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)

Response from the Communicants to the 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?

The term "substantive legality" in Article 9(2) is a reference to the decision being soundly based in law and fact, including by reference to the procedural requirements of the Convention. The assessment of substantive legality should be proportionate to the nature and degree of the potential environmental impact and the public concern.

That is partly (but only partly) secured by the traditional approach in the UK.

That traditional UK approach is limited to the court (on judicial review) checking that the decision-maker has:

(1) followed the correct procedure;

(2) applied the law correctly; and

(3) reached a decision which (within the traditional formulation of ***Wednesbury***) took into account all legally required considerations, ignored irrelevant considerations and is within the range of responses which a "reasonable" decision-maker could reach.

However, checking for substantive legality also requires the following additional components which are not currently part of UK judicial review.

In particular it requires that all necessary factual evaluations, or exercises of a discretionary power, have been (a) based on proper and sufficient inquiries and investigation, leading (b) to proper and sufficient evidence. That process needs to ensure that:

(1) the decision-maker has properly understood and evaluated evidence; and

(2) the evidence in question is relevant and capable of supporting the decision-maker's conclusions, and

(3) that the decision-maker has properly explained its conclusions and how it has resolved conflicts of evidence.

In relation to all of those matters, a proportionality-based approach requires that the level of scrutiny applied to be increased depending on (amongst other things) the importance

of the issues *for the environment*, and the level of public controversy or concern.

Where public consultation is involved, (1) the public must also have been provided with proper and sufficient information, (2) due account[1] must be given to their responses (including a proper evaluation of them and a sufficient explanation of why and on what basis the decision-maker has disagreed with their representations).

Overall "substantive legality" is concerned with the quality or cogency of the content of the decision reached and the soundness of the basis for it.

For completeness, we also remind the Committee that in ***Janecek***[2], the CJEU held that an EU principle of effective judicial review covering substantive and procedural legality applies to acts and omissions falling under Article 9(3) of the Aarhus Convention. Were that not the case, it could not be ensured that the objectives of, and the rights conferred by, EU environmental law could be sufficiently protected by national courts. Moreover, the Aarhus Convention Implementation Guide recognises that the standard of review to be applied in the context of Article 9(3) is identical to the one to be applied in the context of Article 9(2) of the Convention.

Please see pages 16-17 (points 1-7) of our Communication and our answer to question 7 (below) for further explanation on what would be required to ensure compliance with Article 9(2) of the Convention.

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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"?

Please note that each of the following points apply in all 3 jurisdictions.

- Unlawful procedure – i.e. that the decision-maker did not follow a procedure which either a statute or the "common law" requires (examples of the latter include the requirements of "procedural fairness" which the courts will sometimes imply into a decision-making process; or the specific steps which the courts require a decision-maker to take where "consultation" is undertaken).
- Error of law – i.e. that the decision-maker misunderstood the legal requirements (for example, misunderstanding the circumstances in which EIA is legally required; or misunderstanding the legal meaning of, say, published Government policy documents) or acted outside of its powers/for an improper purpose (i.e. *ultra vires*).
- Unlawful failure to discharge a legal obligation – i.e. the decision-maker did not do as the law required (for example, not undertaking EIA when it was legally required, or

[1] See our answer to question 7(2) for discussion on "due account"

[2] Case C-237/07 ***Dieter Janecek v Freistaat Bayern***

not giving reasons where there is a lawful obligation to do so).

- *Wednesbury* reasonableness – i.e. that the decision-maker took into account all legally required considerations including taking the steps it considered necessary to obtain information relevant to those considerations, ignored irrelevant considerations and is within the range of responses which a "reasonable" decision-maker could reach .
- Error of fact – i.e. that the decision was based on a fact (but only in relation to a fact which the parties now agree was incorrect after all), in circumstances where the claimant was not responsible for the error being made.
- Incompatibility - with the European Convention on Human Rights and/or EU law.

The second to the sixth of those could each be part of the consideration of substantive legality.

As we have explained to the Committee, ***Wednesbury*** is potentially flexible enough to allow for all aspects of substantive legality to be dealt with through that framework.

But, in practice, ***Wednesbury*** does not operate in that way because of the narrow, traditional, approach which is taken by the courts. We explain below how (contrary to the claim made by the Party Concerned) that has not been changed by ***McMorn***.

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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.

As far as we are aware, the approach is the same across all three jurisdictions within the UK.

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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*[3], *RSPB*[4], *Sustainable Shetland*[5], and *Langton*[6]), 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.

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3 *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)

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

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

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

(1) Foster

We draw the Committee's attention to our summary at pages 4-5 of our Communication and to paragraphs 22-25 of the Court's judgment[7] including, at 23-24.

The Judge in ***Foster*** was responding to the argument (based on the CJEU's decision in ***Sweetman***) that the court needed to assess whether an assessment for the Habitats Directive[8] "*cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned*".

The judge said this:

> *23. To my mind there is an air of unreality about this submission. The CJEU could not have been suggesting that, as Ms Wigley submitted, national courts themselves must decide when the assessment has lacunae, whether it contains complete, precise and definitive findings, and whether its conclusions are capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned. Judges may be clever, but not that clever. The submission also misunderstands the role of courts in European societies. To my mind the CJEU was simply stating that the national court had to evaluate the assessment in the ordinary way, not become the primary decision-maker.*
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> *24. In any event, the submission is contrary to authority binding on me, despite the different context. In* ***Smyth v. Secretary of State for Communities and Local Government*** *[2015] EWCA Civ 174, [79]–[80], Sales LJ rejected a submission that in applying the Habitats Directive the national court must apply a more intensive standard of review, in effect making its own assessment afresh. Sales LJ rejected the submission, reaffirming earlier authority that the standard of review is the Wednesbury standard, which is substantially the same as the relevant standard of review of "manifest error of assessment" applied by the CJEU in equivalent contexts: see [80].*

Our contention is that the review required by Articles 9(2) and 9(3) of the Convention would be one which at least met the requirements explained in ***Sweetman***.

