United Kingdom submissions on

ACCC/C/2013/90 (United Kingdom)

27 November 2015

Introduction/Summary

1. Thank you for the letters of 16 December 2013 and 29 June 2015 in respect of the above communication received by the secretariat on 4 June 2013. Although the Compliance Committee has determined the communication to be admissible on a preliminary basis, this initial view was reached before the new arrangements on admissibility were adopted. This will therefore be the first opportunity the Committee has had to consider the United Kingdom's submissions on admissibility. Comments on the communicant's substantive allegations are made notwithstanding those on admissibility and we expect that the Committee will wish to consider the admissibility points first.

2. This document is prepared by the United Kingdom in response to the communication, including in respect of its admissibility.

3. The communicant (the River Faughan Anglers Ltd) concludes the communication of 4 June 2013 ("the communication") by asking that the complaint be received both in relation to alleged breaches (of articles 1, 3, 4, 6 and 9 of the Aarhus Convention) arising "in regard to development consent A/2008/0408/F" and "to consider in general whether the Northern Ireland Government's continued failure to enact the proposed introduction of third party rights of appeal, and reliance on the prohibitive expense of the judicial review process to discourage legal challenge on environmental grounds, is impeding the public's ability to effectively engage in environmental decision making in Northern Ireland."

4. The matters complained of arise out of the processing and determination of application for planning permission A/2008/0408/F for inter alia the relocation of settlement lagoons, site drainage works, associated landscape and environmental improvements. Planning permission was granted on 13 September 2012 ("the Planning Permission") and a copy of the approval appears at Appendix 6 to the communication of 4 June 2013.

5. In summary the United Kingdom's position is that the complaint is both inadmissible and without merit. The complaint should be dismissed.

6. In particular:

(i) The Planning Permission is now time expired and so incapable of implementation. The communicant's complaints relate to the Planning Permission. Those complaints are accordingly of no legal or practical consequence.

(ii) The communicant was able to do and did challenge the Planning Permission by application for judicial review to the High Court of Justice in Northern Ireland.

(iii) Although the communicant was unsuccessful in that application costs were enforced against it only in a limited and Convention compliant manner.

(iv) The Department of the Environment ("the Department") engaged in extensive correspondence and provided considerable environmental information to the communicant over a protracted period of time including throughout the processing of the application.

(v) The communicant was afforded the opportunity to participate in the process of determining the application for planning permission (including the offer of meetings with Departmental officials) and did engage in the process, in particular by making representations on relevant matters that were taken into account.

(vi) There have been no breaches of articles 1, 3, 4, 6 and 9 of the Aarhus Convention.

(vii) Compliance with the Convention does not require the introduction of third party rights of appeal.

(viii) There has been and is no attempt to discourage legal challenge on environmental grounds by reliance on the alleged prohibitive expense of the judicial review process. Indeed positive steps have been taken to mitigate the cost of bringing such challenges in Northern Ireland.

(ix) There is no impediment to the public's ability effectively to engage in environmental decision making in Northern Ireland.

(i) The Planning Permission is incapable of implementation and is of no legal or practical consequence.

7. As appears from the notice of approval, it was a condition of the grant of the Planning Permission that "The new lagoons shall be constructed and brought into operation within 6 months of the date of planning approval".

8. By the time the communication was received, therefore, the Planning Permission was time expired and no longer capable of implementation. It was not, and never will be, implemented.

9. Indeed before the substantive hearing of the communicant's application for judicial review had even commenced the Planning Permission was incapable of implementation. Nevertheless the communicant chose to pursue the application rather than withdraw the challenge at that time and avoid the cost of continuing to challenge a planning permission which could not be implemented and was no longer of any practical consequence to the River Faughan. For this reason alone (and without prejudice to the inadmissibility and/or lack of merit in the communicant's other complaints), the complaint should be found inadmissible.

(ii) The communicant was able to do and did challenge the Planning Permission by application for judicial review to the High Court of Justice in Northern Ireland.

10. Since the time that the communication was first received (4 June 2013) the challenge brought by way of application for judicial review of the Planning Permission by the communicant has been dismissed, on 13 March 2014. See paragraph 120 of the judgment, a copy of which is provided at **Annex I**.

11. The application for judicial review was heard over five days (23 May 2013, 17-18 June 2013 and 17–18 October 2013).

(iii) Costs were enforced against the RFA only in a limited and Convention Compliant manner.

12. Having delivered its decision to dismiss the communicant's application for judicial review on all grounds, the Court allowed the parties some time to consider the costs position. The parties then exchanged correspondence on the issue and an agreed position was reached that the communicant would make a limited contribution of £6,000 (£5,000 plus VAT) towards the Department's overall costs of £54,363.65. A copy of the correspondence is attached at **Annex II**. In particular, it will be noted that:

(a) The Department sought only a modest contribution to its costs as the successful party, despite the RFA's earlier considered decision not to pursue any application to the Court for costs protection.

