Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10
Switzerland

3rd July 2019

Dear Ms Marshall,

Re: PRE/ACCC/C/2017/156: Case-law update and request for expedition

We write to update the Compliance Committee on recent judgments of the High Court and request the Committee consider expediting the above Communication in light of the UK's imminent departure from the EU and concerns due to future governance arrangements within the UK yet to be finalised. We expand on both of these points below.

The Heathrow Judgment

The Heathrow case (*R (Spurrier & Others) v Secretary of State for Transport* [2019] EW HC 1070 (Admin)) encompassed five claims for judicial review challenging the Secretary of State for Transport's decision to designate an Airports National Policy Statement (ANPS). The ANPS sets out the Government's policy on the need for new airport capacity in the South East of England and its preferred location - namely a new runway at Heathrow.

The first claim comprised the London Borough of Hillingdon (in which Heathrow is situated) and four adjacent boroughs, the Mayor of London and Greenpeace. Two other claims were brought by Plan B Earth and an individual claimant (Mr Spurrier). A further claim was brought by the promoters of a rival Heathrow scheme, which would double the length of the existing northern runway to allow it to operate as two independent runways. The final claim was brought by Friends of the Earth Ltd, represented by Leigh Day (instructing Peter Lockley, David Wolfe QC and Andrew Parkinson). Both Friends of the Earth and Leigh Day are Communicants in the above Communication, in which we are fortunate to be advised by David Wolfe QC.

On 1st May 2019, the Court handed down two judgments, one dealing with 22 grounds of challenge in the environmental claims (claims 1, 2, 3 and 5 referred to above) and the second judgment dealing with the fourth claim. In respect of the environmental claims, the High Court held:

- **Hillingdon claimants**
  - **Surface access** – permission for both grounds refused;
  - **Air Quality** – permission for all five grounds refused;
  - **Habitats** – permission for both grounds granted but application dismissed;

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- **SEA** – permission granted on both grounds but application dismissed. Remaining three grounds refused permission; and
  - **Consultation -** permission granted on one ground but application dismissed.

- **Friends of the Earth**
  - **Climate Change -** all three grounds refused permission (awaiting a decision regarding permission to appeal).

- **Plan B claim**
  - permission on all three grounds refused.

- **Mr Spurrier**
  - Permission on all six grounds refused.

The lengthy and detailed judgment dealing with the 22 environmental grounds is attached to this letter. The main grounds of challenge fell within the following categories: climate change [paragraphs 558-660], air quality [220-285], surface access [185-219], noise [464] and habitats [286-373].

There are numerous references to the appropriate standard of review to be applied in this case throughout the judgment and this was an issue of some considerable debate during the hearing. The main paragraphs of relevance are highlighted in the second attachment to this letter (**Heathrow Judgment – key passages**) and, while the judgment in its entirety provides the necessary contextual framework, paragraphs 141-184 and 344-352 are particularly germane to this Communication.

While counsel for the claimants submitted that the nature of the issues involved (including climate change, air quality and other environmental issues of critical national and global importance) warrant a particularly high level of scrutiny (see for example paragraph 142), the Government argued that the threshold for judicial intervention in relation to an NPS is "very high indeed", particularly where irrationality is alleged (paragraph 143). Indeed, it is for this reason that Friends of the Earth did not pursue an irrationality ground of challenge to the substantive legality of the decision, despite very significant factual and scientific issues around the climate change impacts assessments of airport expansion and the ability of operators to mitigate increased emissions so the UK can hit national carbon reduction targets (further as to which see below related to *R (Mott) v Environment Agency* [2016] EWCA Civ 564).

The Court held that the scrutiny of review is dependent upon the circumstances of a particular case and that the requirements of procedural fairness depend on context, including the statutory framework within which the decision was taken. The Court cited case-law in support of its view that a 'low intensity' of review is appropriate in cases involving political judgment (see for example, paragraphs 149-150), where the decisions relate to a matter of national economic policy, and the Court would not intervene outside of the extremes of bad faith, improper motive or manifest absurdity. At the other end of the spectrum are decisions infringing fundamental rights where unreasonableness is not equated with 'absurdity' or 'perversity', and a 'lower' threshold of unreasonableness is used.