In ***Foster*** the court specifically rejected that approach (partly claiming that judges are not up to that task, something which is manifestly not the case given that, in private law environmental claims (i.e. claims between private parties) the courts routinely go further than required by ***Sweetman*** in actually reaching determinations on the merits of contested environmental matters). In any event, what the judge explained is not consistent with Article 9(2) and 9(3).

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[7] Judgment available as Annex H to the Communication here: https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2018-156/Annexes_A-AA_to_Communication_to_Aarhus_Convention_Compliance_Committee.pdf

[8] Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora

(2) The RSPB

The Inner House of the Court of Session overturned the decision of the Lord Ordinary in the Outer House, who had set aside consents for four offshore windfarms.

As the Inner House noted in relation to Ground B1[9] at [81], the Lord Ordinary had applied the approach described by the CJEU in ***Sweetman***. That included [91] considering whether the failure to take into account certain bird impacts "*was a lacuna of the kind referred to in* ***Sweetman****".*

Rejecting that approach, the Inner House reiterated that [203]:

> *The standard of review which the Court should apply when assessing the legality of an AA is that of "manifest error of assessment" (**Commission of the European Communities v United Kingdom** (C-508/03) [2007] Env LR 1 at paras 91 and 92). This is no different from the conventional test for judicial review set out in **Wordie Property Co v Secretary of State for Scotland** 1984 SLT 345; that is to say if the respondents have improperly exercised the discretion confided in them and, in particular (LP (Emslie) at 347-8) if the decision:*
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> > *"… is based upon a material error of law going to the root of the question for determination … if the [respondents have] taken into account irrelevant considerations or … failed to take account of relevant and material considerations … [W]here it is one for which a factual basis is required, there is no proper basis in fact to support it … [or] if it … is so unreasonable that no reasonable [minister] could have reached… it".*
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> *This equates to the test applied in England and Wales (**Associated Provincial Picture Houses v Wednesbury Corporation** [1948] 1 KB 223 followed recently in **Smyth v Secretary of State for Communities and Local Government** [2016] Env LR 7 (p129), Sales LJ at 80, citing **R (Evans) v Secretary of State for Communities and Local Government** [2013] JPL 1027 at paras 32-43). The manifest error must be one detectable by the court and not, at least in the absence of expert advice, an ornithologist or a scientist.*

The Inner House explained that [206]:

> "*The rationale behind [the Lord Ordinary's] thinking must have been his expression of what he regarded as a legal test; that being whether the AA's conclusions were capable of removing all reasonable doubt. Yet the existence, or otherwise, of a reasonable doubt is primarily a matter of fact for the decision-maker (and not a judicial reviewer) to determine."*

And [207]:

> "*Despite paying lip service to the correct legal test for judicial review, the Lord*

[9] Which focused on criticisms of the Habitats Directive required appropriate assessment.

Ordinary has strayed well beyond the limits of testing the legality of the process and has turned himself into the decision-maker following what appears to have been treated as an appeal against the respondents' decisions on the facts."

Then at [219]:

"*The Lord Ordinary considered that non-breeding effects ought to have been taken into account. He did so by rejecting the explanations provided; notably that this was the advice of the SNCBs. There was no basis for this approach which, once more, attempts to analyse scientific fact or methodology which is outwith the scope of judicial review, at least in the absence of manifest error."*

Accordingly, overall, the Lord Ordinary had applied the ***Sweetman*** approach (which we say is part of the requirements of Article 9(2) and 9(3)) to ascertaining the legality of the Appropriate Assessment.

The Inner House then rejected the application of that approach (namely a wider ***Wednesbury*** approach which incorporates an element of close scrutiny), instead re-asserting the "traditional" narrow ***Wednesbury*** approach. That, we submit, was inconsistent with Article 9(2) and Article (3) of the Convention.

(3) Sustainable Shetland

We refer to page 9 of the Communication.

The Petitioner challenged the decision of the Scottish Ministers to grant consent to a windfarm on Shetland. One ground of challenge was that the Ministers had failed to take proper account of their obligations under the Birds Directive[10].

The Lord Ordinary had found in favour of Sustainable Shetland and reduced (set aside) the Ministers' consent.

The Inner House of the Court of Session allowed the Ministers' appeal. The court emphasised that "[w]hat is under consideration [in such cases] is the legality of a decision made in exercise of specific statutory powers". The Inner House reminded itself of the nature of JR, with reference to ***Wordie*** at 348, and noted that while the decision- maker must consider relevant considerations fairly and rationally, "it is for him to accord them such weight as he considers appropriate" (at para [25]). It further noted that the question for the court was whether, taking account of the Directive (as one of many considerations), the Ministers' decision to grant consent had been lawful and not whether, taking the Directive as the starting point, the Ministers had, in their decision letter, demonstrated that they had fully understood and complied with their on-going obligations under the Directive (at para [28]).

The Supreme Court agreed with this view.