(b) The contribution sought was in line with (and indeed below) that provided for under the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013[1] which, although not in force in relation to the challenge, had since come into effect.

(c) The communicant could have chosen to resist any order for costs before the Court but instead chose to accept the Department's proposal.

(iv) The Department engaged in extensive correspondence and provided considerable environmental information to the communicant over a protracted period of time including throughout the processing of the application.

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(v) The communicant was afforded the opportunity to participate in the process of determining the application for planning permission and did engage in the process, in particular by making representations on relevant matters that were taken into account.

13. **Annex III** to this response summarises relevant correspondence with the communicant and the communicant's representatives including Northern Ireland Assembly Questions apparently asked on behalf of the communicant. **Annex IV** summarises various requests for information made under the Environmental Information Regulations 2004 and the answers thereto. Copies of the relevant correspondence, Assembly Questions and Answers, and requests for information with responses thereto are provided at **Annex V**.

14. The correspondence demonstrates considerable active engagement with the communicant from the very early stages of consideration of the application through until determination of the application, and indeed thereafter. Beyond the maintenance of its open file system the Department acted in appropriate instances in a proactive manner and went beyond established procedures to ensure that the communicant had access to all relevant information.

15. Engagement included public advertisement, neighbour notification, extensive correspondence, response to Environmental Information and Freedom of Information requests and attempts at direct engagement, for example by

[1] http://www.legislation.gov.uk/nisr/2013/81/contents/made

inviting a representative of the communicant to an office meeting with all major consultees at the Derry Planning Office to discuss the application on 16 March 2011 (when the communicant did not attend, minutes of the meeting were e-mailed to the communicant).

16. The Department worked throughout to ensure that the communicant had proper access to information associated with the planning application and was able to effectively engage in the process. Issues raised by the communicant were fully considered and informed assessment of the relevant issues. The Environmental Information Regulations 2004[2] provide for the provision of all necessary and appropriate information in response to requests for environmental information. All necessary and appropriate information was provided to the communicant in this case.

17. Further matters specific to the alleged breaches of the Convention are also addressed separately below.

(vi) There have been no breaches of articles 1, 3, 4, 6 and 9 of the Aarhus Convention.

18. Each alleged breach is dealt with in turn.

Article 1

19. Article 1 sets out the objective of the Aarhus Convention. It does not fall to be considered in its own right.

20. If any of the operative provisions of the Convention are not complied with, it follows that article 1 itself is also breached (see ACCC/C/2004/3 and ACCC/S/2004/1 (Ukraine)[3]).

21. If there has been no breach of the operative provisions of the Convention then there will be no breach of article 1 either. For the reasons set out below there has been no breach of articles 3, 4, 6 and 9 of the Convention. That being so, the communicant cannot establish a breach of article 1 either.

Article 3(2)

22. Article 3(2) requires that:

[2] www.legislation.gov.uk/uksi/2004/3391
[3] http://www.unece.org/fileadmin/DAM/env/documents/2005/pp/c.1/ece.mp.pp.c1.2005.2.Add.3.e.pdf

"*Each Party shall endeavour to ensure that officials and authorities 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*".

23. The communicant complains that "by its actions DOE planning has failed to include the level of environmental information in its EIA screenings and when asked to justify its negative EIA screenings it declined to do so and invited RFA to take judicial review" (paragraph 17 of the communication).

24. The planning application was screened in accordance with relevant legislation to determine whether it was EIA development. The Department made a screening decision determining that the development, albeit Schedule 2 development, was not EIA development.

25. That screening decision was challenged through judicial review by the communicant on a series of detailed grounds, including the adequacy of the information given as part of the screening decision. The Court ruled that the grounds of challenge relied upon impugning the validity of the screening decision were not made out, the application for judicial review was dismissed and the Department's decision granting the Planning Permission was upheld (See **Annex I**, in particular at paragraph 117 and 118).

26. The letter of 2 August 2012 must be considered against the background of all of the correspondence and engagement that preceded it as addressed in detail above and in the Annexes to this submission.

27. The letter from the communicant (dated 25 July 2012) to which the reply of 2 August 2012 issued neither purported to be nor was considered to be a request for environmental information. Rather, that letter was yet another invitation to revisit the facts of the case.

28. The reference to the options of judicial review in the letter of 2 August 2012 was to advise the communicant of the legal remedy available to it, if it remained dissatisfied with the validity of the decision making process. Had the letter of 25 July 2012 been an Environmental Information request (which it was not), the communicant would have been advised of its rights to seek an internal review and to appeal to the Information Commissioner.

29. The correspondence record shows that the Department and the officials working therein did in this case assist and provide guidance to the communicant in seeking access to information, did provide access to extensive information and did facilitate the communicant's participation in the

decision-making process. Earlier responses to actual requests for environmental information mentioned the communicant's right of review. Thus by the date of the letters of 25 July 2012 and 2 August 2012, the communicant was already well aware of its right to request an internal review.

