

Format for communications to the Aarhus Convention Compliance Committee

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II. Party concerned

United Kingdom

III. Length of the communication

20 pages

IV. Facts of the communication

This Communication concerns a general failure by the UK to provide an adequate review of the “substantive legality” of certain decisions, acts and omissions in accordance with Articles 3(1) and 9(2), (3) and (4) of the Aarhus Convention. Although general jurisprudence and numerous examples are given, it does not refer to a specific current case of non-compliance. What we refer to here is a continuing judicial practice (including in cases brought by ourselves) and legal principle, and an ongoing resistance to change that approach when requested, that places the UK in breach of the Convention.

We also do not detail what specific measures are necessary for the UK to comply with the Convention in this respect, although we do make some suggestions as to how compliance could be addressed. The Communication is set out as follows:

Section IV (Facts of the communication) provides a brief background on Judicial Review (JR) and *Wednesbury* unreasonableness (and what that means in practice for environmental JRs). It also reviews the relevant case-law and describes the nature and extent of the problem.

Section VI (Nature of alleged non-compliance) provides the contextual background to JR in the UK, including a gradual and partial shift towards a proportionality-based approach to greater judicial scrutiny of environmental decisions.

We are mindful that while the main underlying points of non-compliance can be simply expressed, this is a complex and lengthy Communication. In order to keep it as concise as possible, court judgments can generally be accessed via hyper-link, with essential judgments attached as Annexes.

Finally, we are grateful to David Wolfe QC (Matrix Chambers) for assistance in drafting this Communication.

Judicial Review

Judicial Review in the UK is rarely concerned with the “merits” of a decision or whether the public body has made the “right” decision.

By this we mean the court is not directly concerned with a new assessment of the evidence or facts before the decision taker and whether they reached a correct conclusion). The only question before the court is whether the public body has acted unlawfully in accordance with established legal principles. In particular, it is not the task of the courts to substitute its judgement for that of the decision maker, although it can intervene in appropriate circumstances. The main grounds for JR (which are neither exhaustive nor mutually exclusive¹) include: (1) illegality (primarily in not applying the correct statutory test(s)); (2) irrationality (*Wednesbury* unreasonableness); (3) procedural unfairness; and (4) incompatibility with the European Convention on Human Rights and/or EU law.

The only review of the “merits” of a decision that can currently take place in JR is to consider whether the decision was *Wednesbury* unreasonable². In *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*³, the English court set out the standard of unreasonableness of public-body decisions that would make them liable to be quashed by way of JR. This came to be known as ‘*Wednesbury* unreasonableness’ and was later articulated in *Council of Civil Service Unions v Minister for the Civil Service*⁴ by Lord Diplock 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*”. It essentially means the court does not intervene and set aside an administrative decision unless it is so outrageous as to be perverse⁵.

Wednesbury unreasonableness may be understood to be a group (or scale) of standards of review, rather than a single monolithic standard. It encompasses the ‘strict’ or traditional *Wednesbury* approach and a more rigorous ‘anxious scrutiny’ standard, which tends to be applied in rights cases (including human rights where these are absolute or limited). Annex A provides some further text on anxious scrutiny.

There is no special provision in the common law for environmental cases. The courts generally apply the strict *Wednesbury* threshold throughout and so anxious scrutiny is not applied without human rights being engaged. The intensity of review is partly a function of the degree to which the courts consider it necessary to defer to the executive. Where the decision-maker has discretion to balance competing considerations, the courts tend to be even more deferential. Thus, in the majority of town and country planning cases⁶, for example, the view of the court is that it is entirely for the decision maker to attribute to the relevant considerations such weight as it thinks fit.

¹ *Wheeler v. Leicester City Council* [1985] AC 1054, 1078 B-C

² Recognising that a review of the substantive legality of decisions, acts or omissions subject to Articles 9(2) and (3) of the Convention extends beyond the merits to also include material errors of fact, errors of law, regard to irrelevant considerations, failure to have regard to relevant considerations and jurisdictional error – as articulated by the Compliance Committee in ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland (at [125]) available [here](#)

³ *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223 - available [here](#)

⁴ *Council of Civil Service Unions v Minister for the Civil Service* A.C. 374, 410 per Lord Diplock – available [here](#)

⁵ Arden, Lady Justice. (2013). *Proportionality: the way ahead?* Public Law P.L. (2013) July Pages 498-518

⁶ Including both JR of a local planning authority’s Decision Notice and statutory review of a planning inspector’s Appeal Decision under s.288 Town and Country Planning Act 1990

In *R (on the application of Jones v Mansfield District Council*⁷, Lord Justice Carnwath (as he was then) held that in this context the principles for the exercise of the court’s discretion are well-established⁸:

“60. Secondly, as explained by the European Court in Bozen (see Dyson LJ para 31ff) responsibility for the “discretion” given by the Directive to “Member States” is shared by the legislative, administrative and judicial authorities. Having myself raised a doubt on the point, I agree with Dyson LJ that, within the statutory framework set by the legislature, determination of “significance” (for Annex II projects) is a matter for the administrative authorities, subject only to judicial review on conventional “Wednesbury” grounds.

61. Quite apart from the legal analysis, that view clearly makes practical sense. It enables an authoritative decision as to the procedure to be made at the outset, without risk of subsequent challenge except on legal grounds. Furthermore, the word “significant” does not lay down a precise legal test. It requires the exercise of judgment, on technical or other planning grounds, and consistency in the exercise of that judgment in different cases. That is a function for which the courts are ill-equipped, but which is well-suited to the familiar role of local planning authorities, under the guidance of the Secretary of State.”

In relation to the last point, in fact the courts can, and do, conduct a forensic analysis of the relevant technical issues in some cases (for example in private environmental law cases). The point is that they choose not to do so in public law cases. Particular facets of that include:

1. Provided that there was some information on a particular point (such as a particular environmental impact), the court will not entertain any challenge to the question of whether the information was capable of leading to a sound conclusion on the point (with challenge only being possible if the court considers that the decision-maker acted perversely – that same very high threshold – in deciding it had enough information on the point);
2. Provided the decision-maker was made aware of what public consultees had said on a proposal (or a summary of what they said), the court will not entertain any challenge to whether the decision-maker sufficiently or properly considered that material, let alone require that the decision-maker provides any explanation for disagreeing with public comments;
3. In situations where multiple decision-makers (typically multiple regulators) are involved, the court will not entertain a challenge to the appropriateness of one regulator relying on what another has done, even where they may be acting for entirely different purposes;
4. The court will assume that a decision-maker has access to, and has deployed (or will deploy) sufficient resources, including technical expertise, to scrutinising proposals and then checking compliance - and has sufficient resilience to resist developer proposals (including the financial ability to resist appeals by developers against refusal decisions);

⁷ *R (on the application of Jones) v Mansfield District Council* [2003] EWCA Civ 1408 – see Annex C

⁸ In the context of statutory review, see *Newsmith v SSETR* [2001] EWHC Admin 74, in which Sullivan J. said: “... *An application under section 288 is not an opportunity for a review of the planning merits of an Inspector's decision. An allegation that an Inspector's conclusion on the planning merits is Wednesbury perverse is, in principle, within the scope of a challenge under section 288, but the court must be astute to ensure that such challenges are not used as a cloak for what is, in truth, a rerun of the arguments on the planning merits ... In any case, where an expert tribunal is the fact finding body the threshold of Wednesbury unreasonableness is a difficult obstacle for an applicant to surmount. That difficulty is greatly increased in most planning cases because the Inspector is not simply deciding questions of fact, he or she is reaching a series of planning judgments. For example: is a building in keeping with its surroundings? Could its impact on the landscape be sufficiently ameliorated by landscaping? Is the site sufficiently accessible by public transport? et cetera. Since a significant element of judgment is involved there will usually be scope for a fairly broad range of possible views, none of which can be categorised as unreasonable ...Against this background an applicant alleging an Inspector has reached a Wednesbury unreasonable conclusion on matters of planning judgment, faces a particularly daunting task ...”.* See paragraphs 6-8, judgment available [here](#)

5. No consideration is given to the resources available to those seeking to scrutinise decisions, whether that be the public concerned or indeed the public body decision-maker (which might be a relatively small public authority without the resources to properly scrutinise a major proposal);
6. And yet no challenge is possible to the fact that, very often, the information relating to the potential or actual impacts of a proposal or activity comes entirely from the developer or operator, or from consultants/experts paid by them (and without there being any legal obligation on consultants/experts to act independently, as there would be if such persons were giving evidence in court and thus owed a professional duty to the court itself).