The judgment is included as Annex T to the Communication. We refer to paras 29-30,

[10] Directive 2009/147/EC on the conservation of wild birds (codified version)

which say this:

> *"29. The first two points reflect the principal difference between the courts below, which lay in their respective assessments of the role of the ministers in considering a proposal of this kind. The Lord Ordinary treated it as requiring them in effect to conduct a full review of their functions under the Birds Directive, with a view to considering how the present proposal would contribute to or fit in with those functions, and in particular the objective of bringing the whimbrel up to "favourable conservation status". The Inner House took a more limited view. The directive was but one of a number of material considerations to be taken into account in reaching a lawful decision whether to grant consent under the Electricity Act 1989.*
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> *30. In principle, in my view, the Inner House were clearly right. The ministers' functions in this case derived, not from the directive, but from their statutory duty to consider a proposal for development under the Electricity Act 1989. The range of issues potentially relevant was apparent from their summary of the large number of representations for and against the proposal. As has been seen, the Act contained specific reference to conservation of wildlife ("fauna") and mitigation of any adverse effects of a development. The Ministers were also required by the relevant regulations to take account of the information provided by the environmental assessment."*

Overall, a review of the "substantive legality" of the decision needed the court to satisfy itself that there had been a proper assessment of the extent to which the windfarm would contribute to/impact on the functions of the Directive (and in particular the central objective of bringing the whimbrel up to favourable conservation status). The Lord Ordinary properly undertook that exercise. The Court of Session and Supreme Court held that the Lord Ordinary was wrong to do that. That was not consistent with the requirements of "substantive legality".

(4) Langton

The claimant challenged the legality of Natural England's decision to licence the culling of badgers as a novel and controversial way of spreading the transmission of bovine TB. He argued that there was no objective or scientific evidence to support the policy. The Court of Appeal rejected the challenge including on the basis that the policy had been supported by expert evidence but without the Court being prepared to give any consideration to the nature of or basis for the expert evidence: see paragraphs 35-39, 42, 46-47, and 68. These paragraphs show the way in which the courts willingly accept as lawful a decision 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 justifications for it.

As mentioned above, that approach is in stark contrast to how the courts in the UK deal with expert evidence in private law environmental cases, namely disputes between private parties rather than judicial review challenges to decisions by public bodies (as

covered by Article 9(3) of the Convention).

In those private law cases, the court will often comprise not just a judge but also technical expert assessors appointed by the court under civil procedure rule 35[11] to help the judge decide exactly these sorts of disputed factual issues relating to environmental impacts etc. Accordingly, the completely 'hands-off' approach explained in ***Langton*** cannot be explained or justified by some inability on the part of the court to scrutinise the basis for expert advice acted on by public bodies.

The Court of Appeal's completely hands-off approach in ***Langton*** means that a public body's decision would be lawful and unchallengeable by judicial review 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.

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5. The Party concerned has submitted that *McMorn*[12] now stands as precedent that in Aarhus claims the test for judicial review is "careful scrutiny"[13].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.

We are not aware of <u>any</u> case in which the court has said that it is following the approach

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11 See: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35#IDASLICC

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

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

explained in *McMorn* (as if that case was a precedent or in any event).

We have checked that by accessing several case law databases, each of which claims to be comprehensive (though in practice none are 100% comprehensive which is why we have checked several).

Indeed, the reverse is true.

In particular, where a claimant asked the court to follow that "close scrutiny" approach, the court has specifically not adopted the approach explained in *McMorn.*

Moreover, as explained below, in a case he was involved in against the Government since the oral hearing before this Committee, David Wolfe QC (who acts for the Communicants here) specifically invited the court to follow the approach described in *McMorn*. In response, but contradicting its submissions to this Committee, the Government specifically argued to the domestic court that *McMorn* is not authority for a careful scrutiny approach. See below for more details.

ENGLAND & WALES

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

Article 9(3)

Rejecting the submission that McMorn required there to be close scrutiny in a case falling with the Convention, the judge said this:

> "*185 I regret that I must differ from Ouseley J, albeit with no little diffidence. For if one goes to Smyth what one finds is a Judgment from Sales LJ, which contains this passage at [80]-[81]*
>
> *[quotes the passage]*
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> *186 In fact, in R (Evans) v Secretary of State for Communities and Local Government [2013] EWCA Civ 114; [2013] JPL 1027, [32]-[42] Beatson LJ expressly rejected the idea that the standard of review had been altered by the Aarhus Convention, as pointed out by Sales LJ. It is worth referring to the way in which Beatson LJ dealt with the point:*
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> *[quotes the passage]*
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> *187 I therefore reject Mr Streeten's submission that there is a different standard of review in an Aarhus case. He did not refer me to the Court of Appeal authorities which were contrary to his submission. But even if there were a different test, the evidence from Mr Caulfield, which I accept and is supported by the assessment documents, and the description of the programme, shows beyond argument that in the case of each removal of trees, the reasons for it have been approached properly."*

Packham v Secretary of State for Transport [2020] EWHC 829 Admin[14]

Article 9(3) – this case concerned a challenge to the decision to proceed with the HS2 railway scheme from London to Birmingham (the largest railway project in modern times). The claimant's challenge focussed on the decision-makers' ignorance of environmental impacts and of the Paris Agreement on Climate Change. In particular, there was no evidence that the Secretary of State had been provided with information on the wider environmental impacts of the project (which are considerable) or on how its climate change impacts would affect the UK's obligations under the Paris Agreement.

