Neutral Citation Number: [2006] IEHC 291

THE HIGH COURT

[2005 No. 84 JR]

BETWEEN

RYANAIR LIMITED

APPLICANT

AND

THE COMMISSION FOR AVIATION REGULATION

RESPONDENT

Judgment of the Honourable Mr. Justice Quirke delivered the 2nd day of October, 2006.

1. By order of the High Court (McKechnie J.) dated 31st January, 2005, the applicant was given leave to seek relief by way of judicial review including an order of certiorari quashing a decision made by the respondent on 6th October, 2004, whereby the respondent approved certain charges which Aer Rianta (hereafter "A.R.T.") sought to impose in respect of access to and rental of check-in desks at Dublin Airport.

2. The decision was made by the respondent pursuant to the provisions of the European Communities (Access to the Groundhandling Market at Community Airports) Regulations, (S.I. No. 505 of 1998), (hereafter "the Regulations").

3. The statutory and other functions and responsibilities of A.R.T. have now been transferred to the Dublin Airport Authority (hereafter "D.A.A.").

4. Leave was granted on the grounds that in making its decision the respondent failed to comply with the provisions of Article 14(3) of the Regulations and in particular made its decision without applying "*…relevant, objective, transparent and non-discriminatory criteria*" as required by the Regulations and by Council Directive 97/67/EC (hereafter "the Directive"), on access to Groundhandling Market and Community Airports.

Factual Background

5. On the 16th December, 1998, the Directive was transposed into Irish law by the Regulations.

6. Regulation 14 of the Regulations provides as follows:

> *(1) Subject to the provisions of Regulations 7, 8 , 9, 10 and 12, suppliers and self-handlers shall have access to airport installations to the extent necessary for them to carry out their activities. If the managing body of an airport places conditions upon such access, those conditions shall be relevant, objective, transparent and non-discriminatory. The Minister shall be informed in writing of those conditions prior to the imposition.*
>
> *(2) The space available for groundhandling at an airport shall be allocated by the managing body of the airport among the various suppliers and self-handlers including new entrants in the field, to the extent necessary for the exercise of their rights and to allow effective and fair competition, on the basis of relevant, objective, transparent and non-discriminatory rules and criteria.*
>
> *(3) Where access to airport installations gives rise to the collection of a fee, the latter shall be determined by the managing body of the airport and approved by the Minister in advance in accordance with relevant, objective, transparent and non-discriminatory criteria."*

7. The relevant Minister for the purposes of the Regulations was the Minister for Public Enterprise. The obligations and functions which were vested in the Minister by the Regulations were transferred to the respondent pursuant to the provisions of s. 9(2) of the Aviation Regulations Act, 2001.

8. It is acknowledged on behalf of both parties that a check-in desk is an "*installation*" within the meaning of the Directive and of the Regulations and that a rent charged for the exclusive right to occupy a particular desk is a "*fee*" within the meaning of the Directive and of the Regulations – see *Flughafen Hannover–Langenhagen GmbH v. Deutche Lufthansa AG*, Case C-363/01.

9. Groundhandling services include services such as baggage sorting, de-icing, water purification and fuel distribution systems.

10. The respondent is responsible for the authorisation of groundhandling operations. It is the competent authority for approving the appointment of suppliers. Suppliers may be either

> (a) "*self-handlers*", i.e suppliers who provide the ground handling service independently and who conclude "*no contract of any description with a third party for the provision of such services…*" or
>
> (b) "*third-party handlers*", i.e. suppliers who provide the service pursuant to or with the assistance of a contract with another party.

11. Both self-handlers and third-party handlers require the approval of the respondent before they can provide groundhandling services.

12. During 2003, there were seventeen self-handlers and twenty three third party-handlers operating at Dublin Airport.

13. The objectives of the Directive and of the Regulations include the following;

> (a) the elimination of restrictions on the freedom to provide groundhandling services within the European Community,
>
> (b) a reduction in the operating costs of airlines and
>
> (c) an attempt to facilitate improvements in the quality of services to airport users by opening up that aspect of the air transport market and promoting the development of effective competition in that market.

14. The specific measures introduced to promote liberalisation of the groundhandling market at Irish airports included *inter alia* (i),

measures to limit the number of approved suppliers of each category of ground handling services in appropriate cases, (ii), a system requiring that suppliers obtain the approval of the respondent before supplying the services and (iii), the imposition of fees in relation to access to airport installations.

15. In April, 2004 A.R.T. submitted to the respondent an application seeking retrospective approval of certain charges in respect of access to airport installations at the three State airports in Dublin, Shannon and Cork.

