From: Dean Blackwood <email address redacted>
To: Aarhus compliance
Cc: Gerry Quinn Brendan Monk , Paul slevin, Thompson-christopher <email addresses redacted>
Date: 12/12/2014 11:20
Subject: Re: ACCC/C/2013/90 (UK) - request for brief clarification

Dear Ms Marshall
Thank you for the opportunity to comment further on this matter prior to the ACCC's meeting.

Notwithstanding that the court case did not go in our favour, this judgment has convinced our organisation, more than ever, that the only recourse to environmental justice in the UK (i.e. judicial review) is seriously prejudicial to those seeking to challenge goverment's environmental decisions, and is in contravention of the Aarhus Convention, for the reasons set out in RFA's initial submissions.

As is evident from the court ruling, the courts in Northern Ireland are concerned with whether proper proceedure has been followed and are reluctant to over-rule a competent authority in matters of judgement on environmental matters. This makes it extremely difficult for challengers like ourselves to convince the courts that the competent authority has fundamentally erred in its interpretation of the facts which led to the impugned planning permission. In essence, the test in such instances is "wednesbury unreasonable" where we were relying on a judge, with no formal planning or environmental protection training, to interprete and understand very complex engineering drawings in order establish that what the Planning Authority had approved was, in fact, not implementable without the real and serious risk to the River Faughan Special Area of Conservation. The "Wednesbury unreasonable" test is one of perversity, where not reasonable authority could have taken such a decision. This is a very high bar to get over, particularly where judges are not experts in planning or environmental matters. The fact that in the summer of 2014 the courts in England moved to appoint specialist judges to hear planning / environemntal judicial reviews, bears out this point.

It became evident to RFA and our legal counsel during the court hearing that the Department had made a serious mistake in its interpretation of the drawings (this we are 100% certain of) but rather that admit to this error, or seek to inform the courts of it, as is a lawful requirement under its "Duty of Candour", it is interesting to note how the Department handled this matter. Rather than rebutting RFA's claims that it had made a serious mistake in its interpretation of the approved drawings, it remained silent and relied on the incorrect information contained in its sworn affidavits. Unfortunately, the judge did not seek to establish whether the drawings were correct, or not, but rather placed determining weight on the (incorrect) affidavits of the competent authority, simply because it was the competent authority.

Since the judgement, RFA has sought (unsuccessfully) to meet with the Department of the Environment in order for it to explain how this planning / environmental decision could be implemented on the ground without serious harm to the River Faughan SAC. To date, it has side-stepped our requests, falling back on the court judgement and the fact that RFA had an opportunity to, but did not appeal the judgement. The simple fact is that the prohibitively expensive nature of mounting an appeal to attain environmental justice was out of our voluntary organisation's reach. And now, we are faced with a position where the Department refuses to provide us with an explanation or information as to how this permission could, in practice, be implemented without environemntal harm. The reason for this refusal to meet is that any meeting will expose the serious error it made and how it failed

to draw this matter to the attention of the judge, which resulted in him relying of seriously flawed information.

Apologies if this is too much detail, but the point being is that RFA could simply not afford to appeal this flawed judgement. Yet the Department by falling back on the fact that RFA did not appeal, is perpetuating an environmental injustice that we believe is contrary to the Aarhus Convention. We strongly beleive that the right to third party appeal, as is available in the Republic of Ireland, would go some way to providing a mechanism where this injustice could be addressed.

Although the Department agreed to limited its recouperation of costs from RFA to £6000 (including VAT), it is clear that this was due to the involvement of the ACCC (for which we are thankful). However, there is nothing to suggest this will become established policy or best practice on the part of the Department in future environmental challenges by the public. Indeed, RFA is certain that had we not complained to the ACCC at the time of lodging our judicial review, the outcome on costs could have been very different and detrimental to the survival of our voluntary organisation. Therefore, we beleive that the arbritarynature and uncertainty which remains within the legal system around awards of costs, and the points raised previously in relation to Protected Costs Orders and Cross Capping Orders, remain a serious impediment to the public's right and ability to mount future challenges of environmental decisions.

In conclusion, RFA believes that our initial complaint on the Department's failure to comply with the Aarhus convention remains valid.
Best regards
Dean