The Intensity of Judicial Review in the UK and the Aarhus Convention

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*Please note that the content of this presentation does not necessarily represent the views of the RSPB or Link

Aarhus Convention Requirements on Intensity of Review (1)

- Article 9(2):

"*Each Party shall, within the framework of its national legislation, ensure that members of the public concerned …have 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 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention*"

Aarhus Convention Requirements on Intensity of Review (2)

- Article 9(3) provides for members of the public to have the right (*if* they meet the national law criteria) to: "*access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment*"

- The requirement for a review procedure challenging substantive and procedural legality therefore applies to cases concerning the rights conveyed under Article 6, and any other Article *if* national law has extended the protection to that Article

- The Convention does not define "substantive legality" and the Implementation Guide and Archives do not elaborate

Judicial Review and Substantive legality in the UK

- Substantive legality addressed by applying the *Wednesbury* unreasonableness test (*Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*)

- Articulated in *CCSU v Minister for the Civil Service* as a decision: "*So outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*"

- The courts will not set aside an administrative decision unless it is perverse

- Primary limitation of JR in England and Wales is its focus on procedural rather than substantive impropriety

- No "special provision" in the common law for environmental cases – the threshold for *Wednesbury* unreasonableness is applied throughout

- Unusual given the presence of EU law in the environmental sphere and the application of proportionality in other areas of law implementing EU obligations (e.g. employment)

Substantive Review in Environmental Cases England and Wales (1)

- Planning and Development proposals – the balancing of material considerations is a matter for public bodies (subject to *Wednesbury* irrationality)
- The courts are acutely aware that it is not their role to substitute their judgment for that of the decision-maker
- *R (on the application of Jones v Mansfield District Council* - Carnwath, L.J. held that the principles for the exercise of the court's discretion are well-established
- *Evans –v- Secretary of State for Communities and Local Government* [2013] - Court of Appeal confirmed *Wednesbury* unreasonableness is the correct standard of review to apply in cases concerning EIA screening decisions

Substantive Review in Environmental Cases England and Wales (2)

- *R (on the application of (1) Derek Foster v Forest of Dean District Council* [2015] – counsel for the claimants argued *Wednesbury* standard of review did not reflect European law (*Sweetman*)
- Cranston, J - CJEU could not have been suggesting that national courts must decide when the assessment has *lacunae*
- Relied on *Smyth v Secretary of State for Communities and Local Government*, in which Sales LJ rejected a submission that in applying the Habitats Directive the national court must apply a more intensive standard of review
- *Smyth* – Sales, LJ rejected request for a preliminary reference to the CJEU

Substantive Review in Environmental Cases England and Wales (3)

- *RSPB v Defra* - Secretary of State concluded cull of 552 pairs of lesser black-backed gull would not adversely affect the integrity of the Ribble Estuary SPA

- RSPB contended decision unlawful because:
  - based upon a misinterpretation of the conservation objectives for the populations of LBBG and the breeding seabird assemblage at the SPA
  - The application of those conservation objectives would have led to the conclusion that the cull would adversely affect the integrity of the SPA
  - Consent for the cull could only be given if necessary compensatory measures were taken in accordance with Art 6(4) HD. Although the SoS concluded there was no alternative solution and there were IROPI for conducting the cull, he was not satisfied that adequate compensatory measures had been identified

- Judge (Mitting, J) dismissed claim at first instance

Substantive Review in Environmental Cases England and Wales (4)

- Court of Appeal – Sullivan, LJ conducted an investigation of the duties on the SoS under Article 6(3) HD, concluding his judgment was "fatally flawed"

- Approach to calculating the baseline figure for the seabird assemblage – SoS discounted a 1999 figure of 14,300 individuals although there were higher figures in 1988 (20,000) and 1989 (15,500)

- Sullivan, LJ observed (*Obiter dictum*) that ascertaining the baseline figure for the assemblage was:

  "*not simply a mathematical exercise, it required the Secretary of State to exercise his planning judgment as to which counts would give the most representative figure. The Secretary of State has given reasons for excluding the 1999 figure for the Black- Headed Gull. Those reasons are intelligible. <u>If this was an appeal on the merits I would have said that they are unconvincing, but I am unable to conclude that they are irrational</u>*"

Substantive Review in Nature Conservation Cases
Sustainable Scotland v The Scottish Ministers

- Grant of permission by the Scottish Ministers for the Viking Wind Farm on Shetland in 2012

- Petitioner (Sustainable Shetland) applied for a JR on the grounds that the Scottish Ministers had failed to take into account their duties under the Wild Birds Directive in respect of the Whimbrel

- **Outer House** in effect undertook a full review and held the Scottish Ministers had failed to comply with their obligations the Birds Directive

Sustainable Scotland v The Scottish Ministers (2)