This approach can leave the court proceeding on a dubious or incorrect basis in particular cases and with no or very little ability for claimants to review that position. Unfortunately, this can also have a decisive effect on the case.

Wednesbury and EIA (Article 6 and 9(2) Aarhus Convention)

The judiciary has been prompted to examine whether *Wednesbury* is the appropriate standard of review in cases concerning Environmental Impact Assessments (EIA) in recent years.

In *R (Loader) v Secretary of State for Communities and Local Government*⁹, the High Court held that a decision of the Secretary of State for Communities and Local Government for a proposed sheltered housing development was not EIA development and, thus, did not require an EIA before permission could be granted. The claimant appealed and the Court of Appeal was asked to consider whether the correct intensity of review in the context of a screening direction was one of proportionality or *Wednesbury* unreasonableness. Lord Justice Pill (with whom Lord Justice Toulson and Lord Justice Sullivan agreed) held there was ample authority that the conventional *Wednesbury* approach applied to these issues (citing both *Jones* (above) and the case of *R (Bowen-West) v Secretary of State*¹⁰).

The Court of Appeal revisited the issue in *Evans*¹¹, which also concerned a negative screening direction and an argument that the High Court had erred in scrutinising the Secretary of State's decision by applying the *Wednesbury* test and not some other test. Counsel for the claimants (David Wolfe QC) referred to the findings of the Aarhus Convention Compliance Committee (ACCC) in Communication C33¹², arguing that because fundamental rights were in play (essentially rights to participate in front-line decision-making and, specifically, the right of access to a court able to assess the substantive and procedural legality of an environmental decision concerning an EIA) the *Wednesbury* principle was insufficient and that more intensive scrutiny was required. The Court of Appeal held that the Aarhus Convention was not part of domestic or EU law and explicitly confirmed that the question for the Secretary of State when making a screening direction was a question of fact, which could not be subjected to a test of proportionality¹³.

Wednesbury and the Habitats and Species Directive

In the case of *Foster*¹⁴, the English High Court addressed a parallel assessment process under Article 6 of the Habitats and Species Directive known as Appropriate Assessment. The claimants sought permission to apply for a JR of the decision of the Forest of Dean District Council to grant planning permission for a mixed use development in Gloucester, England. Their objections were based on the potential impact on

⁹ *R (on the application of Loader) v Secretary of State for Communities and Local Government* [2011] EWHC 2010 (Admin) and *R (on the application of Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869 – see Annexes D and E

¹⁰ *R (Bowen-West) v Secretary of State* [2012] EWCA Civ 321, [39] – see Annex F

¹¹ *R (Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114, [32]-[43] – see Annex G

¹² *Supra*, n. 2 at [123]-[127]

¹³ Case C- 127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [33], [35], [37]-[39] – see Annex K

¹⁴ *R (on the application of (1) Derek Foster (2) Tom Langton (claimants)) v Forest of Dean District Council (Defendant) & (1) Homes & Communities Agency (2) Natural England (Interested Parties)* [2015] EWHC 2648 (Admin) – see Annex H

bats (in particular, the lesser horseshoe bat) and bat roosts nearby. Counsel for the claimants referred to the judgment of the Court of Justice of the European Union (CJEU) in *Sweetman*¹⁵ in submitting in the light of the passage below, a *Wednesbury* standard of review would not reflect European law and that it was clearly for the national court to establish whether the assessment of the implications for the Special Area of Conservation (SAC) met the requirements:

*“So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned: see *European Commission v. Spain* (Case C-404/09), paragraph 100 and the case law cited. It is for the national court to establish whether the assessment of the implications for the site meets these requirements.” [own emphasis added]*

The judge (Cranston, J) observed that there was “*an air of unreality about this submission*”, in that the CJEU could not have been suggesting that national courts must decide when the assessment has *lacunae*, whether it contains complete, precise and definitive findings, and whether its conclusions are capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned. In his words, “*Judges may be clever, but not that clever*”. Mr Justice Cranston observed that this approach was also to misunderstand the role of courts in European societies and that, to his mind, the CJEU was simply stating that the national court had to evaluate the assessment in the ordinary way, not become the primary decision-maker. The judge also stated that counsel’s submission was contrary to binding authority (albeit in a different context), referring to *Smyth v Secretary of State for Communities and Local Government*¹⁶. In this case, Sales LJ rejected a submission that in applying the Habitats Directive the national court must apply a more intensive standard of review, in effect making its own assessment afresh, reaffirming earlier authority that *Wednesbury* is the correct standard of review:

*“[80] I do not accept these submissions. In the similar context of review of screening assessments for the purposes of the Environmental Impact Assessment (EIA) Directive and Regulations, this Court has held that the relevant standard of review is the *Wednesbury* standard, which is substantially the same as the relevant standard of review of “manifest error of assessment” applied by the CJEU in equivalent contexts: see *R (Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114; [2013] JPL 1027, [32]-[43], in which particular reference is made to Case C-508/03, *Commission of the European Communities v United Kingdom* [2006] QB 764, at paras. [88]-[92] of the judgment, as well as to the *Waddenzee* case. Although the requirements of Article 6(3) are different from those in the EIA Directive, the multi-factorial and technical nature of the assessment called for is very similar. There is no material difference in the planning context in which both instruments fall to be applied. There is no sound reason to think that there should be any difference as regards the relevant standard of review to be applied by a national court in reviewing the lawfulness of what the relevant competent authority has done in both contexts. Like this Court in the *Evans* case (see para. [43]), I consider that the position is clear and I can see no proper basis for making a reference to the CJEU on this issue.”*

In fact, in *Waddenzee*¹⁷, the CJEU held that competent public authorities may only authorise an activity in a protected Natura 2000 site where, taking into account the conclusions of an appropriate assessment, no reasonable scientific doubt remains that, in the light of the site's conservation objectives, the activity will not adversely affect the integrity of the site. As such, the national judge may be called upon to take into account the relevant scientific evidence on which environmental measures are normally based. As such, the formulation of the ruling in *Waddenzee* indicates that the test of whether there is no reasonable doubt is an objective one and cannot be treated by the national court as a subjective one lying exclusively within the public authority's sole own discretion. It does not necessarily require the court to substitute its

¹⁵ Case C-258/11 *Sweetman v. An Bord Pleanála (Galway County Council intervening)* [2014] PTSR 1092, [44] – see Annex I

¹⁶ *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, [79]-[80] – see Annex J

¹⁷ *Supra*, n.13 [59] – see Annex K

own view but, for example, point to whether or not there remains scientific doubt on adverse impacts on the site, or if the decision-making process was otherwise materially deficient.

The view in *Foster* was also confirmed in *Abbotskerswell Parish Council v (1) Teignbridge District Council (2) Secretary of State for Communities & Local Government*¹⁸. In this case, Abbotskerswell Parish Council argued that the Teignbridge District Council Local Plan required a strategic level Greater Horseshoe Bat Mitigation Strategy for the wider South Hams Special Area of Conservation (SAC) and settlement-level mitigation plans for the nearby town of Chudleigh and two other municipalities. The Parish Council argued that *Sweetman* required the court to conduct a full merits review of the Council's assessment, rather than applying a *Wednesbury* test. The local planning authority argued that in order to comply with the Habitats Regulations 2010, it simply had to ascertain that the Local Plan would not adversely affect the integrity of the SAC, applying the test of no reasonable scientific doubt. The judge accepted that this was a judgment for the plan-making authority to make, and so only reviewable by the court on conventional JR grounds, citing *Loader*¹⁹, *Evans*²⁰, *Feeney v Oxford City Council*²¹ and *Cairngorms Campaign v Cairngorms National Park Authority*²². In his judgment, it was plain from paragraph 46 of the judgment in *Sweetman* that the decision is one for the "competent national authority" to take, not the court.

In the Ribble case²³, the RSPB challenged the Secretary of State for the Environment, Food and Rural Affairs for directing Natural England (NE) to give consent to BAE Systems Ltd for the culling of two species of gull within the Ribble Estuary Special Protection Area (SPA). While the Court of Appeal subsequently held that the Secretary of State had erred in directing NE to grant consent, Lord Justice Sullivan observed that while the Secretary of State's reasons for determining a population baseline for one of the species concerned were unconvincing, he was "... unable to conclude that they are irrational". As such, that ground of the challenge failed (Mitting J had made a similar observation at First Instance, holding that while there was an element of justification in the Secretary of State's approach, he was not persuaded that it was irrational or unlawful).

