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Department for Environment Food and Rural Affairs

26 February 2009

Jeremy Wates
Secretary – Aarhus Convention
Economic Commission for Europe
Environment, Housing and Land Management Division
Bureau 332
Palais des Nations
CH-1211 Geneva 10
Switzerland

Dear Sirs,

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 the Belfast City Airport (ref ACCC/C/2008/27)

The Aarhus Convention Compliance Committee ("the Committee"), in its letter of 26 September 2008 to DEFRA, raised several questions arising from the recent unsuccessful judicial review in relation to Belfast City Airport (GIR 5962 reported as [2007] NIQB 90). The answers are as follows.

I Regarding the allegation concerning the prohibitive nature of costs.

Question 1: *Is there a government regulation specifying conditions under which public authorities incur or calculate their litigation costs?*

Provision relating to the award of costs in High Court proceedings (e.g. proceedings undertaken by the Cultra Resident's Association in this case) is made by section 59(1) of the Judicature (Northern Ireland) Act 1978 viz:-

"Subject to the provisions of this Act and to rules of court and to the express

provisions of any other statutory provision, the cost of and incidental to all proceedings in the High Court …. shall be in the discretion of the court and the court shall have power to determine by whom and to what extent the costs are to be paid."

Order 62 Rule 3(3) of the Rules of the Supreme Court (which apply to the High Court) provides:-

"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".

In calculating its costs, the Department relied on the conventional method appropriate to taxing the bill of a solicitor in private practice as it is appropriate for the bill of an in-house solicitor in all but special cases (of which this is not one) (see Cole -v- British Telecommunications plc [2000] EWCA Civ 208 – Buxton LJ at para 9 – interpreting and later applying In Re Eastwood [1975] Ch 112).

Question 2: *What were the specific reasons for and calculations underlying the Department of the Environment's request that the amount of £39,454.00 court costs be awarded against the applicants following the court decision GIR 5962([2007] NIQB 90)?*

The Department of the Environment had successfully defended the proceedings and sought to recover the legal costs which it had reasonably incurred in maintaining that defence. The costs reflected the fees of Counsel (Senior and Junior) and the Departmental Solicitor's Office (which acted for the Department of the Environment).

The Applicant made no application at any stage of the proceedings for a protected costs order. Such an order may specify what costs and up to what limit each party may have to pay. It may provide early certainty on the limits of a claimant's liability.

Question 3: *Could you specify the amount of costs before the "leave hearing" and in relation to the "leave hearing", and the costs after the "leave hearing"?*

No legal costs were incurred prior to the Leave hearing. Senior Counsel charged £1,875 plus VAT at 17.5% for the Leave hearing. Junior Counsel's fee was two-thirds of this plus VAT. DSO's fees were £192 plus VAT. The remainder of the costs were incurred after the Leave hearing.

Question 4: *Before asking for £39,454.00 court costs did the Department of the Environment consider Article 9.4 of the Aarhus Convention ("the Convention")? What is that Department's justification for considering the sum of £39,454.00 as not "prohibitive" in the given case?*

The rules governing award of cost, referred to under Q1, are consistent with the requirements of article 9.4 of the convention. The rules allow courts the discretion as to whether or not to award costs against the losing party and if so what amount to award. The award of cost made in an individual case will depend on the circumstances of the case and will be considered by the judge. In the present case the judge heard argument on behalf of both parties and considered that it was reasonable for the applicants as the losing party to bear the costs incurred by the Department. In the present case, the amount of costs claimed was agreed between the parties, but in the absence of such agreement, there is provision in the rules for costs to be taxed (assessed) in order to ensure that the amount claimed is reasonable.

The sum of £39,454 is not considered prohibitive because it reflects the reasonable costs incurred by the Department in defending the proceedings and was determined in accordance with the rules of court. It is reasonable for the Department to seek costs incurred in defending proceedings in order to protect the public purse. In the present case, the applicants represented many thousands of residents. The possibility of an award of costs would have been known to them given the fact that they were legally represented, but did not dissuade them from bringing their case.

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II. Allegation concerning failure to comply with Article 7 of the Convention.

Question 5: *Are there clear rules in UK laws for differentiation of cases where an*

Examination-in-Public procedure is applicable and those where public authorities have to apply the Public Inquiry route? Or is this left to be decided according to a discretionary power delegated to the relevant authority?

The Department of the Environment has a discretion to arrange an Examination in Public in such circumstances as it thinks fit.

Question 6:

(i) What is the legal status of a planning agreement under UK law?