The court said this:

> *"51. The public law test is whether the Secretary of State failed to take into account a consideration which was not only relevant but which he was legally obliged to take into account. …*
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> *…*
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> *54. In his written statement to the House of Commons dated 3 September 2019 the First Defendant[15] explained that the Report of the OR [Oakervee Report] would inform the decisions on the next steps to be taken. It was not suggested that those decisions would be based solely on the OR. In the* ***Buckinghamshire*** *case the Supreme Court recognised that a decision whether it was in the public interest to proceed with a project such as HS2 is a matter of national political significance, and therefore was appropriately dealt with by the legislature ([108]). The same applies to the decision taken on 11 February 2020. It was a "macro-political" decision* ***(R (Begbie) v Secretary of State for Education and Employment*** *[2000] 1 WLR 1115, 1131). The Secretary of State is accountable to Parliament for the decision. The functions he exercised were not constrained by legislation.*
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> *55. In these circumstances, a judicial review of that decision would involve only a low intensity of review (see e.g. Carnwath LJ (as he then was) in* ***IBA Healthcare Ltd v Office of Fair Trading*** *[2004] ICR 1364 at [91]) and* ***Plant*** *[2017] PTSR 453 at [62]-[69]. In the Heathrow case, this court had to address the standard of review for a challenge to a national policy statement (see* ***Spurrier and others v Secretary of State for Transport*** *[2020] PTSR 240 at [141] – [184]. That part of the judgment usefully summarises the key cases on intensity of review. It was not only not criticised by the Court of Appeal, parts of it were expressly endorsed. Accordingly, when dealing with matters depending essentially upon political judgment, matters of national economic policy and the like, the court will only intervene on grounds of bad faith, improper motive and manifest absurdity: see [147], [149], [153].*
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> *56. In a situation where a Minister is considering a review of a complex project*

[14] In this case, the claimant Chris Packham CBE, was represented by Leigh Day (one of the Communicants) and David Wolfe QC, who represents the Communicants in this Communication

[15] Here the Secretary of State for Transport

which did not involve a call for evidence, it seems to us to be a nonsense to suggest that the Minister could only be assumed to know about the review, and not the Parliamentary process by which environmental issues have been and will be addressed and Phase 1 has been approved. The Review cannot be divorced from that process in the way suggested by Mr Wolfe QC; on the contrary, as paragraph 2.3 of the Report itself made clear, the OR did not start from a blank sheet of paper, because of all the proceedings which and resulted in the 2017 Act.

57. In the present case, we are confident that, at the time of the decision on 11 February 2017, the First Defendant can be assumed to have known the parliamentary processes for the approval of the HS2 project (and, for example, the 2017 Act), the Dissenting Report of Lord Berkeley, and the OR Report. In our view, the only realistic way in which that decision can be impugned is by way of judicial review on Wednesbury grounds, namely that it was irrational for the First Defendant not to take into account something that was "obviously material". That is a 'light touch' review, for the reasons noted above. However, although that is our general approach, we have also addressed below the different ways in which Mr Wolfe QC sought to argue his Grounds." [underlining added]

Accordingly, because HS2 is of "national political significance", the court treated the decision to approve it as one where there would be a "low intensity" of judicial review, namely a "light touch review".

Paradoxically, therefore, the bigger the project (and with the greater the environmental impacts) the lower was the intensity of the court's scrutiny of the decision. This is the opposite of what we say is required for Aarhus-compliant review of "substantive legality".

Applying that approach, the court then decided that "the First Defendant can be assumed to have known …." of other environmental reports and documents.

However, there was absolutely no evidence at all to support that assumption. Indeed, as it happens, the claimant had specifically and repeatedly asked the Secretary of State to identify the information he had considered for the purposes of deciding whether this £100bn+ railway should proceed, and he had declined to do so.

Swire v Secretary of State for Housing, Communities and Local Government [2020] EWHC 1298 (Admin)

Article 9(2) – this case concerned a challenge to a decision that an EIA was not needed for redeveloping a contaminated site used previously for rendering BSE infected cattle.

In his written case before the hearing (a copy of which is attached to this document) David Wolfe QC specifically drew attention to ***McMorn*** and to what the Party Concerned has said about it to this Committee. He wrote this [38]:

"*That conclusion [on approach] is reinforced because the court here can and should adopt the approach explained to be appropriate by Ouseley J in* ***McMorn v Natural***

England [2015] EWHC 3297 (Admin) in a case falling (as this one also does) within the Aarhus Convention, namely a "more intensive form of scrutiny" and "close examination"."

That paragraph had a footnote which specifically quoted to the domestic court what the Party Concerned has said to this Committee:

"*In his DGR [i.e. an earlier document to the court] paragraph 17 [33] the Secretary of State disagrees but, in so doing, he contradicts the position he is currently taking before the Aarhus Convention Compliance Committee ACCC/C/2017/156, namely: "The High Court has recently held that, in the context of a judicial review claim of an environmental permitting decision within the scope of the Aarhus Convention, "careful scrutiny" is required of the reasonableness of the challenged decision, which the Court saw as a "more intensive form of scrutiny" than in other contexts: see* R (McMorn) v. Natural England *[2016] P.T.S.R. 750, per Ouseley J. at paras. 174 and 204-205"."*

Responding to that skeleton argument in his written submission to the court, the Secretary of State repeated to the domestic court what he had said in his "DGR". Having quoted from *McMorn* he said this:

"*46. That [McMorn] is not support for an intensive form of review in cases within the scope of the Aarhus Convention. Rather, Ouseley J is recognizing that Wednesbury is flexible and that a more intensive form of scrutiny may be appropriate where a claimant's livelihood is directly affected by a decision, as in that case. That is not the situation here. Indeed, Ouseley J's reliance on Evans bears out that, where a decision concerning a screening direction is under challenge, the conventional Wednesbury standard is appropriate.*

47. That approach is consistent with that adopted by the CJEU to reviewing decisions of competent national authorities. In Upjohn Ltd v The Licensing Authority [1999] 1 WLR 927, the Court held at paragraph 34:

"According to the court's case law, where a Community authority is called on, in the performance of its duties, to make complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to a limited judicial review in the course of which the Community judicature may not substitute its assessment of the facts for the assessment made by the authority concerned. Thus, in such cases, the Community judicature must restrict itself to examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion …"

