Opening Statement on Communication ACCC/C/2017/156 by the Communicants

Introduction

1. We are grateful for the Committee's consideration of our Communication and welcome the opportunity to make brief opening remarks.

2. The documentation for our Communication comprises (1) our original communication with Annexes containing case-law; (2) our Reply; (3) two further updates of cases (the latest of which takes the form of a single hard copy judgment printout, and electronic links to others); and (4) this Opening Statement.

3. The thrust of the case-law provided to the Committee comprises instances in which the courts in England & Wales, Scotland or Northern Ireland have addressed the question of how judicial review operates within the UK. They are all environmental judicial review cases but - since the characteristics are essentially common across judicial review - they cover other things too. We will speak shortly about two court decisions from the latest batch of case law which have been handed down since our Reply.

4. The UK complains that our Communication focusses on those general characteristics, rather than being triggered by a particular court decision. But the point is a bad one, partly because, as we will explain shortly, the UK does not dispute our characterisation of the principles of judicial review; also because, as explained further below, the courts' approach to judicial review in the UK means that

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environmental lawyers simply advise clients against even bringing claims which would require a different approach by the courts. Such challenges simply never happen, but not because the issues they raise do not exist.

The UK's preliminary point

5. In any event, in its Response to our Communication, the UK makes a preliminary point as to the nature of Article 9(2): UK paragraphs 8-10.

6. In particular, the UK argues that Article 9(2) is concerned only with the bare fact of access to a court, and says nothing about how the court should then approach the matters before it.

7. We have explained in our Reply (paragraphs 8-11) why that is a bad point. We do not repeat those matters here other than to note that the Committee has decided the point (against the UK's argument) in ACCC/C/2008/33 (UK) (paras 123-127). The UK's Response does not mention that decision, let alone explain why the Committee should depart from it. There is no basis to do so.

The UK does not dispute how we say judicial review works

8. The thrust of the UK's fall-back submission is to emphasise the potential flexibility of the approach which the UK courts can take within judicial review. We will return to that in a moment.

9. But what is notable is that the UK says nothing, let alone so as to dispute, the six facets of the current approach to judicial review in the UK which we had set out on pages 3-4 of our Communication.

Expert evidence

10. We also note a further element relating to the way in which the courts treat the legality of public body decisions which were based on scientific or expert evidence, a common feature of environmental decisions. The point was made clearly in the Court of Appeal's 17 September 2019 dismissal of an appeal challenging decisions relating to the culling of badgers in the UK (as a mis-conceived approach to tackling bovine TB): **Langton [2019]**. We draw attention to paragraphs 35-39, 42, 46-47, and 68 which show the way in which the courts willingly accepted as lawful a decision-maker (here the Secretary of State) authorising an untested approach supported by a "scarcity of evidence" simply because it was supported by "qualified experts" (who could well be on the pay-roll of the developer) without in any way scrutinising the basis on which those experts had given that advice and their basis for it.

11. The Court of Appeal's approach in **Langton** would mean that a public body's decision would be lawful and unchallengeable 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. See also in the court's dismissal of challenges (including by reference to climate change impacts) to proposals to expand Heathrow airport: **Spurrier [2019]** (a copy of which was in our previous case law update); the court explained that – in a judicial review – the court would not give any scrutiny whatsoever to technical points within the challenged decision if "*the evidence of an expert relied upon by a claimant is contradicted by a rational opinion in a statement from an expert filed by the defendant*." And that contradicting "statement" need in fact be no more than a single sentence or paragraph in a witness statement who may be on the payroll of the promoter of the environmentally harmful activity.

13. To be clear though, we are not saying that it is for the court to assess the underlying scientific merits of such decisions. But that does not detract from the point that simply to treat the mere fact of there being advice from a single "expert" which goes

against a claimant as being legally sufficient without any more scrutiny does not – in our submission - meet the requirements of the Convention.

14. As for how such matters should – we say - be approached, we draw the Committee's attention back to the passage our Communication quoted from **Sweetman**[1] as to the nature of the approach a court should take (there to evaluating the legal sufficiency of an Appropriate Assessment under the Habitats Directive).

15. As for the push-back on the **Sweetman** approach seen in **Foster** (set out in our Communication at pages 4-5), we note with surprise Cranston J's suggestion that judges would not be "clever" enough to apply such scrutiny. That is puzzling since the same judges who sit on judicial review cases in the UK will also hear civil claims (and indeed judicial review claims involving human rights) in which they would not merely be evaluating technical information and expert evidence in the manner contemplated by **Sweetman**, but actually going far further in the evaluation in order to reach their own (i.e. the court's decision) on the substantive underlying technical issues (albeit where money, rather than the environment is at stake).

16. If UK judges can reach decisions by actually evaluating expert evidence to reach conclusions on technical points for themselves - which they do on a routine basis in civil claims when money is at stake - they can certainly scrutinise such evidence at a level beyond the approach taken in **Langton** when significant environmental impacts and harms are at stake.

"Due Regard" to Consultation Responses

17. A further point seen in **Langton** goes to point two in our undisputed list of the features of judicial review as further explained in the final paragraphs of page 13 and

[1] See also what the CJEU has recently said about the approach required in environmental judicial reviews involving EU law: **Lies Craeynest [2019]** [46]: the appropriate standard of review, or rigour, must take into account the purpose of the act – to make sure effectiveness is not undermined; and per AG Kokott [40] and [43]: "regard must be had to what standard of judicial review is necessary so that reliance on the applicable provisions of EU law is not rendered excessively difficult"

on to page 14 in our Communication, namely issues arising from the need arising from the Convention for a decision-maker to have "due regard" to what consultees have said in response to a consultation.

