



MINISTRY OF THE
ENVIRONMENT AND
RURAL AND MARINE AFFAIRS

SUBSECRETARIAT

TECHNICAL SECRETARIAT GENERAL
SUBDIRECTORATE GENERAL OF
INFORMATION TO THE PUBLIC,
DOCUMENTATION AND
PUBLICATIONS

REPORT RELATING TO THE COMMUNICATION OF THE ASSOCIATION OF ENVIRONMENTAL JUSTICE (AJA) TO THE AARHUS CONVENTION COMPLIANCE COMMITTEE ON SPAIN'S ALLEGED PRESUMED BREACHES OF PROVISIONS OF SAME IN CONNECTION WITH DECISION- MAKING IN AN URBAN DEVELOPMENT PROJECT IN THE CITY OF MURCIA.

(Ref. ACCC/C/2008/24)



I.- BACKGROUND.

1.- The Association for Environmental Justice of Spain (hereinafter AJA) submitted in Geneva, on 1 April 2009, at the 23rd Meeting Committee for Compliance with the Aarhus Convention, a Communication on Spain's alleged breach of certain provisions of the aforesaid Convention, ratified by Spain on 15 December 2004, (BOE, 16 February 2005), in relation to decision-making in an urban development project in the town of Murcia (Ref. ACCC/C/2008/24).

2.- On 10 June 2009, the Committee for Compliance with the Aarhus Convention – although I consider it premature to set forth comments on substantial aspects of the Communication – adopted a preliminary Resolution relating to the acceptability of the communication on compliance with the Convention by Spain in reference to decision-making in the aforementioned urban development project.

3.- As soon as the new National Focal Point of this Ministry became aware of this preliminary Resolution of the Committee for Compliance and all the background circumstances of the case in question, the necessary arrangements specified in section II were instituted in order to produce the adjoining report.

4.- We should explain that certain errors arising in the chain of communication between the Aarhus Convention Secretariat and this Ministry, of which the Secretariat is fully aware, have impaired cooperation between this Ministry and the Convention Secretariat in the supervision of compliance with the provisions of the aforesaid Convention in Spain.

II.- PROCEDURE

1.- As soon as the new National Focal Point learnt of this Communication, notification was sent by burofax, signed by Mr. José Abellán Gómez, the Subdirector General for Information to the Public, Documentation and Publications, on 8 and 15 June 2009, to the following Executive Centres of the Autonomous Community and Local Administration connected with the urban development project in question so that they might submit the allegations deemed fit with regard to the AJA communication in question, indicating website <http://www.unece.org/env/pp/pubcom.htm>, where supplementary information is available:

- ✓ The Mayor of Murcia, Mr. Miguel Angel Cámara.
- ✓ The Secretary General of the Department of Agriculture and Water of the Autonomous Community of the Region of Murcia, Mr. Francisco Moreno García.



- ✓ The Subdirector General for Urban Planning and Development of the Department of Public Works and Land Planning of the Region of Murcia, Mr. José María Ródenas Cañada.

At the same time, the State Legal Service at this Ministry was also asked to submit a report. The Senior State Lawyer, Mr. Juan Antonio Puigserver Martínez, issued his report on 17 June (appended as document no. 1)

On 13 March 2009, the Deputy Mayor, responsible for Land Planning and Development in Murcia City Council Town Planning Department, Mr. Fernando Berberana Loperena, remitted an initial report by the Assistant Director of General Services of the Planning Department, Ms. Juana Fuentes García, to the Subdirector General for Legislation of this Ministry in relation to this subject (appended as document no. 2).

On 10 June, the Secretary General of the Department of Agriculture and Water of the Region of Murcia replied, stating that responsibility for the matters in question lay with Murcia City Council and the Courts of Justice and, in addition, that he was sending a letter to the Director of Services of the Planning Department and an e-mail to the Assistant Director of that Department, Ms. Juana Fuentes García, attaching all the documentation received (appended as document no. 3).

- ✓ Contacts were also established through the new National Focal Point by telephone and e-mail with Ms. María Luisa Ballesta, the Technical Consultant of the Secretariat General of the Department of Agriculture and Water, in her capacity of person responsible for monitoring the Aarhus Convention in the Region of Murcia.

2.- In view of the fact that Murcia City Council is the institution with the most significant responsibilities relating to alleged breaches of the Aarhus Convention in the case in question communicated by AJA, a personal meeting was held on 18 June at the City of Murcia Planning Department with the Assistant Director of General Services of the Planning Department, Ms. Juana Fuentes García, in order to gather supplementary information on the report already remitted on 13 March 2009 to the Ministry in relation to the aforesaid report.

