Communication ACCC/C/2013/90 (United Kingdom) to the Aarhus Compliance Committee – the River Faughan Anglers – 59th Meeting of the Aarhus Compliance Committee in Geneva

NOTE OF ORAL PRESENTATION

ON BEHALF OF THE GOVERNMENT OF THE UNITED KINGDOM
12 DECEMBER 2017

Introduction

1. This communication concerns a planning permission granted on 13 September 2012 ('the planning permission') by the Department of the Environment in Northern Ireland ('DoE'). The planning permission authorised the relocation of settlement lagoons and other works serving an operational concrete production plant at Glenshane Road, Drumahoe, Londonderry ('the site'). The site lies adjacent to the River Faughan, which is designated as a Special Area of Conservation (SAC). The communicant is an anglers association who manage the fishing rights on the river. It objected to the proposed development at the site.

2. The effect of the planning permission was that the replacement lagoons had to be constructed and operational by no later than 13 March 2013 and the existing lagoons decommissioned and removed from the site by 31 October 2013.

3. In the event, the lagoon scheme was not carried out. The planning permission has expired. Should the operator of the site wish to revive the lagoon scheme in future, it must make a fresh application for planning permission. If it does so, the communicant will have the opportunity to participate and again raise its objections to the lagoon scheme under the statutory procedures in the Planning Act (Northern Ireland) 2011 and the Planning (General Development Procedure) Order (Northern Ireland) 2015.

4. The UK relies upon its submissions on the communication dated 27 November 2015 and the Department for Environment, Food and Rural Affairs' (DEFRA) letter dated 30 November 2017. The purpose of these submissions is to summarise the UK's key points.

The communicant's principal complaint

5. The principal complaint is that the DoE granted the planning permission on the basis of a "fundamentally flawed EIA determination dated 25 June 2012". The communicant relies upon its letter dated 25 July 2012, complaining that "instead of responding to our environmental concerns and reasonable questions, DOE Planning advised on 2 August 2012 that….there is an appropriate remedy through Judicial Review".

The key facts

EIA determination dated 25 June 2012

6. On 25 June 2012 the DoE determined that the lagoon scheme did not need EIA, applying the screening procedure laid down by regulation 9(1) of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 1999.

7. The EA Determination Sheet dated 25 June 2012 records the DoE's reasons for concluding that EIA was not necessary. Although the lagoon scheme was within schedule 2 of the EIA Regulations, it was not likely to result in significant environmental effects for the following reasons –

> "Based on the current location of the lagoons, the Department had determined in June 2008 that there was no requirement for an environmental statement as all aspects of the application could be dealt with through the normal planning process. The consultation process established that NIEA had concluded, through its appropriate assessment consideration, that there will not be significant adverse impact on the SAC and ASSI subject to amendment of the proposal. It was established that the current lagoons are within the flood plain and as a result had the potential to impact on the nearby River Faughan if a flood event occurred. On foot of this a revised scheme was submitted, which proposes to decommission the current lagoons and relocate them outside the flood plain and further away from the area of acknowledged importance, the River Faughan ASSI and SAC.
>
> The Department has determined that the relocation of the lagoons can also be dealt with through the normal planning process. It is satisfied that the relocation has reduced the probability of impact and has moved the proposal away from the River Faughan ASSI and SAC and outside the flood plain. Essentially therefore the overall size of the development subject of the application is the same as June 2008 and the location of the new lagoons is an improvement on the current location. In conclusion an EIA is not required".

8. The DoE emailed a copy of the EA Determination to the communicant on 17 July 2012.

The exchange of correspondence (25 July 2012 and 2 August 2012)

9. The communicant's letter of 25 July 2012 shows that it strongly disagreed with the EIA determination. The communicant wrote that letter in order to contend that the EA Determination was clear evidence of illegality. Thus, the letter of 25 July 2012 concluded –

> *"RFA must caution the department that if it attempts to proceed on the basis of the EIA determination carried out on 25 June 2012, it will be deliberately doing so in the knowledge that it is acting illegally and in direct breach of the EA and Habitats Directives".*

10. Thus, in lawyers' language, the letter of 25 July 2012 was a "letter before claim". It was a warning that if the DoE permitted the lagoon scheme without further EIA and on the basis of the EA Determination, it faced the prospect of legal proceedings by the communicant to challenge the validity of the EA Determination and the planning permission.

