Complaint to the Aarhus Convention Compliance Committee against the UK Member State's (Department for Infrastructure for Northern Ireland) violation of the Convention.

William Donnelly
[redacted]

14 October 2019

Dear Sir,

I am a private individual, now retired but until March 2019 ran a small Bed and Breakfast business in close proximity to the Cavanacaw Goldmine near Omagh in County Tyrone Northern Ireland.

My Telephone number is:
[redacted]

My Email is:
[redacted]

Background

In 1995, Omagh Minerals Ltd were granted planning permission K/1992/0713/F, for a 60 hectare 40 meter deep, "Opencast pit for the extraction of gold and silver and associated minerals, with associated plant and storage" at Cavanacaw, near Omagh. *(Annex 02)*

The planning application was the subject of environmental impact assessment at that time and was also the subject of a lengthy public inquiry. Many expert witnesses gave evidence at the inquiry about the likely environmental impact of such a project. The public inquiry report contained numerous references to heavy metals and Acidic Rock concerns at the site. There was an article 40 agreement entered into between Omagh Minerals Ltd and the Department around the time of the grant of planning permission, which required that if net acid generation potential is identified, monitoring should continue for a period of thirty years after closure of the development. *(Annex 03)*

Opencast mining operations did not commence until 2007 and subsequently ceased in 2013. In 2012 Omagh Minerals submitted an application to extend operations to 300 meters underground. (Planning Application K/2012/0373/F). *(Annex04)* The planning application was also the subject of Environmental Impact Assessment, *(Annex05)* a Habitats Regulations Assessment and stage 2 Appropriate Assessment were also carried out. *(Annex06)* Planning permission was subsequently granted in July 2015, *(Annex07),* a decision which I challenged by judicial review.

My complaint

My complaint is against DFI Planning Clarence Court 10-18 Adelaide Street Belfast BT2 8GB, which is an organisation within the Department for Infrastructure (DFI) for Northern Ireland (part of the UK Member State), which I believe, by its action, has placed itself in breach of the Aarhus Convention. Furthermore I believe that in the course of my judicial review the hearing I got in both courts was less than fair, timely, or indeed equitable.

Presently in Northern Ireland only an applicant for planning permission has the right to appeal DFI's decisions to the appellate body, the Planning Appeals Commission. Objectors to planning proposals are not afforded the same equality of opportunity to appeal DFI's Planning decisions, and the only path open to those

who have objected to development consents on planning and environmental grounds, is to take the prohibitively costly route of Judicial Review.

I believe that the Department for Infrastructure is in breach of the Aarhus Convention by vigorously exploiting this position on the basis that it is aware that very few individuals have the financial resources to mount such a legal challenge, made worse since the introduction of cross capping.

However, my objections to this planning application to extend the existing 1995 approved open cast mine to a depth of 300 meters underground, on the basis of non compliance with three EU Directives, were simply ignored and consequently the Department for the Environment (now the Department for Infrastructure for Northern Ireland, DFI) issued development consent, confident I'm sure that as a small bed and breakfast operator I would not have the financial means to challenge their planning decision.

In 2016 the High Court in Belfast granted me leave to judicially review the decision, which I did as a Litigant in Person based on five grounds for challenge. *(Annex 08)*

The High Court Hearing

In her judgement the presiding High Court judge Madam Justice McBride dismissed all five grounds for challenge which had dealt primarily with the alleged regularisation of unauthorised EIA development, changes to the site layout, the size of the approved site, failure to properly apply the precautionary principal in respect of mine waste issues i.e. potentially acidic rock.

I remain of the opinion that if the precautionary principal enshrined in Article 6.3 of the Habitats Directive had being as rigorously applied by the Belfast High Court as it is in other jurisdictions, then all five grounds may well have been upheld.

