Patrick Campbell & Co

SOLICITORS AND NOTARIES

430 Victoria Road
Glasgow G42 8YU
LP3 Queenspark

Telephone: 0141 423 2222
Fax: 0141 423 2424
email: fm@patrickcampbellsolicitors.co.uk

Aphrodite Smagadi
Legal Affairs Officer
Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Environment, Housing and Land Management Division
Palais des Nations
CH-1211 Geneva 10
Switzerland

Our Ref: FM/HC/RoadSense Aarhus
Your Ref:

Date: 21st November, 2010

Dear Miss Smagadi,

COMPLAINT TO AARHUS COMPLIANCE COMMITTEE CONCERNING COMPLIANCE BY THE UNITED KINGDOM IN CONNECTION WITH THE ABERDEEN WESTERN PERIPHERAL ROUTE: ACCC/C/2009/38
OUR CLIENTS: ROADSENSE

Thank you for your letter of 27th October 2010.

We attach a document providing our answers to the questions for the communicant. We have also taken the liberty of answering some of the points referred to in your questions to the party concerned which we hope that the Committee find helpful.

We are more than happy to answer any further points as may be required.

Yours faithfully,

Frances McCartney
Solicitor
Patrick Campbell & Co

ANNEX 1

ACCC/C/2009/38

ANSWERS TO POINTS RAISED BY THE AARHUS CONVENTION COMPLIANCE COMMITTEE IN THEIR LETTER OF 27 OCTOBER 2010

Questions to the Communicant

1. Please advise whether Dr Hawkins has subsequently sought to appeal the Scottish Information Commissioner's Decision of 25th May 2010 to the Court of Session.

Doctor Hawkins has not sought to appeal the Scottish Information Commissioner's decision of the 25th May 2010 to the Court of Session. Any appeal to the Court of Session involves both high costs legal fees on the part of Dr Hawkin's legal fees, and a high potential liability for costs.

The cost of instructing Solicitors and Counsel simply to raise the appeal and cover the initial stages would be in excess of £5,000 (5,776 Euros). The cost of proceeding to a full hearing for two or three days is likely to be somewhere in the region of £10,000/£20,000 (11,552/23,104 Euros). The liability for expenses could be as much as £40,000/£50,000 in the event of Dr Hawkins being unsuccessful.

There is no statutory regime to allow individuals such as Dr Hawkins to obtain certainty that he would not be liable for the Scottish Information Commissioner's expenses in the event of losing. There is one case in Scotland where an order was made relatively quickly after the proceedings were raised as to an upper cap on how much that individual would be liable for expenses: McGinty v Scottish Ministers [2010] CSOH 5 (http://www.scotcourts.gov.uk/opinions/2010csoh5.html).

However, it is likely that it would be argued that the rules set out in the McGinty case would prevent Dr Hawkins from obtaining such an order. Dr Hawkins would firstly have to provide details of all of his personal financial resources. This would have a chilling effect given that such information has to be provided in open court. Dr Hawkins would be discouraged from applying for an order in respect of having to provide such intimate personal details (which are likely also to mean the personal finances of his wife). In any event, the cap set in the McGinty decision is £30,000 (35,369 Euros). This is not affordable for Dr Hawkins, bearing in mind that in the event of Dr Hawkins losing, he would have to pay his own expenses plus the expenses to the level of the cap.

It should also be borne in mind that the public inquiry finished in 2008 and the decision to build the road has now been taken (albeit it is under appeal). The information was originally sought to challenge the Government's position taken at the public inquiry.

2. Please indicate whether in the light of the Scottish Information Commissioner's decision of May 25th 2010 the communicant still wishes to proceed with its allegations in respect of the freshwater pearl mussels.

Yes, we do wish to proceed. The Scottish Information Commissioner announced as part of his decision of May 25th that '*During the investigation, SNH reconsidered its approach to this request, and no longer sought to apply the exception in regulation 10(5)(g) to most of the information that had previously been withheld. The Commissioner found that SNH had failed to deal with Dr Hawkins' request for information fully in accordance with the EIRs.*'

This change in opinion by SNH, and the subsequent release of information, came too late to enable Dr Hawkins to present key evidence on the likely impact of the AWPR upon freshwater pearl mussels. That information was required to support the claim that the construction of the AWPR would cause major damage to vulnerable and depleted populations of freshwater pearl mussels. In effect, a UK government agency has now acknowledged that it withheld information from a member of the general public who wished to use that information to challenge the government itself. We maintain that this acknowledged failure to provide information, which has been acknowledged by the parties concerned, was a serious breach of the Aarhus Convention.

