Re Communication ACCC/C/2017/156

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Observations on the UK's Response to Questions Dated 1st June 2020 submitted by the Communicants

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The Table below sets out the Communicants' observations on the UK's responses (particularly to the passages highlighted in yellow) below.

| UK's Response | Communicants' observations |
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| <u>Introduction</u><br><br>1. These responses are made without prejudice to the United Kingdom's overarching response to the Complaint, namely that the Communicants have failed adequately to specify a breach of the Aarhus Convention. The Complainants have not explained how the approach for which they content would make a substantive change to the outcome of the cases on which they rely. The evidence does not demonstrate a systemic breach of the Aarhus Convention, such as could justify a finding against the party concerned outside the context of a specific case. | The Communicants have already responded to this proposition. |
| <u>The meaning of "substantive legality"</u><br><br>As the UK has previously emphasised (Response, Section III; Further Observations, Section III, Note of the Oral Presentation, Section III), Article 9(2) concerns ensuring that qualifying Members of the | As the Communicants have already explained[1] it cannot be right that the Convention is not concerned with the approach which domestic courts take to determining substantive legality (i.e. |

[1] See the Communicants' Reply to Observations made by the United Kingdom on Communication ACCC/C/2017/156 (here) and David Wolfe QC's Opening Notes for ACCC Opening here. We also refer to the importance of the objective of any administrative or judicial review process as being to "have erroneous decisions, acts and omissions corrected and, ultimately, to obtain a remedy for transgressions of law" (see page 200 of the Aarhus Implementation Guide here) and the stated purpose of the Convention as set out in Article 1: "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."

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| Public have access to a review procedure to challenge the substantive and procedural legality of certain decisions relating to the environment. It is about access to a judicial means of decision-making. It is not about what the domestic law principles that the court or equivalent body is to apply to determining whether a decision is or is not substantively lawful. To interpret the Convention in this way would constitute a radical expansion of its scope, beyond what the Parties have agreed. What is, and is not, substantively lawful is exclusively a matter of domestic law. | that compliance with the Convention is achieved just by having such courts in place, regardless of the approach they apply). And see further below. |
| 7. Substantive legality concerns the non-procedural legal requirements for a valid decision. Therefore, depending on the substantive content of the State party's law, examples of substantive illegality may include:<br>(i) Acting pursuant to the wrong legal provision;<br>(ii) Misinterpretation of the relevant law;<br>(iii) Misinterpretation of relevant policy;<br>(iv) Making a material and demonstrable error of fact;<br>(v) Unjustifiably breaching a person's legitimate expectation as to the outcome of an application;<br>(vi) Reaching a decision which is not logically open to a decision-maker on the material available to it. | This is a non-exhaustive list of essential components for assessing substantive legality.<br><br>If the Party Concerned is correct to say that the Convention requires merely the existence of domestic courts and is not concerned with how those domestic courts assess substantive legality, then it would allow for a domestic system which did not even consider any of those elements. That is plainly incorrect. The issue for the Committee is what are the minimum requirements? The Communicants say that it is not just the items listed by the Party Concerned, as above, but also (at least) the additional elements identified by the Communicant and considered further below. |
| 8. Whilst these paragraphs indicate what procedural and substantive review are capable of including, it is not the case that those forms of review must include those elements. There is no basis in the text of the Convention for dictating the content of a Party's law regarding substantive review. It is up to each State Party to decide what its substantive law requires. | See above. The Convention is concerned to ensure that minimum requirements are met. If the Party Concerned were correct then the Convention would be met simply by the existence of a court to which citizens could apply, even where the court in question in practice did not apply any substantive scrutiny at all. As above, the Committee is here concerned with whether the Party Concerned has met those minimum requirements. |
| 9. There may be some circumstances where a legal requirement which is said to have been breached has both procedural and substantive characteristics. | The Communicants agree - and have repeatedly emphasised that "substantive legality" does not require a merits appeal[2]. |

[2] See: (i) page 16 of the Communication here, (ii) the Communicants' Reply to Observations made by the United Kingdom on Communication ACCC/C/2017/156 here; and (iii) the Opening Statement on Communication ACCC/C/2017/156 by the Communicants here