30. The reference in the letter of 2 August 2012 to the availability of judicial review as a further remedy was not in any way detrimental to the communicant's interests. On the contrary, that letter facilitated the communicant's access to justice in environmental matters by advising it of options available to it.

31. In a similar vein, the Department advised in its many responses to requests for information under the Environmental Information Regulations 2004 what options were available to an applicant if they were dissatisfied by the Department's response. Each Environmental Information response to the communicant, or its Directors, advised that if they were unhappy with the response, there was an option to request a review by the Department in the first instance and, if still unhappy after such a review, they had the right to appeal to the Information Commissioner.

32. The Department did not invite, direct or actively encourage the communicant to make an application for judicial review but rather merely advised it of the route open to it. There is no such policy as alleged by the communicant. The reference by the communicant to a "*policy"* of encouraging JR implies a systematic approach across a number of cases. The Department is unaware of any basis on which the communicant alleges that objectors have been actively encouraged by the Department to take legal challenges.

33. The communicant claims its requests for the Development Control Officer's report ("the DCO Report") were not actioned by the Department in a timely manner, thereby denying it the right to participate in environmental decision making as reports were withheld until after the determination of the application.

34. The time at which the DCO Report was sent to the communicant did not prevent or affect the communicant's participation in the development management process. The communicant was entitled to participate in the process leading up to the decision on the planning application. The communicant was offered and took the opportunity to do so. The communicant was not entitled to participate in making the actual decision whether to grant the Planning Permission. The communicant's views were well known by the Department as evidenced by both the lengthy correspondence on the application and the matters considered by the Department and statutory consultees prior to the decision to grant the Planning Permission.

35. The recommendation to approve the application was made on 24 August 2012 at the monthly Development Management Group Meeting. It was a statutory requirement that Derry City Council is consulted on the Department's recommendation.

36. Following the monthly Development Management Group Meeting, the Department would compile a monthly schedule of applications for presentation to Council with the Department's recommendation. These are available online at least one week before the Council meeting to view. This schedule would have been available for any interested person, including the communicant, to view. In this way the Department's recommendation is made known to the public in advance of the Council meeting. During the period between uploading the schedule online and the Council meeting, it was open to the communicant to have lobbied the Council about the application and/or submit further representations to the Department.

37. The Department's recommendation was presented to the Council on 4 September 2012. The Council agreed with the Department's recommendation and at that point the decision could have issued immediately. In practice, due to competing work demands, it is not possible to issue all decisions immediately following a Council meeting and the Department was only in a position to issue the decision on 13 September 2012.

38. The Department was required to consider all representations received prior to issue of the Planning Permission. It was open to the communicant to submit further representations at any time up until that point. The communicant did not require sight of the DCO report in order to do so. No representation was received from the communicant within this period.

Article 3(8)

39. Article 3(8) requires that:

> "*Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings."*

40. The communicant complains that:

> "… Given the prohibitively costly nature of Judicial Review proceedings, and the Northern Ireland Government's refusal to

introduce "third party" rights of appeal against planning decisions, this RFA believes, is an injustice which unfairly penalizes individuals and voluntary groups, such as ourselves, who are being affected and who have raised legitimate objection to development proposals on environmental grounds".

41. Article 3(8) explicitly "shall not affect the powers of national courts to award reasonable costs in judicial proceedings". The award of costs in principle is therefore not contrary to the principles of the Convention. This has been affirmed in the Committee's findings in ACCC/C/2008/23 [4] and ACCC/C/2008/27[5].

42. The Committee, in those communications, did not rule out the possibility that pursuing costs could in certain contexts be unreasonable and amount to penalisation or harassment within the meaning of article 3(8) of the Convention.

43. There is simply no evidence to substantiate the allegation that this occurred in this case. The limited nature of the costs order agreed and the circumstances in which it was agreed have already been set out above. In the circumstances of the present case, the communicant's complaint that an award of costs in favour of the Department was, in itself, unreasonable and tantamount to penalisation and harassment is absurd. It is an abuse of the right to bring a communication and should be found to be inadmissible under paragraph 20(b) of the annex to decision I/7.

44. Despite having successfully defended the proceedings, the Department pursued only a small portion of its costs incurred in defending this case. The combined cost of the fee of Counsel (Senior and Junior) and the Departmental Solicitor's Office (which acted for the Department of the Environment) together with the outlay incurred was £54,363.65. Nonetheless, the Department sought only to recover £6,000 (£5,000 plus VAT) from the communicant.