3. Please advise whether the communicant or Dr Hawkins has made an application under the Freedom of Information (Scotland) Act or the Environmental Information (Scotland) Regulations to get access to the report on the location of the badger setts.

No further action has been taken by the communicant or Dr Hawkins. The information on the location of badger setts was required to enable expert witnesses to challenge evidence provided by witnesses for Transport Scotland on the impact of the AWPR on badgers. As that information was withheld, and as it was ruled by the Reporter that such information could not be presented at the open Public Inquiry, RoadSense expert witnesses were unable to present a proper case. Again, a UK government agency withheld information from those members of the general public who wished to use it to challenge the government's position. As we have commented above, it is now too late to utilise any additional information on badger setts.

In pursuing options under the Freedom of Information (Scotland) Act or the Environmental Information (Scotland) Regulations Dr Hawkins thought it better to pursue the case of the freshwater pearl mussel (which has a higher degree of protection) than the badger.

4. Please indicate whether the communicant has brought a statutory appeal under the Road (Scotland) Act or an application for judicial review to challenge the Scottish Minister's decision of 3rd March 2010. If so please elaborate on the basis of the claim.

A Statutory Appeal under the Roads (Scotland) Act 1984 has been lodged by RoadSense, with Mr William Walton the Chair acting as its representative. We attach a copy of the Statutory Appeal. In summary, the basis for the appeal is:

- The Ministers in coming to their decision to build the AWPR failed to have regard to all the findings of the Public Inquiry, in particular with respect to the acknowledged levels of environmental damage that would be caused

- Ministers attributed economic benefits to the road, and these provided the main justification for building the AWPR, yet the public were excluded from challenging those claimed economic benefits at the Public Inquiry.

- In coming to a decision with respect to European Protected Species Ministers ignored the provisions of the European Habitats and Species Directive

RoadSense is seeking an order to cap the potential liability for expenses. That application will be heard on 17th and 18th December 2010. The full hearing has been assigned for 22nd February onwards for 6 days.

There are three matters which particularly should be brought to the Committee's attention regarding the appeal.

The first is the limited scope of the powers of the court in the appeal. That is dealt with under question 2 below, addressed to the Party.

The second is that the Scottish Government has lodged written Answers to the appeal . Their Answers indicate that they will argue that RoadSense and its representative named on the court papers (William Walton, Chair of RoadSense) do not have the right to bring the challenge. RoadSense are concerned that as a party to the Public Inquiry, where considerable expense was incurred by group members in presenting expert evidence and instructing their own QC, the Scottish Ministers wish are challenging the right of RoadSense to bring the appeal.

The third point is that appeals under the Road (Scotland) Act 1984 are usually dealt with by the Inner House. By way of background information, the Inner House is a higher Court of Appeal within the Court of Session. Most cases will begin in the Outer House. Despite opposition from all parties, the Inner House decided the case should be remitted to the Outer House. The Scottish Ministers were concerned about the delay if the case was dealt with by the Outer House, given that if the Ministers lose in the Outer House, they are very likely to appeal. The Court dealt with the issue of delay by providing an early hearing date (22nd February onwards). The Inner House was concerned that given the complex issues raised by the appeal, the case should be 'filtered' by a decision in the Outer House, before potentially coming to the Inner House.

This decision acts an additional financial barrier for justice. The remit to the Outer House adds a layer of court process – it is likely the case will be appealed to the Inner House, and the net effect of this is to add expense to RoadSense.

5. Please provide us with an internet link to the Scottish Legal Aid Board's guidance on Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002.

The Scottish Legal Aid Board (SLAB) is a non-departmental public body which is answerable to the Scottish Ministers, but which has day to day control over the granting and provision of most types of legal aid in Scotland.

SLAB provide guidance to applicants and the legal profession on how they will exercise their powers to grant or refused legal aid, referred to as the legal aid handbook

There are two parts of the handbook that are particularly relevant for applications where SLAB consider that Regulation 15 applies. The first is at section 3.17 'Applications by persons with a joint interest'. The second is found at 4.78 under the heading 'Wider Public Interest'.

The legal aid handbook is found at:

http://www.slab.org.uk/profession/handbook/Civil%20handbook/wwhelp/wwhimpl/js/html/wwhelp.htm

We have taken the precaution of attaching both sections in Appendix 2 as unfortunately we cannot link to the individual sections.

We also attach an article recently published in Scots Law Times by Frances McCartney Solicitor, which might be of interest in considering some of the practical difficulties of that this Regulation and the Guidance create.