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| The final sentence of the passage quoted above from the Implementation Guide recognises this, referring to "mixed questions, such as the failure properly to take comments into account". In such a situation, the procedural entitlement of members of the public (the right to make comments prior to a decision) delivers an output (the comments generated) which, certainly under the UK's legal system, is required as a matter of substantive law to be taken into account prior to the decision being made.<br><br>10. It is important to note that there is no indication in the Convention nor in the Implementation Guide that the review carried out by the court or similar body must be such as to remove the discretion of the decision-maker. A review of substantive and procedural legality does not mean that the court or similar body must carry out an appellate function, where it decides the matter for itself de novo. This would go beyond the scope of the Aarhus Convention. | |
| The Grounds of Judicial Review in UK Law<br><br>1. There are the following main grounds of judicial review in UK law:<br>(1) Error of law;<br>(2) Error of fact;<br>(3) Misinterpretation of policy;<br>(4) Failure to take into account a consideration that the law requires to be taken into account;<br>(5) Taking into account a legally irrelevant consideration;<br>(6) Acting for an improper purpose;<br>(7) Overriding a person's legitimate expectation of a particular outcome without adequate justification;<br>(8) Fettering decision-making function by policy or contract;<br>(9) Failure to comply with the substantive requirements of European Union law;<br>(10) Decision made contrary to the European Convention on Human Rights in terms of substantive outcome;<br>(11) Taking a decision not reasonably open to a | The Communicants do not dispute that list. As the Communicants have already explained 17(d) is interpreted by the UK courts as only requiring that the decision-maker is aware of what consultees have said. It does not mean that the decision-maker evaluates those responses in any way, let alone that they only disagree with them for good reason, let alone that they explain their disagreement (as per "due account"). |

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| decision-maker.<br>(12) Failure to follow process required by domestic law;<br>(13) Failure to comply with procedural requirements of European Union law;<br>(14) Decision made contrary to a procedure as required by the European Convention on Human Rights;<br>(15) Overriding a person's legitimate expectation of a process being followed without adequate justification;<br>(16) Bias or disqualification of decision-maker:<br>a. Decision taken by decision-maker automatically disqualified from taking decision due to interest in the outcome;<br>b. Decision taken by biased decision-maker;18<br>c. Decision taken where the reasonable and informed observer may have a reasonable suspicion of bias;<br>d. Decision taken by decision-maker where s/he appears to have predetermined the outcome prior to considering the evidence;<br>(17) When carrying out a consultation:<br>a) Consultation not carried out when the proposals are still at a formative stage;<br>b) Public not given sufficient reasons for a proposal to permit of intelligent consideration and response;<br>c) Adequate time not given for consultation and response;<br>d) Product of consultation not conscientiously taken into account in finalising the proposal;<br>(18) Failure to give adequate reasons for a decision;<br>(19) Unlawful delegation of decision-making power. | |
| Analysis of the Communicants' four example cases<br><br>*Preface to our response to this question*<br><br>14. In responding to this question, the United Kingdom emphasises that the question the Communicants ask the Committee to consider is whether 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. For reasons given above, Article 9(2) | The Communicants have dealt with this above. |

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| does not require any particular a standard of review. It provides that a Member of the Public must have access to a review procedure before a court of law or equivalent body to challenge whether the decisions was in accordance with *the State Party's rules* regarding substantive and procedural legality. | |
| 15. So long as Members of the Public have had access to a court to challenge a decision on the basis of procedural or substantive legality, this requirement is met. There is no threshold of intensity of review set out in Article 9(2). | The Communicants have dealt with this above. |
| 16. The same point applies to Article 9(3). It requires that Members of the Public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment. This does not set out a level of intensity of the court's review, or set out what those provisions of national law relating to the environment must actually say. | The Communicants have dealt with this above. |
| 17. For these reasons, so long as the courts were considering whether the decisions taken were in compliance with the procedural or substantive rules set down by the law of the United Kingdom, within the framework of the arguments put to them, then the decisions will be consistent with Articles 9(2) and (3). This limited requirement of Articles 9(2) and (3) was satisfied in relation to each of the cases. The answer therefore is that the requirements were satisfied. The only "standard of review", if it can be described this way, is to include both procedural and substantive elements; there is no indication that the courts declined to apply either procedural or substantive review. | The Communicants have dealt with this above. |
| 18. This Committee is therefore right not to ask whether the various decisions of the courts were correct. And yet the assertion that they were not | That does not follow. The Communicants are concerned with the approach taken by the courts in each case[3]. It is entirely possible in each case that |

[3] Noting that in a number of the Scottish cases highlighted, the more intense (i.e. Convention compliant) scrutiny applied by the first instance court was overturned on appeal

