

**Communication to the Aarhus Compliance Committee concerning compliance by the United Kingdom in connection with the proposed displacement of traffic in central Edinburgh
(ACCC/C/2010/53)**

The thirty fifth meeting of the Aarhus Compliance Committee in Geneva

**NOTE OF THE ORAL PRESENTATION
by James Maurici to the Committee on
Thursday 15 December 2011
on behalf of
THE GOVERNMENT OF THE UNITED KINGDOM**

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INTRODUCTION

1. This communication arises out of a long running dispute between local residents and Edinburgh City Council over the impact of plans for a tram system – the Edinburgh Tram Network or “ETN” – on traffic in an area of Edinburgh called the Moray Feu.
2. There are two documents which the Committee has which I commend as providing a detailed account of the background:
 - (i) the City of Edinburgh’s Statement of Case for the traffic regulation order dated February 2010. This is at annex 2 to United Kingdom’s response to the communication. It provides a commendably detailed account of the proposed ETN and the numerous opportunities for public participation there has been in the various procedures which have resulted in the decisions to approve the ETN and make consequential traffic orders;
 - (ii) the report of the Scottish Public Services Ombudsman. The Ombudsman is an entirely independent appointment. He conducted a thorough investigation of the very same sort of complaints now made before this Committee. He concluded that local residents were not “excluded from meaningful participation in the process”. A number of other complaints were also rejected.
3. There are two important points to make at the outset.
4. First, the communicant quite clearly disagrees with the traffic regulation decisions taken by Edinburgh City Council consequential upon the ETN proposals. They believe different decisions should have been taken. That is understood. Whenever a decision is taken to divert traffic in a town in the public interest there are those who consider themselves adversely affected by the decision and who oppose it. It almost goes without saying that the rights or wrongs of the decisions taken are not matters in which this Committee has any interest. It is not for this Committee to say that some different traffic regulation order should have been made or that there should not be a tram system in Edinburgh. The decisions taken by the relevant domestic authorities in this case were based on a very full assessment of the technical traffic, environmental and financial implications: see the officer report of 21 September 2010 at annex 5 to the United Kingdom’s response to the communication. The decision on the merits is, of course, a matter for those authorities. What this Committee must consider is whether the procedures relevant to such decisions involved any breach of the requirements of the Aarhus Convention. It will be the United Kingdom’s case that there has been no breach of the Convention in this case.

5. Second, the communication in so far as it alleges breaches of the Convention is wide-ranging and unspecific, as the response from the communicant to the Committee dated 29 November 2011 shows. A large number of articles are cited without any attempt to relate them to the substance of the complaint made. The communicant has alleged breaches of all three pillars, see the letter from the Secretary to the Committee dated 23 November 2011. I intend to focus on what are understood to be the key complaints.

(i) PUBLIC PARTICIPATION

6. The key complaint made under this head appears to be that before confirming various road traffic regulation orders there was no obligation on the City of Edinburgh Council to hold a public inquiry before an independent reporter (in England & Wales, an inspector) by virtue of an amendment made in 2008 to the Local Authorities' Traffic Orders (Procedure)(Scotland) Regulations 1999 ("the 1999 Regulations").
7. The United Kingdom would make these points in response to this:
8. First, as one would expect with a major proposal such as that for the ETN a number of consents, authorizations and approvals were required. Thus it was back in 2004 that Private Bills were first promoted by the City of Edinburgh Council before the Scottish Parliament seeking approval in principle for the ETN. Before those Bills were given Royal Assent and became Acts in April 2006 the plans they approved were subject to a 60 day objection period. Those who formally objected to the Bills were allowed to give evidence to the Parliamentary Committee which was considering those Bills. Members of the public affected, fully participated in this process, as the documents contained in annexes 2, 3 and 4 to the communication amply demonstrate.
9. Second, following the approval in principle for the ETN obtained via the Parliamentary Process there followed a detailed design development process during which process there was extensive consultation with the public (see paras. 3.8 – 3.26 and 6.1 - 6.9 of the Statement of Case document at annex 2 to the United Kingdom's response to the communication). Thus there were liaison meetings, public exhibitions and feedback meetings. Numerous comments were received from the public and the suggestions made led to changes in the design.
10. Third, the implementation of the detailed design of the ETN required the making of road traffic regulation orders under the 1999 Regulations. These Regulations require statutory consultation with various bodies and organizations. They also require what is called "public deposit" of any draft road traffic regulation orders. The draft orders must be put on public deposit for a minimum of 21 days, the draft must include a map showing the existing and proposed traffic measures and