Lastly, we rely on information provided by the Scottish Legal Aid Board from Freedom of Information requests.

We were provided with a breakdown of the types of cases considered by the Scottish Legal Aid Board where the Board considered Regulation 15 applied. We asked for information in relation to the subject matter of the action and the outcome of the application. A previous application for legal aid for a challenge under the Roads (Scotland) Act 1984 was refused on the basis of Regulation 15 although we do not know the details of that application. We understand that legal aid for environmental challenges is rarely if ever given; we are only aware of such legal aid being granted if it is in the context of challenging a private interest (such as contamination to property) or alternatively to sue for damages from environmental harm rather than to challenge environmental decision-making itself.

We also obtained confirmation from the Board that it has never granted legal aid subject to others paying part of the costs. This is important to note as it contrasts with the position set out in the Port of Tyne case where the UK Government relied on the flexibility of funding environmental cases by the Legal Services Commission (operating in England and Wales only).

Questions addressed to the Party concerned

We would also like to provide our own comments on the questions addressed to the Party concerned (the UK Government), simply to clarify our own position on these issues:

1. What possibilities were there for members of the public to challenge the Minister's Decision of 1st December 2005?

There was no opportunity to challenge that decision. The Minister announced on Dec 1st a new route for the AWPR which combined elements of an original Milltimber Brae route with the addition of a Fastlink connecting the AWPR to the A90 trunk road at Stonehaven, 15 km south of Aberdeen. There had been no previous public intimation of a proposed Fastlink, and no prior public consultation with respect to it. Subsequently, following the announcement, the AWPR project team carried out landowner consultations, survey and development work to identify and to refine the alignment of a preferred line within the corridor announced on Dec 1st. An alignment for the new route, including the Fastlink, was announced by the Minister on 2nd May 2006. However, there was no opportunity for the public to challenge the new route announced on December 1st before draft road orders were issued.

2. What is the scope and powers of the statutory appeal to the Court of Session under the Road (Scotland) Act?

There can be no appeal in Scotland on the merits of a decision under the Road (Scotland) Act. Any appeal is restricted to matters regarding the legality of the decision.

The legal test that the court applies is found in Schedule 2 to the Road (Scotland) 1984 Act. Section 4 states that subject to s3, a scheme or order to which the Schedule applies shall not be questioned in any

legal proceedings whatever. Section 3 prescribes the court's powers if it is satisfied that an appeal under s2 is made out. It has a discretion to "quash the scheme or order or any provision contained in it, either generally or in so far as it affects any property of the applicant".

It is generally difficult, if not impossible, to argue a judicial review or statutory appeal of this type in the context of proportionality, except insofar as there is a specific human rights issue arising. There are two other statutory appeals to the same orders; those parties have applied for legal aid on the basis that their businesses and/or homes are under threat. Those appeals are based in part on challenges involving the European Convention of Human Rights and the court may well engage in a test of proportionality insofar as those appeals are concerned. It is unlikely that the court will consider its test to be one of proportionality insofar as the wider environmental issues that RoadSense are concerned with although clearly that is a matter we would not want to be seen to be prejudging with the court.

3. The Modern Transport System and its objectives

Although the MTS is the strategic transport plan which includes the AWPR in its provisions we are not aware of it being modified to include the new strategic objective to provide traffic relief to the A90. The new objective was introduced by Transport Scotland retrospectively, after the announcement made on December 1st 2005. We presume that the lack of revision of the MTS was either a fault of omission, or it reflected a wish to avoid the requirement for Strategic Environmental Assessment which would have been triggered by such a significant amendment to the plan. Note that under the SEA Directive the inclusion of a significant length of new road into a strategic transport plan would have required an SEA.

4. If the MTS does not include this objective please provide us with a strategic document which does

We are not aware of any other strategic transport plan which does include this objective.

5. When was the last date that the 'zero option' of not building the AWPR was an option for public participation?

The AWPR was identified in 2003 by NESTRANS as a key element in their integrated transport strategy for Aberdeen - the Modern Transport System (MTS). The MTS did not go out to public consultation. Instead a questionnaire was sent out to selected parties. The details of that questionnaire have not been made available to the public.

In March 2003 Scottish Ministers announced that the AWPR would be taken forward as a National Trunk Road project by a funding partnership of the Scottish Executive (now the Scottish Government), Aberdeen City Council and Aberdeenshire Council. The AWPR was subsequently mentioned in Scotland's first National Planning Framework published in April 2004. The zero option of not building the AWPR was never an option for public consultation. The Reporters' note on matters agreed at or arising from the pre-inquiry meeting on 13 May 2008 stated that "the Scottish Ministers have accepted the need in principle for the road, and they do not wish to be advised on the justification

for the principle of the scheme in economic, policy or strategic terms."…"Accordingly, the reporters do not intend to permit the presentation of evidence or questioning on the need for the scheme."