16. In respect of Dublin Airport A.R.T. sought approval to levy charges at the level of €15,718 by way of an annual check-in desk rental and €20.90 for hourly check-in desk rental. These proposed charges represented increases from levels of €15,237 and €19.05 respectively, which had been in force since January, 2001.

17. In its submission to the respondent dated 8th April, 2004, A.R.T. stated *inter alia* that:

> *"Aer Rianta's proposed desk rental charges have their origin in charges which were set in January, 2001. The only adjustment made since then was a single C.P.I. adjustment applied in October, 2003."*

18. It advised the respondent that when introducing its charges in January, 2001 it had considered a number of pricing options including:

> *"…the recovery of all costs together with a return on assets through rental charges for use of check-in desks - Full Recovery".*
>
> *The partial recovery of costs through rental charges for use of check-in desks - "Implemented Charges".*

19. It advised that it had estimated that an average charge per desk of approximately €86,000 annually could be applied to achieve full recovery of costs and earn a return on assets.

20. In relation to "*implemented charges*" it advised that:

> *"…conscious of the need to minimise the discontinuity for users in moving towards the charging levels required to effect full cost recovery (above) Aer Rianta opted to implement an initial set of annual charges for allocated desks and an annual charge for unallocated desks which were not based on full recovery."*

21. Indicating that it had fixed annual charges of €15,237 per desk and hourly charges of €19.05 per desk in 2001 it explained that "*charges at these levels were considered reasonable when compared with check-in desk charges at other airports at the time…*".

22. Referring to the criteria to be applied by the Directive and by the Regulations A.R.T. submitted that:

> *"Aer Rianta's check-in desk rental fees meet the criteria of relevance, objectivity, transparency and non-discrimination viz;*
>
> *· Relevance – the fee is logically connected to what is being provided in consideration of the fee. In this case the fee is being charged for check-in desks infrastructure to which access is being granted.*
>
> *· Objectivity - the charge is set in the manner undistorted by any prejudice on the part of the price setter. In this case the fees were set following a process that recognised the need to minimise discontinuity for users rather than concentrating on the best interests of Aer Rianta only. (Adoption of the latter course would have resulted in Aer Rianta implementing a much higher charge to cover all costs involved).*
>
> *· Transparency – the criteria on which the charge is based are readily available and understood. The precepts underpinning Aer Rianta's charging policies are set out clearly above.*
>
> *· Non-discrimination – identical or comparable situations must not be treated differently. In this case the check–in desk fees are applied to all users equally. The charges are published and details of same are made available to all users."*

23. Following a meeting with the respondent on the 9th June, 2004, A.R.T. submitted a revised application on 11th June, 2004. That application bore the original date of 8th April, 2004.

24. In its revised submission (at p. 7) under the heading "*check-in desk annual rental charge*" the submission provided that:

> *"The cost base for the check-in desks has been re-examined recently and a cost analysis has been carried out. This analysis shows the cost of a check-in desk to be approximately €54,951.00 per annum (see Appendix 4).*
>
> *Though a move to more cost reflective charges is planned over time, we propose to retain the check-in desk rental charge at €16,718 per desk per annum at present. This rate represents an under-recovery of approximately 70%."*

25. Appendix 4 to the submission comprised a "*cost analysis*" which calculated the total costs of 142 check-desks at €7,802,971 with the resultant calculation of €54,951.00 as the cost for each desk.

26. Further details contained within the Appendix disclosed the estimates as being arrived at by calculating all of the capital and other costs of the entire airport space (including maintenance and operating costs), allocating the appropriate spaces used in respect of check-in areas, baggage areas, and baggage sortation areas under the overall headings "*check-in desks*" and calculating the annual costs of the 142 desks as the appropriate fraction (1/142) of the total annual cost of the space.

27. On 9th July, 2004, the respondent received applications from A.R.T. for approval for check-in desk charges at Cork airport and at Shannon airport.

28. At Shannon Airport A.R.T. sought approval for check-in desk rental charges of €8,000 per annum and €19.05 per desk per hour (increasing to €20.00 from 1st October, 2004).

29. On the same date the respondent received an application from A.R.T. for a charge for the use of a Common User Terminal Equipment (C.U.T.E.) which is installed on the check-in desks at Shannon Airport. Explaining that C.U.T.E. is a common hardware/software platform designed to facilitate access by airlines to their departure control systems from shared desktops and terminals (located at any gate or check-in desks), A.R.T. stated in its application that no charges had been levied for C.U.T.E. in Shannon up to the date of the application although users had made a contribution towards the costs of installing their own back office equipment.