48. The CJEU adopted the same approach when reviewing the application of the EIA Directive. In Case C-508/03 **Commission v United Kingdom** *[2007] Env LR 1 the CJEU held at paragraph 91 that:*

> *"… in order to demonstrate that the national authorities exceeded the limits of their discretion by failing to require that an impact assessment be carried out before giving consent for a specific project, the Commission cannot limit itself to general assertions by, for example, merely pointing out that the information provided shows that the project in question is located in a highly sensitive area, without presenting specific evidence to* ***demonstrate that the national authorities concerned made a manifest error of assessment when they gave consent to a project****." [Emphasis added]*

49. The appropriate standard of review was considered again by the Court of Appeal in **Plan B Earth v SSfT** *[2020] EWCA Civ 214, in the context of a challenge to the decision to designate Heathrow as a location for a new runway in the Airports National Policy Statement. The Court (Lindblom, Singh and Haddon-Cave LJJ) held that the Wednesbury standard of review was the correct one when considering decisions taken under the Habitats Directive (at paragraph 75) and the SEA Directive (at paragraph 136):*

> *"75.Wednesbury" irrationality is the normal standard of review applicable in judicial review proceedings in this jurisdiction where interferences are alleged with rights of various kinds, including rights arising in domestic environmental law. And it seems to us appropriate in principle, and not less favourable, to apply the same standard to rights under EU law. Nor does it render the exercise of EU rights virtually impossible or excessively difficult in practice. In our view, therefore, there is no justification for applying a more intense standard of review than "Wednesbury" to the operation of the provisions of article 6(4) of the Habitats Directive.*
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> > *"136 The court's role in ensuring that an authority - here the Secretary of State - has complied with the requirements of article 5 and Annex I when preparing an environmental report, must reflect the breadth of the discretion given to it to decide what information "may reasonably be required" when taking into account the considerations referred to - first, "current knowledge and methods of assessment"; second, "the contents and level of detail in the plan or programme"; third, "its stage in the decision-making process"; and fourth "the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment". These requirements leave the authority with a wide range of autonomous judgment on the adequacy of the information provided. It is not for the court to fix this range of judgment more tightly than is necessary. The authority must be free to form a*

reasonable view of its own on the nature and amount of information required, with the specified considerations in mind. This, in our view, indicates a conventional "Wednesbury" standard of review - as adopted, for example, in Blewett. A standard more intense than that would risk the court being invited, in effect, to substitute its own view on the nature and amount of information included in environmental reports for that of the decision-maker itself. This would exceed the proper remit of the court."

50. Those observations are plainly applicable to decisions taken under the EIA Directive. That is shown by the Court's approval of the approach taken in ***R (Blewett) v Derbyshire County Council*** *[2004] Env LR 29, which concerned the EIA Directive (see paragraphs 126-127). Moreover, the Court approved the Divisional Court's finding that* ***Blewett*** *does not represent a freestanding principle of law, but is simply a "practical application of conventional ["Wednesbury"] principles of judicial review" at paragraph 130.*

51. There are also important policy reasons supporting a restrictive intervention by the Court, where (as here) an evaluative decision is otherwise not challenged on other public law grounds. The decision whether an EIA was required in this case was considered both by the LPA and by the Secretary of State, with the benefit of advice from specialist consultees and other experts. The Court does not have the same specialist expertise and experience. The adoption of a more intensive form of a review, effectively asking the Court to reconsider the merits of the Secretary of State's evaluative judgement, would make judicial review in environmental and planning cases even more complex. It would, for example, require decision makers to call experts, have those experts tested in cross-examination and potentially the need for a judicial site visit. As Carnwath LJ explained in ***R (Jones) v Mansfield DC*** *[2004] Env LR 391 at paragraph 61, the exercise of judgement on technical or planning grounds is a function for which the courts are ill-equipped."* [underlining added]

Accordingly, the Party Concerned knowingly (because it had specifically been drawn to its attention by the lawyers for the Claimant in that case) contradicted what it has said to this Committee.

For her part, the judge said this in the light of those submissions:

"*57. It is well-established that the screening authority, be it the local planning authority or the Secretary of State, has been entrusted with the task of judging whether the development is likely to have significant effects on the environment, and the Court will only intervene if the decision-maker errs in law.*

58. In ***R (Hockley) v Essex County Council*** *[2013] EWHC 4051 (Admin), Lindblom J. helpfully reviewed the authorities at [23] to [25]:*

…

25. In **R. (on the application of Loader) v Secretary of State for Communities and Local Government** *[2012] EWCA Civ 869, Pill L.J., with whom Toulson and Sullivan L.JJ. agreed, said (in paragraph 31 of his judgment) that there was "ample authority that the conventional* **Wednesbury** *approach applies to the court's adjudication of issues such as these". That principle is firmly established in the domestic jurisprudence. For example, in* **R. (on the application of Evans) v Secretary of State for Communities and Local Government** *[2013] EWCA Civ 114) Beatson L.J. said (in paragraph 22 of his judgment) that the "assessment of the significance of an impact or impacts on the environment has been described as essentially a fact-finding exercise which requires the exercise of judgment on the issues of "likelihood" and "significance"" (see also paragraph 40 of Laws L.J.'s judgment in* **Bowen-West v Secretary of State** *[2012] EWCA Civ 321). In* **Jones v Mansfield** *Carnwath L.J. said (at paragraph 61) that because the word "significant" does not lay down a precise legal test but requires the exercise of judgment on planning issues and consistency in the exercise of that judgment in different cases, the function is one for which the courts are ill-equipped."*

59. In **Hockley**, *Lindblom J. went on to say, at [102], that unless it is obvious that relevant and potentially significant effects on the environment have been overlooked, the Court will need some objective evidence to show this was so. Mere conjecture is not enough.*