Note that Ministers made their announcement to take forward the AWPR despite a report which concluded that the road would have little impact in terms of reducing traffic congestion. The Sustainable Transport Study for Aberdeen, commissioned by the Scottish Office and the local authorities in 1998 looked at a wide range of transport interventions including a 'no AWPR' scenario. This was a pioneering 'multimodal study' now regularly used by the UK Government to assess transport options for a specific area or region. It examined a series of about 25 different scenarios featuring different combinations of transport policy interventions.

The report concluded that the AWPR offered no significant advantages. It was almost neutral in terms of its impact. There was no public consultation on this report.

6. The final approved route for the Fastlink was some distance to the east of the consulted routes. Was the exact line chosen subject to consultation?

The preferred alignment was announced by the Minister on 2nd May 2006. The line was not subject to formal consultation until the Draft Road Orders for the AWPR, including the Fastlink, were published on 14th December 2006. Another set of Draft Orders, Draft Compulsory Purchase Orders and a new Environmental Statement for the AWPR were subsequently published in August, September and October 2007.

Publication of the Road Orders was followed by a statutory consultation. About 10,000 objections to the proposals were lodged.

The Scottish Government then announced on 12th October 2007 that a Public Local Inquiry would be held into its proposals for the AWPR. Reporters from the Scottish Government were appointed to conduct the inquiry and report to Ministers. At the Pre-Inquiry meeting on the 13th May 2008, the Reporters undertaking the Inquiry stated that Scottish Ministers had accepted the need in principle for the road and did not wish to be advised on the justification for the principle of the scheme in economic, policy or strategic terms. The Ministers had also directed that they only wished to be advised on the technical aspects of the route choice, including the environmental statement and any opinions expressed on it. In response to these instructions the Reporters decided to disallow any evidence which had, as its objective the calling into question of the need for the scheme. In addition, while acknowledging the intention of certain objectors to present evidence "on alternative routes and alternative designs" the Reporters specifically commented that the inquiry was into the scheme proposed by Transport Scotland and "cannot turn itself into an inquiry into a series of assumed alternative proposals". In the event, no significant changes to the route were subsequently recommended by the Reporters or accepted by Ministers.

Thus, although the line for the Fastlink was formally published through the Road Orders, and those Road Orders were subject to consultation, there was no separate consultation on the line of the Fastlink. The Public Inquiry on the Road Orders was constrained to consider only minor changes to

the route. The Public Inquiry was specifically framed by Ministers to exclude detailed discussion of alternative routes. The only parties permitted to put forward alternative routes were statutory objectors; i.e. Community Councils and affected landowners. Third party objectors like Road Sense were specifically proscribed from suggesting alternative routes.

7. At any time was the option of both a southern leg and a fast link as one combined option presented to the public for their comments?

No. The combined Southern Leg/Fastlink route was simply announced as a *fait accompli* on December 1st 2005. The public were never able to comment on this new route which combined one of the options for the Southern Leg with a completely new road – the Fastlink. The term Fastlink is itself significant. It was introduced to link the Southern Leg of the Aberdeen Western Peripheral Route, which was intended to by-pass the city, to the A90 a distance of 15 km south at Stonehaven. The public were simply consulted about the details of the actual line to be followed within an announced corridor for the Fastlink.

The Public Inquiry was the first opportunity for public consultation on the Fast Link. However, at the Inquiry any Fastlink route which did not have Stonehaven as its southernmost terminus was specifically discounted from consideration. Any alternative Fastlink proposed by objectors which joined the A90 further to the north, for example at Portlethen, was specifically excluded.

8. When was the decision taken to change the Fastlink from a single to a dual carriageway? Was the public consulted?

The decision to upgrade to a dual carriageway was taken by the AWPR Steering Group of transport officials from the Scottish government Government and the local authorities. There was no public consultation on that decision.

The issue of whether sections of the AWPR (including the Fastlink) were to be a single or dual carriageway standard was discussed at the Steering Group Meetings on 8th October 2004, 3rd February 2006 and 22nd November 2006. The Ministerial announcement on 1st December 2005 clearly indicated that the Fastlink was to be a wide-single road and this was agreed at the Steering Group Meeting on 3rd February 2006 (Item 21). A dual carriageway Fastlink was shown on the map produced by the Transport Minister on 2nd May 2006, when he announced the alignment, and the dual carriageway status was subsequently confirmed at Steering Group Meeting on 22nd November 2006. only to be changed at the meeting on 22nd November 2006. No ‘ADesign Manual for Roads and Bridges Assessments ssessments of Carriageway Carriageway Standards Standards’ in accordance with the Design Manual for Roads and Bridges have been produced despite FOISA requests. Accordingly the AWPR design does not comply with the DMRB, compliance with which is a policy of the Scottish Government.

