Communications to the Aarhus Compliance Committee concerning compliance by the United Kingdom with provisions of the Convention in connection with planning procedures (ACCC/C/2011/45 & 60)

The thirty seventh meeting of the Aarhus Compliance Committee in Geneva

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NOTE OF THE ORAL PRESENTATION
by James Maurici to the Committee on
27 June 2012 on behalf of
THE GOVERNMENT OF THE UNITED KINGDOM

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Introduction

1. The hearing is to consider two communications:
    1) (ACCC/C/2010/45) from the Kent Environment and Community Network ('KECN'). This relates to a long running dispute between the community organisation and Shepway District Council based on a planning application concerning the proposal to construct a new Sainsbury's superstore in Hythe, Kent. The complaint to the Committee dates back to January 2010. It covers wide ranging issues developed over a number of submissions to the Committee.
    2) (ACCC/C/2010/60) a complaint is made by Mr T Ewing. He has submitted a number of other communications to the Committee and the UK Government has written to the Secretary of the Committee regarding information relevant to Mr Ewing. He submitted this communication to the Committee in June 2011; it raises general issues concerning public participation rights for third parties on planning matters.

2. The Committee is referred to Defra's letters of 11 April 2011 and 22 December 2011 in respect of ACCC/C/2010/45 and 22 December 2011 in respect of ACCC/C/2010/60 which set out the UK's detailed responses. Attached to this submission is an annex updating the Committee on matters raised in those letters so far as relevant to the issues it now wishes to consider.

3. The Committee has decided to deal with the following issues:
    1) Whether the planning laws and procedures of England and Wales meet the standards regarding public participation in articles 6 and 7 of the convention (ACCC/C/2010/45) including whether the fact that oral hearings allegedly might not be held at meetings of planning committees is contrary to the Convention (ACCC/C/2010/45).
    2) Whether the review procedures mentioned in the complaint (where they are not covered in the other complaint (ACCC/C/2008/33)) meet the requirements of article 9 of the Convention.

(i) Issue 1 – public participation in planning law

4. The planning system is as KECN say (see Rebuttal Statement 7.6.11) "replete with opportunities for public participation". The detailed provisions are set out in Defra's letters of 11 April 2011 and 22 December 2011 in respect of ACCC/C/2010/45.

5. In terms of planning law in England & Wales there are two key aspects:

    1) Statutory Development Plan Documents: these are planning policy documents setting out a local authority's planning policies for its areas. Although other types of planning policy exist Development Plan Documents are key. This is because the planning system is "plan-led". S.38(6) of the Planning & Compulsory Purchase Act 2004 ("the 2004 Act") provides that in determining an application for planning permission "the determination must be made in accordance with the plan [by which it is meant the statutory Development Plan documents] unless material considerations indicate otherwise." These plans engage Article 7 of the Convention.
    2) Development Control: a decision made in the first instance by a local planning authority in response to a planning application on whether or not to grant planning permission for a particular project. These decisions engage Article 6 of the Convention.

6. There is a useful account of how planning law operates in England & Wales in ***Cala Homes (South) Ltd v Secretary of State for Communities and Local Government*** [2011] 1 P. & C.R. 22 (attached), see especially paras. 24 – 32. The Committee is referred to that account.

7. The UK Government would though emphasise a number of key points:

    1) Statements of Community Involvement: under s. 18 of the 2004 Act local authorities are required to prepare a Statement of Community Involvement ("SCI") which is a statement of how communities will be engaged in the preparation and revision of local development documents and consideration of planning applications. A report to the Government in support of the 2004 Act stated that "[i]t must ensure the active, meaningful and continued involvement of local communities and stakeholders throughout both processes"

(http://www.communities.gov.uk/documents/planningandbuilding/pdf/148187.pdf dated December 2004 at para 1.3.1). That document also says "The Government is committed to a planning system that is "...transparent, participative accessible and accountable ... in line with the objectives of the Aarhus Convention". KECN say in its response to the Committee's letter of 2 May 2011 that an SCI is a "soft" document that cannot be enforced. This is incorrect, as is explained in Defra's letter of 22 December 2011. The domestic Courts have held that a failure to adhere to the process in the SCI is a breach of legitimate expectation that can justify the quashing of a planning decision.

2) Development Plan Documents: the preparation of Development Plan Documents is governed by detailed Regulations. These make provision for the preparation and publication of a number of drafts of such documents and provide numerous opportunities for persons to make representations seeking changes to those Documents before they are finally adopted. A person making such representations is given the opportunity (if requested) to appear before and be heard at an independent examination into the draft Documents. Public participation is thus a key part of whether plans are approved. Moreover, all Development Plan documents, if it is considered that they have the potential to have significant environmental effects, are also subject to Strategic Environmental Assessment under the Environmental Assessment of Plans and Programmes Regulations 2004 which implement Directive 2001/42/EC. This imposes further statutory requirements for publicity and for participation.

