Reply to Observations made by the United Kingdom on Communication ACCC/C/2017/156 by the Communicants (the RSPB, Friends of the Earth, Friends of the Earth Scotland and Leigh Day)

Introductory remarks

1. We respectfully request the opportunity to Reply to the UK's Observations on the above Communication, in order to assist the Committee in its deliberations, in accordance with paragraph 25(c) of the annex to decision I/7 which provides that "*to assist the performance of its functions, the Committee may… c) Consider any relevant information submitted to it*"[1]. We hope that these comments will serve to clarify the Communicants' position and assist in narrowing the issues in dispute.

2. Please note that 'Friends of the Earth Scotland' is a separate legal entity and is joined as a Communicant in its own right. The UK failed to list them as a one of the Communicants[2].

3. The UK alleges that this Communication concerns its failure to comply with Article 9(2) of the Aarhus Convention in relation to the review of the substantive legality of decisions, acts and omissions to which that provision relates. We remind the Committee that our Communication concerns Articles 3(1), and 9(2), (3) and (4) of the Convention – to be read together and in the context of Recitals 7, 8, 9 and 16 and Articles 5(1), 6(3), 6(6) and 6(8)[3]. Overall, and as we set out further below, the standard or intensity of substantive review for all Aarhus Convention Judicial Review (JR) claims must be consistently higher than is currently the case in order to meet the requirements of the Convention.

Substantive comments

Absence of dispute from the UK

4. We note that the UK has not disputed several points advanced in our Communication. Unless otherwise indicated, we invite the Committee to infer that the absence of denial is confirmation that these points are conceded.

5. In particular, we refer to our submissions concerning the customary approach of the domestic courts to JR (bullet points at pages 3-4 of the Communication) including, for example, that provided there is some information on a particular point, the court will not entertain any challenge to the question of whether the information capable of leading to a sound conclusion on the point. The UK has made no comments on any of these points.

6. We refer also to our recommendations as to how the intensity of review could operate (pages 17-18 of the Communication). For example, we propose that the intensity of review undertaken

---

1 See https://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf

2 See paragraph 1 of the UK's Observations

3 See Section V of the original Communication

for Aarhus JR claims should be determined by factors such as the potential environmental implications and the extent of public concern. Again, the UK has made no comment on these recommendations.

7. We will consider below what the UK says about the potential nature and scope of the *Wednesbury* review process. For now we simply note that the UK has (rightly) not said that what we have explained could not be accommodated within (because it is somehow inherently incompatible with) that process.

Lack of specificity

8. The UK submits that the Communication is without merit because, *inter alia*, it 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*".

9. In so doing, the UK repeats arguments promoted in its comments on the admissibility of the Communication[4]. The Compliance Committee found no force in those arguments when determining admissibility and we contend there is no foundation for them now.

10. The Fourth draft of the revised Guide to the Aarhus Convention Compliance Committee (discussed at the 60th meeting of the Compliance Committee (Geneva, 12-16 March 2018)) states: "*Communications to the Committee may concern either a general failure by a Party to introduce the necessary legislative, regulatory and other measures to implement the Convention; specific deficiencies in the measures taken; or specific instances of a person's rights under the Convention being violated; or a combination of these*"[5]. Moreover, in terms of the information required when submitting a Communication to the Committee, the revised Guide goes on to state: "*Also indicate whether the communication concerns a specific case of a person's rights of access to information, public participation or access to justice being violated as a result of the alleged non-compliance of the Party concerned, or whether it relates to a general failure by the Party concerned to implement, or to implement correctly, the provisions of the Convention. If you consider that the non-compliance concerns a general failure by the Party concerned, provide as attachments to your communication any key supporting documentation that will help to substantiate that it is a general failure*"[6].

11. In practice, there have been numerous examples of Communications before the Compliance Committee in which the Communicants have argued a general failure by the Party concerned to comply with provisions of the Convention as opposed to any individual or organisational prejudice. Several such cases can be found in the Compendium of the Case-law of the Committee (2004-2014), which provides a summary of the first 70 Communications considered by the Committee – ours being number 156. Examples include, *inter alia*, ACCC/C/2004/4 (Hungary), ACCC/C/2005/11 (Belgium), ACCC/C/2008/31 (Germany), ACCC/C/2009/36 (Spain),

---

4 See Defra letter to the Secretary to the Aarhus Convention Compliance Committee dated 9th March 2018 available here

5 The draft Guide can be found here

6 *Ibid*

ACCC/C/2010/48 (Austria), ACCC/C/2010/50 (Czech Republic), ACCC/C/2011/57 (Denmark), ACCC/C/2011/58 (Bulgaria) and ACCC/C/2011/63 (Austria). In many of these cases, the Committee found the Party concerned to be in non-compliance with provisions of the Convention and improvements in implementation across all three pillars have been achieved. This illustrates that such Communications are not only entitled to be considered by the Committee, they can secure significant, long-term benefits for civil society.

