BEFORE:

THE AARHUS CONVENTION COMPLIANCE COMMITTEE
UNITED NATIONS, ECONOMIC COMMISSION FOR EUROPE
RE: COMMUNICATIONS 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

NOTE OF THE ORAL PRESENTATION
By Charles Banner QC to the Committee
on 5 November 2019 on behalf of
THE GOVERNMENT OF THE UNITED KINGDOM

I. INTRODUCTION

1. This Communication concerns the approach of the UK courts to judicial review and equivalent legal challenges brought in the environmental context, on substantive (i.e. non-procedural) grounds. The Communicants are not advancing their argument in relation to any specific court litigation, but rather the practice of the United Kingdom courts in public law environmental cases generally. Their complaint is about the application of what is called the ***Wednesbury*** 'standard of review' to the merits of environmental decisions – by which a decision which was so unreasonable that no reasonable decision-maker would have reached it (***Wednesbury*** unreasonable) is treated as unlawful, but a decision which is within the range of reasonable responses is (subject to compliance with other substantive legal requirements) treated as lawful.

2. This Note should be considered in combination with the UK's Observations dated 20 August 2018 and the Further Observations dated 22 October 2019.

3. The UK denies that the Communicants have demonstrated that there is or has been any non-compliance with the Convention as alleged.

4. The purpose of this oral presentation is to highlight the core points. In outline:

   (i) the Communication is insufficiently specific, arising from the fact that there is no reliance on any particular case and the Communicants' own analysis the ***Wednesbury*** standard of review is not an in principle barrier to environmental challenges succeeding (their concern is with what they say is the application of the standard in many but not all instances) ;

   (ii) the Communication is based upon a fundamental misunderstanding of the nature and requirements of the provisions of the Convention that they rely upon;

   (iii) the ***Wednesbury*** principle is just one of many principles governing the substantive lawfulness of environmental decisions; the case-law law demonstrates that there are several routes by which the courts consider substantive grounds of challenge in environmental cases, and even in relation to allegations of ***Wednesbury*** unreasonableness,[1] environmental cases can and do succeed.

[1] ***Associated Provincial Picture Houses Limited v. Wednesbury Corporation*** [1948] 1 K.B. 223; Annex 5 to the UK's Observations.

II. LACK OF SPECIFICITY IN THE APPLICATION

5. The Communicants have failed adequately to specify the alleged breach of the Aarhus Convention. Whilst it raises concerns with the ***Wednesbury*** standard of review, the Communication does not refer to a "specific current case of non-compliance",[2] and has not identified in relation to a single case that a higher standard of review would have made a difference to the outcome of the legal proceedings.

6. The result of this is that the Communication relies on general allegations of systemic approaches by the courts. These are without merit. As the UK can demonstrate, a number of environmental claims have succeeded on substantive grounds, and on a number of bases. As such, there is no systemic problem of judicial practice which prevents such claims from succeeding. It is only by examining the facts and decisions in one or more particular case(s), where domestic remedies have been exhausted, that would allow sufficient scrutiny of whether the approach of the courts has failed to comply with the requirements of the Aarhus Convention.

7. The Communicants do not take this approach. For example, in one of the main cases on which they rely, ***R (Dillner) v. Sheffield City Council***,[3] the Judge (Gilbart J.) expressly held that the result would have been the same even if a more intensive standard of review had been applied.

[2] Communication, p.1.

[3] [2016] Env. L.R. 31, Communication Annex O.

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. Our Observations and Further Observations have explained that Article 9(2) of the Aarhus Convention[4] concerns access to a court or tribunal to challenge the legality of environmental decisions. It concerns the public's ability to go to an independent body to apply the criteria of legality to environmental decisions. It does not set what those criteria of legality are, or what they should be.