3) Pre-application consultation: statutory requirements exist for publicity on planning applications. Prior to the application being submitted developers often voluntarily engage in consultation with communities and this is something the Government encourage. The recently adopted National Planning Policy Framework ("NPPF") at paras. 188 - 189 encourages pre-application engagement: see attached. In respect of the planning application about which KECN complain Sainsbury's (the developer) voluntarily engaged in pre-application consultation via meetings, a mail-drop and advertisements in the local press[1]. To further strengthen the role of

[1] See http://www.ukplanning.com/ukp/doc/Report-7394211.pdf?extension=.pdf&id=7394211&location=VOLUME6&contentType=application/pdf&pageCount=1 which is a report by Sainsbury's on Community Engagement undertaken prior to the submission of the planning application about which KECN complain and which runs to 63 pages.

local communities in planning, the Localism Act 2012 introduces a new statutory requirement for developers to consult local communities before submitting planning applications for certain developments. This will give local people even more opportunity to comment at an early stage when there is greater scope to make changes to proposals. The Government will shortly publish information on how the provisions will be implemented.

4) Planning application procedures: there are statutory requirements for planning applications to be publicised (via local newspapers, notices displayed on or near the application site or individual letters to addresses in the locality, see the Town and Country Planning (Development Management Procedure) (England) Order 2010/2184 ("the DMP Order") which consolidated earlier legislation to the same effect). It is a statutory requirement that persons are given at least 21 days to respond to an application. Very often the period given is longer, as it was in the case about which KECN complain, see Defra's letter of 11 April 2011 at p. 4. Moreover, "late" representations are almost always considered so long as they are received before the decision on planning is actually made. There are separate requirements to consult with and allow representations by specified statutory consultees. Where an application is for development that is EIA development for the purposes of Directive 2011/92/EU (previously 85/337) there are further statutory requirements for additional publicity and for participation (Directive 2011/92/EU cross-refers to the Aarhus Convention in Recitals (18 – 21)). The proposal about which KECN complains was not EIA development for these purposes.

5) Taking account of representations: Article 28 of the DMP Order (see above) provides that "[a] local planning authority shall, in determining an application for planning permission, take into account any representations made" following the giving of notice of an application for planning permission. Local planning authorities are also required under that provision to give notice of their decision to persons who have made representations (see Article 28(2)) and are required to give reasons for their planning decisions.

6) Procedures leading to a planning decision: the public has access to documents submitted in support of planning applications. These are required to be kept on the planning register and are these days almost always accessible on-line. If a planning application is to be considered by a committee of a local authority (as

was the case in respect of the application about which KECN complains) an officer report will be prepared. This contains an analysis of the planning issues by a professional planning officer and a summary of the views of those that have made representations. The officer reports in respect of the matter about which KCEN complain are attached as an example. Such reports also contain a recommendation on whether planning permission should be granted. Such reports are statutorily required to be made available prior to the committee meeting. In relation to the ability to make oral presentations to the committee – see below.

7) Planning appeals: where there is a planning appeal or a called-in application (terms explained further in Defra's letters) there is a right for the public to make representations on such appeals (in writing and orally if there is a hearing or inquiry) and a requirement that these be taken into account: see p.2 of Defra's letter of 11 April 2011.

8. There are thus numerous opportunities for public participation within the planning system.

(ii) Issue 2 – oral hearings before planning committees

9. Mr Ewing complains about the lack of a statutory right for objectors to make oral representations to a planning committee. The UK responded to this allegation in letters dated 11 April 2011 (on both Cases 45 and 60) setting out the involvement of third parties in the planning process, meetings and proceedings of local authorities, including speaking at planning committees.

10. The starting point is this. Article 6 (7) of the Convention provides only that procedures "shall allow the public to submit in writing or, as appropriate, at a public hearing or inquiry" any comments, information, analyses or opinions. Thus the Aarhus Convention itself does not require that there must always be a public hearing or inquiry.

11. The UK would make these observations:

1) Mr Ewing rightly accepts (see his further submissions para. 1) that "there are many opportunities for third party objectors to put their concerns in writing";

2) Almost all local authorities do allow members of the public objecting to a proposal to speak at committee meetings. This happened in the case in respect of which KECN complain. Mr Ewing's complaint is that there is no statutory requirement for such an oral hearing in all cases.

3) The Court of Appeal in England has held that neither common law fairness nor the requirement in Article 6 of the European Convention on Human Rights in respect of a fair hearing required that a local planning authority must in all cases accord objectors an oral hearing: see ***R (Adlard) v Secretary of State for Transport, Local Government and the Regions*** [2002] 1 W.L.R. 2515. However, the Court went on to say "[t]he remedy of judicial review, in my judgment, amply enables the court to correct any injustice it perceives in an individual case. If, in short, the court were satisfied that exceptionally, on the facts of a particular case, the local planning authority had acted unfairly or unreasonably in denying an objector any or any sufficient oral hearing, the court would quash the decision and require such a hearing to be given. This presents no difficulties ... [there being no dispute as to] the authority's power to conduct such a hearing nor the court's power to order it".

12. It is submitted that the existing situation is compliant with the requirements of the Convention.

(iii) <u>Issue 3 – review procedures – third party rights of appeal</u>

13. KECN (and Mr Ewing) seek to argue that there is a breach of the Convention because of the absence of a third party objector right of appeal against the grant of planning permission to the Secretary of State as there is for applicants. The allegation is that this is a breach of Article 9 of the Convention.