30. A payment of 23 cents per embarking passenger was sought in respect of the C.U.T.E. system in Shannon. It was submitted that this amount would not cover the full costs associated with the use of C.U.T.E. facilities and that C.U.T.E. costs were not covered within the rental charge for the check-in desks.

31. There were exchanges of correspondence and meetings between representatives of A.R.T. and representatives of the respondent between 21st June, 2004 and 22nd July, 2004.

32. On 17th August, 2004, the respondent published a consultation document entitled C.P. 5/2004 which initiated a consultation process with airport users on access fees to airport installations.

33. The document contained details of the A.R.T. application for approval of charges at the three airports and details in relation to their arguments and submissions.

34. The consultation document also contained *inter alia* details of the criteria to be applied by the respondent in deciding whether or not to grant approval and sought views as to whether the criterion in respect of non-discrimination had been met in the context of the separate application for approval of charges for the C.U.T.E. facility.

35. Eight responses were received to the consultation paper including a response from the applicant and a response from A.R.T.

36. Between the 13th September, 2004, and 6th October, 2004, there were further exchanges of correspondence between the respondent and the applicant and between the respondent and A.R.T.

37. In its decision made on 6th October, 2004, the respondent stated that it had:

> *"In..(its).. view, provided a critical breakdown of the major components of the costs relating to the infrastructure at issue and confirmed that the fees had been found to be below a reasoned approach as to cost."*

38. Agreeing that:

> *"….C.U.T.E. was bundled into the costs for the use of check-in desks at Dublin Airport and that not all users at Dublin availed of C.U.T.E...."* the respondent *"…noted that Aer Rianta had clarified that it did not currently impose a separate fee for the use of C.U.T.E. in Dublin and that such a fee was not part of its application. As the full costing did at that time include C.U.T.E., revised costings were submitted which excluded an allowance for C.U.T.E. The re-submission did not result in a reduction in the amount of the annual below cost figure for which approval was sought by Aer Rianta*". Concluding that all four criteria established by the Regulations had been met, *"….subject to a condition to be imposed on Aer Rianta in respect of the transparency requirement to the effect that (a) the fees approved be promulgated in Aer Rianta publications and (b) that any user paying the check-in desk charges be facilitated in any reasonable request for breakdown of those charges*" the respondent approved the application by A.R.T. in respect of the charges at Dublin, Shannon and Cork for check-in desk rental and in respect of C.U.T.E. charges at Shannon.

The Applicants Claim

39. It is contended on behalf of the applicant that the decision made by the respondent offended the requirement identified in Articles 16(2) of the Directive and 14(2) of the Regulations that the decision should be made in accordance with criteria of (a) relevance, (b) objectivity, (c) transparency and (d) non-discrimination.

40. The applicant claims that the fees for which approval has been sought include a proportion of the costs of the provision of C.U.T.E. It claims that C.U.T.E. is not used or required by the applicant for its groundhandling operations and that, consequently, the applicant should not be required to pay for the provision of that service.

41. It is claimed that the failure on the part of the respondent to adjust the fees payable by the applicant in a manner which would take into account the provision of C.U.T.E. comprises breaches of Article 16(3) of the Directive and Regulation 14(3) of the Regulations.

Decision

42. Both Article 16(3) of the Directive and Regulation 14(3) of the Regulations have been couched in the following identical terms;

> *"Where access to installations gives rise to the collection of a fee, the latter shall be determined by the managing body of the airport and approved by the Minister in advance in accordance with relevant, objective, transparent and non-discriminatory criteria."*

43. It was argued on behalf of the applicant that the respondent confined itself to the question of the actual cost of the provision of the service and failed to establish whether and to what extent the proposed fees were actually below cost.

44. It is also contended that the respondent failed to consider other relevant criteria and has not explained the decision making process adequately.

45. I do not consider that the respondent was under all of these obligations. The respondent is the relevant decision-making body equipped with the competence and expertise to decide upon the criteria which should be applied to the fixing of fees for access to installations at Dublin Airport.

46. Its principal obligations were to ensure that the criteria which it applied were consistent with the objectives of the Directive and in particular that those criteria would be, (a), relevant to the service to be provided, (b), objective, (c), transparent, and, (d), non-discriminatory.

47. It is appropriate to consider the criteria which the respondent sought to apply when it made its written decision dated the 6th October, 2004, and whether the criteria were consistent with the objectives and requirements of the Directive.

Relevance
48. It is unsurprising that the costs of providing the service should be the most relevant factor in the calculation of the fees to be charged. Examination of the documentation discloses that the respondent was conscious of the objectives of the Directive and of the Regulations in the course of its consideration of the costs and how they were calculated.