60. In **R (Kenyon) v Secretary of State for Housing, Communities and Local Government** *[2020] EWCA Civ 302, Coulson LJ cited paragraph 102 of Lindblom J.'s judgment in* **Hockley** *with approval (at [15]), and added, at [43]:*

> *"43. An appellant seeking to argue that the decision-maker …. reached a conclusion for which there was no evidential basis invariably faces an uphill task. Such a task is made even more difficult in a situation like the present case, given that the screening direction is a preliminary, broad-based assessment of environmental impacts, undertaken by those with relevant training and planning expertise."*

61. Where a screening decision is based on the opinion of experts, which is relevant and informed, the decision-maker is entitled to rely upon their advice: see the judgment of the Court of Appeal in **R (Langton) v Secretary of State for Environment, Food and Rural Affairs** *[2019] EWCA Civ 1562, at [68] – [70]. Where a statutory regulator makes a decision based upon an evaluation of scientific, technical and predictive assessments, the Court should afford the decision-maker an enhanced margin of appreciation* **(R (Mott) v Environment Agency** *[2016] 1 WLR 4338, applied in* **R (Spurrier) v Secretary of State for Transport** *[2019] EWHC 1070 (Admin) at [171]).”*

As it happens, the judge went on to decide that the Secretary of State had taken a legally

flawed approach to the EIA screening decision, and she allowed the claim. But, as above, in the course of doing so and having been confronted (as had been the Secretary of State) with the *McMorn* point made by the Party Concerned to this Committee, she specifically re-asserted the orthodox judicial review approach including that:

1. The conventional *Wednesbury* approach applies to the court's adjudication of issues such as these.
2. The word "significant" does not lay down a precise legal test but requires the exercise of judgment on planning issues and consistency in the exercise of that judgment in different cases, the function is one for which the courts are ill-equipped.
3. An appellant seeking to argue that the decision-maker …. reached a conclusion for which there was no evidential basis invariably faces an uphill task. Such a task is made even more difficult in a situation like the present case, given that the screening direction is a preliminary, broad-based assessment of environmental impacts, undertaken by those with relevant training and planning expertise.
4. Where a screening decision is based on the opinion of experts, which is relevant and informed, the decision-maker is entitled to rely upon their advice.
5. Where a statutory regulator makes a decision based upon an evaluation of scientific, technical and predictive assessments, the Court should afford the decision-maker an enhanced margin of appreciation.

Accordingly, (1) the Party Concerned is entirely wrong in its claim that *McMorn* acts as a precedent for a close scrutiny approach, (2) the Government has directly and knowingly acted to undermine and contradict that position before the domestic courts, even since making the claim to this Committee, and (3) the domestic courts have not acted in the way which the Party Concerned has claimed to this Committee, before or since.

SCOTLAND

As for England and Wales as explained above, we have checked legal databases.

We have not been able to find a single case since December 2019 in which the Scottish courts have applied, referred to, or explained a 'close scrutiny' approach, let alone by reference to *McMorn*.

Only two of the published Scottish judgments involving planning/environmental matters since then make any obvious reference to the approach being taken by the court. In each case, what they mention is an entirely traditional (and narrow) *Wednesbury* approach. We mention them for completeness:

- *Liddell v Argyll and Bute Council* Court of Session (Inner House, First Division) [2020]

CSIH 30 10 Jun 2020) – see paras 16, 19 and 22 in particular[16].

- *City of Edinburgh Council v Scottish Ministers* Court of Session (Inner House, First Division) [2020] CSIH 13 9 Apr 2020 – see para 45[17].

That confirms that, in Scotland as in England and Wales, there has been no change in practice. It is simply not the case that the courts have adopted a close scrutiny approach as contemplated in ***McMorn***.

NORTHERN IRELAND

Having made relevant searches, no case has been identified where the Courts of Northern Ireland have referred to the ***McMorn*** case or felt it appropriate to depart from the normal judicial review supervisory standards by applying a 'close scrutiny' approach in cases engaging the Aarhus Convention[18].

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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.

Given our answer to Question 5 above, the Committee will appreciate that the issue does not generally arise in the form contemplated by Question 6.

As far as we aware the point has therefore only arisen in the context of the decision in ***McMorn*** itself, where Ouseley J held that the case was an Aarhus claim for the purposes of both costs and for his consideration of the merits of the case (albeit that, as above, his "close scrutiny" approach was based on the fact that the claimant's financial interests were at stake, rather than his conclusion that it was an Aarhus claim).

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

16 https://www.bailii.org/scot/cases/ScotCS/2020/2020_CSIH_30.html

17 https://www.bailii.org/scot/cases/ScotCS/2020/2020_CSIH_13.html

18 Comments in relation to Northern Ireland provided by Roger Watts, Partner, C & J Black Solicitors, Linenhall House, 13 Linenhall Street, Belfast BT2 8AA

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.

As explained below, our general answer is that judicial review generally does not, and certainly not routinely and predictably, operate in the way described in those points.

However, it is in practice not possible really to demonstrate that counter-factual from court judgments.

That is because, particularly in environmental judicial reviews, the lawyers involved are all familiar with the limitations of the conventional approach to judicial review. In particular, we all know that arguments based on propositions 1-7, as above, would be rejected out of hand by the court and any attempt to do so is dismissed out of hand. So we do not raise such arguments. So they do not feature in court judgments.

It follows that it is not readily possible to identify specific rejections of those points by way of a counter-factual, let alone only in Article 9(2) cases. What we have set out below is our best attempt to illustrate the points, which apply in England/Wales, Scotland and Northern Ireland.