9. Our analysis in this respect is consistent with, and supported by, the section of the Aarhus Convention Implementation Guide (2nd Edition, 2014) on the Access to Justice Pillar of the Convention.

    a. P.187: *"Access to justice under the Convention means access for the public to access procedures where legal review of alleged violations of the Convention and national laws relating to the environment can be requested"*
    b. P196: *"Members of the Public have the right to challenge… decisions, acts or omissions if the substance of the law has been violated (substantive legality) or if the public authority has violated procedures set out in law (procedural legality)."*
    c. P.188: *"It is clear that [the Convention's] provisions on access to justice draw on and develop established notions from international human rights law. In particular, Article 9… reinforces the right to a fair trial as provided for in* [Article 6] *of the European Convention on Human Rights"*.

[4] This is the main focus of the Communication; the same would apply as is relevant for Arts 9(3) and 9(4).

10. According to the UK's system of administrative law, Governmental decisions will for most purposes be assumed to be lawful unless they have been quashed by a court. When a claim is brought challenging the legality of a particular decision, the court assesses that decision against a number of criteria of legality. The ***Wednesbury*** case explains some of those criteria of legality.[5] It is part of the "substance of the law". As the Implementation Guide notes, Article 9 is about ensuring members of the public have effective access to a review to determine whether the "substance of the law" has been complied with, it is not about what the "substance of the law" should contain.

11. I invite you to read the ***Wednesbury*** judgment in full (Annex 5 to our Observations) as this will clearly demonstrate that it is about the substantive domestic law principles concerning what is and what is not a lawful decision. It is not about effective access to a court. It is about the substantive law that the court is to apply. It is therefore not a matter which is affected by Article 9(2).

12. The same point applies to Article 9(3), which concerns challenges to acts which contravene provisions of a Party's national law relating to the environment. The ***Wednesbury*** approach is one aspect of the consideration by judicial review of whether acts have contravened a Party's national law. Article 9(3) does not affect the content of national law, but merely access to the means of determining whether that law has been breached. The Communication (p.16), referring to the Aarhus Convention Implementation Guide, does not suggest that the approach under Art 9(3) is different to that under Article 9(2).

[5] The case ***In the matter of an Application by Paul McNamara for Judicial Review*** [2018] NIQB 22, Case 12 of the Communicants' 21 October 2019 Case-Law Update, makes the point clearly. At paragraph 17, the Court referred to the approach of the courts taken in environmental cases as "governing legal principles".

13. As is relevant to this communication, Article 9(4) concerns remedies and procedures for breaches of the law. It does not affect what the content of national law should be, but rather the processes for determining breach of national law, and the remedies consequent to a finding of a breach of national law. There is no basis for saying that applying an unreasonableness standard as a criterion of legality is contrary to this provision.

14. Article 3(1) does not add anything to the Communicants' complaints under Article 9(2), as it does no more than require the Parties to take measures to implement the provisions of the Convention. If there is no breach of Article 9, there is no breach of Article 3(1).

IV. THE SEVERAL ROUTES BY WHICH THE COURTS CONSIDER SUBSTANTIVE GROUNDS OF CHALLENGE IN ENVIRONMENTAL CASES

15. Our Further Observations, dated 22 October 2019, explain that there are a number of grounds on which the substantive legality of environmental decision may be questioned, going beyond procedural complaints.[6] These include:
    - error of fact;[7]
    - misunderstanding evidence;[8]

[6] The Communication is therefore predicated on the wrong basis. The Communication states at p.13 "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".

[7] See ***R (Baroness Cumberledge of Newick) v. Secretary of State for Communities and Local Government*** [2018] P.T.S.R. 2063, United Kingdom Further Observations, Appendix 3.

- carrying out insufficient investigations;[9]
- failure to take into account material considerations;[10]
- taking into account immaterial considerations;[11]
- misinterpretation of legislation;[12]
- misinterpretation of policy;[13]
- insufficient reasoning;[14] and
- incorrect categorisation of decisions in legal terms.[15]

16. A potential claimant is not restricted to claiming that a decision is ***Wednesbury*** unreasonable (irrational),[16] even aside from the important safeguards of procedural requirements.