11. Understandably, that was how the DoE understood the communicant's letter of 25 July 2012 when it received it. That explains why the DoE responded as it did in its letter of 2 August 2012 -

> *"The Department has complied with the requirements of the legislation and has made and documented its decisions and reasoning. It is considered that this is both correct and justified. I note the River*

Faughan Anglers take a different view and you are entitled to challenge the Department's decision by way of Judicial Review. In the interim there is nothing further that can be added as there would appear to be fundamentally different views taken on EIA. The Department does not consider it appropriate to engage in extended and expansive correspondence in the light of your stance as there is an appropriate route for remedy through Judicial Review".

The communicant's claim for judicial review of the planning permission

12. The communicant then made its claim for judicial review, on the ground that the planning permission was invalid because the DoE had unlawfully determined that the proposed development did not need EIA. The claim review was heard by the High Court in Belfast. The communicant chose to be represented by senior and junior counsel specializing in planning and environmental law. The communicant took the opportunity to bring expert evidence in support of its claim before the court.

13. The communicant's claim was dismissed by Treacy J in a reasoned judgment running to 121 paragraphs – [2014] NIQB 34. The communicant and the DoE reached agreement that the communicant would pay legal costs to the DoE limited to the sum of £5,000 (excluding VAT). The communicant did not seek to appeal the decision of the High Court.

United Kingdom' response to the complaint

14. The UK's main submission is that, in the light of these facts, this communication is without proper foundation or merit. The communicant was able to pursue its complaint, i.e. that there had been a failure of EIA in respect of the lagoon scheme that invalidated the planning permission. It was able to do so in accordance with the domestic legal and procedural arrangements for legal challenge and at limited liability in costs to the DoE. That the communicant did not succeed in its claim does not put the UK in breach of its obligations under the Convention. It merely shows that the communicant's case was not well-founded. The Committee should not act as a court of appeal against the court's decision.

Article 3(2)

15. The alleged breach is 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". The UK's response is set out in paragraphs [22] to [38] of its submissions dated 27 November 2015.

16. This allegation is founded upon the same exchange of correspondence dated 25 July 2012 and 2 August 2012. For the reasons already given, it is incorrect to characterize the communicant's letter of 25 July 2012 as a request for information. It was a letter before claim.

17. Moreover, by the date that letter, the communicant did not lack any relevant environmental information on the issues raised. The communicant was well aware of the lagoon scheme. On 17 July 2012 the communicant had received a copy of the EA Determination. It was thus able to formulate its detailed criticisms and mount a sustained argument about the validity of that determination.

18. There had already been extensive engagement between the DoE and the communicant about the lagoon scheme. There was in truth no further environmental information to be given to the communicant in response to its

letter. The communicant knew what the DoE knew. The letter of 25 July 2012 was a critique of the EA Determination, based upon the environmental information that the communicant had already obtained from the DoE.

19. In the circumstances, the DoE's letter of 2 August 2012 discloses no breach of article 3(2) of the Convention. It was consistent with the UK's treaty obligation for the DoE to respond drawing attention to the availability of judicial review.

20. In its letter of 15 February 2017 the communicant complains that it did not receive a substantive response to certain letters and about the quality of information provided. The communicant complains that the open file system is not properly maintained. However, the correspondence shows that the communicant had a good grasp of the issues and participated actively in the process. The letters form part of the communicant's ongoing objection to the lagoon scheme. The DoE well understood that objection and took account of it in determining whether planning permission should be granted.

21. Nevertheless, by 2 August 2012, the parties had fundamentally different views about the need for EIA. There was no purpose in further extended correspondence reiterating those views. The DoE assisted the communicant in drawing attention to the available and appropriate remedy of judicial review.

22. The communicant asserts that its ability to participate in environmental decision-making was hindered by the expiry of the statutory time limit for enforcement action against the existing settlement lagoons, which were thus lawful. That complaint is about the operation of the domestic rules governing enforcement of planning control in relation to allegedly unauthorised EIA development. In fact, the UK courts have determined that the UK's system of time limits for taking enforcement action is compatible with both the EU EIA Directive (2011/92/EC) and the principles of EU law. This communication is not the place to debate that decision.

Article 6

23. Article 6 concerns public participation in decisions to permit specific activities. In the present case, none of the activities on site for which planning permission was required fell within annex 1 of the Convention. The EA Determination was a screening decision by the DoE that the lagoon scheme was not likely to have significant effects on the environment and so did not need EIA under the procedures laid down by the EIA Regulations.

24. The position is thus quite straightforward –

(1) The planning permission did not authorise an activity falling within the ambit of article 6(1)(a) of the Convention.

(2) The EIA Regulations provided the procedures under national law protecting the rights provided under article 6(1)(b) of the Convention. There was a system for screening in place under regulation 9 of the EIA Regulations 1999.

(3) On 25 June 2012 the DoE applied those procedures - the EA Determination.