Dealing then with the specifics of 1-7:

1. Satisfy itself that the public/consultees had been provided with proper and sufficient information about the proposal in a timely way – including adequate opportunity to submit an informed response to the assessment of such information by decision-makers and developers.

   This is the point to which judicial review comes closest: the court will indeed check that consultees were provided with sufficient information and had the opportunity to submit informed responses.

2. Satisfy itself that the decision-maker had properly considered (i.e. "due regard"[19] and not merely "taken into account" generally by being aware of it only) contrary views expressed by consultees and others overall or on particular points, including identifying and explaining the basis for disagreeing with those views where that was the case, and the evidence relied on in doing so.

   As explained in point 2 on page 3 of our Communication, the court will indeed check to ensure that the decision-maker was aware of the substance of the main points raised by consultees. In that vein, challenges have succeeded where (for example) officials did not pass on to the decision-making Secretary of State key responses from consultees. In other words, where the actual decision-maker was literally ignorant of what consultees had said in response to a consultation, albeit that the court will only take that view where it is satisfied that the particular point being made by consultees was one which the

[19] Or "due account"

decision-maker was legally required to take into account.

But provided the decision-maker was aware of consultation responses on such points, the court would not entertain a challenge to whether the decision-maker sufficiently or properly considered that material, let alone require that the decision-maker provides any explanation for disagreeing with public comments, or has any evidential basis for doing so. The courts essentially rely on overarching principles of "overall" fairness to govern the lawfulness of a consultation process. That does not involve the level of scrutiny which is required by the Convention.

We are though aware of one case in which the claimant argued for that closer scrutiny (and indeed did so by reference to the Convention and the Implementation Guide): *Stephenson v Secretary of State for Housing Communities and Local Government* [2019] EWHC 519 (Admin). The judge explained the submission made by the claimant:

> *"41. The second subsidiary matter related to consultation relied upon by Mr Wolfe was the contention that, because the subject matter of the decision was environmental in character there was a need, in addition to the common law principles pertaining to consultation, to incorporate into the analysis the principles of the Aarhus Convention in relation to Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Article 7 of the Aarhus Convention requires parties to the Convention to make appropriate practical and or other provisions for public participation in relation to plans and programmes relating to the environment. Article 6(8) provides as follows:*
>
> > *"6(8) Each party shall ensure that in the decision due account is taken of the outcome of the public participation."*
>
> *42. Mr Wolfe submitted that this provision of the Aarhus Convention augmented the requirements of the common law. He submitted that it was of significance that in Stichting Natuur En Milieu v European Commission (Case T-338/08) the CJEU had made reference to the Aarhus Convention Implementation Guide in its consideration of the application of the provisions of the convention. Moving to the provisions of the Aarhus Convention Implementation Guide pertinent to Article 6(8), whilst the Guide notes that the Aarhus Convention does not specify what taking "due account" or public participation means in practice, Mr Wolfe drew attention to the observation in the guide that "the relevant authority is ultimately responsible for the decision based on all the information available to it, including all comments received, and should be able to show why a particular comment was rejected on substantive grounds." The guide goes on to observe that the requirement to take into account the outcome of public participation in the context of Article 6 "requires something more than "as far as possible"; rather, the paragraph should be strictly construed to require the establishment of definite substantive and procedural requirements*." [underlining added]

Having analysed the evidence the judge concluded that, on key points, the Secretary

of State was literally unaware (because officials had not provided him with the material) of what a key consultee had said.

> "*58. … This had the effect of excluding from the material presented to the Minister any detail of the observations or evidence which bore upon the merits of the policy. Given my conclusion as to what the reasonable reader would have concluded from the publicly available documentation the consultation exercise which was undertaken was one which involved breaches of common law requirements in respect of consultation and which was therefore unfair and unlawful. In the light of that conclusion in relation to the common law principles there is no need to examine the further subsidiary submissions made by Mr Wolfe related to the application of the requirements under the Aarhus Convention*." [underlining added]

In other words, the claim succeeded because of a breach of the "common law" threshold, namely that the decision-maker was literally unaware of consultation responses.

So, as he said, the judge did not need to decide whether the Convention required (by reference to the requirement that "due account" be taken[20]) that the decision-maker explain on substantive and evidenced grounds why he had rejected particular consultation responses.

3. Satisfy itself that the decision-maker had actually evaluated information or evidence on the basis of which to answer all of the issues before it (including issues raised by the legal points before it).

The court will be satisfied if the decision-maker was aware of the relevant evidence. It will not make any attempt to ascertain whether the decision-maker actually evaluated that evidence, let alone require the decision-maker to explain why they rejected particular evidence. The case of ***Packham*** (relating to the HS2 railway) as above obliquely illustrates the point. In particular, as above, the court was prepared to assume that the Secretary of State was aware of (and therefore had evaluated)

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[20] In England and Wales, the Equality Act 2020 places an obligation on public authorities to give "due regard" to specified equality obligations (around race, gender, etc) in the context of the Public Sector Equality Duty under s.149 of The Equality Act 2010.

The courts have interpreted that to require "more than simply giving consideration to" (which would be the ordinary ***Wednesbury*** formulation). Indeed, the approach taken by the courts to that requirement has much in common with the requirements of "due account", referred to in Article 6(8) of the Aarhus Convention and discussed in Communication ACCC/C/2008/24 concerning compliance by Spain. In that Communication, the Compliance Committee observed that the meaning of "due account" meant that the decision-maker must still seriously consider all the comments received (para 99) and that the obligation to take due account of the outcome of public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account (para 100).

All of that means that the UK courts should have no difficulty in following the requirements of "due account".

information on the environmental impacts of the project. It did not require evidence on the point. It certainly did not entertain any question of whether the Secretary of State had actually evaluated such information.