It is clear from these authorities that the courts routinely decline to provide full and effective substantive review in environmental cases, applying the very high threshold of *Wednesbury* unreasonableness to considering the merits of a decision (i.e. that the decision must be so outrageous if it is to be considered unlawful). This often renders substantive review (and any remedy) out of reach in nearly all cases.

Other recent cases falling within Article 9(3) Aarhus Convention

In *R (on the application of Richard McMorn) v Natural England & Defra*²⁴, which concerned licensing for the shooting of buzzards, Mr Justice Ouseley temporarily opened up the possibility that *Wednesbury* principles can accommodate a more intensive review and that such a position was consistent with *Smyth*:

"204. An intense form of review was required here because, Aarhus claim or not, the decisions of NE affected the Claimant's livelihood directly, without right of appeal, and NE's policy required

¹⁸ *Abbotskerswell Parish Council v (1) Teignbridge District Council (2) Secretary of State for Communities & Local Government* [2014] EWHC 4166 (Admin) – see Annex L

¹⁹ *Supra*, n.9

²⁰ *Supra*, n.11

²¹ *Feeney v Oxford City Council* [2011] EWHC 2699 (Admin) at [81]: "If this assumption is correct, then in my judgment, the Council's submission is unassailable. If the Council did find that there was no harm to the Oxford Meadows SAC arising from the Core Strategy, then (unless that finding was *Wednesbury* unreasonable) the Claimant can have no ground of challenge under s.113 and the challenge can only be one of planning merits, which is outwith the jurisdiction of this court"

²² *Cairngorms Campaign v Cairngorms National Park Authority* [2013] CSIH 65, at [63] to [64] - Judgment attached as Annex U

²³ *R (the RSPB) v Secretary of State for the Environment, Food and Rural Affairs & BAE Systems (Operations) Ltd (Interested Party)* [2015] EWCA Civ 227 – judgment attached as Annex M

²⁴ *R (on the application of Richard McMorn) v Natural England & Defra* [2015] EWHC 3297 (Admin) – see Annex N

that licences should not be unreasonably withheld. But I have concluded that this is an Aarhus claim, and that a more intensive form of scrutiny is justified, for reasons I come to in dealing with costs."

This view may have been based on the fact that the case engaged rights (as opposed to being an Aarhus case) – but, in any event, any departure from the standard approach was short-lived. In *R (on the application of Dillner) v. Sheffield City Council*²⁵, Mr Dillner and a number of environmental campaigners challenged the tree-felling policies of Sheffield City Council. One of the claimants' arguments was that tree-felling required an environmental assessment and, thus, the claim fell within the protections conferred by the Aarhus Convention. The claimants argued that the case required intense scrutiny, relying on the judgment of Ouseley, J in *McMorn*. Mr Justice Gilbert robustly rejected the argument, citing *Smyth and Evans* to re-state the now orthodox position that while the status of a claim as an Aarhus claim may be relevant to the question of cost protection, it makes no difference to the standard of review applied:

"188 It is not the function of this court to take decisions for the democratically elected decision maker, nor to act as an appeal court on the merits. Disagreements on such issues are a matter for the ballot box in elections, not judicial review. The most that the claimant and others have shown is that in some cases it may be possible to have a different view about the retention of one or more trees. But that does not get close to showing that any decision to fell made by the City Council was irrational, or one which no reasonable Council could have made."

The status of a claim as one that engages the Convention as an environmental matter is not currently sufficient in the UK to provide for a compliant standard of substantive review and, thus, access to adequate and effective remedies.

Scotland

The standard of review applied by the Scottish court in JRs of both planning decisions and statutory appeals is also the *Wednesbury* standard. The relevant test for determining whether a decision should be quashed was set out in *Wordie Property Co Ltd v Secretary of State for Scotland*²⁶ as per Lord President Emslie, namely if the decision: "... is based upon a material error of law going to the root of the question for determination ... if the [respondents have] taken into account irrelevant considerations or ... failed to take account of relevant and material considerations ... [W]here it is one for which a factual basis is required, there is no proper basis in fact to support it ... [or] if it ... is so unreasonable that no reasonable [planning authority] could have reached... it."

The test in *Wordie* was relied upon by Lord Nimmo-Smith in *R v Secretary of State for Scotland & Ors, ex parte WWF-UK Ltd and the RSPB*²⁷, which concerned the delineation of the boundary of the Cairngorms mountains candidate Special Area of Conservation (cSAC). The judge reiterated that he was "not concerned with the merits of any of these decisions ... It is not competent for the Court to review the act or decision on its merits, nor may it substitute its own opinion for that of the person or body to whom the matter has been delegated or entrusted".

Various petitioners and appellants have subsequently suggested that Article 9 of the Convention requires a more intense level of scrutiny be applied in environmental cases. However, the following cases confirm the Scottish Courts continue to apply the strict *Wednesbury* standard of review.

In *Royal Society for the Protection of Birds v Scottish Ministers*²⁸, the RSPB applied for a JR of various decisions taken by the Scottish Ministers to grant consent for the construction and operation of four large

²⁵ *R (on the application of Dillner) v. Sheffield City Council* [2016] EWHC 945 (Admin) – see Annex O (paras 183-188 contain a helpful summary of the relevant court decisions on the standard of review)

²⁶ *Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345 at 347-348

²⁷ *R v Secretary of State for Scotland & Ors, ex parte WWF-UK Ltd and the RSPB* (1998) OH – judgment available [here](#)

²⁸ *Royal Society for the Protection of Birds v Scottish Ministers* [2017] CSIH 31 – see Annex P

offshore wind farms off the east coast of Scotland on the basis of non-compliance with EIA, Birds and Habitats Directives' requirements. In their reclaiming motion against the Lord Ordinary's decision, the Scottish Ministers (the respondents) and the developers (as interested parties) submitted that, amongst other things, when considering the relevant appropriate assessment, the Lord Ordinary, while purporting to apply a *Wednesbury* standard of review, embarked on an examination of the merits and thereby erred in law (at para [116]). The RSPB submitted that the court should adopt an appropriately intensive level of scrutiny, whilst remaining within the *Wednesbury* framework (at para [171]).

The Inner House confirmed (at para [203]) that the conventional test laid out in *Wordie Property Co Ltd* should be used when judicially reviewing appropriate assessments. It likened the conventional test to the "manifest error of assessment" applied by the Court of Justice of the European Union (CJEU) in *Commission of the European Communities v United Kingdom*²⁹ and the test applied in England and Wales in *Associated Provincial Picture Houses v Wednesbury Corporation*³⁰.

The Inner House also noted the length of time that the Lord Ordinary must have spent getting to grips with the relevant scientific material, although having acknowledged the limits of JR, and considered that the rationale behind his thinking must have been what he regarded as being a legal test, namely whether the appropriate assessment's conclusions were capable of removing all reasonable doubt. In this regard the Inner House considered that the existence, or otherwise, of a reasonable doubt is primarily a matter of fact for the decision-maker and not the judiciary (paragraph [[206])). The Inner House noted that, despite paying lip-service to the correct legal test for judicial review "*the Lord Ordinary had strayed well beyond the limits of testing the legality of the process and [...] turned himself into the decision-maker following what appears to have been treated as an appeal against the respondents' decisions on the facts*" (at para [207]).

Delivering the Opinion of the Court, Lord President Carloway stated (at para [204]) that: "*Sometimes, of necessity, the court will have to grapple with difficult scientific concepts [...] That is entirely reasonable. However, it is not the function of the court, in a judicial review, to decide between the differing views of experts in a technical area.*"

The Inner House found that it was for the decision-maker, and not the court, to make evaluative judgments. For an error to count as "manifest", it must be detectable by the court and, therefore, where there are differing views in a technical area, the court is bound to conclude that the decision was not *Wednesbury* unreasonable (at para [204]). Even if errors could be identified on a close scrutiny of the appropriate assessment of the proposed windfarms, none could be described as "manifest" (at para [221]). The question for the court is whether the appropriate assessments were lawful.

