Notes for ACCC opening – David Wolfe

3 main topics in OS arising from UK further Observations

1. Whether A9(2) – concerned only with access to court.
2. Is JR sufficient to meet requirements? (1) there are other criteria, (2) cases succeed on Wednesbury sometimes
3. Alleged lack of specificity

Also, will refer to recent EU law developments

1. A9(2) – says PC is a question of legality

We say – is a false distinction, because Wednesbury only exists, in terms of assessing illegality.

Committee has already indicated interest in approach Re Wednesbury.

A9(2) – ignores content of A9(4) – adequate and effective.

If UK were right, then domestic court could proceed in arbitrary way – and committee would have no right to be concerned/ form of view. That cannot be right.

2. Is JR sufficient to meet requirements

(a) UK Govt says that Wednesbury is not the only test – some cases succeed, even in cases under Wednesbury test. That is not an answer to our complaint, that there are other mechanisms. Or that some succeed – doesn't show that not a systemic problem of non-compliance.

Even within additional JR tests identified by UK, many collapse back into Wednesbury, because they turn on "reasonableness" – see for example – **Padden** at UK paragraph 21 (Appendix 5) asking whether the public body had made (Wednesbury) reasonable inquiries.

Also – every evaluative question which a public body required to consider – is assessed by Wednesbury. See thus **McNamara** our Case Law Update at Annex 12 – at 17. Whatever the evaluative question, will only be supervised by court as Wednesbury.

So that there are other criteria is no answer.

(b) As for the fact that Wednesbury succeeds sometimes, doesn't mean that there is not a systemic problem.

The UK has only managed to find a few examples!

And two of them are actually examples of the intrusive review for which we call.

The first is **Wealden** – appendix 20 to UK's materials.

- Para. 59 note the court using expert to assist the court.
- Paras 89-94 and 101-111, which illustrate a single judge in a single case proceeding to scrutinise in a convention-compliant way, but that is not a common practice. That is an outlier case which demonstrates potential solution.

Second **Residents v Waste** – appendix 27 of UK further documents at para. 44, another example of judge giving scrutiny. But that doesn't demonstrate compliance.

The central problem is unpredictability. If judges adopted the **Wealden** approach all the time, or predictably, then there might be compliance.

But most judges don't apply the test, that way and it's impossible to know when that's going to be the case.

That uncertainty arises in 2 dimensions:

1. Whether the judge adopts a "flexible" approach; or
2. Whether they adopt a "conventional" approach

Sometimes UK will approach flexible approach; sometimes a conventional approach. Even in flexible, when court says it can scrutinise more, then will it do so?

Notably the UK doesn't defend conventional approach as being compliant.

The conventional approach is not compliant. Yet it is the norm; referred to in lots of cases. See (for example) **Loader** #31

To try and show compliance with the Convention the UK promotes the "flexible" approach but it is not the norm.

As an example see **McMorn** – the judge decided on flexible approach (because of the commercial interests in play). But then in **Dilne**r (paras 183-187) the judge rejected that flexible (and Aarhus informed approach) on basis that it was not the conventional approach which he saw as mandatory.

See in a similar vein, what has happened with **Sweetman** – CJEU explained appropriate approach for domestic cases as to how can be done. But in subsequent cases UK decided not to apply it – e.g. **Foster**, "judges are clever but not that clever". Self-effacing which is not helpful; our judges are that clever.

So, there are rare examples of outliers cases – but the point is they are not the norm.

I suspect Mr Banner won't meet the point on predictability.

3. Lack of Specificity/Not make a difference

Why are there not obvious examples?

(1) lawyers advising potential Cs will say v. difficult to succeed, and cases won't come forwards

(2) Where Judges approach conventional approach, they will never say, well if we'd applied the other approach, it would have made a difference

(3) Anyway see the two Scottish cases:

- RSPB – Scotland case.
- Sustainable Shetland case

In both, the Lord Ordinary – applied more scrutiny, but was then shot down by higher court.

4. Finally, EU developments

The UK said, in its original reply, that the EU law standard of review was same as Wednesbury (manifest error)

Lies Craeynest – [64] AG Kokott, paras. [54] and [56] – assessing compliance of placing air monitors. [56] reminds us that domestic courts job was to verify if sample points placed as per stated criteria.

If came to UK – UK, the court would ask, is it “Wednesbury reasonable”? Not, “is it correct”?

And so the EU law has stepped forward, and manifest error of assessment is not consistent with UK current practice.