4. Satisfy itself that the nature and scale of the information or evidence was capable, in all the circumstances, of properly addressing relevant issues including the need to resolve any scientific doubt about environmental impacts. By definition, this requires surveys to be: (i) based upon sufficiently complete, focused and detailed assessments taken over an appropriate scale/period; (ii) based on a measurement/sampling regime that is capable of providing proper information; (iii) sufficiently up to date; (iv) collected for (or suited to) the relevant issue; and (v) undertaken by competent experts.

   Our point 4 includes elements from what the CJEU had said in ***Sweetman*** was required for a lawful assessment under the EU Habitats Directive.

   On pages 7-8 of our Communication we explained how the judge in ***Foster*** rejected that as appropriate. The judge (Cranston, J) observed that there was "*an air of unreality about this submission",* in that the CJEU could not have been suggesting that national courts must decide when the assessment has lacunae, whether it contains complete, precise and definitive findings, and whether its conclusions are capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned. In his words, "*Judges may be clever, but not that clever".* Mr Justice Cranston observed that this approach was also to misunderstand the role of courts in European societies and that, to his mind, the CJEU was simply stating that the national court had to evaluate the assessment in the ordinary way, not become the primary decision-maker. The judge also stated that counsel's submission was contrary to binding authority (albeit in a different context), referring to ***Smyth v Secretary of State for Communities and Local Government***. In this case, Sales LJ rejected a submission that in applying the Habitats Directive the national court must apply a more intensive standard of review, in effect making its own assessment afresh, reaffirming earlier authority that ***Wednesbury*** is the correct standard of review.

   No experienced environmental lawyer in the UK would waste time repeating that argument, let alone with the additional elements set out in our point 4 so the point does not feature again in the case law.

5. Satisfy itself that the information or evidence was logically probative (i.e. capable of proving or demonstrating what is necessary) in relation to those issues.

   As explained above, the court limits itself to checking whether the decision-maker had evidence relating to a particular point. Thus, for example, did the decision-maker have evidence on (say) air quality, or the impact of a development on protected site or species. Provided there was <u>some</u> evidence, the court would not entertain an argument relating to whether it was logically probative. The court would take the view that all evaluation of the evidence was for the decision-maker.

It is well established that the court will check that the decision-maker made "reasonable inquiries" in relation to the points it needed to decide.

However, in the recent judgment relating to the expansion of Heathrow Airport, in which one of the Communicants, Friends of the Earth, was one of the main claimants, the Court of Appeal rejected arguments that the Strategic Environmental Assessment (SEA) was deficient[21]. Part of the complaint was that the Secretary of State had not made proper inquiries to establish the factual position. The Court said that [129]: "*The established principle is that the decision-maker's judgment in such circumstances can only be challenged on the grounds of irrationality*".

In other words, it is only if the decision-maker made such poor inquiries that no reasonable decision-maker could have done less (i.e. it was irrational not for the decision-maker not to do more by way of inquiries), the court would not assess the nature or extent of the inquiries.

In other words, the court does not consider whether the inquiries were "sufficient" in any objective or independent way. It simply defers to the decision-maker.

6. Satisfy itself that the decision maker had made reasonable and sufficient inquiries in establishing that information including following up gaps and areas of obvious doubt, and in considering contrary points put by consultees.

   Again, it is hard to show the counter-factual given that experienced lawyers would not run arguments which would be doomed to fail, and so the rejection of such arguments does not feature in judgments.

   We would though draw the Committee's attention to ***Friends of the Earth and Frack Free Ryedale v North Yorkshire County Council*** [2016] EWHC 3303 (Admin) (page 17 of the Communication and referred to in question 7 below) and ***RSPB) v Secretary of State for the Environment, Food and Rural Affairs*** [2015] EWCA Civ 227 (page 6 of the Communication).

7. In circumstances where one decision-maker was reliant on decisions taken by others (or information provided by others) for some aspects, satisfy itself that (and the challenged decision-maker needs to check and show to the court that) the second decision maker's assessment and approach had been such that the first decision-maker's reliance was indeed warranted. It would not be for the court or first decision-maker to retake that other decision, rather to check/show that it was taken on a proper and sufficient basis and (regardless of the purpose for which it had been taken) it was fit for this purpose.

   The significance of this issue is illustrated by reference to a recent case concerning hydraulic fracturing ("fracking") on the site of a former gas well in North Yorkshire.

[21] See *R (Plan B Earth & ors) v SSBEI.[2018] EWHC 1892* (Admin) [2019] and *Plan B Earth and Others v Secretary of State for Transport* [2020] EWCA Civ 214

In *Friends of the Earth and Frack Free Ryedale v North Yorkshire County Council* [2016] EWHC 3303 (Admin), the judge concluded that it was lawful for the planning committee not to take the environmental impacts of the burning of the gas at an electricity generating station into account on the advice of another statutory consultee (the Environment Agency) and because the National Planning Policy Framework states that: "…control of processes or emissions where these are subject to approval under pollution control regimes, and it should be assumed that those regimes will operate effectively". As such, the judge held that the court should not apply any further independent scrutiny of whether the regulation of greenhouse gases in this case was sufficient enough to allow the planning committee to ignore those impacts.

Overall, we would also remind the Committee that the Party Concerned has not at any point in these proceedings disputed our characterisation at pages 3-4 (points 1-6) of the approach taken in judicial review or the additional approach relating to expert evidence which we set out in paragraphs 10-15 in our speaking note for the Committee Meeting, other than in the generalised (but spurious, as above) suggestion that the courts now follow a 'close scrutiny approach'. That submission by the Party Concerned is entirely misleading, as demonstrated by UK Government's own actions/legal submission in the domestic courts (as set out above).