12. In the light of that, what we submit matters here is that we have explained a series of real and practical problems with the way that JR currently operates in the UK; the UK has not (as above) challenged any of that. And so the Committee has before it a more-than sufficiently formulated basis on which to consider the UK's compliance with the Convention in this regard.

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

13. The UK contends that the Communication fundamentally misunderstands Article 9(2) of the Convention (whilst saying nothing on Article 9(3)). It states: "*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). The UK then asserts that the Communication concerns the question of whether the standard of review subsequently applied by the Court in any judicial or statutory review complies with the Convention, but that this matter is outside the scope of Article 9(2).

14. In the first instance, such a narrow interpretation of Article 9(2) would subvert the objective and spirit of the Convention, which pursuant to Article 1, is: "*In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."* In this regard, we note also the caution included in the Guide, that: "*the effective implementation of the Convention depends on the Parties themselves and their willingness to implement its provisions fully and in a progressive manner*" (page 15; own emphasis added). More specifically, Article 9 seeks to provide wide access to justice, and must be interpreted purposively so that it is capable of ensuring the complete implementation of the rights contained in the Convention.

15. Furthermore, the UK's argument on that point lacks any basis in light of the Committee's previous consideration of this issue in ACCC/C/2008/33 (UK). Paragraphs 123-127 of the Committee's Findings clarify the scope of Article 9(2) of the Convention[7]. In particular, the Committee found that in relation to Article 9(2), the party must *"ensure that members of the public have access to a review procedure before a court of law and/or another independent body established by law which can review both the substantive and procedural legality of decisions, acts and omissions in appropriate cases."* (paragraph 123). The Committee found that whilst Article 9(3) does not explicitly refer to substantive or procedural legality, it refers to "*acts or*

[7] See here

omissions […] which contravene its national law relating to the environment", and the Committee therefore concluded (para. 124) that *"Clearly, the issue to be considered in such a review procedure is whether the act or omission in question contravened any provision — be it substantive or procedural — in national law relating to the environment."* Furthermore, the Committee found at paragraph 125, that whilst the Party permitted members of the public to challenge certain aspects of the "*substantive legality of decisions, acts or omissions subject to article 9, paragraphs 2 and 3, of the Convention, including, inter alia, for material error of fact; error of law; regard to irrelevant considerations and failure to have regard to relevant considerations; jurisdictional error; and on the grounds of Wednesbury unreasonableness (see paras. 87–89 above). The Committee, however, is not convinced that the Party concerned, despite the above-mentioned challengeable aspects, meets the standards for review required by the Convention as regards substantive legality. In this context, the Committee notes for example the criticisms by the House of Lords,[8] and the European Court of Human Rights,[9] of the very high threshold for review imposed by the Wednesbury test."* (own emphasis added).

16. Therefore, it is clear from paragraphs 123 and 124 of the Committee's Findings that Article 9(2) of the Convention does indeed require access to a review procedure before a court of law and/or another independent body established by law, in which *effective standards* of review of both the substantive and procedural legality of decisions, acts and omissions in appropriate cases can be achieved. The subsequent discussion in paragraph 125 of the Findings focussed on the extent to which the ability to challenge certain aspects of the substantive legality of decisions, acts or omissions subject to Articles 9(2) and (3) (including, *inter alia*, material error of fact; error of law; regard to irrelevant considerations and failure to have regard to relevant considerations; jurisdictional error; and on the grounds of *Wednesbury* unreasonableness) meet the standards for review required by the Convention. As such, the standard of review of substantive legality available is clearly central to the fulfilment of Articles 9(2) and (3). Moreover, we note the Committee expressly concluded that it was "*unconvinced*" that the procedures and challengeable aspects outlined in the UK *"meets the standards for review required"* (own emphasis added).

17. It follows that there is a fundamental contradiction in the UK's Observations. As set out above, they assert (erroneously) that Article 9(2) is concerned only with simple access to a substantive review process, not to the standard of the review itself, but they then go on to submit that the *Wednesbury* test enables a flexible standard of review to be applied (see paragraph 15b of their Observations), even though, in practice, it is not the case (as shown in the many cases we have cited in the communication, some of which are our own).

18. In the end, the Committee may well take the view that what actually matters here is simply whether the process adopted in the UK (as then explained by the UK and considered below) in fact meets the requirements of Articles 9(2)-(3): the UK's submission on Article 9(2) is in practice simply an unhelpful distraction from that real issue.

---

8 For example, Lord Cooke in *R v. Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, [2001] 2 AC 532 para. 32

9 *Smith and Grady v. United Kingdom* (1999) 29 EHRR 493, para. 138

Judicial and Statutory Review provides members of the public Article 9(2) compliant access to a court

19. Turning then to that core issue: With regard to *Wednesbury* unreasonableness, the UK maintains that this legal test is flexible and context-specific (and so compliant with the Convention).

20. For the avoidance of doubt, 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, particularly given that, on occasion, judges have indeed embarked on a thorough scrutiny of the substantive legality of a decision under the label of *Wednesbury*.