In *Douglas v Perth and Kinross Council*³¹, the petitioner (Helen Douglas) challenged the local planning authority's decision to grant planning permission for a windfarm, primarily on the basis of a failure to have proper regard to its obligations in relation to the protection of ospreys and wildcats, both of which are protected species under the Wild Birds and Habitats Directives. The petitioner argued that, in applying the legislation implementing European Directives governing highly protected species, the standard of review is stricter than the ordinary *Wednesbury* standard that normally applies to planning decisions (at para [21]). The Inner House rejected this argument.

Delivering the Opinion of the Court, Lord Drummond Young explained that the application of the ordinary *Wednesbury* standard recognised the large element of discretion entrusted to planning authorities under planning legislation in reaching decisions on the merits. Interference by the court is only justified when the planning authority acts outside recognised norms (at para [22]). Lord Drummond Young confirmed that the principle applies equally to decisions made under legislation implementing European Directives governing highly protected species and to other planning legislation (at para [23]) and stated that: "*It is plain that, so far as any planning decision is affected by that legislation, the*

²⁹ Case C-508/03 *Commission of the European Communities v United Kingdom* [2007] Env LR 1 – see [here](#)

³⁰ *Supra*, n.3

³¹ *Douglas v Perth and Kinross Council* [2017] CSIH 28 – see Annex Q

relevant planning authority is still the decision-maker. In that situation the court's ability to interfere must be limited. There are good reasons for this: it is the planning authority that has the expertise necessary to make a proper decision. Furthermore, it is the planning authority that has the powers necessary to ensure that the measures taken to protect highly protected species are based on adequate information, are properly directed and are proportionate. The court, in short, is not well qualified to make planning decisions, including those about highly protected species; it can only interfere if the planning authority's decision is legally defective in the manner set out in the leading cases, including Wednesbury."

The Inner House further noted that if the court went beyond the ordinary *Wednesbury* standard, it would be compelled to make a technical decision in an area where it lacks expertise (at para [25]).

The case of *Sustainable Shetland v Scottish Ministers*³² concerned the JR of a decision of the Scottish Ministers to grant consent to a windfarm on Shetland. One of the grounds of challenge was that the Ministers had failed to take proper account of their obligations under the Wild Birds Directive. The Lord Ordinary had found in favour of Sustainable Shetland and reduced the Ministers' decision. The Inner House allowed the Ministers' appeal. The court emphasised that "[w]hat is under consideration [in such cases] is the legality of a decision made in exercise of specific statutory powers³³". The Inner House reminded itself of the nature of JR, with reference to *Wordie* at 348, and noted that while the decision-maker must consider relevant considerations fairly and rationally, "it is for him to accord them such weight as he considers appropriate" (at para [25]). It further noted that the question for the court was whether, taking account of the Directive (as one of many considerations), the Ministers' decision to grant consent had been lawful and not whether, taking the Directive as the starting point, the Ministers had, in their decision letter, demonstrated that they had fully understood and complied with their on-going obligations under the Directive (at para [28]). The Supreme Court agreed with this view³⁴.

In *Cairngorms Campaign v Cairngorms National Park Authority*³⁵, the Cairngorms Campaign had appealed against CNPA's decision to adopt a local plan, claiming that the appropriate assessment was unlawful in that, amongst other things, it postponed the CNPA's legal obligations under Article 6(3) and (4) of the Habitats Directive to a future stage in the planning process. Although the appellants argued before the Inner House that their challenge was one of "unlawfulness", the Inner House considered that it was one of *Wednesbury* unreasonableness, i.e. that no reasonable authority could have produced the appropriate assessment which the CNPA did and accordingly that no such authority would have adopted the local plan [at para [63]]. Adopting the conventional test for JR, the Court was not satisfied that no reasonable authority could have produced the appropriate assessment (at para [65]).

Finally, the case of *Carroll v Scottish Borders Council*³⁶ concerned a statutory appeal against a decision of a Local Review Body to grant planning permission for two wind turbines. Amongst other things, the appellant contended that because the LRB was not independent of the original decision-maker, the court had to apply an intense degree of scrutiny in any appeal against the decision of the LRB and that the Lord Ordinary had erred in not doing so. In this regard the petitioner referred to the Findings and Recommendations of the Aarhus Convention Compliance Committee with regard to Communication ACCC/C/2008/33 concerning compliance by the UK on prohibitive expense³⁷.

The Inner House considered that the Lord Ordinary had given a detailed and fully reasoned consideration in his opinion, which they considered amounted to sufficiently intense scrutiny. In this regard, delivering the Opinion of the court, Lord Menzies noted (at para [62]) that: "While of course the concerns of the Aarhus Convention Compliance Committee are entitled to respect, the convention is not part of domestic law as such (except where incorporated through European directives) (*Walton v Scottish Ministers, para*

³² *Sustainable Shetland v Scottish Ministers* [2013] CSOH 158 and [2014] CSIH 60 – see Annexes R and S

³³ At para [25] per Lord President Gill, Opinion of the Court

³⁴ See *Sustainable Shetland v Scottish Ministers* 2015 UKSC 4 at paras [29]-[30] per Lord Carnwath – see Annex T

³⁵ *Cairngorms Campaign v Cairngorms National Park Authority* 2014 SC 37 – see Annex U

³⁶ *Carroll v Scottish Borders Council* 2016 SC 377 – see Annex V

³⁷ *Supra*, n.2 paras 3, 125. (paras [9] and [10])

100), and the committee does not appear to recognise that *Wednesbury* reviews within the United Kingdom may have different intensities of scrutiny appropriate to the particular circumstances of the case (*R (Evans) v Secretary of State for Communities and Local Government*, particularly paras 37, 38). We are not persuaded that, in the particular circumstances of the present case, the PPD adds anything to the well-known requirements of our domestic law.”

Northern Ireland

We also refer the Compliance Committee to recent cases in Northern Ireland, in which the Queen’s Bench Division of the High Court has clearly articulated the limitations of JR.

For example, *In the Matter of an Application by River Faughan Anglers Limited for Judicial Review*³⁸, the River Faughan Anglers Limited challenged the Department of Environment (Planning Service)’s decision to grant planning permission for an unauthorised brick building facility beside the River Faughan Special Area of Conservation. In referring to both *Loader*³⁹ and *Evans*⁴⁰, Treacy J confirmed that the judgment as to whether a development falling within the categories in Schedule 2 of the EIA Regulations has significant effects upon the environment is a matter of planning judgment for the decision maker, only reviewable on *Wednesbury* grounds, concluding that: “*There is considerable force in the respondent’s submission that the criticisms levelled by the applicant are criticisms of the respondent’s findings of fact, the weight to be given to evidence particularly from specialist consultees and the balancing of relevant considerations by the respondent. It is not the function of the court in judicial review to substitute its own opinion of the evidence for that of the respondent. The court is not sitting as an appeal court to carry out a merits based review*”.

Similarly, in *An Application for Judicial Review by the National Trust*⁴¹, the Trust applied for Judicial Review of the grant of planning permission for a hotel and golf resort on land near the Giant’s Causeway World Heritage Site by the Minister for the Environment in Northern Ireland. In referring to “*certain recurring issues*” raised by the Trust including inadequate surveys and information on impact and mitigation provided by the developer, Weatherup J felt it necessary to restate the nature of JR in the following terms: “*The primary decision maker in this process was the Department as provided by Parliament. The Court is limited in its review of the decision and considers whether the decision is within the legal framework, whether the decision is rational and takes account of the relevant considerations and leaves out of account irrelevant considerations and whether the decision has been arrived at in a procedurally fair manner*”.