supporting documents. The public is given access to inspect such documentation and told that objections can be lodged with the City of Edinburgh Council. Following this process consideration is then given to the draft orders by the Council which can proceed or not with the draft orders and/or make amendments. The Council can also in its discretion refer the outstanding objections to a public inquiry: see the commendable summary of the procedures at paras. 5.7 – 5.12 of the Statement of Case document at annex 2 to the United Kingdom's response to the communication. During the statutory process tie ltd – the City of Edinburgh's arms length company – wrote to a number of community bodies and organizations alerting them to the statutory procedures and directing them to the relevant websites. A number of objections were received to the draft orders. Following which officers at Edinburgh City Council wrote a detailed report summarizing and analyzing the objections and. The report is at annex 5 to the United Kingdom's response to the communication. The document runs to over 150 pages and is an exhaustive analysis of the views expressed. Again some changes were made to the orders to take on board the objections of members of the public. This is something which is noted by the Ombudsman in his report.

11. Fourth, even following the making of the road traffic regulation orders a number of local workshops with local interest groups has continued, see what the Ombudsman says in this regard at para. 28 of his report.
12. Thus at every stage of the procedure there were ample opportunities for public participation. These opportunities were taken up by the communicant and others. In consequence (and as the communication acknowledges) changes were made to the ETN scheme and the consequential traffic proposals. The communicant is disappointed that further changes were not made. That is understood. The Aarhus Convention though seeks only to ensure public participation. And there was on any view considerable public participation in this case. What the Convention does not do is dictate that the views expressed by the public must in all regards be accepted. That would in any event be an impossible dictate. Those who responded to the various consultations had a range of views about what was proposed. It would be impossible to satisfy everyone. Thus there are many who support the ETN – and the consequential traffic orders - because of the important economic and environmental benefits they will bring to the City as a whole. Decisions on matters such as this always involve the relevant authority balancing the competing interests and considerations. There can be no question that the procedures here allowed very full participation by the public.
13. The only complaint that is really pursued is that following all of the above lengthy consultative procedures which involved the public (Parliamentary Processes, informal consultation, statutory

traffic regulation procedures etc.) the City of Edinburgh Council should have referred the draft traffic regulation orders for a *further* public hearing in the form of a public inquiry. The City of Edinburgh Council considered but rejected the need for this. A decision the Ombudsman upheld. The Aarhus Convention does not dictate that there needed to be such a further procedure. There is always more consultation and public participation that can be carried out. But decisions like the one in issue need to be made. Here they were only made after extensive public engagement. There was no need for there to be yet more consultation than had already taken place.