17. Further, it is not the case that a claim which is brought on a ***Wednesbury*** basis will inevitably fail. The fact that such claims are still brought, over seventy years after the decision in ***Wednesbury***, indicates that claimants do not perceive this to be the case. The United Kingdom has assembled a number of

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[8] See ***Re Alternative A5 Alliance's Application for Judicial Review*** [2013] NIQB 30, United Kingdom Further Observations, Appendix 4.
[9] See ***R (Padden) v. Maidstone Borough Council*** [2014] Env. L.R. 20, United Kingdom Further Observations, Appendix 5.
[10] See ***R (Squire) v. Shropshire Council*** [2019] Env. L.R. 36, United Kingdom Further Observations, Appendix 6
[11] See ***McMorn v. Natural England*** [2016] P.T.S.R. 750, United Kingdom Further Observations, Appendix 7.
[12] See ***R (Save Woolley Valley Action Group) v. Bath and North East Somerset Council*** [2013] Env. L.R. 8, United Kingdom Further Observations, Appendix 8.
[13] ***HJ Banks & Co Ltd v. Secretary of State for Communities and Local Government*** [2019] P.T.S.R. 668, United Kingdom Further Observations, Appendix 9.
[14] ***AI Walgate & Son v. Scottish Natural Heritage*** [2017] CSOH 51, United Kingdom Further Observations, Appendix 13.
[15] ***R (Wakil) v. Hammersmith and Fulham London Borough Council*** [2013] Env. L.R. 3, United Kingdom Further Observations, Appendix 15.
[16] In Case 12 of the Communicants' 21 October 2019 Case-Law Update, ***Persimmon Homes Ltd v. The Scottish Ministers*** [2019] CSIH 30, the appeal succeeded on the basis that the decision-maker had failed to take into account a material consideration (paragraph 34).

cases in the environmental context in which the courts were not satisfied that the decision was reasonable.

18. To take one example, ***R (Wealden District Council) v. Secretary of State for Communities and Local Government***,[17] Jay J. found that the advice from Natural England (the United Kingdom's adviser for the natural environment in England) was "plainly erroneous". The Judge considered the scientific logic of Natural England's position, found it to be illogical, and held that this meant that the challenged decision which relied on the advice was ***Wednesbury*** unreasonable. It is therefore not the case that, provided there is some information on a particular point, a UK court will not entertain any challenge to the question of whether the information is capable of leading to a sound conclusion on the point.[18]

19. The Committee is respectfully invited to consider the UK's Further Observations in some detail, providing as they give a number of examples of successful environmental claims, including on the basis of unreasonableness.

20. There are examples of environmental claims which are successful on the ground of irrationality in combinations with other grounds of challenge, or where it is found that a decision would be found to be irrational were it necessary to do so.[19] This is unsurprising: if a decision is one which no reasonable decision-maker could have made, then there is a good prospect that the decision-maker will have made some other error.

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[17] [2017] Env. L.R. 31, United Kingdom Further Observations, Appendix 20.

[18] Communicants' Reply to Observation (3 October 2018), paragraph 5.

[19] ***R (Roskilly) v. Cornwall Council*** [2016] Env. L.R. 21, United Kingdom Further Observations, Appendix 21; ***Obar Camden Ltd v. London Borough of Camden*** [2016] J.P.L. 241, United Kingdom Further Observations, Appendix 22; ***R (Manchester Ship Canal Co Ltd) v. Environment Agency*** [2013] J.P.L. 1406, United Kingdom Further Observations, Appendix 23.

V. CONCLUSION

21. For the reasons given in its Observations, Further Observations and in this Oral Presentation, it is contended that the Committee should not hold that the UK has failed to comply with the Convention in the way alleged by the Communicants.

22. Neither the Communicants nor the UK suggest that there is a material difference for the purposes of this Communication between the different jurisdictions in the UK.

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