As pointed out in our Reply to the UK's Observations, we do not dispute that the *Wednesbury* test has the potential to act as an effective form of substantive review consistent with Article 9(2) or 9(3) of the Convention. Both the Government, and the High Court in this case, maintain the legal test is flexible and context-specific but the problem, as illustrated acutely here, is that *Wednesbury* in important environmental cases such as this is almost universally understood and applied very narrowly (but with the ultimate approach still being taken left entirely to the discretion of the particular judge(s) dealing with the case and therefore not being something that a challenger can predict with any confidence).

This is despite the Court finding that the interests that claimants seek to protect are relevant to the standard of review to be applied, and that the interests raised by the claimants in this case – such as the protection of the environment – were matters of great public importance (paragraphs 151-152). In environmental cases such as this there is almost always matters of political, scientific/factual or economic judgement that the court will refer to and apply a low level of review, whilst also citing the lack of suitability of the Judiciary themselves to effectively consider such matters (presumably even if they wanted to).

We do not attempt to highlight every instance in which – in our view - an unduly narrow interpretation of *Wednesbury* substantive review is manifest in this judgment. However, we would draw your attention to two (or three) points raised in our original Communication and Reply to the Observations made by the UK. Firstly, in cases where the grounds involve matters of scientific, technical and predictive assessment, the judges again approved the approach in *R (Mott) v Environment Agency* [2016] EWCA Civ 564; [2016] 1 WLR 4338), in which the courts afford an enhanced margin of appreciation to a decision-maker. So, for example, when considering the various points advanced by Transport for London, the assessments and judgments reached were not found to be irrational bearing in mind *Mott*. Whilst the Court refers to a flexible standard of review, the flexibility appears to be interpreted in one direction: a narrow application of *Wednesbury* based on an enhanced margin of appreciation for technical and scientific matters, yet many environmental JR claims are likely to involve scientific and technical matters.

Secondly, the Court revisited the appropriate standard of review to be applied in respect of cases concerning the Habitats Directive. Counsel for the first claimants sought to rely on *R (Lumsdon) v Legal Services* Board [2015] UKSC 41; [2016] AC 697, submitting that Article 6(3) and (4) of the Directive were to be construed as inherently incorporating proportionality. However, the Court held that these provisions do not involve any derogation from fundamental freedoms or rights of the kind with which the principles set out at in *Lumsdon* were concerned, again approving the approach taken in *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174; [2015] PTSR 1417, that although a strict precautionary approach is required for Article 6(3) of the Habitats Directive, the appropriate standard of review is the *Wednesbury* rationality standard.

We find it hard to conceive of a case raising more serious environmental considerations than this case - yet the court remains seemingly convinced that a 'low intensity' of review was appropriate in considering - and dismissing - all 22 grounds. This judgment therefore compounds our concerns that the courts have almost entirely set their minds against the more flexible approach and more intense standard of review (including in Aarhus JR claims) that the Government relies on its submissions before the Committee. We would be grateful if the Committee could take this case into account in its deliberations on this Communication.

The Hen Harrier cases

We also attach the judgment of the High Court in joined cases *R (on the application of RSPB) v Natural England: R (on the application of Mark Avery v Natural England & (1) Jemima Parry-Jones (2) Secretary of State for the Environment, Food and Rural Affairs* [2019] EWHC 585 (Admin). These claims challenged the lawfulness of a licence granted by Natural England (NE) to conduct a trial into the brood management of the Hen Harrier, a bird species listed on Annex I of the Wild Birds Directive and Schedule I of the Wildlife & Countryside Act 1981 (WCA 1981).