21. The problem, however, is, that *Wednesbury* is almost universally understood and applied narrowly, and in a way that does not meet the requirements of Article 9(2) and 9(3) (etc.), as set out in our Communication (the key elements of which have not been disputed by the UK, as noted above).

22. Indeed, the established body of case law cited in the Communication demonstrates that the courts have almost entirely set their minds against the more flexible approach and more intense standard of review, including for Aarhus JR claims.

23. The central issue is that whilst the *Wednesbury* approach is indeed potentially flexible, if it is to enable the UK to meet the requirements of Article 9(2)-(3) then it must be *applied* consistently in the way which the UK rightly identifies as being possible, as required by Article 3(1) of the Convention (which imposes an obligation on Parties to establish and maintain a clear, consistent and transparent legal framework).

24. In the environmental context, the UK's Observations refer to the case of *R McMorn v Natural England*[10] as an example of a case in which "*careful scrutiny*" (i.e. a more intense standard of review) was "*required*" (the submission uses that word) of the reasonableness of the challenged decision[11]. We submit that the UK mischaracterises the judgment in *McMorn*. Contrary to the UK's assertions, *McMorn* was, in a sense, the previous high-water mark for the intensity of review under *Wednesbury*. Mr Justice Ouseley applied a careful scrutiny standard, holding "*But I have concluded that this is an Aarhus claim, and that a more intensive form of scrutiny is justified*" (see paragraph 205 of the judgment). But what is clear is that he was doing so on the specifics of that case not, contrary to what the UK submission seeks to imply, setting down a more general rule; and he was doing so (as he explained) because the financial interests of the JR claimant were at stake, and not because of the environmental content of the issues at play. In other words: he took a more rigorous approach in that one case because that was permissible within *Wednesbury* and in the context of an Aarhus claim, but not because it was an Aarhus claim or on any wider basis.

---

10 *R (McMorn) v Natural England* [2016] P.T.S.R 750

11 See paragraph 15b of the UK's Reply

25. Moreover, perhaps surprisingly (and certainly unfortunately) the UK fails to explain, or even refer to, the subsequent case of *Dillner*[12] (page 7 of our Communication), in which the approach of Mr Justice Ouseley was categorically quashed. Referring to paragraphs 204 to 205 of *McMorn,* Mr Justice Golbart held that *"I regret that I must differ from Ouseley J, albeit with no little diffidence*" (paragraph 185) and on the basis of *Smyth* and *Evans*, that "*I therefore reject Mr Streeten's submission that there is a different standard of review in an Aarhus case*" (paragraph 187). It is clear therefore, that as things presently stand, the more liberal position temporarily opened up by Mr Justice Ouseley in *McMorn* has now been reversed by *Dillner*, and the much more restrictive orthodoxy re-established.

26. Accordingly, the UK's incomplete and unqualified reference to *McMorn* is actually very misleading. That is unfortunate.

27. Anyway, as above we recognise that the *Wednesbury* test is capable of being operated in a way which is capable of meeting the standard of review required under the Convention in respect of substantive legality, but only if a more intense standard of substantive review were to be applied consistently to all Aarhus JR cases.

28. In that regard we would draw the Committee's attention to pages 16-17 of our Communication in which we identified some of the characteristics and approaches that would be required. As we noted above, the UK has not contradicted any of that including, in particular, not suggesting that any of it could not be encompassed under the label of *Wednesbury*. We invite the Committee to conclude that such an approach is indeed entirely consistent with what the UK (in its reliance on *McMorn*) is already claiming (albeit erroneously) to be the case.

29. In light of the court's rejection of a more intense standard of review in environmental cases, we submit that one mechanism to ensure such an approach would be to pass legislation requiring *Wednesbury* to be operated and applied in a more intensive way. However, we also recognise that there may be other ways in which the UK could ensure a compliant and effective standard of review. Should the Committee conclude that the UK is, indeed, non-compliant, we invite it to recommend the UK investigate and consult on appropriate mechanisms.

30. As concerns the UK's suggestion (see page 8 of their Observations) that if the courts had to review the merits it would take us in the wrong direction (in relation to complexity, cost and time etc.) we submit that this is an entirely different (and extraneous) issue and amounts to a mischaracterisation of our Communication. In the first instance, we have been consistently clear that there is a distinction between a full merits review and a review of substantive legality as required by Articles 9(2) and (3) of the Convention. Our submission is simply that the proper standard of review is not being applied as required under the Convention – the UK cannot hide behind other potential issues such as cost and practical barriers that may (or may not) be created, and which are in any event dependent in large part by its own compliance with other requirements of the Convention, such as set out in Article 9(4).

---

12 *R (Dillner) v Sheffield City Council* [2016] EWHC 945 (Admin)

31. Finally, the UK asserts that *Wednesbury* unreasonableness is substantially the same test as the concept of “manifest error of assessment", which is the standard of review applied by the CJEU. We would emphasise that it is not for the Communicant to comment on whether, as a Party in its own right, the European Union complies with the Aarhus Convention in terms of the intensity of review applied in the CJEU, and neither is it a matter for the Committee to rule upon it in this instance.

3rd October 2018