The Department decided to regulate the changing use of the airport by means of modification of the extant planning agreement. In its opinion, the changing use (which included an increase in the number of seats for sale but only increased permitted flight movements from 45,000 to 48,000 per annum) did not constitute development which required permission under the Planning (NI) Order 1991. Because the change was not considered to have a significant impact on the environment and in the absence of a requirement for a development consent, the environmental impact assessment procedure established by directive 85/337/EEC was not applicable. The environmental impact was considered in detail at the Examination in Public.

A planning agreement in this case was an alternative means of controlling the use of the airport in the circumstances where planning permission was not required.

(ii) Can a planning agreement be appealed?

A planning agreement may not be appealed. Failure by the Department to modify a planning agreement may be subject to appeal (see Article 40B of the Planning (NI) Order 1991).

(iii) Should the Environmental Statement precede the Planning Agreement or is it the other way around?

Because the Department determined that the proposed changes to the use of the airport did not constitute development for which planning permission was necessary it also follows that they did not think the environmental impacts of the proposed change of use were sufficiently significant to warrant an environmental impact assessment so no environmental statement was prepared although environmental impacts were considered during the examination in public.

(iv) Where does a Planning Permission fit in the sequence of these legally provided steps (Planning Agreement and Environmental Statement)?

As explained above this case was dealt with by way of amendment to the planning agreement. This procedure would only apply to cases that do not require planning permission.

Question 7: *How do the procedures for Examination-in-Public Inquiry and Environmental Statement relate to the Aarhus Convention – Articles 6 and 7?*

Articles 6 and 7 of the Aarhus Convention were implemented by way of Directive 2003/35/EC ("Public Participation Directive"). Modification of a planning agreement falls outside Annex 1 to that Directive, and the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999 (S.R. 1999 No. 73 as amended by S.R. 2008 No. 17). The 2008 Regulations transposed Article 3 of the Public Participation Directive insofar as it affects public participation in the decision making process for applications and appeals relating to development for which environmental impact assessment is required.

The Department may, under Article 123 of the Planning (NI) Order 1991 cause a public local inquiry to be held for the purpose of the exercise of any of its functions under the 1991 Planning Order.

In relation to GBBCA, the Department received a request in July 2004 from the airport authorities to modify an existing Planning Agreement by increasing the upper limit on seats for sale. The Department decided to consult all interested stakeholders, including the various residents groups, on the proposal. The public consultation exercise raised a number of inter-related issues which focused primarily on opening hours, noise, air traffic movements (ATMs) and passenger numbers.

In order to move the consultation process forward openly and transparently the Department decided to use its powers, under Article 123 as referred to above, to hold an Examination in Public. The EIP was held to facilitate public participation and debate on a number of key matters of public interest and not because of any overriding environmental concerns. This is in line with Articles 6 & 7 of the

Convention, insofar as they are material.

The EIP was held during the period May-June 2006 and all interested parties were afforded the opportunity to participate. The report of the EIP Panel was submitted to the Department in August 2006 with a number of recommendations on how best to proceed. The EIP Report was made available to all participants and to the public generally.

The Department is satisfied that the extensive consultation and EIP procedure fully accord with Articles 6 and 7 of the Convention.

Question 8: *Does the increase in the seats for sale limit from 1.5 million to 2.5 million constitute a "material development" under the Planning (NI) Order 1991?*

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.

This view was confirmed in writing to the airport authorities by letter dated 30 June 2003.

It should be noted that the modified 2008 Planning Agreement increased the upper limit on seats for sale from 1.5 million to 2.0 million.

Question 9: *Does the Department of the Environment consider the increase in the seats for sale limit from 1.5 million to 2.5 million as an activity subject to Article 6.1(a), (b) or 10 of the Convention.*

As stated above, the upper limit on seats for sale under the modified 2008 Planning Agreement increased from 1.5 million to 2.0 million. The increase in the seats for sale is not considered to be an 'activity' that is subject to Article 6.1(a), (b) or 10 of the Convention insofar as the proposal was not considered to have significant environmental impact.

Question 10: *What are the next steps in the relevant decision making processes following the dismissal of the communicant's application (decision GIRC 5962)?*

The matter has been concluded. A planning agreement was executed by Belfast City Airport Ltd and the Department of the Environment on 14 October 2008. It amended the original planning agreement made by those parties on 22 January 1997.

We hope that this addresses the Committee's questions and we look forward to hearing from you.

Yours sincerely,

Åsa Sjöström
UK focal point for the Aarhus Convention