

H L McCracken

For and on behalf of the Cultra Resident's Association

ENCLOSURES

1. Judgment of Mr Justice Weatherup delivered 29th March 2007 (Leave Stage)

2. Correspondence re: costs of Department

3. Correspondence re: Examination in Public dated 16th November 2005

4. General correspondence between the Cultra Residents Association and the Department, August 2008 to February 2009.

5. Report by Bickerdyke Allen Partners on Airborne Aircraft Noise 2008.