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| correct is necessarily implicit in the Communicants' case. | failed the underlying claim would have failed even if a Convention-compliant approach had been followed by the court. Without the underlying factual and other material (which of course is not available now) it is not possible to tell. |
| 19. Because the Communication does not in fact concern these specific court decisions, the Compliance Committee only has the text of the judgments. It does not have before it the underlying evidence or submissions which were made to the courts. | That is entirely correct and explains why, as above, the Communicants arguments do not depend on whether the actual claims would have been decided differently. |
| 20. Likewise, because the Communication does not concern these specific court decisions, even if the Compliance Committee finds that the decisions could be improved in relation to consistency with Articles 9(2) and (3), this does not mean that there is systemic non-compliance on the part of the United Kingdom with its obligations under the Convention. | The Communicant's case does not depend on there being systematic non-compliance (if that is taken to mean that the UK courts never follow a Convention compliant approach).<br><br>The Communicants' case is that the UK courts only occasionally follow such an approach, and certainly not on any predictable basis (as to which see below). Unless the Committee is satisfied that the Party Concerned has in place arrangements which ensure that a Convention-compliant approach is always adopted for Convention cases, and is adopted on a predictable basis, then the Communication should succeed. Even a single instance can show non-compliance of a systemic kind. |
| *Foster v. Forest of Dean District Council*<br><br>22. At para. 23, Cranston J responded to a submission on behalf of the Second Claimant that, according to caselaw of the Court of Justice of the European Union, it was for the national courts to establish whether the assessment of impacts upon protected habitats met the requirements of the Habitats Directive. Cranston J said:<br>"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 | The Communicant agrees with this statement. But that misses the point which is that Cranston J rejected application of the **Sweetman** approach which the Communicant says is part of the requirements of the Convention.<br><br>In this regard, see paragraph 101 of joined Cases C-293/17 and C-294/17 Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu v College van gedeputeerde staten van Limburg, College van gedeputeerde staten van Gelderland ("the Dutch Nitrogen cases), in which the CJEU held that:<br><br>"In order to ensure that all the requirements thus recalled are fulfilled, it is for the national courts to |

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| 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."<br><br>23. There is no inconsistency between this reasoning and the requirements of Articles 9(2) and (3) of the Aarhus Convention. Those Articles require rights of access to court for substantive and procedural review. They do not require that the court turns itself into the primary decision-maker. | carry out a thorough and in-depth examination of the scientific soundness of the 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive accompanying a programmatic approach and the various arrangements for implementing it, including inter alia the use of software such as that at issue in the main proceedings intended to contribute to the authorisation process. The competent national authorities may be entitled to authorise such an individual project on the basis of such an assessment only if the national court is satisfied that that assessment carried out in advance meets those requirements in respect of each specific individual project".<br><br>That approach is plainly also part of an assessment of substantive legality for Convention purposes. |
| 24. At paras 27-31, Cranston J considered an argument that the permission under challenge contained conditions which did not provide effective protection. In the course of dismissing this argument, the Judge considered the meaning and effect of the conditions in detail. There is no basis for concluding that the standard required under Articles 9(2) and (3) was not met. | The approach to the conditions was the traditional narrow **Wednesbury** approach. However, the issue here relates to the court's treatment of expert evidence, i.e. because the policy was supported by an expert, the court refused to look any further (such as at the nature of, or basis for, the expert advice), which was not sufficient for considering substantive legality. |
| 25. At paras 32-34, Cranston J considered an argument that no reasonable competent authority could have concluded, to the standard required by law, that the findings and conclusions of an Appropriate Assessment into the impacts upon a Special Area of Conservation were capable of removing all reasonable scientific doubt. It was argued that there were elements of uncertainty in the assessment. Cranston J considered the argument, and found that the decision-maker's approach could not be impugned in law. It had carried out an Appropriate Assessment, and had applied the relevant test. This constitutes a finding that the substantive requirements of the law had been met. It complies with the requirements of Articles 9(2) and (3) of the Convention. Cranston J also relied on the fact that Natural England, England's expert nature conservation body, agreed with the decision-maker's decision (para. 34). He was entitled to take this into account. | As above, the Communicant disagrees. The requirements set out in **Sweetman** are a key part of a substantive review. |