49. Another factor in the decision of the respondent was the need to establish and to take into account the concerns of other airport users.

50. On the 17th August, 2004, the respondent published a consultation documents entitled "P.P. 5/2004". It contained details of the A.R.T. application for approval of charges at the three airports and details in relation to the arguments advanced and the submissions made in the applications.

51. The consultation document contained *inter alia* details of the criteria which would be applied by the respondent in deciding whether or not to grant approval. It sought the views of airport users in that regard.

52. Eight responses were received, including a response from the applicant and a response from A.R.T.

53. At paragraph 3.1 of its written decision, under the heading "*Relevant*", the respondent noted that:

> "*The standard applied here was 'is the fee directly connected to the subject matter to which it is applied and is not inclusive of extraneous items or costs which cannot be regarded as being reasonably related to that item of infrastructure or equipment or to the activity in question.' Following an examination of the costs which were submitted as being related to the infrastructure in question, the Commission found the fees to be less than actual costs, even if an actual cost was calculated according to a de minimis approach to the assets and operating costs involved (excluding the return on capital and return of capital (depreciation), allocations in respect of terminal assets deemed by Aer Rianta, as relevant to the check-in section).*"

54. There is no reason why this Court should reject the "*standard*" applied by the respondent.

55. A number of responses were received by the respondent to its consultation paper, (including the response from the applicant), before the decision was made. The contents of those responses were relevant to the decision to be made.

56. In *Scrollvide Ltd. v. Broadcasting Commission of Ireland* (Unreported, Supreme Court, 6th April, 2006) Denham J. refused to quash a decision of the Broadcasting Commission of Ireland granting a broadcasting contract for the operation of a radio station.

57. Identifying the principles applicable to the intervention by the courts in the decision making process of expert bodies Denham J. observed at p. 9 that:

> *"To succeed on such an application the applicant has to achieve a high bar, meet a significant burden of proof, to show that a decision of the specialist decision maker, in this case the respondent, should be declared void by the courts.*
>
> *The courts approach with caution the review of a specialist body. Such a body has particular expertise to apply to decision-making in their arena. That specialist knowledge is not held by the courts. The process of review by way of judicial review is not a full appeal, but rather a review of the process and fair procedures."*

58. That is not to say that the courts will not intervene where a clear breach of a directive of the E.U. or of a regulation transposing a directive into domestic law has been established in evidence. However a clear and unambiguous breach must be established before judicial intervention is warranted.

59. Reliance has been placed by both parties upon the decision of the European Court of Justice in *Flughafen Hannover – Langenhagen GmbH* [2003] E.C.R. I-11893.

60. In that case the Court of Justice considered the legality of a fee imposed by a German airport authority in respect of access to the ground handling market. Noting that Article 16(3) of the Directive requires that the fee must be determined according to relevant, objective, transparent and non-discriminatory criteria the Court declared at para. 56 that this:

> *"…did not prevent the fee from being determined in such a way that the managing body of the airport is able not only to cover the costs associated with the provision and the maintenance of airport installations, but also to make a profit."*

61. In Case C-460/02 *Commission v. Italy* [2004] E.C.R. I – 11547 the Court of Justice confirmed its decision in "*Flughafen*" and that the objective of the Directive was "*to ensure the opening up of the groundhandling market which…must help…to reduce the operating costs of airlines..*" in order to achieve its stated aim which includes " *the creation of appropriate conditions for intra-community competition in the sector.*"

62. No evidence was adduced in these proceedings suggesting that the respondents applied criteria which were other than relevant to its deliberation and to the objectives of the Directive and of the Regulations. It was not necessary for the respondents to "justify" its decision by providing explanations in writing detailing precisely how each of the four factors identified in articles 16(2) and 14(2) of the Directive and Regulation had an application to the criteria adopted by the respondent.

63. I am, accordingly, satisfied on the evidence in these proceedings that the respondent made its decision in accordance with criteria which were relevant to that decision.

Objectivity
64. At paragraph 3.2 of its written decision the respondent stated that the standard which it applied in relation to objectivity was "*has the fee been set in a fair and balanced way without any motivation on the part of the airport other than that expected of a commercial entity having statutory responsibilities to: meet its financial obligations, conduct its affairs in a cost-effective manner and make a reasonable profit. As the fees set have been found by the Commission to be below actual cost, the Commission finds that this criterion has, in effect, been met*".

65. It is contended on behalf of the applicant that it was necessary for the respondents to provide a comparative analysis demonstrating that the approval was objectively justified.