45. It would have been reasonable for the Department to have sought an order that the communicant should pay the Department's full costs incurred in successfully defending the communicant's application for judicial review. Under the procedure governing applications for judicial review in Northern Ireland, it was open to the communicant to seek an order limiting its liability to pay the costs of the Department. The communicant chose not to seek such an order. It is manifestly unreasonable for the communicant now to complain that its

[4] http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-23/findings/ece_mp.pp_c.1_2010_6_add.1_eng.pdf
[5] http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-27/DFR/ece_mp.pp_c.1_2010_6_add.2_eng.pdf

exposure to a liability to pay costs to the Department, as the successful litigation party, amounted to "penalisation, persecution or harassment". The Department's approach was reasonable. The Department's approach cannot sensibly be argued to have amounted to "penalisation, persecution or harassment".

46. The communicant was not penalised, persecuted or harassed in any way for its involvement in the planning process or for bringing its challenge to that process by way of judicial review.

47. Other matters relevant to costs and the allegation in respect of failure to introduce third party rights of appeal are dealt with below in respect of the allegation made of breach of article 9.

Article 4

48. Article 4(1) provides that:

> "(1) *Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:-*
>
> (a) *without an interest having to be stated;*
>
> *(b) in the form requested unless:-*
>
> (i) *it is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or*
>
> (ii) *the information is already publicly available in another form."*

49. The communicant complains that "rather than engage with RFA on how it has assessed the environmental effects of A/2008/0408/F, DOE Planning has chosen to invite our voluntary organisation to take a Judicial Review, in the likelihood that this would prove prohibitively expensive".

50. The allegation that the reference to judicial review proceedings was inappropriate has already been dealt with above. The question in relation to

this allegation of breach of article 4 is whether there has been a failure to make environmental information available to the public.

51. The communicant has conceded in its supplementary letter to the Committee dated 30 August 2013 that the information requested in this respect does not exist. No breach of article 4 can therefore have occurred in this respect.

52. In any event, the communicant did not avail of the domestic remedies available in section 50 of the Freedom of Information Act 2000[6] (as applied to the Environmental Information Regulations 2004) in respect of environmental information. These remedies provide for an independent and impartial body to consider reviews of article 4 requests. The communicant has made use of the representation and reconsideration provisions in regulation 11 of the Environmental Information Regulations 2004, which transpose the requirements in Article 6 of EU Directive 2003/4/EC[7].

53. The communicant's complaint is perverse. A procedure or procedures for review, including judicial review, of the correctness or validity of specific decisions by individual public authorities, forms part of the United Kingdom's implementation of the Convention. Not every public authority will get every decision correct every time and it would be nonsensical to suggest that the United Kingdom as a whole is in breach of the Convention because of a specific decision where there is suitable provision for any wrong decision to be corrected.

54. The communicant's failure to avail itself of the available domestic remedies should render its complaint inadmissible having regard to paragraph 21 of the annex to decision I/7 and paragraph 6(b) of decision V/9. The Committee cannot sensibly assess a complaint in circumstances in which the communicant has failed to pursue the potential corrective measures under national law, where a member of the public disagrees with the public authority's decision. In such circumstances, the Committee has no proper basis upon which to call into question the process whereby that decision was reached.

Article 6

55. Article 6 provides that:

> "*1. Each Party:-*

[6] http://www.legislation.gov.uk/ukpga/2000/36/section/50
[7] http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1448557968393&uri=CELEX:32003L0004

(a) shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;

(b) shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions, and ....

2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia of:-

(a) the proposed activity and the application on which a decision will be taken;

.....

(d) the envisaged procedure, including as and when this information can be provided:-

(ii) ... the opportunities for the public to participate ...

3. The public participation procedures shall include reasonable time frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making."

56. The communicant complains (paragraphs 19 - 21 of the communication):

"19. By operating a practice of allowing EIA developments to commence and continue without the necessary development consents, and where these consents can be applied for retrospectively, does not allow the public to become involved in environmental decision making at an early stage. As in the case of A/2008/0408/F, the settlement lagoons adjacent to the River Faughan had already been constructed and operating before the planning application for their retention was eventually submitted in May 2008.

By the time DOE Planning served enforcement notices to have them removed, they had already become immune from enforcement action, as confirmed by the PAC at appendix 10.

20. Furthermore, on 4 September 2012 DOE Planning informed Derry City Council of its intention to approve application A/2008/0408/F. On 5 September 2012 RFA called at the Northern Area Planning Office and requested a copy of the case officer report and Development Management Report as there is a requirement for this information to be available to the public prior to any recommendation being presented to Council. Our River Watcher was advised that these reports were not ready and that it would be sent to him once it became available. On the 6 September 2012, a copy of these reports were requested in writing by RFA. On 11 September 2012 a copy of these reports were once again requested in person by our River Watcher and once again he was turned away from the Planning Office after being advised that the reports were still being finalised. Eventually they were posted to him on 17 September 2012, four days after the development consent was issued. Incredibly, these reports, when received, were dated 24 August 2012 (attached as appendix 12) This is clear evidence of non-compliance with Article 6 of the Convention in that RFA was clearly and deliberately denied the opportunity to participate in environmental decision making as these reports approving the development were withheld from us until after the decision was made.