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| *Royal Society for the Protection of Birds v Scottish Ministers*<br><br>28. This decision extends to some 233 paragraphs. The list of legal materials referred to extends to over two pages of the report. The suggestion that the petitioners did not have access to a court to challenge the substantive and procedural legality of the decision, or to challenge an act by a public authority on the basis of alleged contravention of national law on the environment, is implausible as well as wrong. | What matters is the sufficiency of the approach taken by the Court, not how many legal authorities it considered within the scope of the approach it adopted. |
| 29. The Inner House of the Court of Session reversed the decision of the Outer House of the Court of Session. The Inner House found that the Outer House had applied the wrong approach to judicial review. The Inner House's approach is entirely conventional. The fact that there is an appellate system, whereby errors of a lower court can be corrected by a higher court, is not contrary to the Aarhus Convention (even if the decision of a lower court was favourable to a Member of the Public).<br><br>30. The Inner House noted (para. 25) that the Environmental Statements supporting the application "are extremely detailed", and "go into the issue of seabirds in quite extraordinary detail".<br><br>31. The Inner House set out the arguments of the parties before it over a number of pages (paras 102-185). The petitioners accepted that they could only succeed if they demonstrated errors of law (para. 157).<br><br>32. The Inner House considered the question of procedural legality. At para. 188, it stated "[t]he principal issue for this court on this ground is…whether there has been a breach of the procedural requirements of the EIA Regulations…". The Inner House found that there had been no such breach. It is, with respect, not a matter for the Compliance Committee whether the reasoning at paras 189- 196 was correct. It was in any event clearly compatible with Articles 9(2) and | The Party Concerned's answer depends entirely on its proposition that the Convention is concerned only with the fact of access to court and not with the approach which the court then takes. As above, that proposition is flawed. |

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| (3) of the Convention.<br><br>33. In paras 222-225, the Inner House considers the substantive requirements of the law regarding potential Special Protection Areas. It reached a judicial decision as to what the law required. This is consistent with Articles 9(2) and (3) of the Aarhus Convention.<br><br>34. The Inner House found that the decision-maker had complied with the procedural requirement of giving adequate reasons: paras 226-230.<br><br>35. A principle of substantive law that the primary decision-maker as to environmental impacts will be an administrative decision-maker, supported by expert advice, rather than a court, is not contrary to Articles 9(2) and (3) of the Convention. | |
| *R (Langton) v Secretary of State for the Environment, Food and Rural Affairs*<br><br>42. This case concerned the legality of guidance concerning badger culling. Statute provided that licences to cull could be granted to prevent the spread of disease. The claimant accepted that the express purpose of the Guidance was to prevent the spread of disease (para. 63). The claimant argued that the Judge in the High Court had proceeded on the basis that this was the only basis on which the Guidance could be legally challenged.<br><br>43. The Court of Appeal disagreed. This was not the approach which the High Court Judge had taken. The Judge had taken into account other points of substantive review (para. 64).<br><br>44. The claimant argued that the Guidance was unlawful due to an absence of evidence. The Court of Appeal noted that the relevant legislative provision did not specify the nature or quality of the evidence necessary to support the grant of a licence for the purpose of preventing the spread of disease (para. 65). Furthermore:<br>(i) At the time of the decision, there was no viable alternative to culling, so the choice was between culling or doing nothing (para. 66); | The Party Concerned does not dispute that the Court of Appeal treated the existence of expert support for the Secretary of State's approach as a complete answer to Mr Langton's challenge (i.e. that the court did not in any way evaluate the nature of, and basis for, that expert support). That is the problem identified by the Communicant. |

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| (ii) There was a timing imperative (para. 67);<br>(iii) The Secretary of State accepted that an approach of supplementary culling was untested (para. 68);<br>(iv) The Secretary of State had scientific judgment of the chief veterinary officer, his department's chief scientific advisor and other experts from specialists agencies (para. 68);<br><br>(v) These advisors acknowledged the limited evidence available but concluded that there was a logical and defensible rationale for the licensing of supplementary culling, and recommended that it should be licenced (para. 68).<br><br>45. The Court of Appeal held that, in these circumstances, the Secretary of State was not acting irrationally in following advice. Furthermore, there was nothing in the law which provided that culling was lawful only if the outcome is certain (para. 69).<br><br>46. The Court of Appeal held that there would be no purpose in determining a point of law in relation to the Habitats Directive, since the practice of the relevant public body had since changed (para. 73).<br><br>47. This decision shows the English Court of Appeal carrying out substantive review. This is what is required by Article 9(2). The claimant was enabled to challenge the decision and claim a breach of environmental law, which is what was required by Article 9(3). The fact that the Court of Appeal found no breach of the law does not indicate a breach of Articles 9(2) and (3). | |
| Table of examples of post-*McMorn* 'careful scrutiny'<br><br>*Aireborough Neighbourhood Development Forum v. Leeds City Council* [2020] EWHC 461<br><br>At paragraph 127 the Court held that it would be irrational, and a breach of the requirement under the Strategic Environmental | The Party Concerned's response is very odd because it includes (as examples of alleged "careful scrutiny") instances of the courts applying (and in some instances being clear that they are doing so) the traditional, narrow, **Wednesbury** approach.<br><br>Traditional narrow **Wednesbury** approach.<br><br>As for **Aireborough,** see paragraph 124 of the judgment: " Mr Banner emphasises the breadth of evaluative judgement which the local authority has in deciding what is a reasonable alternative as set out |