3.- On 22 June 2009, the National Focal Point e-mailed an urgent request for information in clarification of certain aspects of the aforementioned Council Planning Department report of 13 March considered to be of special interest.

4.- On 23 June 2009, the aforesaid Assistant Director e-mailed the report requested, along with other supplementary documentation (appended as document no. 4).



III.- COMMUNICATIONS DUE TO SUPPOSED BREACHES OF THE AARHUS CONVENTION ALLEGED BY AJA AND COMMENTS ON THE MATTER.

- Ø 1.- AJA claim a number of different breaches in connection with access to information and the amount of the fees applied. (article 4, points 1, 2, 7 and 8)

COMMENTS:

In the Report that is appended as document no. 4, signed by the Assistant Director of General Services of the Planning Department, after furnishing documentation on the appearances at the Department by the Senda de Granada Oeste Residents Association, the conclusion is reached that "at no time was any impediment or restriction placed on access by this Association or any other interested party to the dossiers requested, saving the possible limitations imposed by the complicated handling process undergone by the respective files as, after the corresponding building permits for the construction of dwellings were granted, they were subject to ongoing archaeological monitoring throughout the execution of the works".

Regarding fees, article 4.8 of the Aarhus Convention specifies that "each party may authorise the public authorities that supply information to receive a fee for this service, but that fee should not exceed a reasonable amount. The public authorities that have the intention of imposing the payment of a fee for the information that they supply shall notify applicants for information of the rates of the fees that have to be paid, stating the cases in which the authorities may waive the collection of those fees and the cases in which the communication of information is subject to advance payment".

AJA considers that the fees that have to be paid to Murcia City Council in order to obtain a copy of the documents containing the environmental information exceed the reasonable amount referred to in the Convention.

The term "reasonable amount" used by the Aarhus Convention is a typical indeterminate legal concept which, in the case of Spain, has to be defined by each Public Administration in question in accordance with the respective regulations governing fees and public prices. As we are talking of Murcia City Council, according to the second additional provision of Law 27/2006, the fees to be paid for access to environmental information will be those established by that local authority in the exercise of its financial autonomy and in compliance with the provisions of Legislative Royal Decree 2/2004, of 5 March, adopting the Recast Text of the Local Finances Regulatory Law and, as regards its taxable event



and cases of non-liability and exemption, by the stipulations of the first additional provision of this Law.

In this respect, the aforesaid first additional provision of Law 27/2006 establishes that in situ examination of the information requested and access to any list or register created and maintained according to the specified in article 5.3 c) of this Law will not be liable to the fee. Furthermore, both deliveries of copies of fewer than 20 DIN A4 format pages and the sending of information by electronic means are exempt from payment of the fee.

These provisions, in particular the possibility of having access to the whole of the information free of charge, providing that it is examined in situ or by electronic means, ensure that the exercise of the right of access does not prove burdensome for interested parties. As regards the cases in which a fee has to be paid, since it is the case of a Local Authority, article 24.2 of the Recast Text of the Local Finances Regulatory Law disposes that the amount of the fees for the provision of a service or for the performance of an activity may not exceed, when taken as a whole, the actual or foreseeable cost of the service or activity in question or, otherwise, the value of the service provision received. Moreover, the provisions of local authorities in this area may be contested under economic-administrative law in a contentious jurisdictional process when they do not comply with the provisions regarding coverage of the cost of the service by the amount of the local fees established.

Specifically, in the case of Murcia City Council, the legislation governing the fee for issuing administrative documents and document examination fees for 2009, states in its article 2.-1: "The taxable event of the fee is the administrative activity carried on as a result of the processing, at the request of an interested party, of all kinds of documents that are issued by and of dossiers that are the responsibility of the Administration or Municipal Authorities. Point 3, of head 1 of the section Fees, sets fees of €2.15 for the case of "copies or photocopies that may be issued of documents, agreements or background facts in the possession of municipal offices or files, even though they may be simple uncertified copies, per single side of a type-written page".

The amount of the fee may not be the same or higher than the cost entailed for the Municipality in providing the service of access to the information in question. The cost is determined in the course of the process of preparing and approving the respective tax legislation, although, as specified in Art. 25 of the Law on the Local Finances Regime Law, "The decisions on establishment of fees for the exclusive use or special utilisation of the public domain or for the total or partial



financing of the new services should be adopted in the light of technical and economic reports in which the respective value of the cost of these is underscored", which will permit the subsequent check that they have been set properly.

The dossier adopting the aforementioned legislation contains the economic study approving the establishment of this fee, where it is stated that only 48.68% of the cost of the service is covered, although there is no record of appeals being submitted against the establishment of the amount of same in the local legislation (appended as document no. 5).