21. As previously stated at paragraph 19 above, it should also be noted that planning application A/2008/0408/F was initially for a retention permission for development (unauthorised settlement lagoons) that had already been constructed adjacent to the River Faughan without any development consents. Presently the Department of the Environment consider it appropriate to allow unauthorised EIA Development (i.e. development that has already commenced and which has been deemed to require the submission of an Environmental Statement) to continue in the absence of any development consent. Two examples of this are retrospective planning applications A/2009/0400/F and A/2011/0210/F for mineral extraction affecting the SAC. RFA has not provided details of these cases in order to avoid potentially extraneous or superfluous documentation (in line with section VIII of the checklist for communications with the ACCC), but can do so on request. Furthermore, it considers it appropriate for such unauthorised development to be regularised at a later date through the submission of a retrospective planning application. Although perhaps not germane to this complaint, RFA feels it is important for the ACCC to be aware of

> the context of our complaint and that we firmly believe that the Department of the Environment for Northern Ireland is failing to properly transpose the requirements of the EIA Directive and uses the prohibitively expensive judicial review process (the only challenge mechanism open to individuals and voluntary groups) to negate its environmental responsibilities."

57. It is denied that the development activity in question fell within the ambit of article 6 by being listed in annex I to the Convention or by being an activity which may have a significant effect on the environment.

58. It is only if article 6 is engaged (which is denied) then the communicant's specific allegations as to failure to facilitate public participation fall to be considered.

59. References to relevant legislative and administrative arrangements for public participation in development management decision-making are given in paragraphs 100 *et seq.* below.

Article 9

60. The communicant complains (paragraph 22 of the communication) that:

> "Article 9 of the Convention relates to access to justice. In Particular Article 9(4) requires provision for *"adequate and effective remedies including injunctive relief as appropriate, and to be fair, equitable, timely and not prohibitively expensive."* As the Northern Ireland Government continues to stall on introducing of "third party" rights of appeal for those members of the public objecting to development proposals, the only alternative available to challenge the public authority's environmental decision making is through Judicial Review, which is prohibitively expensive, for all but the wealthiest of challengers. For the public authority to openly invite Judicial Review in the full knowledge of the true costs of these legal actions, is unjust and violates the Aarhus Convention."

61. The communicant makes a number of complaints in respect of article 9. Each is dealt with in turn.

Third Party Rights of Appeal

62. Although the issue of third party rights of appeal has been the subject of ongoing discussion and consideration over recent years in Northern Ireland

(and will, we understand, be kept under review) the current position, in common with the other UK administrations, is that Northern Ireland does not operate a system of third party rights of appeal.

63. There are no current plans to consider the introduction of third party rights of appeal in the rest of the United Kingdom. The United Kingdom's view is that, regardless of the arguments for or against their introduction, they are not necessary for achieving compliance with the Convention.

64. Article 9 requires that the public have access to procedures for review before a court, and this is clearly met by the availability of judicial review to challenge both the substantive and procedural legality of development management decisions by public authorities. There are opportunities for the public both to engage during the decision-making process and to challenge decisions by application for judicial review. The availability of an appeals process for those requesting the development consent provides no bar to this, and can be seen as separate and additional to the wider rights of participation and challenge.

65. In cases where article 6 is engaged, the requirement is to provide a review procedure before a Court/independent body established by law to challenge the substantive and procedural legality of a public authority's decision (article 9(2)).

66. Even if article 6 is not engaged, article 9(3) still requires that the public has access to administrative/judicial procedures to challenge acts and omissions by public authorities which contravene provisions of national law relating to the environment.

67. Judicial review fully meets the requirements of both 9(2) and 9(3).

68. The communicant appears to argue that judicial review is inadequate for that purpose because it does not enable a challenge to the substantive legality of a decision (in its e-mail to the Secretariat of 12 December 2014, it expresses concern that the courts in Northern Ireland are concerned only with whether the proper procedure has been followed). That complaint is simply factually incorrect and betrays a basic misunderstanding of the nature of the Court's powers on judicial review of administrative action. (A complaint about the substantive merits of a decision to grant planning permission has never in itself been a proper ground for judicial review).

69. The United Kingdom has noted the Committee's comments in ACCC/C/2008/33 regarding the availability in the UK of a procedure for substantive review of decisions but also notes that the Committee has not made a finding of non-compliance on this issue.

70. Article 9(2) of the Convention does not require provision of access to a full merits review. It does not refer to a right to challenge the factual basis for, or the merits of, a decision. The role of the courts is to review the substantive and procedural legality of a decision. It is not to substitute the court's view of the actual decision taken by the executive. Taking a different approach would be at odds with fundamental constitutional principles of separation of powers and democratic oversight of executive decision-making.