- **Inner House** - judge's jurisdiction confined to an examination as to whether the grant of consent had been a lawful decision, not whether the Scottish Ministers had demonstrated a proper understanding of, and compliance with, the BD

- Compliance with the BD is an entirely factual question for the Scottish Ministers to determine and that "*once that conclusion was arrived at, the Wild Birds Directive, and any associated problems of interpretation and application, fell out of the picture as far as this proposal was concerned*"

- **Supreme Court** - Inner House "clearly right" in that the Ministers' functions derived from their statutory duty to consider a proposal for development under the Electricity Act 1989 not the BD

- However, if there had been evidence that the proposal might prejudice the fulfilment of the ministers' duties under the Directive, this would have been a potential objection which required consideration

Proportionality in the Common Law (1)

- *Wednesbury* test under sustained attack for several decades
- Gradual move towards proportionality
- Built into Article 5(4) of the TEU -*"Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*."
- Applies to national measures which generally fall into one of three categories:
  - implement EC Law
  - invoke some permitted derogation under EC law
  - "*otherwise fall within the scope of Community Law because some specific substantive rule of EC law is applicable to the situation*"
- Only applies to measures that interfere with a protected interest – most commonly the Human Rights Act 1998

Proportionality in the Common Law (2)

- *Bank Mellat v HM Treasury* - HRA proportionality depends on an "exacting analysis" of the factual case advanced in defence of the measure in order to determine four requirements:
  - whether the objective is sufficiently important to justify the limitation of a fundamental right
  - whether the measure is rationally connected to the objective
  - whether a less intrusive measure could have been used
  - whether a fair balance has been struck between the rights of the individual and the interests of the community, having regard to the above matters and the severity of the consequences
- *Keyu and Others v Secretaries of State for Foreign Affairs and Defence* –replace traditional *Wednesbury* rationality basis for challenging executive decisions with a more structured and principled challenge based on proportionality

Does JR in the UK satisfy the Aarhus Convention?

- Civil society frustrated, disappointed and baffled that they cannot challenge the merits of a decision that seems indefensible as a matter of common sense
- Inequity between third parties and developers - the latter enjoys the right to appeal a decision with a full merits review
- Leigh Day Environmental Planning and Litigation Service (EPLS):
  - Over 100 clients advised since September 2013
  - 5 applications for Judicial Review
  - Decision remitted back to decision-maker – same decision again?
- Aarhus Convention Compliance Committee C33 - UK not in non-compliance with Article 9(2) or (3) but suggested the "proportionality principle" could provide a more appropriate standard of review in cases within the scope of the Convention

Aarhus Convention and Substantive Review

- 2012 - European Commission contracted Professor Jan Darpö to coordinate studies on access to justice in 28 EU Member States - see http://ec.europa.eu/environment/aarhus/access_studies.htm
- Professor Darpö concluded generally: "*the wider the entrance, the smaller the room*", i.e. systems with a generous attitude towards standing tend to offer a more limited scope of review, typically limited to legal (as opposed to factual) issues
- 20152016 - German Federal Environmental Agency (Umweltbundesamt – UBA) project on the implementation of Art. 9(2) – 9(4) Aarhus Convention to inform refinements to the Environmental Appeals Act (Umwelt-Rechtsbehelfsgesetz – UmwRG), the basis for lawsuits brought by NGOs in the field of environmental protection
- Expert studies undertaken in Germany, UK, Sweden, France, Italy and Poland
- Expert Workshop March 2016 and final report due Autumn 2016

Aarhus Convention and Substantive Review Conclusions (1)

- JR in the UK does not comply with Aarhus Convention requirement for substantive review
- Convention did not envisage a system of review focused almost exclusively on procedural irregularities - substantive review must mean something quantifiable and effective
- Difficult to find common ground between the other EU Member States studied – varying intensities of reviews.
- German study timely and informative
- Swedish “nirvana” of a full merits review is the only system that provides a truly level playing field for civil society, in that third parties enjoy the same intensity of review enjoyed by applicants through the planning appeal process
- Political context in the UK – deregulation, BREXIT

Aarhus Convention and Substantive Review
Conclusions 2

- Proportionality already engaged in cases involving EU law and protected interests
- Modest step to recognise that protected interests extend to environmental protection (preambles to the Aarhus Convention, Article 191 TEU)
- Apply HRA proportionality approach to EIA screening decisions - national courts obliged to undertake a more intense scrutiny of the reasons given for a negative screening opinion and exercise discretion as to whether the appropriate balance had been made in deciding against the need for an EIA
- Deference is key to the difference (if any) a shift towards proportionality might make - if proportionality is to make any difference in the UK the level of deference afforded to decision-makers must change
- Merit in establishing a technical adviser to sit alongside the judiciary in complex environmental cases - similar role to that performed by law costs draftsmen when the court assesses detailed costs

Thank you for Listening

Any Questions?