It is considered of interest to point out that Murcia City Council Planning Department has considered it appropriate to submit the question to the Municipal Tax Office so that it may present a review of the amount of the fee in question with a view to the coming budgetary year or so that it may set a new fee for the cases of the issue of copies of documents subject to the Aarhus Convention.

- Ø 2.- In relation to public participation, AJA lodges allegations in relation to the applicability of article 6 regarding assessment of environmental impact and infringements relating to the lack of information and public participation (Article 6, paragraph 1, letter a), point 2, letters a) and b), and points 3, 4, 6 and 8).

COMMENTS

The report of the Assistant Director of General Services, which is appended as document no. 4, specifies and presents a record of the information and participation of the above-mentioned Association and of any interested party who made such an application in the processing of the dossiers that affected the Master and Partial Urban Development Plans.

It is also stated that in the documentation for the Preview of amendment no. 50 of the Master Plan a prior study was furnished for the Evaluation of Environmental Impact, which did not prove necessary in the end because it was so deemed fit, in accordance with the provisions of Land Act 1/2001, of 24 April, of the Region of Murcia, amended by Law 2/2002, of 10 May, the resolution of the Directorate General for Environmental Quality of the Environment Quality and Land Planning Department of 24 September 2004, the body with responsibility in the matter, so that the municipal decision was therefore made subject to the decision of the abovementioned environmental agency.



Furthermore, the documentation referring to this matter on file at the Secretariat of the Aarhus Convention contains a Resolution of the Directorate General for Environmental Quality of the Department of the Environment and Land Planning of the Region of Murcia, of 24 September 2004, on the environmental impact procedure for spot modification no. 50 of the Murcia Urban Development Master Plan for the establishment of development sector ZM-ED3, in Espinardo, at the request of Murcia City Council, which disposed that for the aforesaid spot modification no. 50, "on account of its meagre entity, in environmental terms, it is not considered necessary that the Environmental Impact Evaluation procedure should be carried out, since it is the case of a market gardening area, where cultivation is in the process of being abandoned, that does not meet the requirements of the Land Act of the Region of Murcia 1/2001 in order to be classified as being protected land not for development".

In the report that is appended as document no. 2 issued by Murcia City Council Assistant Director of General Services of the Planning Department it is also stated that the development plans sponsored by Sociedad Cooperativa de Viviendas Joven Futura, processed at the Planning Service, complied with the procedure laid down in the planning legislation of the Region of Murcia, that the whole procedure carried out complies with planning processes, in accordance with the planning procedures laid down in the Regional Land Act, and that the environmental management was carried out according to established environmental procedures before the respective environmental agencies.

Moreover, in relation to the building process, Sociedad Cooperativa de Viviendas Joven Futura applied for building permits for the construction of 369 housing units for young people under Partial Plan ZA-ED3 of Espinardo Action Unit 1. According to information supplied by the General Administration Engineer attached to the Planning Department Building Permit Section:

"In the administrative processing of the dossiers, we observed strict compliance with general and sectoral legislation, insofar as the award of planning permits was concerned. Alleged failure to comply with Art. 6, paragraph 1 letter a) is not considered justified inasmuch as the processing of building permit dossiers is not included amongst those comprising Annex I to the Aarhus Convention. It is not considered justified either to contend breach of Art. 6, paragraph 2, letters a) and b), as this article is directly linked to procedures having environmental impact and does not cover the processing of a dossier for the awarding of development permits for the construction of housing units on building land where the planning had already been duly approved, the urban development already completed and where the planning permit was



confined to supervising that the building planned complied with the planning legislation and regulations applicable”.

The report in question repeats that ongoing access was open to any interested party at any time in the processing of the administrative dossiers by virtue of the exercise of the public action available in planning matters.

The Senda de Granada Oeste Residents Association, actively legitimized for challenging the decisions made by Murcia City Council, appealed against the approval of the Partial Plan for Espinardo, of 5 April 2006, in a process under contentious-administrative law, without obtaining the suspension of the act challenged. This entity, therefore, has had the opportunity to claim jurisdictional protection, although to date it has not obtained a favourable ruling. The dispute, however, has not yet been settled, as there are various appeals pending before the ordinary jurisdiction and an appeal for protection before the Constitutional Court.

It is evident that the communicating entity is not unaware that the right to effective legal protection enshrined in Article 24 of the Spanish Constitution of 1978 entails, amongst other guarantees, that of access to the jurisdictional protection of the courts and magistrates, but not necessarily to the satisfaction of the claims that are filed before them.

