Complaint ACCC/C/2009/38 against the UK by RoadSense

Hearing of the Aarhus Compliance Committee: 17th March 2009

Text of oral presentation on behalf of RoadSense

1. We welcome the opportunity today to address the Committee. The background to the complaint relates to the proposal to build 46 km of new road through rural Aberdeenshire. The complaint is brought by RoadSense - an entirely voluntary group with no paid members of staff.

2. The basis of the complaint is the withholding of environmental information by the Scottish Government and its agents, both as a complaint in its own right and relating to subsequent procedures followed; the consultation procedures and compliance with Articles 6 (4) and 6 (6) and the right to challenge the subsequent environmental decision.

3. It may be the Committee feel it premature to adjudicate on the access to challenging the decision. The road orders have only just been confirmed, and a six week period for challenge is still running. Nonetheless, there are some structural issues that it might be worth highlighting regarding Scotland's compliance under this heading (as to be distinguished from England, Wales and Northern Ireland).

4. The first part of RoadSense's complaint relates to the withholding of information. We need not emphasise the importance that the Convention places on information rights. It is a key right, from which participation and access to justice properly flow. However, it is also a stand alone right important to call public authorities into account.

5. The issue in this case is whether it was right to withhold the information on the ground that it relates to a breeding site of a rare species - Article 4 (4) h.

6. The species in question is the pearl mussel. We accept it is a rare species and that the information probably relates to its breeding ground (we have not seen the information). However, the Convention requires this exemption to be applied restrictively and it is our position the public interest favoured release.

7. In this case, Scottish Natural Heritage (SNH) the government body charged with biodiversity duties release information on the pearl mussel to Transport Scotland (an Executive Agency of the Scottish Government) who subsequently released it to their private sector contractors (Babties). SNH refused to release it to RoadSense, rejecting an offer that Professor Tony Hawkins of RoadSense would sign an undertaking not to release the information further. Professor Hawkins expertise and experience in this field makes him suitably qualified to do so.

8. SNH's position was that pearl mussels could be subject to illegal fishing if the infromation was released. The only evidence of this relates to a single incident in 2002. Given the information was released to private sector contractors without seemingly any restrictions being placed on it, and given the willingness of RoadSense to agree regarding the wider release of the information, the decision not to release is unjustified.

9. The reality is that the threats to the pearl mussel are from contaminated water and other man made hazards. This is an important factor in determining the balance of the public interest. It also appears there was a duty to disseminate at least some information regarding such hazards by Article 5 (1) (c), which could have been done without releasing information on the precise site location.

10. The refusal to release this information raises separate issues with compliance of Article 6. A public inquiry was held in late 2008. That public inquiry cannot form any part of compliance with Article 6 for two reasons.

11. First, the withholding of the information on the pearl mussel quite simply meant that the process was unfair and inadequate - the proposers of the road had information which was not available to RoadSense and other objectors. RoadSense could not properly test the assertation that the route would not adversely effect the Dee SAC (designated under the Habitats Directive) and were at a fundamentatl disadvantage. Any attempt to use the public inquiry to comply with Article 6 is therefore flawed.

12. Second, the public inquiry could only look at one option, despite attempts by objectors to lead evidence on a 'no road' solution (such as improved public transport) or alternative routes. The inquiry's limited and restrictive remit was upheld despite challenges. I accept that Article 6 does not require a public inquiry to examine all options. What the public inquiry could not do, however, is satisfy the need to consult on all options under Article 6 (4).

13. Previous consultations before the public inquiry also do not comply with Article 6 (4). In Spring 2005 the Scottish Government undertook a consultation on 5 different routes. The consultation papers made it clear that the principle of the road had been determined, citing 'factual' evidence such as reduction on city traffic. Following that consultation a different route was chosen. I argue the earlier consultation did not allow for all options - such as a 'no road' option - and in any event, it is fundamentally flawed as a series of consultations as envisaged by Case ACCC/C/2006/16 (Lithuania case) envisages a series of consultations with a narrowing of options within the original set consulted upon. In December 2006 the Minister chose a route that had not been the subject to any previous public consultation.

14. Almost 10,000 objections were lodged to the draft orders (before the public inquiry). RoadSense estimate that at least 54 % of those objections raised the point that sustainable alternative transport solutions should be thoroughly considered before promoting a new road. These objections were effectively ignored in the subsequent public inquiry.

15. There was therefore never a consultation procedure which allowed all options to be examined. The public consultation exercise held in Spring 2005 presumed a road would be built and presented alternative 5 routes. Despite a desire amongst objectors to argue for non by-pass options such as park and ride, improved public transport and transport improvements, the public inquiry did not allow such evidence and does not satisfy Article 6 (4).

16. The complaints regarding public participation also extend to compliance with Article 7. In particular, those complaints extend to changing objectives within the strategic

transport plan (the Modern Transport Strategy) without any public consultation. Further, there was no Strategic Environmental Assessment carried out on the revised MTS.

17. The additional objective added to the revised MTS was to "*Provide traffic relief (including the removal of long distance heavy goods vehicle traffic) on the existing congested A90 route through and to the south of Aberdeen."* The public should have had the opportunity to comment on such an additional objective. It is RoadSense's view that additional objective was introduced to justify the new choice of route (and in particular the Fastlink).

18. The last head of complaint is on access to justice. The Committee already has heard extensive complaints regarding compliance in England, Wales and Northern Ireland. This is not a typical case, given it relates to a statutory review and not a common law judicial review. There is little case law on whether a voluntary group such as RoadSense can be defined as an 'aggrieved person' for the purposes of the Roads (Scotland) Act 1984. Even if a challenge were to be lodged in this complaint, given there is no permission or leave stage in Scotland, if the Government ultimately object to RoadSense's right to take the challenge, this is unlikely to be dealt with until the full hearing, putting the Communicant's to great expense.

19. The period for challenge does not expire until mid-April 2010. We cannot say today if a challenge will be mounted. Clearly it will be an uphill struggle to raise the necessary finance. There are no clear principles enshrining the right to obtain a Protective Cost Orders (referred to as Expenses Orders) as only one such order has been granted to date in Scotland. In that case the Protective Expenses Order set a liability cap at £30,000. We estimate that a further £60,000 is required to pay the claimant's own fees. This gives a potential liability of around £90,000.

20. What is clear is that some of the issues relied upon by the UK Government in case ACC/C/2008/33 do not apply to Scotland. The Government relied in that case on the low level of PCOs that could be granted - £1,000 was mentioned - and the availability of legal aid in public interest environmental matters. Despite my attempts to engage the Scottish Government in discussions to reduce the £30,000 cap in the case referred to above, they refuse to do so. The Committee might also want to note that I have asked the UK Government to set a direction as they can do under section 58 (2) of the Scotland Act 1998 ordering the Scottish Government to enter into discussions to reduce the cap.

21. Legal aid is not available for public interest environmental matters. There has never been such a grant since the introduction of the Civil Legal Aid (Scotland) Regulations 2002. Regulation 15 of those regulations together with the Scottish Legal Aid Board's guidance on that Regulation prohibit a grant of legal aid for public interest environmental cases. Legal aid was refused in the case referred to above. The Scottish Legal Aid Board relied upon Regulation 15. Regulation 15 effectively acts as a barrier against legal aid being granted.

22. It may be the Committee do not feel able to determine this point today given that the use of domestic remedies is still open, albeit with many hurdles to overcome. In that case, we would ask the Committee to continue that part of the complaint to a further hearing.

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and

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