(4) The communicant was able to and did challenge the validity of that determination in proceedings before the High Court.

25. The obligations laid down under article 6(6) of the Convention have been fulfilled in this case. The DoE made the EA Determination available to the

communicant by email on 17 July 2012. The communicant was thus able to formulate both its letter of 25 July 2012 and its subsequent claim for judicial review. The communicant's real complaint is not the absence of procedures that fulfil the provisions of article 6 but rather the outcome of the proper operation of those procedures in this case. This is not a meritorious basis for complaint.

26. The communicant should confine its complaint under this ground to participation in decisions that actually fall within the scope of article 6. In the present case, that complaint is limited in scope only to the validity of the EA Determination. None of the other acts or omissions that the communicant alleges against the DoE is concerned with a decision whether to permit proposed activities that fall within the scope of article 6(1) or accordingly within the scope of article 6(6).

Article 9

27. The communicant's complaint is that judicial review does not give a third party applicant a merits based appeal against a planning permission as opposed to a lawfulness review.

28. On the facts of the present case, however, the availability and scope of the judicial review procedure provided the communicant with the appropriate legal basis upon which to pursue the remedy that it wanted. As is evident from its letter of 25 July 2012, the communicant contended for the invalidity of the DoE's determination that the lagoon scheme did not need EIA. Judicial review was the appropriate review procedure through which to maintain that contention. On 2 August 2012, the DoE reasonably drew the communicant's attention to the availability of that remedy. The communicant availed itself of that review procedure and pursued its claim.

29. For these reasons, in this particular case the UK's obligations under articles 9(2) and (3) of the Convention have been fulfilled.

30. Although not strictly necessary in order to respond to the present communication, the general position is as follows -

(a) 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. In the UK generally and within Northern Ireland there are opportunities for the public both to engage during the decision-making process and to challenge decisions by application for judicial review.

(b) 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)).

(c) 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.

(d) Judicial review meets the requirements of both 9(2) and 9(3). Access to a full merits review is not required by either provision.

(e) The availability of an appeals process for those seeking development consent is separate and additional to the wider rights of participation and challenge. It does not undermine compliance with articles 9(2) and 9(3) as set out above.

31. In its response of 15 February 2017, the communicant accepted that by the time of the substantive hearing before the High Court the planning permission had expired. The communicant's attempted explanation in that letter for maintaining its complaint is unsatisfactory. The communicant acknowledges that before the trial took place, the point had been reached where the proceedings could serve no useful purpose. Nevertheless it decided to press on with the application. This was perverse. Whatever the outcome of the proceedings, the existing lagoons would remain *in situ*. It is said that the communicant worried about how withdrawal would be construed. But the communicant could have withdrawn its proceedings on the explicit basis that the planning permission was now incapable of implementation and it had a duty to its members not to risk its funds in pointless litigation.

The communicant's letter of 26 November 2017

32. The role of the Ombudsman is to provide a remedy for alleged maladministration. Its relevance is that it provides a further systemic route whereby a complainant is able to seek relief for matters that do not fall naturally within the scope of other regulatory controls or legal procedures. The confidentiality of the Ombudsman process arises from the statutory procedure itself.

33. The communicant's "joint proposal" is inappropriate for the reasons given in the Department for Infrastructure's letter dated 29 November 2017. The communicant's assertion that the High Court was misled (the "overlap" point) is without merit. The contention is that the sequence of development imposed by conditions 1 and 2 of the planning permission could not in practice be achieved, since the replacement settlement lagoons could not be constructed whilst the existing lagoons remained in place.

34. The communicant argued this point before the Court. The DoE's case was that the phasing and methodology for implementing the lagoon scheme was a matter for engineering and building control. It was the developer's responsibility to carry out the scheme in accordance with the conditions imposed on the planning permission. In the event, the lagoon scheme cannot now be carried out without a fresh planning permission.

35. The communicant was able to make its case before the Judge, through expert planning evidence and the submissions of specialist senior and junior counsel. The real complaint is that the Judge was not persuaded by the communicant's argument.

36. The points raised about structural integrity and other environmental litigation did not form part of the original communication and so cannot be entertained.

Conclusion / Summary

37. The UK maintains its original response of 27 November 2015. For all the voluminous material that the communicant has supplied to the Committee since making its original communication in June 2013, it is the exchange of letters dated 25 July 2012 and 2 August 2012 that remains the basis of its complaint. The UK contends that, on analysis, there has been no failure to guarantee the rights provided under the Convention. The true position is that the communicant has taken advantage of those rights and pursued its case about the validity of the EA Determination and the planning permission through its legal challenge in the High Court, but has failed to make good that case.

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11 December 2017