(II) ACCESS TO JUSTICE

14. The access to justice complaint is not very much developed in the communicant's correspondence. This is not really an access to justice case at all. The 29 September 2011 letter suggests that to challenge the decisions made judicial review would have been required and that this had "been costed at a minimum £60,000" and as such was out of reach for local residents. In response to that there are really two points to make.
15. First, as the 29 September 2011 letter in fact acknowledges judicial review was not the only route open to the communicant to challenge the decisions. There was also the possibility of a complaint to the Ombudsman. That is the route that was chosen. Here the Ombudsman decided it was a case he would investigate and he carried out a thorough and detailed investigation (which involved, inter alia, inspecting the Council's files and interviewing officers). He found all the complaints made to be unfounded. This procedure was entirely cost free to the communicants. One of the virtues of the Ombudsmen system is that it provides a route to remedying administrative injustices that is cost free and as it is not based on a court model it is much more accessible to non-lawyers.
16. Second, there is no evidence to support the suggestion that judicial review – rather than a complaint to the Ombudsman – was ever seriously considered and costed. There is no evidence of what other ways there could have been to bring any case to Court. Nothing is known of the means of the communicant. In any event it appears that for whatever reason local residents preferred – as they were perfectly entitled to – to go down the Ombudsman route. In the end there only grievance can be that the Ombudsman did not uphold their complaints. Of course, this Committee has no interest in acting as a court of appeal from the decisions of Ombudsmen. The issue is whether or not there was any denial of access to justice. The fact is the Ombudsman route, rather than the judicial review route, was chosen but ultimately the complains made were found to have no foundation. That does not mean access to justice was denied. Rather it is a reflection of the fact that the underlying complaints of the communicants, in particular as to the lack of public participation, lack any justifiable basis.

(III) ACCESS TO INFORMATION

17. The real focus of the more recent correspondence from the communicant has been on access to information. The suggestion is that there has been a failure on the part of the City of Edinburgh to provide residents with up-to-date air pollution data.
18. There are three key points to be made in response to this complaint.
19. First, the complaints lack any factual basis. The simple fact is that the City of Edinburgh Council has never refused to release completed data from the air quality monitoring it carries throughout the city - including in Great Stuart Street. Complete, fully corrected data sets for monitoring in calendar years 2009 and 2010 have already been provided to residents at their request. Data from monitoring in calendar year 2011 will be released in the first quarter of 2012, following validation and correction in accordance with DEFRA technical guidance for Local Air Quality Management (LAQM TG-09). Residents have been given numerous assurances by the Council that data for 2011 will be made available, in early 2012. As with every other year, all raw monthly data for a 12-month calendar year requires to be subjected to correction calculations - for distance and method bias - and then averaged retrospectively to provide a scientifically meaningful set of values.
20. Second, if the communicant nonetheless believes that Edinburgh City Council are holding further relevant data which has not been communicated it has domestic remedies which it could pursue but appears not to have. The Environmental Information (Scotland) Regulations 2004 implement Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information and repealing Council Directive 90/313/EEC (O.J. No. L 41, 14.2.2003, p.26) as regards Scottish public authorities (which includes Edinburgh City Council). They provide for the making available of environmental information held by those authorities, subject to exceptions allowed for by the Directive. If a request for disclosure under these Regulations is refused complaint can be made to the Scottish Information Commissioner: <http://www.itspublicknowledge.info/home/ScottishInformationCommissioner.asp>. If the complaint is upheld he can require disclosure. If the Commissioner refused to uphold the complaint the complainant can take the case to the Court of Session.
21. Third, what really underlies this complaint is that the communicant is at odds with the City Council on the underlying air quality issues. The communicant is entitled to its views but the fact is that the air quality issues have been properly and professionally handled throughout by the City of Edinburgh Council. The Council has not just relied on its own officers but has sought outside independent professional advice. Thus in March 2011, a special Tram sub-committee meeting of

the Council heard from Professor Duncan Laxen, a national expert and scientific adviser to DEFRA on Local Air Quality Management. Professor Laxen gave clear advice to the meeting that the Council was adhering correctly to DEFRA Technical Guidance, and that assertions by some Moray Feu residents - that Air Quality Standards were being breached in Great Stuart Street - were incorrect.

22. Following the committee meeting - and at the request of residents - the Council established a number of additional air quality monitoring sites in and near Great Stuart Street, in June 2011. This includes monitoring directly at residential building facades and in open basement areas immediately adjacent to the properties. As described above, data from the additional monitoring - and from all other monitoring in the city - will be published by the Council in the first quarter of 2012. The extent of air quality monitoring in the Great Stuart Street vicinity is the highest anywhere in the City - well beyond that which would otherwise be in place if siting criteria in DEFRA's Local Air Quality Management Technical Guidance was being adhered to.

CONCLUSION

23. For all these reasons it is contended that the Committee should reject the allegations made of breach of the Convention.

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