It can be argued that the change to a high specification dual carriageway was a change that needed further consultation. Road Sense has maintained that the predicted traffic flows do not warrant a dual carriageway.

9. Comments on the communicant's allegations regarding the expenses of an appeal and its scope.

We would seek to draw the Committee's attention our application for restriction of liability that will be heard in the Court of Session on 16th and 17th December 2010.

We also note that the European Commission has warned the UK about prohibitively expensive challenges to the legality of decisions on the environment. The Commission sent an initial warning letter about this issue in October 2007, and the UK replied that the procedures were under review. However any review that may have been carried out had not resulted in any changes having been made to improve on the situation that existed in 2007. In noting this omission the Commission considered that the UK was failing to comply with the legislation. It remarked that failure to comply with this final warning could see the UK brought before the European Court of Justice.

As indicated, to date no statutory rules have been brought into force in Scotland specifying the circumstances under which such an order could be obtained.

ANNEX 2

ACCC/C/2009/38

EXTRACTS FROM SCOTTISH LEGAL AID HANDBOOK

"3.17 Applications by persons with joint interest

In terms of regulation 15, we can only grant legal aid to someone who is jointly concerned with, or has the same interest in the matter as, other people if we are satisfied that:
•the applicant would be seriously prejudiced in their own right if legal aid were not granted or
it would not be reasonable and proper for the other people concerned to pay the expenses that would
•be paid under legal aid if it was granted.

Where there are a number of individuals who all appear to share a broadly similar objective in an action public funding will not generally be made available to fund the case unless strong evidence is provided to show that an individual will suffer serious prejudice.

An example of "serious prejudice" would be an owner of a flat in a tenement faced with litigation over a bill for common repairs.

Examples of cases where an applicant will not suffer serious prejudice include closure of a school, community centre, swimming pool, or other cultural or leisure institution.
Where several people each have a claim for damages, say, arising out of a common calamity and each individual has their own distinct claim, this would not be joint interest. While the parties have similar interests, they are not the same.

Similarly, where a claim arises from a fatal accident, the claim for a child of the deceased is treated as separate and distinct from the claim of a spouse or other relative."

"4.78 Wider public interest

When considering the reasonableness test, a relevant factor may be that a case demonstrates a wider public interest. A wider interest may be presented in an application for matters such as judicial review, appeals or reparation where several cases arise out of the same incident, or where the outcome of the case may have a direct tangible benefit to the applicant and to others.

It may be unreasonable to make legal aid available to a person to litigate, as a private citizen, at public expense, about something that is obviously not exclusive to him or her. Examples could be fluoridation of public water supplies, noise generated by a large social or cultural event, closure of public leisure facilities. Our Legal Services Cases Committee will consider any applications of this nature.

If we are satisfied the case does demonstrate a wider public interest, we can, in the particular circumstances, treat this as a determining factor, even if the value of the claim is relatively modest. However, we must also consider questions such as prospects of success and cost-benefit.

Evidential requirements

You must give us full and accurate information about the value of the claim and the likely case costs.

This will allow us to assess whether there is any prospect of financial benefit to the applicant.
Full information should be provided about the nature of the wider interest in the case. Our criteria for a wider public interest will not be met:
•by simply asserting that such an interest exists, without material to back it up
just because other people may find the nature of the proceedings interesting, or there may be some
•hypothetical interest
•where we consider the interest is, in fact, a private interest.

Any application must address the tests in regulation 15 of the civil regulations. That regulation requires us to refuse applications for civil legal aid where the applicant has a joint or the same interest with others if we are satisfied that
•the applicant would not be seriously prejudiced in their own right if we did not grant legal aid, or
•it would reasonable for the other people concerned to meet the expenses of the action.

If the applicant is part of a group bringing similar claims, or similar claims have already been brought by others, whether legally aided or not
•we need full information about the funding of the other claims
•the applicant will need to explain clearly the prejudice that would arise if we refused legal aid.

We must refuse the application if the tests in regulation 15 are met. You should include your views on wider public interest and regulation 15 in relation to this case in a separate note, not in the statutory statement or the applicant's statement."