71. The relevant concept is substantive legality. The 2014 *Implementation Guide* (at page 196) confirms this position by referring to challenges if the substance of the law has been violated. Judicial review permits these challenges. It is elementary that judicial review in the United Kingdom, including Northern Ireland, encompass substantive legality. It is not restricted to a consideration of whether a decision was reached by a correct process but can also consider whether the decision was in itself contrary to the law.

72. As the England and Wales Court of Appeal emphasised in *R (Evans)* v *Secretary of State for Communities and Local Government* [2013] EWCA Civ 114[8], there are a number of other established heads of public law review in the UK. Irrationality, or '*Wednesbury* unreasonableness', is only one form of substantive illegality which may form the basis of a judicial review challenge. The procedure also permits challenges to decisions on the basis that there has been an error of law and material error of fact.

73. The communicant criticises the *Wednesbury* test applied in judicial review proceedings as providing too high a standard of review. It suggests the threshold at which the decisions of public authorities are considered irrational is placed so high that it is virtually impossible for their decisions to be disturbed. The suggestion is that this threshold is rigidly applied by the courts.

74. That suggestion is without merit. As the Committee will be aware, article 9(2) of the Convention has been incorporated into EU law under both the Environmental Impact Assessment Directive (2011/92/EU)[9] and the Industrial Emissions Directive (2010/75/EU)[10]. We note that in CJEU decision in *Commission* v *UK* (Case C-508/03[11]), the CJEU did not criticise the use of the *Wednesbury* principle. In the *Evans* case (at [35]-[38]), the Court of Appeal in

[8] http://www.bailii.org/ew/cases/EWCA/Civ/2013/114.html
[9] http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1448558355792&uri=CELEX:32011L0092
[10] http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1448558355792&uri=CELEX:32011L0092
[11] http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30dd7d911c24fc924a3eadfae4790ce392b3.e34KaxiLc3qMb40Rch0SaxuRc3z0?text=&docid=56614&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=864436

England and Wales stated it to be substantially the same as the 'manifest error of assessment' test required by EU law.

75. Furthermore the Convention does not in fact specify a particular standard of review. Article 9(4) simply provides that the review procedure must provide 'appropriate and effective remedies'. The remedies provided by the judicial review procedure include quashing, prohibiting and mandatory orders and awards of damages, remedies which are clearly both appropriate and effective.

76. It is noted that the Committee has previously indicated the view that the principle of proportionality might be applied by the courts in environmental cases in which judicial review is sought in the UK. We consider, however, that the test is by its nature inapplicable to a factual assessment such as that made by the Department in this case (see the similar comments made by Sir Stanley Burnton in the *Evans* case at paragraph 44).

77. In summary, the judicial review procedure allows courts across the UK to assess the substantive and procedural legality of decisions in compliance with the Convention. The communicant has failed to substantiate any breach in this respect.

Judicial Expertise

78. The communicant is also critical of what it perceives as a lack of planning expertise on the part of the judge that dealt with its judicial review. It suggests that this impeded his ability to understand complex engineering drawings and affected the standard of review applied in the case.

79. This allegation is completely lacking in merit. Judicial review cases across the UK are taken in respect of a wide range of subject matters. Many involve the detailed consideration of esoteric and technically complex issues. Planning cases are not unique in this regard. The judges that deal with these reviews in Northern Ireland are highly skilled in assimilating and assessing the relevant information in each case to determine the appropriate outcome. They do not need to have the level of technical expertise possessed by the relevant decision maker. On the contrary, their role is to consider whether or not the decision of the relevant public authority is lawful by applying relevant legal principles. The selection process which governs the appointment of the relevant High Court Judges ensures that those appointed possess the necessary legal skills and experience to meet those demands.

80. The communicant cites the creation of the Planning Court in England and Wales as an example of the particular expertise that it considers is needed in

planning cases. The main impetus for establishing a Planning Court was the need to expedite the consideration of planning cases in England and Wales. The number of planning cases brought in that jurisdiction, and the potential for delay in planning cases to result in delay to development, led to the establishment of the Planning Court to make sure that cases can be heard more quickly. As a small legal jurisdiction, the number of planning cases in Northern Ireland is relatively low and can be dealt with swiftly. As such, there is considered to be no justification for the creation of a similar structure there.

Allegation of prohibitive cost

81. The only complaint remaining to the communicant in this respect is the complaint of prohibitive cost. We refer again to those matters set out above in the response to the allegation of breach of article 3(8) which also referenced an allegation of prohibitive cost.

82. The issue of costs of judicial review proceedings has already been considered in detail by the Committee and the Meeting of the Parties, most recently in decision V/9n and the progress reports provided to the Committee in December 2014 and November 2015.

83. It is submitted, given the Committee's considerable workload and in accordance with past precedent, that the appropriate forum for further discussion on an issue that has already been considered and which is subject to continuing dialogue, would be decision V/9n. The communicant does not appear to raise any new issues in this case. We would therefore request that the Committee does not consider these aspects further in this communication.