14. The position is this. Where planning permission is refused, or the local planning authority fail to determine the application within the requisite period laid down by statute, the applicant has a right of appeal to the Secretary of State for Communities & Local Government. The Secretary of State is a politician, an elected MP and a member of the Cabinet. Some of those appeals he determines himself, some are delegated to planning inspectors. There is as the Communicants say no right of appeal to the Secretary of State against the grant of planning permission by a local planning authority.

15. It is submitted that Article 9 of the Convention does not require a third party right of appeal. Article 9 requires "access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6". A planning appeal to the Secretary of State – which is what the Communicant's say third party objectors should have - is not an appeal to a court of law or other independent and impartial body established by law. The Secretary of State on an appeal is merely one of the public bodies charged with decision-making under Article 6. What is required in respect of such decisions (see Article 6(7) above) is proper public participation procedure. These already exist – see above. There is no automatic requirement under the Convention in every case for a "public hearing or inquiry". Moreover, an appeal to the Secretary of State is not an appeal challenging substantive and procedural legality of a decision. It is an appeal on the planning merits. It is an entirely de novo determination of whether planning permission should as a matter of expediency/policy be granted or not. This is something entirely different from a challenge on the grounds of legality.

16. What Article 9 requires is access to a Court (or similar Tribunal) for the purposes of judicial review of a decision under Article 6. That, of course, already exists in England & Wales. The scope of review in such proceedings is, it is understood, not a matter the Committee wished to further consider.

17. There is thus no requirement derived from the Convention for third party rights of appeal. In short the planning system involves third parties very fully, from the preparation of the plan, to the application process and any planning appeal. There is not even a requirement for standing. It is important to remember that the applicant's right of appeal to the Secretary of State is a safeguard against an unjustified refusal. It is normal to give rights of appeal whenever one applies to a government body for any form of licence, permit or funding. We see this in fields as diverse as environmental permitting and claims for social security payments.

Other matters

18. The Communications (especially that of KECN) raises a host of other issues. Many of these have been raised late in the day. The UK has responded to these in the Defra letters.

At the hearing it will answer any questions the Committee may have on such matters. In short it is contended that none of them give rise to any breach of the Convention.

Conclusion

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

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UPDATE ANNEX

In the Defra's response (dated 11 April 2011) there were set out the various opportunities for the public to comment on both planning applications and development plans. The information contained therein remains current with a few exceptions for which updates have been provided below:

- The Town & Country Planning (Local Development) England Regulations 2004 have been consolidated and amendments made to them to take account of the changes made by the Localism Act 2011 (which received Royal Assent on the 15 November 2011). The relevant Regulations are now The Town and Country Planning (Local Planning) England Regulations 2012 which came into force on the 6 April 2012. The Regulations set out the procedure to be followed by local planning authorities in relation to the preparation of local plans and supplementary planning documents, including as to consultation with interested persons and bodies and the documents which must be made available at each stage.

- The letter makes reference to neighbourhood planning provision in the Localism Bill. The Localism Act and the neighbourhood planning system commenced on the 6 April 2012. Neighbourhood planning empowers parish councils and communities to shape the development and growth of their local area through the production of a Neighbourhood Development Plan or Neighbourhood Development Order or a Community Right to Build Order. Fundamental to neighbourhood planning is that the plans are community and neighbourhood led. Neighbourhood planning is designed to be an inclusive process with the views of the whole community being sought at consultation and independent examination and tested at referendum. The Neighbourhood Planning (General) Regulations 2012 set out the procedure for the designation of neighbourhood areas and neighbourhood forums and for the preparation of neighbourhood development plans and neighbourhood development orders (including Community Right to Build orders); these including minimum consultation and publicity requirements. The Regulations came into force on the 6 April 2012.

- In our letter we cite Planning Policy Statement 1: Delivering Sustainable Development. This has been revoked now that the National Planning Policy Framework (NPPF) has been published. The NPPF is clear that local councils should proactively engage a wide section of the community in plan making, and that early and meaningful engagement and collaboration with neighbourhoods, local organisations and businesses is essential. The NPPF is national policy and guidance which the Secretary of State has discretion to issue. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides that planning applications should be determined in accordance with the development plan, unless material considerations indicate otherwise. Material considerations can constitute any matter relevant to the application at hand. The Framework is a material consideration in planning decisions.

- In the letter of 11 April 2011 we make reference to pre-application consultation with communities and in particular to provisions in the Localism Bill to make this a requirement for certain types of development. As noted above the Localism Act gained Royal Assent in November 2011.

- In our letter of 11 April 2011 we make reference to the forthcoming consolidation of the 1999 EIA regulations and associated guidance. The consolidated regulations came into force on the 24 August 2011. The Regulations clarify that any person may ask the Secretary of State to exercise the power of direction (regulation 4(8)) and also a requirement for the reasons for negative screening decisions to be provided in writing and placed on Part 1 of the planning register, to be available for public inspection (regulation 4(5) and (7) refers).