18. As we have explained there, the UK courts will accept as lawful a situation in which the consulter is merely generally aware of what consultees have said. As we have explained, that is not "due regard".

19. In **Langton**, the Court of Appeal's judgment noted in passing (the point not being live in the appeal) the judge's rejection of a challenge to the decision-maker's failure to consider responses such as this (in this instance) from the (world-famous) Zoological Society of London (ZSL) opposing the badger cull. The judge said this: *"As to how the Secretary of State addressed the consultation responses, for unlawfulness the claimant must establish that a matter was such that no reasonable decision-maker would have failed in the circumstances to take it into account as a relevant consideration.*" In other words, the court will only find unlawful a failure not to take into account consultation responses if no reasonable decision-maker would have failed to do so (i.e. the outer limit of **Wednesbury** 'perversity'). We say that is not "due regard".

Overall – no dispute on the facets of judicial review

20. In any event, as we say, the UK does not dispute the six facets of judicial review which we identified; nor the approach taken by the Court of Appeal to decisions based on scant expert evidence as further explained above.

The practical implications of the UK's approach to judicial review

21. As can be seen from our Communication, the practical implications of the UK courts to **Wednesbury** unreasonableness is that many individuals, community groups and NGOs are advised by their lawyers not even to bring cases covering a wide range of

environmental issues because, whilst clearly poor or ill-informed decisions, they are not "outrageous" enough to be considered unlawful given the courts' current approach to illegality.

22. The consequences of the UK's approach are therefore not only that claimants will generally fail on (and therefore almost always avoid or seek to characterise in another way) many illegality arguments, but that claimants are dissuaded from bringing many such claims in the first place.

23. As practising lawyers, we understand our clients' frustrations about the bluntness of a system that prevents them from challenging decisions, acts or omissions that may be of wide environmental and public interest.

The UK does not say that judicial review could not operate in the way we have suggested

24. On pages 17-18 of our Communication we set out suggestions as to the way in which judicial review (even working within the 'flexible' **Wednesbury** framework) could and should adapt to meet the needs of the Convention.

25. The simple point is that judges could easily adopt the approaches we propose, and occasionally indeed do so. The problem is that twofold: first, judges only occasionally adopt an approach of greater scrutiny (other than in human rights cases, where it is the general approach); and secondly, predicting when that will be the case is almost impossible. We doubt the UK's representatives will dispute any of that.

26. What is necessary is that judges routinely adopt an approach of greater scrutiny (akin to the "anxious scrutiny" approach used for human rights cases), and that they do so in accordance with a clear, transparent and consistent framework to implement the provisions of the Convention (as set out in Article 3(1)).

27. Indeed, as we say, one of the problems with the existing UK approach is the sheer unpredictability of the judicial review process: while judges could do any or all of the

things we suggest, the question of whether they do so depends entirely on the approach taken by the particular judge based on an unpredictable and unstructured evaluation against a disparate range of factors.

28. An explanation of some of that was seen in the recent decision of the Divisional Court[2] in **Spurrier [2019]**. The case concerns proposals to expand Heathrow Airport in a way which will mean that the UK's compliance with the Paris Agreement on Climate Change is either not possible, or only possible with particularly dramatic changes elsewhere in the economy and society. Challengers to the decision argued that the court should (of course without substituting its view on the underlying merits) scrutinise expert and other evidence which had been relied on to support the decision to approve airport expansion. The Divisional Court rejected that plea having set out an explanation of the very flexibility of the judicial review approach. An appeal against that decision is being heard as at the date of filing this Opening Statement with judgment awaited.

29. Anyway, notably, the UK does not dispute any of that characterisation of how judicial review could adapt in a way which could meet the requirements of the Convention.

<u>The essence of the UK's argument</u>

30. The essence of the UK's argument is that the UK framework for environmental judicial review does not need to adapt in those (or any other) ways despite the undisputed characterisation of judicial review we have set out because of the mere fact that judges <u>can</u> and <u>sometimes do</u> behave that way.

31. The high point of that argument is the UK's reliance (Response paragraph 15b) on **McMorn [2016]**. In that case, Ouseley J applied what he called "*a more intensive form of scrutiny*" by reference to it being a case falling within the Convention. But,

[2] A court of the seniority of the High Court but comprising a Court of Appeal judge and a High Court judge

crucially, and contrary to the impression given by the UK Response, the judge was not laying down some general rule. Rather, this was a one-off: another example of the unpredictability of the UK approach to judicial review. Moreover, Ouseley J's reason for doing so here was important. Mr McMorn (the claimant in the case) had challenged the legality of restrictions placed by the environmental regulator Natural England (pursuant to the EU Bird Directive) on his killing of buzzards. The "anxious scrutiny" applied by the judge was operated to undermine the protection of the Directive on the basis that what was in play were Mr McMorn's commercial interests; and certainly not solely on the basis that it was an Aarhus Convention claim.

Overall

32. Overall, therefore, we invite the Committee to uphold our Communication and recommend the UK be invited to consider, and consult on, measures to bring itself into compliance with the relevant provisions of the Convention.

33. The UK's judicial review process simply does not meet the requirements of the Convention, including by reference to its unpredictability, and the undisputed characteristics we have described.

34. Our proposals for how it could be adapted are not said by the UK to be impracticable or unworkable.

35. Indeed, as we have explained, the UK's submission celebrates a judicial application of "anxious scrutiny" in **McMorn**. The problem for the UK is that that decision was an unpredictable one-off which was triggered by the claimant's commercial interests not by the environmental protection imperatives underpinning the Convention.

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