Re Communication ACCC/C/2017/156

UNITED KINGDOM'S COMMENTS ON COMMUNICANT'S RESPONSE TO COMMITTEE'S QUESTIONS

7th August 2020

INTRODUCTION

1. The United Kingdom makes the following Comments in relation to the Communicants' Response to the Committee's questions, posed on 1 June 2020. In making these Comments, the United Kingdom limits itself to making specific points in response to the Communicants' Response. By doing so, the United Kingdom must not be taken to have abandoned the wider points it made in its own Response to the Committee's questions.

MEANING OF "SUBSTANTIVE LEGALITY"

2. The United Kingdom restates its definition of "substantive legality" as given in its Response to the Committee's questions (Section I). The Communicants explain the meaning of the phrase (Response, p.1) as "a reference to the decision being soundly based in law and fact, including by reference to the procedural requirements of the Convention". The Communicants' reference to factual basis is notable. At no point does Article 9(2) indicate that a member of the public must be permitted to challenge the factual findings of the decision-maker. Indeed, there is no reference to factual matters at all in Article 9(2).

RELIANCE ON THE CJEU CASE OF *SWEETMAN*

3. The Communicants' Response relies heavily (pp.4-7, 21) on the decision of the Court of Justice of the European Union in Case C-258/11 ***Sweetman v An Bord Pleanála***.[1] This appears to be para. 44 of the CJEU's judgment, which stated:

> ""[44] 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."

4. The first point to note is that the CJEU was not considering the requirements of Arts 9(2) or (3) of the Aarhus Convention. Indeed, the Convention is not mentioned in the CJEU's judgment. The CJEU is a court of one of the Contracting Parties to the Convention. It cannot conclusively determine the requirements of the Convention. The requirements of Articles 9(2) and (3) are as explained in the United Kingdom's Response to Questions.

5. Secondly, the correct interpretation of the CJEU's decision, and its implications for environmental judicial review in the United Kingdom is not a question of compliance with the Aarhus Convention.

6. In any event, it is clear from the CJEU's judgment that it considered that the decision-maker for the purposes of determining compliance with the Habitats

[1] [2014] P.T.S.R. 1092, http://curia.europa.eu/juris/document/document.jsf;jsessionid=D893D1D67EB2278D3BF9A7CC634FC9AB?text=&docid=136145&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=11731222

Directive was the "competent national authority", not a court.[2] At para. 46, the CJEU stated:

> "if, after an appropriate assessment of a plan or project's implications for a site, carried out on the basis of the first sentence of Article 6(3) of the Habitats Directive, the competent national authority concludes that that plan or project will lead to the lasting and irreparable loss of the whole or part of a priority natural habitat type whose conservation was the objective that justified the designation of the site concerned as an SCI, the view should be taken that such a plan or project will adversely affect the integrity of that site."

REFERENCE TO PRIVATE LAW ENVIRONMENTAL CLAIMS

7. The Communicants make a new point in their Response to Questions. They state that it cannot be correct that judges lack the ability to determine the substance of environmental matters, since they determine the merits of contested environmental matters in private law disputes (p.4).

8. No examples are given of such private law disputes, and no cases are referred to, in support of this argument. It is misconceived. A typical private law environmental dispute would be a claim in the tort of nuisance:[3] for instance, a claim that the defendant's user of land was noisy, such as to cause an unlawful interference with the claimant's enjoyment of its land. This claim would focus on the reasonableness of the defendant's action, and the demonstrated level of impact of the noise upon the claimant's land.

[2] Incidentally, this is the approach taken by Lang J in ***Abbotskerswell Parish Council v Teignbridge District Council*** [2015] Env. L.R. 20, a case relied upon by the Communicants (Communication, p.6). She rejected an argument that the reference in a single sentence of para. 44 of ***Sweetman*** to it being "for the national court to establish" whether requirements were met should be interpreted as meaning that a reviewing court should carry out a full merits review of the local planning authority's assessment. Lang J stated at para. 36 that it was plain from para. 46 of *Sweetman* that the decision was for the competent national authority, not the court. https://www.bailii.org/ew/cases/EWHC/Admin/2014/4166.html

[3] See, for example, ***Lawrence v. Fen Tigers Ltd*** [2014] A.C. 822, https://www.bailii.org/uk/cases/UKSC/2014/13.html

9. This is a different type of question to that which arises in a public law environmental claim. Such a claim will typically relate to the predicted effect of a proposal. It will typically relate to a balance between benefits and environmental harms. In ***McMorn v. Natural England*** Ouseley J rejected a distinction between challenges which seek to protect the environment, and those which seek to cause harm.[4] He stated at para. 242:

> "such a distinction cannot be operated without the court forming a value judgment, which it is far from best placed to reach, as to whether a decision would advance or harm or be neutral in its effect on environmental interests. Culling wildlife to protect other wildlife, damage to some environmental interest in the interests of renewable energy, illustrated the sort of problems which would have to be resolved…"

10. There is no requirement in Article 9 of the Aarhus Convention that such judgments have to be resolved by a court, rather than by or on behalf of an elected decision-maker. Nor is it a requirement of Article 9 that the determination of the question of what is in the interests of the environment, and how that is to be balanced with other concerns, must be judicialised and legalised.

RELIANCE UPON EXPERTS

11. On p.8, the Communicants state:

> "The Court of Appeal's completely hands-off approach in ***Langton*** means that a public body's decision would be lawful and unchallengeable by judicial review simply because it was supported by a single sentence in an unexplained report from a single "expert" which was contradicted by a wealth of detailed and reasoned data-based analysis."

12. This is an exaggeration and does not reflect the reality. On the substantive requirements of United Kingdom law, a decision will be unlawful if it is not

[4] United Kingdom's Response to Communication, Annex 1.

reasonably open to the decision-maker, on all the evidence. The fact that an advisor has asserted something does not mean that a decision-maker can lawfully conclude that it was correct. This was clear from ***R (Wealden District Council) v. Secretary of State for Communities and Local Government***.[5] At para. 111, Jay J held:

> "applying traditional public law principles to this case, I am driven to conclude that the [Habitats Regulations Assessment] is vitiated by Natural England's plainly erroneous advice. I have reached this conclusion on two bases: the first, because the decision-makers should have undertaken further inquiry of Natural England in circumstances where no explanation had been given for not aggregating two amounts; the second, because Natural England's error directly infects the decision-making process."

13. Secondly, in ***Hale Bank Parish Council v. Halton Borough Council***,[6] Lieven J held at para. 54:

> "In my view the vice (and legal error) in this case is twofold. Firstly, the [Officer's Report to the Planning Committee] told members nothing about why, or on what basis, [Development Plan Policy] WM1 was met. It simply said that the Council's advisor (Ms Atkinson) had confirmed that the applicant had supplied sufficient information to demonstrate compliance. The members were therefore not in a position to make up their own minds, but equally were not in a position to reach a view as to the conclusion reached by Ms Atkinson. Secondly, when the background material is examined it is clear that Ms Atkinson had simply accepted Veolia's [the holder of the planning permission's] assertion that the site was chosen because of proximity to Veolia's depot, and "therefore allocated sites were not considered suitable". There was no investigation or even consideration of the suitability or availability of alternative sites. The officers accepted Ms Atkinson's advice and themselves asked no further questions."

14. Therefore, the fact that the Planning Committee had been told that an advisor was satisfied of something did not, of itself, entitle the Planning Committee to reach that conclusion.

---

[5] [2017] Env. L.R. 31, Annex 20 to the United Kingdom's Further Observations received 22 October 2019.
[6] [2019] EWHC 2677 (Admin), http://www.landmarkchambers.co.uk/wp-content/uploads/2019/10/Hale-Bank-Parish-Council-Approved-Jud-9.10.19.pdf

15. Furthermore, a decision must proceed on a sound logical basis from its premises. As Holgate J said in ***Trustees of the Barker Mill Estates v. Test Valley Borough Council***:[7]

> "irrationality challenges are not confined to the relatively rare example of a "decision which simply defies comprehension". They also include a decision which proceeds from flawed logic: see *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, para 65."

"PROPER ASSESSMENT"

16. The Complainants argue that a review of substantive legality requires a court to satisfy that there had been a "proper assessment" of the environmental issues.

17. In ***R (Squire) v. Shropshire Council,***[8] the Court of Appeal quashed a decision of a local planning authority to grant planning permission for an intensive poultry-rearing facility. At para. 69, Lindblom LJ held:

> "the environmental statement was deficient in its lack of a proper assessment of the environmental impacts of the storage and spreading of manure as an indirect effect of the proposed development. In this respect it was not compliant with the requirements of the EIA Directive and the EIA regulations."

18. This was the basis for quashing the grant of planning permission (para. 82).

19. A court may therefore quash a grant of planning permission on account of failure to carry out a proper assessment of environmental matters. What a decision-maker must demonstrate in order to show legally-compliant assessment is, of course, a matter for domestic law, and a matter which Article 9 of the Convention does not seek to control.