84. Since the proceedings for judicial review in this case were issued, new rules providing for cost protection for applicants for cases within the scope of the Convention have been adopted throughout the UK. These schemes will ensure that no unreasonable pursuit of costs or penalisation in pursuing costs can take place in Aarhus cases arising in the UK.

85. The relevant rules that apply in Northern Ireland are the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013. They came into force on 15 April 2013.

86. The Regulations provide cost protection for applicants in judicial reviews and statutory reviews to the High Court in Northern Ireland of decisions within the scope of the Aarhus Convention. They limit the costs recoverable in these cases to £5,000 from an applicant who is an individual and £10,000 in all other cases. The costs recoverable from a respondent are limited to £35,000. The

Regulations also clarify the factors the court must take into consideration when a cross-undertaking in damages is required in the context of an application for an injunction in such a case. In addition, the Regulations empower the court to make costs orders for payment to a charity promoting *pro bono* representation when the applicant is represented *pro bono*.

87. Details of these regulations have been provided to the Committee in update reports on Decision V/9n and as the Committee is aware, case law delivered since these regulations were adopted have led the Department of Justice in Northern Ireland (and the other administrations across the UK) to review the scheme adopted in 2013.

88. To this end, on 25 November 2015, the Department of Justice in Northern Ireland launched a public consultation which makes proposals which would address issues formulated in Committee's decision V/9n. This followed the launch of a similar consultation exercise in respect of England and Wales in September 2015.

89. As with the proposals made in respect of England and Wales, the Northern Ireland consultation proposes giving the parties to Aarhus proceedings the right to apply to the court to vary the cost cap applied. It proposes that the court will only be able to vary the cap if it is satisfied that to do so would not make the costs of the proceedings prohibitively expensive for the applicant. It is proposed that the court should be required to have regard to the principles set out in *Edwards* v *Environment Agency* (Case C-260/11) (and reiterated by the UK Supreme Court in *R (Edwards)* v *Environment Agency (No. 2)* [2013] UKSC 78 [12]) when determining the level of costs which would be 'prohibitively expensive' in a particular case. It is considered that this will allow for continued compliance with the Convention by ensuring that any variation would not make costs prohibitively expensive for the applicant.

90. The consultation on the Northern Ireland costs rules closes on 20 January 2016. An update on its outcome can be provided to the Committee in due course once the consultation responses have been analysed. The consultation is available at https://www.dojni.gov.uk/consultations/consultation-proposals-revise-costs-capping-scheme-certain-environmental-challenges.

91. Although the communicant's application for judicial review was commenced prior to the introduction of the new statutory protected costs regime, there can be no sensible suggestion that the costs incurred by the communicant were prohibitively expensive. The sum of £6,000 recovered cannot be considered prohibitive. It was in line with the principles for determining the reasonableness

[12] www.bailii.org/uk/cases/UKSC/2013/78.html

of costs as set out in the *Edwards* case. The sum agreed upon constituted a small fraction of the true costs incurred by the Department in defending the proceedings. It was reasonable for the Department to seek to recover these costs in order to protect, to at least to some extent, the public purse.

92. The communicant further alleges that the costs of an appeal from judicial review proceedings in Northern Ireland are prohibitively expensive. This is denied. The 2013 Regulations provide the courts in Northern Ireland with the capacity to ensure that appeal proceedings in that jurisdiction are not prohibitively expensive. They provide that in hearing any appeal in an Aarhus Convention case, the court may make an order limiting the recoverable costs of the appeal. In deciding the extent of the limit to be imposed, the Regulations provide that the court must have regard to the means of both parties, all the circumstances of the case and the need to facilitate access to justice. Similar protection is provided in England and Wales and Scotland in the court rules that apply to those jurisdictions.

93. The 2013 Regulations do not impose a fixed cap for the costs of an appeal, as is applied to judicial or statutory reviews which come within the scope of the Convention. We note the findings in *Edwards* that the assessment of what is prohibitively expensive cannot differ depending on whether the national court is adjudicating at the conclusion of first-instance proceedings or on appeal. In appeal proceedings, the relevant issues will have been adjudicated by the court of first instance. The issues subject to appeal will have crystallised. Under the 2013 Regulations, it is for the appeal court judicially to determine appropriate costs limit or limits on appeal having regard to all the relevant circumstances of the instant case, including the decision in the lower court. In this way, the appeal court is able to give proper effect to the decision in *Edwards*.

94. The communicant suggests that it would have appealed the judicial review decision in this case, but that it has been deterred by what it considers to be the prohibitive costs of mounting an appeal. That a prohibitive level of costs were not recovered or pursued from the communicant by the Respondent has already been clearly established. The communicant does not attempt to establish any difference that would have applied in this regard on appeal. It is more likely that it was the weakness of the arguments advanced by the communicant and its limited prospect of success that influenced its decision not to appeal (each ground of its case was rejected by the High Court of Northern Ireland in its application). Insofar as the complaint is about the level of costs the communicant agreed to incur vis a vis its own representatives, it is relevant to note that we do not consider the level of a claimant's own costs for legal representation to be relevant to whether proceedings are "prohibitively expensive".