The Court of Appeal Hearing

I felt there was a strong case to appeal all 5 grounds however court officials advised me that due to time constraints, most appeals were dealt with in a single day and it was unlikely I would be granted more than a morning to present my case. I decided that due to the limited time available to me, it was prudent to limit my appeal to 2 of the 5 grounds only, namely grounds (d) and (e) as I felt they were less complicated for me as a litigant in person and had the best chance of success. Subsequently I was granted 2 hours by the court to make my presentation. On commencement of the proceedings, at paragraph 3 of my oral submission. *(Annex 09)* I made the court aware of this unsatisfactory situation, already my right to exhaust judicial procedure was being denied me.

My complaint to the Aarhus Compliance Committee concerns the unfairness and the unjustness of these proceedings, in particular the conclusions reached by both courts in relation to Grounds (d and e).

At paragraph 124 of the High Court judgement concerning the disputed 81/60 hectare area of the site the judge omitted to either specifically dismiss or uphold ground (d) before at paragraph 134, going on to dismiss the application in its entirety. At paragraph 128 she rejected ground (e), decisions which I was then granted leave to appeal at the Court of Appeal. *(Annex 10)*

Article 9(4) of the Aarhus Convention requires hearings to be fair, equitable, timely and not prohibitively expensive. All of these requirements were I believe breached in my case.

Firstly the hearings could hardly be described as **equitable** as the Department, at substantial cost to the public purse, felt it necessary to commission one of the UK's top environmental QC's brought over from England to Northern Ireland, namely Mr Tim Mould (who I believe is well known to the compliance committee), to defend

them against an unrepresented Litigant in Person. The Notice Party Omagh Minerals also felt the need to commission the services of Mr William Orbinson QC, reputed to be Northern Irelands top QC on environmental law, supported by Mr Scott Lyness of Landmark Chambers in England, a legal team which I believe represents the legal equivalent of commissioning a sledge hammer to crack a very small nut.

Secondly, the hearings were not **timely** as in total the leave hearing, High court proceedings, and ultimately the Court of Appeal hearing, all of which had been protracted affairs with numerous lengthy adjournments had lasted in total over 3 years, with me being required to attend court on I believe 13 or so days in total.

Thirdly, as a litigant in person, the hearing I received in the Court of Appeal was also **unfair** due as already stated to the time constraints placed upon me by the court to make my case, being able to appeal only 2 of the 5 original grounds for challenge in what was a complex case which at that point had already taken over 2 years. I am aware that the court is extremely busy but I felt that no special consideration was allowed for my position as a Litigant in Person and the particular complexities which arose in this case.

GROUND FOR CHALLENGE (D)

Ground for challenge (d) encompassed a very simple issue at its core. There was a discrepancy over whether the planning permission granted permitted the Notice Party to underground mine beneath an area of 81 hectares or 60 hectares.

As I put to the Court:

"*The Department approved inaccurate drawings numbered 02 and 19 which show the application boundary encompassing an area of* ***approximately 81 hectares****, not 60 as applied for and assessed. This represents a failure to comply with EIA Directive 2011/92/EU*

Article 5(3), as well the precautionary requirements of the (EIA Directive 2011/92/EU) and the (Habitats Directive 92/43/EEC)."

At Informative 01 the planning permission clearly states that:
"*This planning permission relates to drawings numbered 01,**02**,03,04,05,06,07,08,09, 10,11,12,13,14,15,16,17,18,**19**,20.*" None of these drawings depict the application boundary as being a 60 hectare area. *(Annex 07)*

In the High Court, the DFI defended their actions with vigour arguing for over a year that the planning permission they had granted allowed for exploitation of reserves within the entire 81 hectare red line area. Indeed at paragraph 327 of senior planning officer Stephen Hamilton's affidavit, *(Annex 12)* he said exactly that*:* "*the application allows for exploitation of reserves within the entire red line area.*" At Paragraph 290 he agreed with the eventual conclusion of the judge that "*the disputed additional 21 hectares of land had not been assessed by the applicant, for the purposes of the ecology assessment*."