[7] [2017] P.T.S.R. 408, para. 26, https://www.bailii.org/ew/cases/EWHC/Admin/2016/3028.html
[8] [2019] Env. L.R. 36, https://www.bailii.org/ew/cases/EWCA/Civ/2019/888.html

THE *PACKHAM* CASE

20. The Communicants rely (p.10) upon the decision of the Divisional Court in ***Packham v. Secretary of State for Transport***, in relation to compliance with Article 9(3).[9] This provides no support for an argument that the United Kingdom has failed to ensure that members of the public have access to judicial procedures to challenge acts by public authorities which contravene provisions of its national law.

21. The claim was lodged by the claimant on 27 March 2020 (a Friday). The matter was urgent, since the claimant sought to prevent works being carried out which were due to occur within a short time. The Divisional Court held a hearing on 3 April 2020, the Friday after the claim was issued. The claimant was told the same day that permission to bring the judicial review proceedings had been refused, and the claim for an interim injunction was dismissed. The Divisional Court gave reasons for that decision on Monday 6 April 2020, the next working day. The Divisional Court provided a detailed judgment of 133 paragraphs, extending over 28 pages.

22. Viewed in this context, the decision in ***Packham*** is an example of the ability of the English courts to accommodate environmental challenges. In terms of access to judicial procedures to bring environmental claims, which is in essence what Article 9(3) actually requires (rather than what the Communicants say it requires), ***Packham*** is a striking success.

23. On pp.20-21, the Communicants refer to the Court assuming that the Secretary of State was aware of (and had therefore evaluated) information on the

[9] [2020] EWHC 829 (Admin), https://www.bailii.org/ew/cases/EWHC/Admin/2020/829.html

environmental impacts of the project. It is not clear what aspect of the Divisional Court's lengthy and detailed judgment the Communicants are referring to. If it is a reference to the Court's consideration of Ground 2: Local Environmental Concerns, then it must be seen in the context of para. 73 of the Judgment:

> "Although we analyse below the ways in which Ground 2 was argued at the hearing, we should say at the outset that we consider that this Ground fails at the very first hurdle. Mr Wolfe QC accepted that there was nothing in the challenge under this Ground which raised anything which had not already been considered by Parliament during its deliberations leading up to the passing of the 2017 Act.[10] In other words, the environmental concerns relied on did not arise out of any changes in the situation since the 2017 Act was passed; neither did they arise out of anything that the OR did or failed to do. They are simply a re-run of the points made 4, 5, 6 years ago during the debates about HS2. In our view, therefore, it is entirely illegitimate to seek to reopen these matters in the guise of a challenge to the OR[11] and the decision of 11 February.[12]

24. The Judgment held that the terms of reference of the Oakervee Review did not require it to undertake a detailed, or "full" environmental assessment (para. 85). Environmental impacts had already been considered in detail in relation to Phase 1 of HS2, and would be considered in the future for Phase 2 (para. 86).

25. An appeal against the Divisional Court's decision was heard on 8 July 2020. Detailed judgment was handed down on 31 July.[13]

26. The Court of Appeal recorded the Divisional Court's finding that the challenge required only a "low intensity of review" (para. 48). This was accepted by Mr Wolfe QC, acting as counsel for the claimant. Whilst finding this approach to

[10] United Kingdom's Note: The High Speed Rail (London – West Midlands) Act 2017. This had involved detailed consideration of environmental considerations by a Parliamentary Select Committee.
[11] United Kingdom's Note: The Oakervee Review into HS2, undertaken in 2019.
[12] United Kingdom's Note: the decision by the Secretary of State for continue with the High Speed 2 rail project.
[13] [2020] EWCA Civ 1004, https://www.judiciary.uk/wp-content/uploads/2020/07/R-on-the-application-of-Packham-v-Secretary-of-State-for-Transport-judgment-31-July-2020.pdf

be "clearly correct" (para. 49), the Court of Appeal observed that the intensity of review may have been only hypothetical, stating at para. 50:

> "The main burden of the arguments presented to us, on both grounds, is that the Government lapsed into misunderstanding in making the decision under challenge. If that contention were made good, the court would have to consider whether any such misunderstanding was material. But if the contention is not made good on either ground, the challenge must fail in any event, no matter whether the appropriate standard of review is "light touch" or more intense."

27. This, once again, demonstrates the problems with arguments essentially of systemic non-compliance with the Convention. The ***Packham*** case was not one in which a higher intensity of review would have made any difference to the outcome.