- Ø 3.- AJA allegations relating to infringements in respect of access to justice and the adoption of cautionary measures (article 9, points 2, 3, 4 and 5).

COMMENTS

The Aarhus Convention establishes in the paragraphs of the article invoked a series of requirements for assuring effective access to environmental justice.

As stated in the Report by the Senior State Lawyer of this Ministry “the allegations of AJA referring to the existence of financial barriers for access to justice and the absence in our legislation of effective remedies that may permit the suspension of administrative acts challenged are manifestly unacceptable.

These rights set forth in the transcribed precepts of the Aarhus Convention are guaranteed in constitutional and legal terms in our legislation.

Article 24 of the Constitution of 1978 assures everyone of the fundamental right to obtain the effective protection of the courts and



magistrates in the exercise of their legitimate rights and interests, without the possibility of being left defenceless under any circumstance. Its Article 119 establishes that justice shall be free of charge when so disposed by the law and, in any case, when evidence is shown of lack of resources to go to law. And in Article 53.2 and in Title IX protection of constitutional rights is specified through appeal for shelter to the Constitutional Court.

Control of the activity (or inactivity) of the Public Administrations is implemented in our legal system by Title VII of Law 30/1992, of 26 November, on the Legal Regime of the Public Administrations and the Common Administrative Procedure, which specifies the possibility that the execution of acts appealed against may be suspended (Article 111); Contentious-Administrative Jurisdiction Regulatory Law 29/1998, of 13 July, which regulates a special procedure for the protection of constitutional rights (Title V, Chapter I) and a broad provision for the possibility of adopting precautionary measures in the course of the process (Title VI, Chapter II), with a view to preventing that the execution of the act or the application of the provision could cause the appeal to forfeit its legitimate purpose; and the Constitutional Court Act 2/1979, of 3 October, governing the appeal for shelter under the Constitution (Title III). For its part, the Free Legal Assistance Law 1/1996, of 10 January, regulates and guarantees the right to free legal assistance recognized by the Constitution, depending on the person's economic circumstances.

These norms represent a guarantee of the right to effective legal protection - including the precautionary protection that the communicating parties claim has been infringed by the Spanish courts - much more far-reaching and comprehensive than that specified in generic terms in the precepts of the Aarhus Convention invoked.

What is quite unacceptable is the allegation that these precepts have been infringed by the mere fact that the appellant (which, by the way, is not AJA, but the aforementioned Residents Association) has not as yet received satisfaction of its claims from the courts and which, owing to its economic capacity, is unable to go to law free of charge and has, therefore, to pay the court costs that may be imposed on it in application of the rules governing the order to pay costs in our legal system. The right to effective legal protection, including precautionary protection, does not comprise - as proclaimed on numerous occasions by the Constitutional Court - the right to obtain a favourable ruling, but only a judicial decision in which the questions lodged before the courts are settled. This judicial decision may be adverse, as has occurred to date in the matter (still pending a firm ruling) that is the subject of this consultation. The above-mentioned norms meet more than amply the



procedural requirements stemming from Article 9 of the Aarhus Convention and a cursory examination of them by the Convention Compliance Committee should be sufficient to reject the unfounded allegations of the communicating entity in relation to our procedural laws and their application by the Spanish courts”.

Furthermore, Title IV of Law 27/2006, of 18 July, governing the rights of access to information, public participation and access to justice in the environment area (BOE, of 19 July 2006) concerns itself with access to justice and to administrative protection and has the object of securing and strengthening, through the guarantee afforded by judicial and administrative protection, effectiveness of the rights to information and participation. Thus, article 20 recognises the right to administrative or contentious-administrative appeal against any act or omission attributable to a public authority that involves an infringement of these rights. These appeals are governed by the general regime; article 21, however, regulates a type of specific claim for infringements committed by private individuals subjected by Law to the obligations to supply environmental information. The Law also comprises the provision of article 9.3 of the Aarhus Convention, which may be exercised by non-profit entities engaged in environmental protection legally set up two years prior to the exercise of the action and that carry on their activity in the geographical area affected by the act or omission challenged.

In this way, acknowledging the right of access to free justice for the aforementioned legal persons, in the terms specified in Law 1/1996, of 10 January, on Free Legal Assistance, assistance mechanisms have been introduced into national legislation to remove or reduce the financial obstacles that may impede access to justice on certain occasions.

In this respect, the judgement issued by the High Court of Justice of the Region of Murcia of 21 December 2007, upon imposing on the appealing party the payment of the court costs, interpreted that the conditions of exemption specified in the legislation were not present therein.

Madrid , 25 June 2009

The Subdirector General for Information to the Public,
Documentation and Publications



Signature: José Abellán Gómez