Similar views were expressed by the High Court in *the Matter of William Young for Judicial Review*⁴² and *the Matter of an Application by Michael Taggart for Judicial Review*⁴³. Finally, in *Newry Chamber of Commerce and Trade’s Application for Judicial Review*⁴⁴ [2015], the Chamber of Commerce in Newry challenged the grant of planning permission for a comprehensive mixed use development in the District. In dismissing the application, Treacy J once again set out the legal principles governing the role of planners and the role of the courts in planning cases. He confirmed that “*The Court will not interfere with the exercise of the planners’ discretion on the weighting of the factors, provided it is rational in the*

³⁸ *In the Matter of an Application by River Faughan Anglers Limited for Judicial Review and in the Matter of a Decision by the Department of the Environment for Northern Ireland (Planning Service) on 13th September 2012 to Grant Planning Permission* [2014] NIQB 34, [78], [114] and [119] – see Annex W

³⁹ *Supra*, n.9

⁴⁰ *Supra*, n.11

⁴¹ *In an Application for Judicial Review by the National Trust for Places of Historic Interest or Natural Beauty* [2013] NIQB 60, [60] – see Annex X

⁴² *In the Matter of William Young for Judicial Review* [2012] NIQB 15, [8] – see Annex Y

⁴³ *In the Matter of an Application by Michael Taggart for Judicial Review and In the Matter of a Decision of the Planning Appeals Commission for Northern Ireland* [2011] NIQB 82 – see Annex Z

⁴⁴ *In the Matter of an Application by Newry Chamber of Commerce and Trade for Judicial Review and In the Matter of a Decision by the Department of Environment for Northern Ireland (Planning Service) on 19 August 2014 to approve Planning Application Ref: P/2009/0163/F* [2015] NIQB 65, [44], [64] and [106] – see Annex AA

Wednesbury sense”, acknowledging that: “... a challenge of irrationality to a planning judgment, and the weight to be attached to a specific factor, is a very high hurdle to overcome⁴⁵”.

The practical implications of *Wednesbury* unreasonableness

In the majority of environmental cases (and certainly the vast majority of town and country planning cases) the courts apply the strict *Wednesbury* test to substantive review and not the more searching anxious scrutiny test reserved for cases involving human rights. However, as illustrated above, even the courts acknowledge that *Wednesbury* unreasonableness is an extremely high threshold to reach. This can leave claimants without access to a remedy where substantive review is concerned.

In addition to the cases cited above, the limitations of the *Wednesbury* test are borne out by practical experience. The Environmental Planning and Litigation Service (EPLS) was established as a partnership between Leigh Day and Landmark Chambers in September 2013 to provide specialist advice on prospective environmental JRs. It has since advised 117 clients as to whether they have arguable grounds to challenge the decisions of public bodies by way of JR. Of those enquiries (most of which concern planning proposals), counsel advised that 15 cases had grounds for JR with reasonable prospects of success (i.e. they demonstrated identifiable legal errors extending beyond merits review type complaints). The vast majority of the remaining cases raised substantive review issues but were advised that they would not meet the threshold for *Wednesbury* review, despite instances where – for example – decisions have been made on the basis of very little information, or it is clear that only scant consideration has been given to consultation comments from the public.

Most individuals and community groups approaching the EPLS understandably have limited experience of the process of JR. Many allege the decision-maker has acted unreasonably and unlawfully, only to be told that the decision cannot be challenged because the Courts will not intervene in matters of judgment or on the merits (i.e. there is no effective substantive review available to them in the absence of a perverse or absurd decision). Most go away disappointed and baffled that the law does not allow them to question a decision that seems indefensible as a matter of common sense, or ask for a review on the basis of what is reasonable or proportionate or better informed. Many point out the inequity that exists between third parties and developers, the latter enjoying the right to appeal a decision and receive a full merits review. Anonymised extracts of advice provided to some EPLS clients by counsel at Landmark Chambers are set out in Annex B. This is just a selection - many more examples could be provided – and, of course, this type of problem is not restricted to just planning decisions.

The consequence of this limitation is that any challenges that do proceed rely almost wholly on procedural grounds. This renders JR a blunt and less effective instrument, as the decision-maker can simply remit the decision back to the relevant committee and make the same decision again with the procedural irregularities rectified. For example, in *R (Andrew Cawdron) v North Norfolk Council and Balfour Beatty Civils Ltd*⁴⁶, the Council agreed to quash approval for the North Norfolk Distributor Road within weeks of legal proceedings being issued. While the clients were initially delighted with the result, it soon became apparent that the Council intended to immediately remit the decision back to the Planning Committee with the acknowledged procedural defect rectified on the papers. Permission was duly granted again within a matter of weeks, essentially rendering the procedure (in the eyes of the client) little more than a costly exercise in delay.

The CJEU and Proportionality

The Court of Justice of the European Union (CJEU) applies a proportionality test in environmental cases⁴⁷. The intensity with which it is employed varies depending on whether the national measure

⁴⁵ See e.g. *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W L R 759 at 780 H per ord Hoffman

⁴⁶ Unreported

⁴⁷ See Jacobs, F. (2006) *The Role of the European Court of Justice in the Protection of the Environment*. Journal of Environmental Law (2006) Vol 18 No 2, 185–205. The paper discusses relevant judgments of the court including *ADBHU* (Case 240/83 *Association de défense des brûleurs d’huiles usages* (ADBHU) [1985] ECR 531), the *Danish Bottles Case*

interferes with a freedom guaranteed by an EU treaty, relies on derogation from an EU treaty, or simply implements EU law⁴⁸. The test is significantly more deferential in situations where a member state has been granted discretion. For example, if a member state is implementing EU law, has been given discretion on how to do so, and is balancing complex social or economic questions, the CJEU's proportionality test generally asks whether a measure is “manifestly disproportionate⁴⁹”. So, for example, in the *ADBHU* case, this required the ECJ (as was) to check whether restrictions on free trade and competition caused by Community measures went beyond the inevitable restrictions justified by the pursuit of the objective of environmental protection⁵⁰.

The CJEU has ruled on a number of cases within the ambit of Article 9(2) Aarhus Convention. In *Mellor*⁵¹, the CJEU held that JR must be able to go beyond the mere existence of reasons and examine whether the reasons given in respect of a decision not to require an EIA are reasonable in the circumstances. Moreover, in *Commission v Germany*⁵², the CJEU held that a Member State cannot limit the scope of a JR to the question of whether a decision not to carry out an EIA was valid. It held that: “the very objective pursued by Article 11 of Directive 2011/92⁵³ and Article 25 of Directive 2010/75⁵⁴ is not only to ensure that the litigant has the broadest possible access to review by the courts but also to ensure that that review covers both the substantive and procedural legality of the contested decision in its entirety”. Similarly, in *Altrip*⁵⁵, the CJEU held that Member States are not permitted to limit the applicability of the provisions transposing Article 10a of Directive 85/337 to cases in which the legality of a decision is challenged on the ground that no EIA was carried out.

V. Provisions of the Convention alleged to be in non-compliance

Articles 3(1), and 9(2), (3) and (4) read together- the requirement for a review of substantive and procedural legality that provides for adequate and effective remedies. This is to be set out in a clear, transparent and consistent legal framework (Article 3(1)). However, those obligations must also be understood in the context of other provisions of the Convention including:

- Recital 7 and the recognition that every person has a right and a duty to protect the environment for the benefit of present and future generations;
- Recital 8 and the recognition that citizens may need assistance to exercise their rights;
- Recital 9 explaining that public authorities must take “due account” of concerns expressed by the public;
- Recital 16 explaining that public authorities must be in possession of “accurate, comprehensive and up to date environmental information”;
- Article 5(1) and the obligation to ensure that public authorities possess and update environmental information which is relevant to their functions (which presumably includes the specific functions of authorising and regulating the operation of potentially polluting developments);
- Article 6(3) requiring the public participation procedures to allow for the public to “participate effectively”;

(Case 302/86 *Commission v Denmark* [1988] ECR 4607 (September 1988)), the *Walloon Waste Case* (Case C-2/90 *Commission v Belgium* [1992] ECR I-4431 (July 1992)), *Dusseldorp* (Case C-203/96 [1998] ECR I-4075 (June 1998)) and *Aher-Waggon* (Case C-389/96 [1998] ECR I-4473 (July 1998))

⁴⁸ *R (oao Lumsdon and others) v Legal Services Board [2015] UKSC 41* [37]-[73] (Hyperlink available <https://www.supremecourt.uk/cases/docs/uksc-2014-0272-judgment.pdf>)

⁴⁹ *Id* [73]

⁵⁰ *Supra*, n. 47

⁵¹ Case C-75/08 *R (oao Christopher Mellor) v Secretary of State for Communities and Local Government* – available [here](#)

⁵² Case C-137/14, *Commission v Germany*, [80] – available [here](#)

⁵³ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment

⁵⁴ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control)

⁵⁵ Case C-72/12 *Gemeinde Altrip, Gebrüder Hörst GbR, Willi Schneider v Land Rheinland-Pfalz, party intervening: Vertreter des Bundesinteresses beim Bundesverwaltungsgericht*- available [here](#)

- Article 6(6) requiring the public authority to make available (among other things) a description (presumably consistent with recital 16 and Article 5(1)) of the environmental impacts of a proposal and reports provided to the authority (i.e. not merely information provided by the developer); and
- Article 6(8) requiring that “due account” is taken of the outcome of public consultation.

