BEFORE:

THE AARHUS CONVENTION COMPLIANCE COMMITTEE

UNITED NATIONS, ECONOMIC COMMISSION FOR EUROPE

RE: COMMUNICATION ACCC/C/2017/156

(CONCERNING COMPLIANCE BY THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND WITH THE PROVISIONS OF THE AARHUS CONVENTION ON ACCESS TO JUSTICE CONCERNING THE REVIEW OF SUBSTANTIVE LEGALITY

OBSERVATIONS ON BEHALF OF THE UNITED KINGDOM

I. INTRODUCTION

1. By a communication ("**the Communication**") received by the Aarhus Convention Compliance Committee secretariat ("**the Committee**") on 7 December 2017, complaint is made by the Royal Society for the Protection of Birds, Friends of the Earth and Leigh Day ("**the Communicants**") in relation to what is said to be the United Kingdom's failure to comply with Article 9(2) of the Aarhus Convention ("**the Convention**") in relation to the review of the substantive legality of decisions, acts and omissions[1] to which that provision relates.

2. On 15 March 2018, the Committee reached a preliminary determination that the Communication was admissible. This was notified in writing to the United Kingdom by letter dated 22 March 2018, requesting that any written explanations or statements by the United Kingdom in response should be made by 22 August 2018. These written observations are made pursuant to that request.

[1] For convenience, these observations use the abbreviated term "*decisions*" below as shorthand for "*decisions, acts and omissions*".

3. In summary, the United Kingdom submits that the Communication is without merit for the following reasons, individually and/or cumulatively:

    a. The Communication does not contain sufficiently specific information to demonstrate that in any particular case a Member of the Public has been denied the rights to which Article 9(2) refers.

    b. The Communication is misconceived, since it fails to recognise that Article 9(2) is concerned with effective access to a court or tribunal to challenge the legality of certain decisions by public authorities, not with the domestic law procedural and substantive requirements which need to be complied with in order for such decisions to be lawful.

    c. Consistently with Article 9(2), the procedures in the UK for judicial review and statutory review of such decisions are <u>not</u> confined to consideration of whether the decision in question was reached by a lawful process but also encompass consideration of whether the substantive requirements of domestic law were complied with.

4. These three points are elaborated in turn below.

II. <u>LACK OF SPECIFICITY IN THE APPLICATION</u>

5. The United Kingdom reiterates the concerns previously made in its letter dated 9 March 2018 about the lack of specificity in this Communication.

6. The Communicants' letter dated 12 Mach 2018 asserts that they have provided *"not one, but numerous cases in which claimants/petitioners have attempted to argue that a more intense standard of review is needed in environmental cases"*. However, they make no attempt to explain how a

different standard of review would have made a difference to the outcome of any specific case, having regard to the particular details of that case. There is therefore is no basis for contending that any particular Member of the Public has been prejudiced in their challenge by the standard of review applied by the court. None of the Members of the Public who were the claimants in these cases have themselves asserted that their rights under the Article 9(2) been breached as a result of what happened in those cases. None of them are party to the Communication.

7. For these reasons, even if the preliminary decision on admissibility is maintained (as to which the UK repeats its objection to the communication's admissibility), the Committee has not been provided with sufficiently specific information to justify it concluding that in any particular case a Member of the Public has been denied the rights to which Article 9(2) refers.

III. ARTICLE 9(2) IS CONCERNED WITH ACCESS TO A COURT OR SIMILAR TRIBUNAL, *NOT* WITH THE RULES OF DOMESTIC LAW GOVERNING THE LEGALITY OF DECISIONS, ACTS OR OMISSIONS

8. The Communication is based upon a fundamental misunderstanding of what Article 9(2) is about.

9. Article 9(2) is concerned with ensuring that qualifying Members of the Public "*have access to a review procedure*" before a court or similar body "*to challenge the substantive and procedural legality*" of certain decisions relating to the environment (emphasis added). In other words, Article 9(2) is concerned with ensuring that Members of the Public have e*ffective access to a court or tribunal to challenge* the legality (whether procedural or substantive) of relevant decisions.