At paragraph 124 of her judgement, Madam Justice McBride concludes that: "*the planning permission granted only relates to what was applied for namely the 60 hectare area.*" She also states that*:* "*I therefore find the planning permission only extends to the 60 hectare site.*"

She also outlined the deficiencies in environmental assessment stating she was:

"*not satisfied that the environmental statement covered the entire 81 hectares,*" or that

"*the environmental statement covered all of the matters required under Schedule 4 in respect of the additional 21 hectare area,*"

and also that

"*the testing for acid rock took place only within the 60 hectare site.*"

She then concluded that:

"I am therefore not satisfied that the additional 21 hectare area was assessed as required by the Regulations."

She then gave her interpretation of the actual legal extent of the planning permission stating that:

"I am however satisfied that the planning permission granted only relates to what was applied for, namely the 60 hectare area. "

It is only as a result of my intervention that the legal extent of this planning permission has been clarified by the Court. It is now limited to the 60 hectares actually applied for and assessed as I claimed from the outset. Under the current planning permission the Notice Party is now prevented from mining the disputed unassessed 21 hectares of land.

Mr Tim Mould QC representing the DFI at Par 21 in his skeleton argument to the Court of Appeal stated:

"Indeed the judge's interpretation of the planning permission provides the answer that the Appellant seeks. It establishes that planning permission does not exist to mine west of the 60 hectare site. It resolves any ambiguity in the approved plans and drawings in his favour. The Notice party is bound by this finding and the fact that the planning permission relates only to the 60 hectare area."

In response at paragraph 9 of my Court of Appeal oral submission I asked:

"*If as Mr Mould claims any ambiguity in the approved plans and drawings has been resolved in my favour,- - - - - - then why did the judge in the lower court not uphold my ground for challenge, and why did she award costs against me?" (Annex 13)*

In fairness to the DFI, having apparently conceded this ground for challenge, to date they have never requested from me, the £5000 costs I believe were so wrongly awarded to them by the High Court. At the Court of Appeal the Lord Chief Justice

Declan Morgan upheld the judgement of the High Court in its entirety, but declined to make a further costs order against me in respect of Court of Appeal costs.

I believe that the judgement in the High Court together with the position taken by the Respondent in the Court of Appeal with regard to my ground for challenge (d) vindicated me in bringing this judicial review and the High Court judge was therefore wrong to award costs against me. I also believe that the Lord Chief Justice's decision not to award further costs against me in the Court of Appeal makes clear his awareness of the financial injustice already meted out to me in the High Court.

I brought this action in the public interest, at great personal cost to myself and my family, the proceedings were anything but expedient with them having taken up three years of my life, to the detriment of my Bed & Breakfast business. The judge had redetermined the legal extent of this site reducing it from the 81 hectares as approved by DFI, back down to 60 as applied for and assessed by the mining company. It is clear to me I should have had this ground for challenge upheld, but instead the Judge bizarrely dismissed the application in its entirety before denying me my legitimate costs by awarding costs to the DFI .

GROUND FOR CHALLENGE (E)

Ground for challenge (e) was, I believe, dealt with unfairly by Madam Justice McBride as either she did not properly understand it, or else chose to misconstrue it. It read:

(e) *The Department accepted a requirement for acidic rock testing every 25 vertical meters as part of a monitoring plan post approval. This entirely new proposal for acidic generation testing at various depths first appeared on the public planning portal on 7 December 2015, four months after approval. This is a subversion of the appropriate assessment process. It represents a failure to comply with the precautionary requirements of the (EIA Directive*

2011/92/EU) and the (Habitats Directive 92/43/EEC), it also breaches the (Management of Waste from Extractive Industries Directive 2006/21/EC).