Those things are particularly relevant when considering whether the courts need to require more (for the purposes of assessing substantive legality) than that the decision-maker was aware of (i.e. “took into account”) public comment, or that the decision-maker had some information (however scant and however sourced) about a particular proposal or environmental impact.

VI. Nature of alleged non-compliance

This Communication is predicated on the argument that the standard of review applied in the UK courts extends little beyond an examination of procedural legality. When prompted to consider whether the high threshold of *Wednesbury* unreasonableness is appropriate in the context of Aarhus Convention cases, the courts have consistently confirmed that there is no need to apply a more exacting scrutiny in environmental cases. The established jurisprudence of the courts effectively prevents the public concerned from challenging the substantive legality of the decisions of public bodies (and especially the decisions of local planning authorities) by way of JR and appropriate statutory reviews. However, no other options are available for JR claimants. While there is a right of appeal available to an applicant in planning matters (in respect of which a full merits review is available), there is no third party right of appeal in the planning process in the UK. The public can submit a complaint to an Ombudsman (such as the Local Government and Social Care Ombudsmen⁵⁶ or the Parliamentary and Health Service Ombudsman) but they will only adjudicate on malpractice.

Article 9(4) of the Convention further requires that there be adequate and effective remedies where 9(2) and 9(3) review procedures are engaged. It is plainly the case – as also explained in the Aarhus Convention Implementation Guide at p.199 - that both review procedures require compliant substantive review, but where the standard applied is so high as to be unattainable in all but the most extreme cases (and so not compliant – as it is the case currently in the UK), this does not provide for adequate and effective remedies as they are simply not attainable for what would otherwise be legitimate cases.

However, as noted above, the courts will not, for example, scrutinise whether “due regard” has been given to the outcome of public consultation (or a legal duty) beyond checking that the decision-maker was generally aware of what the public had said or a sense of it. That can be contrasted with the more inquisitorial approach taken by the courts to the statutory obligation on public authorities to give “due regard” (a statutorily defined term) to equality impacts (the ‘public sector equality duty’ in section 149 Equality Act 2010⁵⁷) which the courts, including the Supreme Court, have held requires the court to assess whether the public body has given sufficient regard to the equality impacts. It is clear, in that context that the court must be satisfied that⁵⁸: “*there has been a rigorous consideration of the [PSED], so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them ... The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria ... the decision maker must be clear precisely what the equality implications are ...*”.

In that context, the courts have explained that⁵⁹: “[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.”

⁵⁶ See [here](#)

⁵⁷ “(1) A public authority must, in the exercise of its functions, have due regard to the need to - (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it;”

⁵⁸ See, for example *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 [here](#) at paragraph 26:

⁵⁹ Per *Meany, Glynn & Sanders v Harlow District Council* [2009] EWHC 559 (Admin) - available [here](#)

And yet, in the environmental sphere, the courts require no more than that the decision-maker had general regard to the outcome of the public participation process. An entirely different approach is taken to “due regard”.

We set out below some of what more could be required for a compliant review of substantive legality. However, it is clear that whatever applies, it must be consistently applied to Articles 9(2) and (3) and in accordance with Article 3(1). We are aware, for example, of the wide divergence in practice between (and even within) the EU Member States, many of which may represent a satisfactory standard of review⁶⁰. However, we do not believe that we currently have a compliant and consistent system in the UK for the substantive review of legality of decisions within JR.

The following sections of the Communication discusses a number of current contextual considerations before making some general observations on how compliance could be addressed.

The Aarhus Convention Compliance Committee and Communication C33

The question of whether the *Wednesbury* test satisfies the requirements for substantive review in the Aarhus Convention was briefly addressed by the Compliance Committee in Communication ACCC/C/2008/C33 concerning the UK and costs.

The Committee concluded that the UK allows for members of the public to challenge certain aspects of the substantive legality of decisions, acts or omissions subject to Articles 9(2) and (3) of the Convention including, for example, material errors of fact, errors of law, regard to irrelevant considerations, failure to have regard to relevant considerations, jurisdictional error and *Wednesbury* unreasonableness. However, the Committee was not convinced that the UK, despite these exceptions, meets the standards for review required by the Convention as regards substantive legality. Particular reference was made to criticisms by the House of Lords⁶¹ and the ECHR⁶², concerning the very high threshold for review imposed by the *Wednesbury* test.

The Committee did not go as far as to find the UK in non-compliance with Article 9(2) or (3) of the Convention. Such a conclusion would have been difficult in the absence of concrete examples or an established body of jurisprudence representing a general barrier before it. Instead, the Committee suggested (perhaps picking up on submissions made by the UK Government during the hearing) that the application of the “proportionality principle” by the courts in England and Wales could potentially provide a more appropriate standard of review in cases within the scope of the Aarhus Convention provided that the principle does not exclude any issues of substantive legality from review⁶³. Such a test would require a public body to provide evidence that an act or decision:

- (i) justified the limitation of the right at stake;
- (ii) is connected to the aims which the act or decision seeks to achieve; and
- (iii) uses means to limit the right at stake which are no more than necessary to attain the aims of the act or decision pursued.

The move towards proportionality in the common law

The *Wednesbury* test has been under sustained attack in the UK for several decades. Lord Lester and Jeffrey Jowell argued in a seminal article⁶⁴ that *Wednesbury* unreasonableness has serious flaws and ultimately concluded: “*the Wednesbury test, because of its vagueness, allows judges to obscure their*

⁶⁰ See research undertaken for the European Commission in 28 Member States in 2012 available [here](#). Paragraphs 121-125 of Professor Darpo’s Summary Report are especially helpful in explaining the variety of approaches employed and the relationship between scope and intensity of review and standing before the courts

⁶¹ See, for example, *Lord Cooke in R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, [2001] 2 AC 532, [32] – available [here](#)

⁶² *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, [138] – available [here](#)

⁶³ *Supra*, n.2 [126]

⁶⁴ Lester, Lord Lester and Jowell, Jeffrey. *Beyond Wednesbury: Substantive Principles of Administrative Law*. [1987] P.L. 368

social and economic preferences more easily than would be possible were they to be guided by established legal principle⁶⁵”. Other commentators have observed that the primary limitation of JR in England and Wales is its focus on procedural, rather than substantive, impropriety⁶⁶. The *Wednesbury* test was also criticised by the European Court of Human Rights in *Smith and Grady v UK*⁶⁷ because:

“[T]he threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants’ rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court’s analysis of complaints under article 8 of the Convention.”

Members of the judiciary have observed that they would prefer the proportionality standard to be applied in domestic law⁶⁸ and have recognised the need for a fresh approach when speaking extra-judicially. For example, speaking at the Administrative Law Bar Association in 2013, Lord Carnwath said⁶⁹:

“... In 19 years as a judge of administrative law cases I cannot remember ever deciding a case by simply asking myself whether an administrative decision was “beyond the range of reasonable responses”, still less whether it has caused me logical or moral outrage. Nor do I remember ever asking myself where it came on a sliding scale of intensity. My approach I suspect has been much closer to the characteristically pragmatic approach suggested by Lord Donaldson in 1988, by way of a rider to what Lord Diplock had said in *CCSU*: “the ultimate question would, as always, be whether something had gone wrong of a nature and degree which required the intervention of the court and, if so, what form that intervention should take” ... If the answer appears to be yes, then one looks for a legal hook to hang it on. And if there is none suitable, one may need to adapt one.

I think the time has come to abandon judicial outrage and sliding scales. We may also have to abandon the search for residual principles, whether of reasonableness or rationality. I doubt if there are any, other than the interests of justice. Anxious scrutiny is probably too embedded in the jurisprudence to be discarded, but we should be wary of thinking that it means anything. Perhaps we as judges should cut out the theorising and concentrate on doing justice in real cases. Where doing justice requires us to develop and refine new, more specific principles, we should be willing to do so. Generally we should look to the academics to do the theorising, and to put our efforts into a wider context. That way, we can decide the cases, and then they can tell us what we really meant, so that we can make it sound better next time.”

