



1 June 2020

Danielle Angelopoulou
Department of Environment, Food & Rural Affairs
London, United Kingdom

Carol Day and Rosie Sutherland
Royal Society for the Protection of Birds
Beldforshire, United Kingdom

Will Rundle
Friends of the Earth (England, Wales and Northern Ireland)
London, United Kingdom

Mary Church
Friends of the Earth Scotland
Edinburgh, United Kingdom

Rosa Curling and Rowan Smith
Leigh Day
London, United Kingdom

Dear Madams/Sirs,

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by the United Kingdom of Great Britain and Northern Ireland with the provisions of the Convention on access to justice concerning the review of substantive legality (ACCC/C/2017/156)

During the hearing to discuss the substance of the above communication ACCC/C/2017/156 at its sixty-fifth meeting (Geneva, 4-8 November 2019), the Committee indicated that it would send questions for the written replies of the Party concerned and the communicant. Please now find **enclosed** the questions prepared by the Committee for your attention.

The Committee would be very grateful to receive your replies to the enclosed questions on or before **Monday, 29 June 2020**. Please send your reply to aarhus.compliance@unece.org, copying the other party. The other party will have two weeks from the receipt of your answer to provide the Committee with any comments it wishes to make on your reply.

Please do not hesitate to contact the secretariat if you have any questions regarding the above.

Yours sincerely,



Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee

- Cc: Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Office and other international organizations in Geneva
- Enc: Questions from the Committee to the Party concerned and the communicants

Questions to both the Party concerned and the communicants:

1. What does the term “substantive legality” in article 9(2) of the Convention mean in your view?
2. Please list all the grounds for judicial review in each of England and Wales, Scotland, and Northern Ireland. For each jurisdiction, which of these grounds are considered to involve review of “procedural legality” and which involve review of “substantive legality”?
3. Please confirm in writing that, as stated orally by both parties at the hearing on 5 November 2019, for the purpose of this communication there is no material difference between the law governing the standard of review in England and Wales, Scotland, and Northern Ireland.
4. For each of the four examples that the communicants presented at the hearing on 5 November 2019 in response to an invitation from the Chair to present specific examples (i.e. *Foster*,¹ *RSPB*,² *Sustainable Shetland*,³ and *Langton*⁴), please explain why, in your view, the standard of review applied by the court was or was not compatible with the standard of review required by article 9(2) and (3) of the Convention.
5. The Party concerned has submitted that *McMorn*⁵ now stands as precedent that in Aarhus claims the test for judicial review is “careful scrutiny”.⁶ Please provide evidence, in the form of a Table, of judgments within the scope of article 9(2) and (3) of the Convention issued by the High Court and higher instances in each of the three jurisdictions **since *McMorn*** to demonstrate whether the standard of “careful scrutiny” is indeed now the standard to be applied in any such cases.

For each judgment listed in your Table, please include the following:

- (a) Case name;
- (b) Case reference;
- (c) Jurisdiction (England and Wales, Scotland or Northern Ireland);
- (d) Whether the case was within the scope of article 9(2) or (3) of the Convention;
- (e) The brief text of the judgment in which the court sets out the standard of review to be applied in the case;
- (f) The paragraph or page number of the judgment where that text is to be found.

Please note that it is not expected that your Table should exhaustively list all relevant cases decided since *McMorn*. However, it should provide enough examples of judgments clearly within the scope of article 9(2) and (3) in each jurisdiction to demonstrate to the Committee what test is in practice being applied.

¹ *R (on the application of (1) Foster (2) Langton) v Forest of Dean District Council (Defendant) and (1) Homes and Communities Agency (2) Natural England (Interested Parties)* [2015] EWHC 2648 (Admin).

² *Royal Society for the Protection of Birds v Scottish Ministers* [2017] CSIH 31.

³ *Sustainable Shetland v Scottish Ministers* [2013] CSOH 158 and [2014] CSIH 60.

⁴ *R (on the Application of Langton) v (1) Secretary of State for the Environment, Food & Rural Affairs (2) Natural England* [2019] EWCA Civ 1562.

⁵ *R (McMorn) v Natural England* [2016] PTSR 750.

⁶ Party concerned’s response to the communication, 20 August 2018, para. 15(b), and its further observations, 22 October 2019, para. 6.

6. Following on from question 5, what is the definition of an “Aarhus claim” used by the courts in each of the three jurisdictions of the Party concerned for the purposes of establishing the applicable standard of review (as opposed to the applicable rules on costs). Please provide the text of where this definition is set out in the legislation or jurisprudence of each of the three jurisdictions of the Party concerned.

Question to the communicants:

7. At numbered paragraphs 1-7 on pages 16-17 of the communication, you set out a list of elements that you claim a review of the “substantive legality” of a decision subject to article 9(2) requires. Which of these elements do you consider to be satisfactorily addressed by the scope of judicial review in each of the three jurisdictions of the Party concerned and which are not? With respect to those elements that you claim are not currently addressed by the system of judicial review in the Party concerned, please provide relevant excerpts of recent judicial decisions within the scope of article 9(2) of the Convention to support your answer.

Questions to the Party concerned:

8. At numbered paragraphs 1-7 on pages 16-17 of the communication, the communicants set out a list of elements that they claim a review of the “substantive legality” of a decision subject to article 9(2) requires. Do you agree that a review of “substantive legality” under article 9(2) should cover all of the elements on this list, including the content of the seven elements as there described? If not, which of these elements do you consider a review of “substantive legality” under article 9(2) is not required to address?
9. Do you agree with the communicants’ assertion at page 16 of the communication that the standard of review to be applied under article 9(3) covers both procedural and substantive legality and that it is identical to the standard required by article 9(2)? If not, what do you consider to be the standard of review required under article 9(3)?
10. Paragraph 15(b) of the Party concerned’s response to the communication states:

“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*” (emphasis in original).

If the *Wednesbury* principle “constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake”, please explain:

- (a) How can the claimants in a case know, either before filing the proceedings or, at the latest, at the time of making their written and oral submissions, the standard of review that will be applied by the court in their case?

- (b) What criteria are used to assess the “nature” and, in particular, “gravity” of what is at stake in any particular case? Please provide evidence to substantiate your answer.
 - (c) Is the same standard of review to be applied to all Aarhus claims, or are some to be considered more “grave” than others? If so, what standard of review applies to “grave” Aarhus claims and what standard to “less grave” Aarhus claims?
 - (d) How does a flexible and “sliding scale” of review meet the requirement in article 3(1) of the Convention for a clear, transparent and consistent framework to implement the Convention?
-