The main premise of the brood management scheme is that Hen Harrier eggs and chicks are removed from their parents in their nests and reared in captivity and released when they are fledged into habitat away from grouse moors (despite some of these moorland areas being Special Protection Areas (SPAs) specifically classified for Hen Harriers) on which they are routinely illegally persecuted. Both claimants argued the scheme was unlawful because of the unnecessary disturbance and harm it will cause to Hen Harriers and the existence of alternative and less invasive ways in which to conserve and protect the species. NE completed a

Technical Assessment (TA) and a Habitats Regulations Assessment (HRA) under regulation 63 of the Conservation of Habitats and Species Regulations 2017 and approved the licence in January 2018.

In setting out the regulatory framework, the Hon. Mrs Justice Lang DBE cited *R (on the application of Mynydd v Gwynt Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWCA Civ 231 as authority for a number of principles for appropriate assessments under Article 6(3) of the Habitats Directive. The final principle was that the relevant standard of review by the court is the *Wednesbury* rationality standard, and not a more intensive standard of review: *Smyth* (at [80]).

The Judge dismissed all seven grounds advanced by the RSPB and both grounds advanced by Dr Avery. Under Ground 1, both claimants submitted that NE misapplied section 16 of the WCA 1981 by treating the purpose of the licence solely as research and not including the conservation of Hen Harriers. The judge noted the differences of view between the claimants and NE on the value of brood management schemes and the effectiveness of diversionary feeding, criminal sanctions, and enforcement through licensing controls, but held that "*it is not the Court's role to adjudicate upon these issues. NE has been entrusted with the task of determining whether a licence should be granted, and the Court will only intervene if NE acts unlawfully*".

Dr Avery's main argument was that the trial was disproportionate because the licence conditions differed from those that would apply if the scheme was subsequently rolled out more widely and that this essentially made the trial worthless. However, on the basis of the research and assessments carried out, the judge was satisfied that NE was correct to conclude the proposed trial was appropriate to achieve the objective pursued. Furthermore, NE was "*entitled to exercise its discretion as to the terms of the licence, and the way in which the trial should operate. It did so lawfully – its conclusions were both rational and proportionate*".

Expedition of the Communication

As the Committee will be aware, the European Union (Withdrawal Act) 2018 (EUWA 2018) provides that the UK will leave the EU by 31st October 2019. The Department of the Environment, Food and Rural Affairs (Defra) is taking steps to address the access to justice deficit in England that will arise from the loss of the Court of Justice of the European Union (CJEU) and the citizen's complaint mechanism provided by the European Commission.

In December 2018, Defra published the Draft Environment (Principles and Governance) Bill. The Bill sets out proposals for the establishment of an Office for Environmental Protection (the "OEP"), the purpose of which is to (amongst other things) operate a complaints and enforcement policy where a public authority has failed to comply with environmental law. Thus, the body can investigate complaints, issue Information and Decision Notices and, ultimately, make an application to the High Court (in England and Wales).

Northern Ireland, Scotland and Wales have also consulted on proposals to address the access to justice deficit but it is currently unclear whether additional bodies and procedures will be established.

There has been some discussion as to the appropriate forum for environmental cases, and whether this may provide the Government with an opportunity to consider other issues, such as the intensity of review and/or the remedies available to the claimant.

We understand the Compliance Committee will be considering its next steps with regard to this, and some 17 other Communications, at its next meeting in July 2019. We also understand that we may not receive any substantive communication from the Committee until March 2020. However, we believe the outcome of this Communication is relevant to the Brexit debate and the UK's ability to move towards compliance with the requirements of Article 9 of the Aarhus Convention. Whilst appreciating the Committee's heavy workload and stringent efforts to ensure that all Communications are heard fairly and transparently, we respectfully

request that the Committee consider the merit of expediting this Communication so that its deliberations and findings may inform that ongoing debate.

Please don't hesitate to let us know if there's any further information or clarification the Committee needs in order to consider this issue. We are copying this letter to Defra in order to give the Government the opportunity to comment on this letter before the Committee's next meeting.

Yours sincerely,

Carol Day and Rosie Sutherland, the RSPB

Rowan Smith and Rosa Curling, Leigh Day

Will Rundle and Katie de Kauwe, Friends of the Earth