66. The evidence has established that initially A.R.T. submitted that "*the fees were set following a process that recognised the need to minimise discontinuity for users rather than concentrating on the best interests of Aer Rianta*".

67. In its revised submission A.R.T. stated that: "*The cost base for the check-in has been re-examined recently and a cost analysis has been carried out*".

68. Appendix 4 of the submission comprised a "*cost analysis*" disclosing how the fees had been calculated.

69. In its written decision dated the 6th October, 2004, the respondent:

> *"…noted that Aer Rianta have clarified that it did not currently impose a separate fee for the use of C.U.T.E. in Dublin and that such a fee was not part of its application. As the full costing did at that time include C.U.T.E., revised costings were submitted which excluded an allowance for C.U.T.E. The re-submission did not result in a reduction in the amount of the annual below cost figure for which approval was sought by Aer Rianta."*

70. It was within the jurisdiction of the respondent to make that determination.

71. When making its decision the respondent had before it a very substantial amount of material including submissions and documentation from a variety of different airport users (including the applicant).

72. It was required to make its decision without fear or favour in a manner which was balanced and consistent with the objective of the Directive and of the Regulation.

73. No evidence has been adduced indicating that the respondent did not do so. I am accordingly satisfied on the evidence that the respondent made its decision by the application of criteria which were objective and consistent with the objectives of the Directive and of the Regulations.

Transparency
74. It has been contended on behalf of the applicant that the decision made by the respondents lacks transparency. That is a contention which cannot be sustained on the evidence.

75. All of the stages of the process which gave rise to the decision were managed by the respondent in a manner which allowed access to all relevant airport users to the manner in which the decision was being made and to the decision-maker (the respondent).

76. A consultation document (entitled "Consultation Paper 5/2004"), was published on the 17th August, 2004. It initiated a full and comprehensive consultation process with all airport users having an interest in access fees to airport installations.

77. Eight responses were received, (including a response from the applicant and from A.R.T).

78. The respondent's written decision dated the 6th October, 2004, was made subject to a condition imposed on A.R.T. in respect of the transparency requirement to the effect that;

> *"(i) the fees approved by the Commission in relation to check-in desk rental and C.U.T.E. be promulgated in any publications relating to the charges imposed by Aer Rianta and, (ii) that any user paying the check-in desk charges be facilitated in any reasonable request made in relation to a breakdown of the components constituting the charge".*

79. In the light of all of the foregoing I am satisfied that the criteria applied by the respondents were applied in an entirely transparent manner.

Non-Discrimination
80. At paragraph 3.4 of its written decision the respondent stated under this heading that:

> *"the standard applied here was 'are the charges applied in an equitable manner to all and are identical or comparable situations treated the same; apart from the issue of the bundling of C.U.T.E. costs into the check-in desk rental, the Commission found no reason to suggest that any element of discrimination applied to the charging of either of the two types of fees in question."*

81. It is apparent from that statement that the respondent expressly considered in detail "*issue of the bundling of CUTE costs into the check-in desk*".

82. In its decision it agreed that "*CUTE was bundled into the costs for the use of check-in desks at Dublin*".

83. However it "*noted that Aer Rianta had clarified that it did not currently impose a separate fee for the use C.U.T.E. in Dublin and that such a fee was not part of its application…"*

84. In its consultation document the respondents provided to all of the airport users details of the criteria to be applied in deciding whether to grant approval for the fees as sought. The documents sought the views of users as to whether the criteria in relation to non-discrimination had been met in the context of the separate application for approval of charges for the C.U.T.E. facility.

85. It received and considered eight responses to that including the responses of the applicant. Material which was before the respondent when it made its decision was material which was relevant to its decision. It did not have before it material which was not relevant to that decision.

86. On behalf of the applicant it is contended that the costs of a C.U.T.E. facility has, logically, to be met by some or all of the airport's users. It was argued that, if, (as the respondent found), "*Aer Rianta had clarified that it did not currently impose a separate fee for the use of C.U.T.E. in Dublin and… such a fee is not part of its application here…*" then the costs associated with the C.U.T.E. facility must have been imposed unlawfully on other airport users by the imposition of other charges.

87. It is not the function of this Court to conduct an investigation into such an allegation. It was not necessary, in making its decision, for the respondent to publish a detailed breakdown of every aspect of its financial operations including its operating and other costs, its profits and losses, its taxation policy and reliefs and it trading and other financial details.

88. The onus of proving by way of evidence and on the balance of probabilities that the decision sought to be impugned in this case was made unlawfully rests upon the applicant.

89. On the evidence adduced in these proceedings that onus has not been discharged. It follows that the applicants claim is dismissed.