10. Article 9(2) does not regulate or harmonise the rules of domestic law which determine the legality of such decisions, namely the procedural and substantive requirements which need to be complied with in order for them to be lawful. Those rules are the true subject of the present Communication. The Communicants describe their complaint as being about the "*standard of review*" applied by the Court in considering challenges to such decisions, but that is simply another way of saying the same thing. The "*standard of review*" applied by the Court in any judicial review or statutory review is whether the decision in question complied with the substantive and procedural requirements that needed to be complied with in order for it to be lawful. The Communicants' real complaint is that the substantive requirements of UK public law that need to be complied with in order for a decision (at least in the environmental context) to be lawful should be made more demanding. That is a matter which is outside the scope of Article 9(2).

IV. JUDICIAL AND STATUTORY REVIEW PROVIDES MEMBERS OF THE PUBLIC ARTICLE 9(2) COMPLIANT ACCESS TO A COURT

11. Consistently with the above analysis of Article 9(2), the procedures in the UK for judicial review and statutory review of decisions by public authorities provide Members of the Public who have a sufficient interest in the matter with access to a Court to challenge their compliance with all relevant substantive and procedural legal requirements.

12. In particular, judicial and statutory review is not confined to consideration of whether the decision in question was reached by a lawful *process*. It also encompasses consideration of whether the *substantive* requirements of domestic law (including EU law and other international obligations transposed into domestic law) have been complied with. See e.g. Michael Fordham QC, *Judicial Review Handbook* (6th Ed., Hart Publishing, 2012), §45.1 at p.487:

> "The most popular classification of grounds for judicial review is the threefold division into illegality (unlawfulness), irrationality (unreasonableness) and procedural impropriety (unfairness). These groupings are neither exhaustive nor mutually exclusive. The classification is valuable, resting on two important distinctions: one between substance (unlawfulness and unreasonableness) and procedure (procedural unfairness); the other between hard-edged questions (unlawfulness and unfairness) and soft questions (unreasonableness)."

13. The above passage reflects the classic statement of the grounds for judicial review given by Lord Diplock in the House of Lords in ***Council of Civil Service Unions v. Minister for the Civil Service*** [1985] A.C. 374 that "*…one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety".*" The first two heads are reviews of substantive lawfulness and the third ground is a review of procedural lawfulness. These terms have been widely employed by the courts since this case: see e.g. ***R (Bancoult) v. Secretary of State for Foreign & Commonwealth Affairs (No. 2)*** [2009] 1 A.C. 453 where at para. 35 Lord Hoffmann referred to "*review on the ordinary principles of legality, rationality and procedural impropriety*").

14. Under the heads of 'legality' and 'rationality' the substantive legal requirements, which can be enforced through an application for judicial or statutory review, include:

    (i) the need for there to have been legal power or 'vires' for the decision-maker to make the decision in the particular circumstances;

    (ii) compliance with relevant legislation (including EU law and the ECHR rights transposed into domestic law by the Human Rights Act 1998, in which contexts any interference with EU or ECHR rights must serve a legitimate interest and be proportionate);

(iii) correctly interpreting any applicable policy statements (such as the terms of local development plans that set the framework for development consent decisions, or of national planning policy guidance);

(iv) compliance with any applicable substantive rules of common law;

(v) taking into account all relevant considerations;

(vi) not taking into account irrelevant considerations; and

(vii) providing adequate and intelligible reasons for the decision, in circumstances where there is a legal requirement to state the reasons at the time the decision is made.

15. Additionally, the requirement of 'rationality' means that the decision in question must also be within the range of reasonable responses open to the decision-maker in the circumstances of the case and based upon the evidence before him/her (known as the principle of *Wednesbury* reasonableness after the judgment in ***Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*** [1948] 1 K.B. 223 which first outlined the principle). This requirement is the focus of the present communication, which alleges that it is in practice very hard to demonstrate that conclusions reached by decision-makers in the planning and environmental context are outside the range of reasonable responses open to them (i.e. *Wednesbury* unreasonable). As to this:

a. In places, the Communication gives the misleading impression that *Wednesbury* reasonableness is the only requirement of substantive legality. As we have explained the foregoing paragraphs, *Wednesbury* reasonableness is just one element of the various substantive legal requirements which public authorities' decisions must comply with, and which can be enforced through an application for judicial review or statutory review in

accordance with Article 9(2). For the reasons set out above, Article 9(2) is concerned with access to a court or tribunal, not with the content of domestic law relating to the requirements for a decision to be lawful.