The UK courts have thus far refrained from extending the proportionality principle to JR generally on the ground that they consider a Supreme Court judgment would be needed prior to doing so⁷⁰. Clearly, given the time that has elapsed without such a case coming to light, and also the well-established problems with the prohibitive costs and other practical barriers with access to justice in the UK (see, in this context, Decision VI/8K concerning the UK adopted at the 6th Meeting of the Parties to the Convention in Montenegro), this is not a timely or realistic prospect for dealing with this issue.

At this stage, it is also impossible to know whether the application of the proportionality principle in Aarhus cases would provide full compliance with the Convention, or if it might exclude substantive issues from review in the way it would be applied. However, domestic courts have held that

⁶⁵ *Ibid*, 368, 381

⁶⁶ Donson, F. and Lee, R. (1996). *Environmental Protection: Public or Private Law*. 1 *Judicial Review* 56

⁶⁷ *Supra*, n.62

⁶⁸ The possibility of such a change was judicially canvassed for the first time in *GCHQ* (1985) but it has been mentioned by various judges in subsequent cases “often with some enthusiasm”. See, for example, Lord Slynn in *Alconbury*, Lord Cook in *Daly*, Dyson L.J. in *ABCIFER*

⁶⁹ Annual Lecture, 12 November 2013. “*From judicial outrage to sliding scales – where next for Wednesbury?*” available [here](#)

⁷⁰ See *Montgomery, Re Judicial Review* [2008]; *ABCIFER, op cit., Re McQuillan’s Application* [2004] and, more recently, *Keyu and Others v Secretaries of State for Foreign Affairs and Defence* [2015] UKSC 69 – available [here](#)

unincorporated treaties may have a bearing upon the development of the common law (see *Lyons*⁷¹) and the development of the common law should ordinarily be in harmony with the UK's international obligations (see *A v Secretary of State for the Home Department (No 2)*⁷²). We would therefore suggest that serious consideration should be given to the Compliance Committee's suggestion that proportionality (or a proportionality based approach) could represent a more appropriate standard of review in environmental cases, and therefore a move towards or into compliance. In any event, we argue that a new approach is required to secure compliance with the Convention in the UK, and that it is the UK that must devise it with the findings and recommendations of the ACCC to hand.

Scope of substantive and procedural legality

While this Communication concerns the intensity of review required under the Aarhus Convention, it is also important to clarify how far such a review extends (i.e. the scope of review).

Article 9(3) of the Aarhus Convention does not impose an explicit obligation on contracting Parties to establish a review system in which the substantive and procedural legality of an act or omission is assessed, although it does require public access to administrative and judicial procedures to challenge acts and omissions. Article 9(2) requires Parties to ensure that members of the public concerned have access to a review procedure 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*”.

In *Janecek*⁷³ (a case concerning the production of action plans to address ambient air quality in accordance with Directive 96/62/EC), the CJEU held that an EU principle of effective JR covering substantive and procedural legality applies to acts and omissions falling under Article 9(3) of the Aarhus Convention. Otherwise it could not be ensured that the objectives of, and the rights conferred by, EU environmental law could be sufficiently protected by national courts. Moreover, the Aarhus Convention Implementation Guide recognises that the standard of review to be applied in the context of Article 9(3) is identical to the one to be applied in the context of Article 9(2) of the Convention, which means that a national court should examine both substantive and procedural legality⁷⁴. This is clearly correct, because of the wide scope of legal issues and national environmental law that the Article 9(3) seeks to cover (including in both public and private law claims).

What would be required

We suggest that consideration of the “substantive legality” of public authority action in conformity with the Convention (and bearing in mind what the CJEU said in *Sweetman*⁷⁵) would require, among other things, the court in a JR to (while not having to trespass into assessing the full merits of the decision-maker's conclusions) nonetheless:

1. Satisfy itself that the public/consultees had been provided with proper and sufficient information about the proposal in a timely way – including adequate opportunity to submit an informed response to the assessment of such information by decision-makers and developers;
2. Satisfy itself that the decision-maker had properly considered (i.e. “due regard” and not merely “taken into account” generally by being aware of it only) contrary views expressed by consultees and others overall or on particular points, including identifying and explaining the basis for disagreeing with those views where that was the case, and the evidence relied on in doing so;

⁷¹ *Lyons* [2002] UKHL 44, [2003] 1 AC 976, 13 per Lord Bingham – available [here](#)

⁷² [2005] UKHL 71; [2006] 2 AC 221 per Lord Bingham at [27] – available [here](#)

⁷³ Case C-237/07 *Dieter Janecek v Freistaat Bayern*- available [here](#)

⁷⁴ Aarhus Convention Implementation Guide p.199

⁷⁵ The court must be satisfied that the evaluation cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned

3. Satisfy itself that the decision-maker had actually evaluated information or evidence on the basis of which to answer all of the issues before it (including issues raised by the legal points before it);
4. Satisfy itself that the nature and scale of the information or evidence was capable, in all the circumstances, of properly addressing relevant issues including the need to resolve any scientific doubt about environmental impacts. By definition, this requires surveys to be: (i) based upon sufficiently complete, focused and detailed assessments taken over an appropriate scale/period; (ii) based on a measurement/sampling regime that is capable of providing proper information; (iii) sufficiently up to date; (iv) collected for (or suited to) the relevant issue; and (v) undertaken by competent experts;
5. Satisfy itself that the information or evidence was logically probative (i.e. capable of proving or demonstrating what is necessary) in relation to those issues;
6. Satisfy itself that the decision maker had made reasonable and sufficient inquiries in establishing that information including following up gaps and areas of obvious doubt, and in considering contrary points put by consultees;
7. In circumstances where one decision-maker was reliant on decisions taken by others (or information provided by others) for some aspects, satisfy itself that (and the challenged decision-maker needs to check and show to the court that) the second decision maker's assessment and approach had been such that the first decision-maker's reliance was indeed warranted. It would not be for the court or first decision-maker to retake that other decision, rather to check/show that it was taken on a proper and sufficient basis and (regardless of the purpose for which it had been taken) it was fit for this purpose. The significance of this issue is illustrated by reference to a recent case concerning hydraulic fracturing⁷⁶ ("fracking") on the site of a former gas well in North Yorkshire. The judge concluded that it was lawful for the planning committee not to take the environmental impacts of the burning of the gas at an electricity generating station into account on the advice of another statutory consultee (the Environment Agency) and because the National Planning Policy Framework states that: "*...control of processes or emissions where these are subject to approval under pollution control regimes, and it should be assumed that those regimes will operate effectively*". As such, the judge held that the court should not apply any further independent scrutiny of whether the regulation of greenhouse gases in this case was sufficient enough to allow the planning committee to ignore those impacts.

Recognising the importance of a "proportionate" or "proportionality" approach, the intensity of the scrutiny undertaken by the court of the public authority's decision in those circumstances should depend on among other things (as applicable):

- The scale of what is in issue – greater scrutiny for a larger development;
- Its potential environmental implications – greater scrutiny for something with greater potential impacts (either short-term or long-term);
- The extent of controversy or public concern – greater scrutiny for something which had attracted greater controversy (albeit that apparent lack of controversy about something which has not been the subject of full and proper consultation should not be taken as showing lack of controversy);
- The extent to which contrary views (on the issues, on environmental impacts, on particular issues, etc) have been expressed by consultees and others particularly which were themselves supported by apparently cogent evidence – greater scrutiny where fully evidenced contrary views have been rejected (albeit, as for 3 above);

⁷⁶ *Friends of the Earth and Frack Free Ryedale v North Yorkshire County Council* [2016] EWHC 3303 (Admin) at [35]

- The extent to which the proposal is for a novel process or form of development (as distinct from something which is well understood and already operating) – greater scrutiny where novel rather than well-established;
- Whether there are other factors which made it harder to predict impacts and risks – greater scrutiny where prediction harder and/or where a precautionary approach is required;
- Whether impacts/risks if they arose would be long term and irreversible (or not capable of being adjusted in the light of experience) including where what was contemplated is one-off (such as clearing an area of protected woodland) rather than gradual (such as emitting a gas over time where action can be taken if, say, impacts turn out to have been underestimated), - greater scrutiny where impacts irreversible and/or long term;
- Whether the information/evidence relied on in support of the proposal was provided (or only provided) from sources (including experts and advisers) which were in some financial or in any other way associated with the proposer (or whether the public body had itself undertaken its own assessments); or whether there were any other factors which might lead them to be in any way partisan or not approach the matter on a neutral basis – greater scrutiny where the assessments came from the developer;
- Whether the public (following a proper consultation) had sufficient resources to apply proper scrutiny and provide views to the decision-maker – greater scrutiny where the public was less able to evaluate fully (perhaps because the issues are very technical or otherwise less accessible) and/or
- Whether the decision-maker had access to and had deployed sufficient resources and expertise to assessing the proposal, particularly technical aspects of it, for itself (including scrutinising and challenging information from a developer) – greater scrutiny where the decision-maker’s own assessment was less rigorous.