28. The Court of Appeal also said this about the approach of review (para. 51):

> "It is, of course, fundamental that both the intensity of review and the extent to which a court will accord a margin of judgment or discretion to a decision-maker will always depend on fact and context. The intensity of the review and the breadth of the margin of discretion accorded are conceptually different. The court may closely scrutinise the reasoning for a decision yet still conclude it is proper to accord the decision-maker a broad margin of discretion."

29. The Court of Appeal considered that the decision-maker was entitled to a broad margin of discretion (para. 52). This was for a number of reasons, including that a number of significant, and potentially conflicting, considerations had to be balanced. There was not a single "right" decision.

30. Following a detailed consideration of the legal arguments, the Court of Appeal held that the grounds pursued were not properly arguable (para. 105).

RELIANCE ON SUCCESSFUL CLAIMS

31. The Communicants rely heavily (pp.11-16) upon the case of ***Swire v. Secretary of State for Housing, Communities and Local Government***.[14] Given that this claim has been the subject of a conclusive judicial decision, what matters in terms of the compliance of the United Kingdom with the Aarhus Convention is the outcome of the claim, not what the parties to the claim might have stated. The Secretary of State's decision was quashed on the basis of misinterpretation of the legal provisions, and therefore will have to be redetermined. The court determined the requirements of the law for itself. Lang J found that the Secretary of State had applied the wrong legal test (para. 105), and the decision was therefore quashed (para. 111).

32. The Communicants likewise place considerable weight (p.19) upon the decision in ***Stephenson v. Secretary of State for Housing, Communities and Local Government***.[15] This claim was successful, and part of the National Planning Policy Framework (a document of considerable significance in the English planning system) was quashed.

33. The Communicants refer (p. 22) to ***R (RSPB) v. Secretary of State for the Environment, Food and Rural Affairs***.[16] The Court of Appeal in that case found that the Secretary of State had misinterpreted the conservation objectives for a Special Protection, and its decision to direct Natural England was flawed.

34. With respect to the Communicants, claims in which challenges to environmental decisions are successful are no basis for an argument that members of the public do not have a review procedure to challenge the substantive and procedural legality of a decision (Article 9(2)), or that members

[14] [2020] EWHC 1298 (Admin), https://www.bailii.org/ew/cases/EWHC/Admin/2020/1298.html
[15] [2019] P.T.S.R. 2209, https://www.bailii.org/ew/cases/EWHC/Admin/2019/519.html
[16] [2015] Env. L.R. 24.

of the public do not have access to judicial procedures to challenge acts of public authorities which contravene provisions of its national law relating to the environment (Article 9(3)).

35. As the United Kingdom has repeatedly emphasised, this Communication does not relate to a specific case. To succeed, it must therefore demonstrate a systemic breach on the part of the United Kingdom. There is no such breach. The *successful* claims relied upon *by the Communicants* reinforce this point.

SCOTTISH CASES

36. Neither of the Scottish cases on which the Communicants rely support their position.

37. ***Liddell v. Argyll and Bute Council*** was a challenge on the basis that a grant of planning permission by the council had failed to identify and define the setting of a historic building.[17] The listed building was 1.5km from the proposed development site. Professional representations had been made against the grant of planning permission on behalf of the petitioners, but these did not mention an impact on the setting of the historic building. In this context, mentioned at para. 15 of the Court of Session's decision, its rejection of the petition is entirely unsurprising.

38. In relation to ***City of Edinburgh Council v. Scottish Ministers***,[18] the Communicants rely upon para. 45 of the decision, which set out the Court of Session's conclusions in relation to an argument that the decision-maker had given insufficient reasons for his decision. Paragraph 45 states:

[17] [2020] CSIH 30.
[18] [2020] CSIH 13.

> "Applying [legal principles set out above] to the fourth ground, the decision letter is clear and concise. It does not leave the informed reader in any doubt about the Reporter's reasons. He determined, as a matter of planning judgment, that, having regard to the LDP [Local Development Plan] policy which he cited and the other material considerations, notably the part implementation of the original permission and the continuing nature of the development on the site, the time for approval of the remaining reserved matters ought to be extended. The reason for that was to allow the development to continue, without substantial delay, rather than to require the developers to apply for an entirely new permission. It was not necessary, on that line of reasoning, to engage in any detail with submissions about changes in certain other aspects of the LDP, such as increased contributions, flood related issues, cycling routes and open space or play areas which would not have altered the decision. The Reporter's relatively summary dismissal of these objections to the application notably those of Mr Gibbons, was appropriate in that context."

39. It is impossible to see how this indicates a breach of Article 9 of the Convention.

CHARLES BANNER Q.C.
ALISTAIR MILLS