b. The application of the *Wednesbury* test is flexible and context-specific. The Courts have long been prepared to calibrate the parameters of what is 'reasonable' (and thus lawful) according to the nature of the issues and the importance of any rights involved. See e.g. ***R. v. Department for Education and Employment, ex parte Begbie*** [2000] 1 W.L.R. 115, where Laws LJ described the concept of *Wednesbury* reasonableness as "*a spectrum, not a single point*" and observed that "*the Wednesbury principle itself constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake*". The High Court has recently held that, in the context of a judicial review claim of an environmental permitting decision within the scope of the Aarhus Convention, "*careful scrutiny*" is required of the reasonableness of the challenged decision, which the Court saw as a "*more intensive form of scrutiny*" than in other contexts: see ***R (McMorn) v. Natural England*** [2016] P.T.S.R. 750, per Ouseley J. at paras. 174 and 204-205 [the full judgment is enclosed].

c. There are sound reasons for this approach. In circumstances where all other requirements of substantive legality are satisfied (i.e. the decision-maker had legal authority to make the decision, complied with relevant legislation and common law principles, correctly interpreted any applicable policy, took into account relevant considerations, did not take into account any irrelevant considerations, and gave adequate and intelligible reasons if required to do so), and where the challenge is to the exercise of a

discretion, a policy judgment and/or an evaluative conclusion – for example, a decision that the public interest does or does not justify the grant of consent for a project in view of the predicted adverse impacts of that project; or a conclusion that the evidence does or does not demonstrate that there would be adverse impacts – there are good reasons for according the decision-maker a margin of appreciation. Decisions of local planning authorities in the planning context are made either by, or with the benefit of the advice of, specialist officers. Central Government decisions are made either by, or with the benefit of a report from, expert Inspectors. In most cases, the officer or Inspector will have undertaken a site visit. Their advice/decisions will typically be the product of extensive consideration of the relevant documentation over a period of days and sometimes weeks. In the case of Central Government decisions, the more complex cases will involve the Inspector holding a public inquiry, again usually lasting days and sometimes weeks, at which evidence is tested in cross-examination. The Court does not have the same specialist expertise and experience as these officers or Inspectors. It is not as well placed as the elected local authority councilors or the Secretary of State to reach policy judgments, nor (unlike them) is it democratically accountable for such judgments. Further, if the Court were required to review the merits (and not merely the legality) of the decision-maker's exercise of discretion or evaluative/policy judgments in this context, that would inevitably make judicial and statutory review a more complex, lengthy and expensive process (e.g. involving expert evidence and in some cases possibly even a site visit). That would frustrate, rather than facilitate, the objectives of Article 9 of the Convention. It would also involve rewriting Article 9(2), which requires access

to court of tribunal to "review" the "legality" of relevant decisions, not an appeal against their merits.

d. The concept of *Wednesbury* reasonableness is substantially the same as the concept of *"manifest error of assessment"* which the Court of Justice of the European Union uses in considering whether national authorities of a Member State have exceeded the limits of a discretion conferred to them by EU environmental law. See Case C-508/03 ***Commission v. United Kingdom*** **(2006] All ER (D) 62** at para. 91:

> "It is also clear from … *Commission v Portugal (2004) E.C.R. 1 5517* that, in order to demonstrate that the national authorities exceeded the limits of their discretion by failing to require that an impact assessment be carried out before giving consent for a specific project, the Commission cannot limit itself to general assertions by, for example, merely pointing out that the information provided shows that the project in question is located in a highly sensitive area, without presenting specific evidence to demonstrate that the national authorities concerned made a manifest error of assessment when they gave consent to a project."

If the Communicants' complaint that the *Wednesbury* test is non-compliant with Article 9(2) of the Convention, it would follow that the EU is also in breach of the Convention. The better view, however, is that the CJEU's similar approach reinforces the conclusion that the UK's approach to substantive legality is sound.

V. CONCLUSION

16. For the above reasons the Communication does not disclose any valid grounds to justify a finding by the Committee that the procedures for judicial and statutory review in the UK is non-complaint with Article 9(2) of the Convention.

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