95. It is submitted that in light of all of the foregoing, notwithstanding that further exchanges on this topic, if any, should properly take place within the ambit of decision V/9n, the evidence in this case is that the scheme complies with the requirements of article 9(4) of the Convention and that non-compliance has not been substantiated.

(vii) Compliance with the Convention does not require the introduction of third party rights of appeal.

96. This is already addressed above in consideration of the allegations of breach of article 9.

(viii) There has been and is no attempt to discourage legal challenge on environmental grounds by reliance on the alleged prohibitive expense of the Judicial review process. Indeed positive steps have been taken to mitigate the cost of bringing such challenges in Northern Ireland.

97. This is already addressed above.

(ix) There is no impediment to the public's ability to effectively engage in environmental decision making in Northern Ireland.

98. In light of all of the foregoing, it is submitted that it is unarguable that this case raises any question of an impediment to the public's ability to effectively engage in environmental decision making in Northern Ireland.

99. Nevertheless, some general comments are also made as to public access and participation in the planning process in Northern Ireland.

Legislative Provision for Engagement

100. The planning system in Northern Ireland is generally regarded as open and transparent. At the time of the determination of planning application A/2008/0408/F, the system was a unitary or single-tier system where the Department operated as the planning authority for the whole of Northern Ireland.

101. The legislative requirements underpinning the operation of the development management elements of the planning system at the time when the application A/2008/0408/F was submitted and considered were set out primarily in:-

- The Planning (Northern Ireland) Order 1991 [13]; and

- The Planning (General Development) Order (Northern Ireland) 1993 (see **Annex VI** for relevant excerpts from the 1993 Order).

102. The legislation addressed the need for planning permission and elements of the process for the determination of an application. The statutory requirements included:-

    - public advertisement in at least one newspaper circulating in the locality;
    - published notice on a website maintained for the purpose of advertisement of applications;
    - consultation with the district council for the area; and
    - retention of copies of identified information on a register of applications.

103. The intention was that all applications received must be publicised so that anyone potentially affected by the proposed development might make representations to the Department before the application was determined. In addition, the Department had in place an administrative process whereby occupiers of premises on neighbouring land identified against set criteria were neighbour notified of any application.

104. In this case, Application A/2008/0408/F was first newspaper advertised on 13 June 2008 and then re-advertised on 3 August 2011. The communicant was first notified under the Neighbour Notification process on 23/10/2008 and continued to be re-notified following each amendment/receipt of additional information. While there is no hard copy of neighbour notification nor the actual press advertisement each element of the process was recorded on the NI Planning Portal.

105. The Planning Act (Northern Ireland) 2011[14] and its subordinate (or secondary) legislation reinforced the role and involvement of third parties in the planning system and strengthens local participation through a range of initiatives leading to more effective community engagement including active participation in the development plan process and at the earliest stages of the development management process. The legislation maintains the statutory requirement for newspaper advertisement of planning applications and notification on a council's website. In addition, the formerly administrative process of neighbour notifying identified occupiers of premises has been placed on a statutory basis

[13] http://www.legislation.gov.uk/nisi/1991/1220/contents
[14] http://www.legislation.gov.uk/nia/2011/25/contents

under the Planning (General Development Procedure) Order (Northern Ireland) 2015.[15]

106. Further provision facilitating engagement is made by the regulations providing for access to environmental information (the Environmental Information Regulations 2004) and through the open access provided by the Northern Ireland Planning Portal.

The Northern Ireland Planning Portal and Public Access

107. Annex VII gives information about the Northern Ireland Planning Portal. See also www.planningni.gov.uk.

Conclusion

108. For the reasons set out above, the communication should be found inadmissible on the grounds that each complaint made therein is unsubstantiated and manifestly unreasonable in terms of paragraph 20 of the annex to decision I/7 and the communicant has not utilised and exhausted domestic remedies in terms of paragraph 21 of the annex to decision I/7 and paragraph 6(b) of decision V/9.

109. In the alternative and in any event none of the communicant's complaints are properly grounded and the communication should be dismissed.

[15] http://www.legislation.gov.uk/nisr/2015/72/contents/made

LIST OF ANNEXURES

I. Judgment of Treacy J in *River Faughan Anglers Limited's Application* [2014] NIQB 34
II. Correspondence on the issue of costs (letters dated 28 March 2014, 23 May 2014, and 30 May 2014)
III. Summary of relevant correspondence between the Department and the communicant.
IV. Summary of requests for information under the Environmental Information Regulations 2004 and responses thereto
V. Copies of relevant correspondence between the Department and the communicant including copies of requests for information and responses thereto.
VI. The Planning (General Development) Order (Northern Ireland) 1993 – excerpts only.
VII. Planning Portal Information.