As already stated, in 1995 the potential for acid rock drainage at this mine was acknowledged and mitigation put in place. During processing of the 2012 underground mine application, some acidic testing of the rock at relatively shallow open cast depths (up to 40m) had been undertaken but not at underground depths, (up to 300m) despite the Habitats Assessment having highlighted potential acid rock concerns during underground operations. At page 7 it reads:
"A concern raised during the application process is that of acid rock deposition. This is of particular concern where aggregate is exported and used in construction – e.g. for road construction adjacent to rivers. The applicant has indicated that there is no potential net acid deposition from the rocks. In agreement with NIEA Water Management Unit, CDP is not in a position to query the results and must take them at face value." *(Annex 06)*

At Paragraph 125 of her judgement, *(Annex 10)* Madam Justice McBride claimed that I, the applicant, had alleged that:
"the Department breached the EIA Habitats and Waste Regulations by accepting a monitoring plan for acidic rock testing post-approval."
This statement represents a grotesque distortion of my actual allegation and her assertion can hardly be described as **fair or just!**

Her assertion was completely wrong as my ground for challenge had absolutely nothing to do with the accepting of a monitoring plan post approval, rather the amending post approval of an existing monitoring plan from 2013 *(Annex 14)* which formed an integral part of the Environmental Statement Addendum. During processing of the application this plan would have been considered as part of the appropriate assessment as is required by the Habitats Directive. The later inclusion in this monitoring plan post consent, of a new requirement for acidic rock analysis to be carried out on rock taken from underground depths, added some 2 years after the appropriate assessment was carried out, was I believe unlawful.

On 7 December 2015, four months after approval and after I had instigated legal proceedings, an amended version of the 2013 monitoring plan was submitted to the Department and then uploaded to the public planning portal post consent. *(Annex 15)*

It contained a new paragraph 4.2 "Monitoring of Deep Groundwater**.**" This entirely new requirement for analysis to be carried out of the potential for acid generation of rock from the underground mine requires rock samples to be taken for analysis every 25 vertical meters as the mine progresses in depth. This requirement for acidic testing, which effectively circumvented the appropriate assessment process, had simply been added retrospectively post consent. This key paragraph was definitely not part of the original version included in the environmental statement addendum of November 2013 used for appropriate assessment.

This is in clear breach of the precautionary principle enshrined in both the EIA and Habitats Directives so there was in fact a gap in the assessments. In the High Court I dealt with this matter in my 2nd affidavit at paragraph 7, *(Annex 16)* and also in my rejoinder affidavit at paragraph 35, *(Annex 17)* and also at paragraphs 94 – 100 of my oral submission *(Annex 18).* In the Court of Appeal I dealt with it at paragraphs 77 – 100 of my oral submission *(Annex 09)*

In her judgement at paragraph 127 Madam Justice McBride was of the opinion that the imposition of a post consent requirement to test for acidic rock, which clearly had circumvented the appropriate assessment process, was acceptable, describing it simply as some kind of further survey, despite the fact that at no time during processing of the application was it ever envisaged that acidic testing at underground mine depths would be required. Ironically I believe it is only as a result of my intervention that today this testing of the Cavanacaw rock is taking place at various depths underground i.e. every 25 vertical meters.

In my opinion the failure of Madam Justice McBride to properly understand, or even worse her having misconstrued this ground for challenge, rules out any possibility

of her having arrived at a robust judgement. Sadly having done so she effectively ensured that these proceedings would end up prohibitively expensive for me, when rejecting this ground, at paragraph 128 she remained mercilessly unrelenting claiming she was:

"satisfied that the imposition of the condition for a monitoring plan does not indicate any deficiency in the assessment rather it was a prudent approach taken to ensure protection of the aquatic environment in the future."

I am certain that had I been represented this level of unfairness could not have happened.

I believe that the High Court judgement together with the position taken by the Respondent in the Court of Appeal with regard to my ground for challenge (d) vindicated me in bringing this judicial review. I also remain convinced that ground for challenge (e) should also have been upheld and on both counts the judge was therefore wrong to award costs against me. *(Annex 11 "costs order")* In doing so she denied me reimbursement of my own substantial legitimate costs thereby ensuring that these proceedings ended **prohibitively expensive** for a low earner like me.

At the court Of Appeal, Lord Chief Justice Declan Morgan in his judgement upheld the High Court Judgement in its entirety. , *(Annex 19)*

Kind regards

William Donnelly