Environmental Tribunals and rights of appeal

Anyone wishing to challenge the procedural or substantive legality of any decision, act or omission of a public body by way of JR (in relation to the environment) must make an application to the Administrative Court (part of the High Court) in England and Wales, the Outer House of the Court of Session in Scotland or the Royal Courts of Justice in Northern Ireland.

However, this Communication demonstrates that it is a fundamental tenet of the UK’s constitutional arrangements that the courts will defer to the democratically elected or accountable decision-taker when reviewing the substantive decisions in JR claims⁷⁷. Similarly, there are a number of other reasons (including access to justice) why JR in the High Court (and equivalent courts in Scotland and NI) may not be optimal forum for determining environmental challenges⁷⁸. The simple fact is that civil society is left with JR by default – there is no other forum of last resort.

We have set out above what we suggest is a compelling proposal for a move towards compliance within JR. However, it is not the only solution - and it may be that more is needed to remove the access to justice *lacunae*. In particular, given the constitutional position of deference by the courts within JR, it may be that an alternative forum is needed. One such possibility is the creation of a specialist environmental court or tribunal (whether providing a full merits appeal or something less than that) applying bespoke rules on standing, costs and remedies and in which specialist judges (possibly with technical advisers) could sit. As evidenced in *R (Jones)*, *Foster*, *RSPB* and *Douglas*, a lack of specialism in the judiciary appears to be one factor in the reluctance of the courts to examine the substantive legality

⁷⁷ It should be noted that the courts do not defer on hard-edged questions of law, or where specifically empowered by statute to review particular issues (etc), however

⁷⁸ Including the complexity of the process, prohibitive expense (as illustrated by other Communications before the Committee) and other practical and financial issues for claimants

of Aarhus cases. It is notable that there is currently an environmental tribunal in existence in England and Wales, although it is underused and its jurisdiction is small.

A further possibility (in relation to planning and regulatory permissions amenable to JR) could be the introduction of a third party right of appeal with recourse to a merits review (thus putting civil society on an equal footing with developers). There may be other solutions, but what is clear is that the UK may not rely on any constitutional arrangement as a valid reason for failing to comply with its Convention obligations⁷⁹. Article 27 of the Vienna Convention (to which the UK is a party) states: “*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.*”

Conclusion

This Communication does not concern specific cases of non-compliance with the Convention but a continuing breach. It concerns the long-established jurisprudence of the domestic courts and the practical barriers this presents to the public when seeking to pursue JR. In that respect, it adopts a similar approach to ACCC/C/2008/32⁸⁰, which also sought to rely on the established jurisprudence of the CJEU in demonstrating a continuing breach of the Convention. It is our contention that a narrow interpretation of substantive review – as demonstrated in JR in the UK as set out above - runs counter to the very objective of the Convention in providing wide access to justice, and does not meet the standards required.

VII. Use of domestic remedies

We refer the Committee to the jurisprudence of the domestic courts as outlined in this Communication and reproduced in the attached judgments – the simple point is that all attempts to argue for a judicial approach going beyond the traditional approach have been rejected, and the constitutional position of the courts in the UK prevents reform. Furthermore, due to the practical and financial difficulties with access to justice in the UK, and that a case would need to go all the way to the Supreme Court that dealt with exactly the right issues there are no effective domestic remedies available to the Communicants. It is notable that during an extended period no such case has come to light to any person as far as we are aware.

VIII. Use of other international procedures

No other international procedures have been pursued or are available at this time.

IX. Confidentiality

We are happy for the entirety of this Communication to be made public.

X. Supporting documentation (copies, not originals)

- **Annex A** – Further information about Anxious Scrutiny
- **Annex B** – Extracts of written Advice provided by Leigh Day’s Environmental Planning and Litigation Service (EPLS) to clients
- Essential judgments:
 - **Annex C** - *R (on the Application of Jones) v Mansfield District Council* [2003] EWCA Civ 1408
 - **Annex D** – *R (on the application of Loader) v Secretary of State for Communities and Local Government* [2011] EWHC 2010 (Admin)
 - **Annex E** – *R (Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869
 - **Annex F** – *R (Bowen-West) v Secretary of State* [2012] EWCA Civ 321

⁷⁹ Communication C32 concerning the failure of the EU to provide compliant standing for claimants when challenging its own institutions and their decisions also sought to rely on this issue

⁸⁰ See [here](#)

- **Annex G** – *R (Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114
- **Annex H** – *R (on the application of (1) Derek Foster (2) Tom Langton (claimants)) v Forest of Dean District Council (Defendant) & (1) Homes & Communities Agency (2) Natural England (Interested Parties)* [2015] EWHC 2648 (Admin)
- **Annex I** – *Case C-258/11 Sweetman v. An Bord Pleanála (Galway County Council intervening)* [2014] PTSR 1092
- **Annex J** – *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174
- **Annex K** – *Case C-127/02 – Waddenzee*
- **Annex L** – *Abbotskerswell Parish Council v (1) Teignbridge District Council (2) Secretary of State for Communities & Local Government* [2014] EWHC 4166 (Admin)
- **Annex M** – *R (the RSPB) v Secretary of State for the Environment, Food and Rural Affairs & BAE Systems (Operations) Ltd (Interested Party)* [2015] EWCA Civ 227
- **Annex N** – *R (on the application of Richard McMorn) v Natural England and DEFRA* [2015] EWHC 3297 (Admin)
- **Annex O** – *R (on the application of Dillner) v Sheffield City Council* [2016] EWHC 945 (Admin)
- **Annex P** – *Royal Society for the Protection of Birds v Scottish Ministers* [2017] CSIH 31
- **Annex Q** – *Douglas v Perth and Kinross Council* [2017] CSIH 28
- **Annex R** – *Sustainable Shetland v Scottish Ministers* [2013] CSOH 158
- **Annex S** – *Sustainable Shetland v Scottish Ministers* [2014] CSIH 60
- **Annex T** – *Sustainable Shetland v Scottish Ministers* 2015 UKSC 4
- **Annex U** – *Cairngorms Campaign v Cairngorms National Park Authority* 2014 SC 37
- **Annex V** – *Carroll v Scottish Borders Council* 2016 SC 377
- **Annex W** – *In the Matter of an Application by River Faughan Anglers Limited for Judicial Review and in the Matter of a Decision by the Department of the Environment for Northern Ireland (Planning Service) on 13th September 2012 to Grant Planning Permission* [2014] NIQB 34
- **Annex X** – *In an Application for Judicial Review by the National Trust for Places of Historic Interest or Natural Beauty* [2013] NIQB 60
- **Annex Y** – *In the Matter of William Young for Judicial Review* [2012] NIQB 15
- **Annex Z** – *In the Matter of an Application by Michael Taggart for Judicial Review and In the Matter of a Decision of the Planning Appeals Commission for Northern Ireland* [2011] NIQB 82
- **Annex AA** – *In the Matter of an Application by Newry Chamber of Commerce and Trade for Judicial Review and In the Matter of a Decision by the Department of Environment for Northern Ireland (Planning Service) on 19 August 2014 to approve Planning Application Ref: P/2009/0163/F* [2015] NIQB 65

XI. Signatures

Carol Day Mary Church Rosie Sutherland Will Rundle Rowan Smith pp Rosa Curling

XII. Sending the communication

Send the communication by **e-mail and by registered post** to the following address:

Secretary to the Aarhus Convention Compliance Committee
 United Nations Economic Commission for Europe
 Environment Division, Palais des Nations, CH-1211 Geneva 10, Switzerland
 E-mail: aarhus.compliance@unece.org
 Clearly indicate: "Communication to the Aarhus Convention Compliance Committee"