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| Assessment Directive, to treat a 25% reduction in the nationally-directed housing requirement for the area as not representing a England and Wales Within scope of Articles 9(2) and (3) fundamental change in the case for releasing potential development sites from the Green Belt.<br><br>In dismissing an argument that there was a breach of a legislative duty to contribute to the achievement of sustainable development, "The starting point is that what is "sustainable development" is a question of very broad planning judgement for the local authority." [135]<br><br>In relation to alleged errors of fact in terms of calculation of housing need and housing land supply, and the impact upon the release of sites from the Green Belt, "There must be a degree of latitude in such a calculation because figures will frequently change and some errors (given the complexity of the process and the figures) are probably inevitable. However, errors that significantly impact on the need for GB release must be material to determining whether there has been an error of fact that gives rise to an error of law." [137] | in **Friends of the Earth v Forest of Dean DC** at [40] and in **R (Spurrier) v. Secretary of State for Transport [2019] J.P.L. 1163,** the Divisional Court at [433-4]. He correctly said that the judgement is only challengeable on **Wednesbury** grounds." |
| *R (ClientEarth) v. Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 1303 (Admin) England and Wales Within scope of Articles 9(2) and (3)<br><br>"It is insufficient for a claimant simply to say that the decision-maker did not take into account a legally relevant consideration. A legally relevant consideration is only something that is not irrelevant or immaterial, and therefore something which the decision-maker is empowered or entitled to take into account. But a decision- maker does not fail to take a relevant consideration into account unless he was under an obligation to do so. Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy | Traditional narrow **Wednesbury** approach.<br><br>In particular, see paragraph 254:<br><br>"Then it was submitted that officials and the Secretary of State asked the wrong question, namely whether the proposed development would lead to a breach of the CCA 2008 or would result in incompatibility with the net zero target, because those questions cannot be answered at this point in time (para. 174 of skeleton). However, the Secretary of State did address those questions and concluded that the proposed development was not incompatible with the net zero target (DL 5.9 and 6.12). **That was a matter of judgment for the Secretary of State which could only be challenged on the grounds of irrationality. Here it is appropriate to** |

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| which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so "obviously material", that it was irrational not to have taken it into account." | have in mind the discussion of the Divisional Court in Spurrier on intensity of review ( [2020] PTSR 240 at [141] et seq.) and in particular cases dealing with challenges to consents, such as Newsmith Stainless Limited v Secretary of State for the Environment, Transport and the Regions [2017] PTSR 1126 at [6] to [8] and R (Mott) v Environment Agency [2016] 1 WLR 4338 at [75] et seq. ClientEarth have put forward reasons as to why they disagree with the Secretary of State on this subject, but the Court is in no position to say on the material which has been produced that her judgment was irrational." |
| *R. (Swire) v. Secretary of State for Housing, Communities and Local Government* [2020] EWHC 1298 (Admin) England and Wales Within scope of Articles 9(2) and (3)<br><br>"Unfortunately, although the Defendant correctly recognised that the issue of BSE-related contamination required further investigation, assessment, and remediation of any contamination found, he then applied the wrong legal test…" [105]<br><br>"The Defendant adopted the Council's approach in his screening opinion. But because of the lack of expert evidence, the Defendant was simply not in a position to make an "informed judgment"… It follows that when the Defendant concluded that "he was satisfied that the proposed measures would satisfactorily safeguard and address potential problems of contamination" and that "the proposed measures would safeguard the health of prospective residents of the development", he was making an assumption that any measures proposed under condition 21 would be successful, without sufficient information to support that assumption." [106] | As it happens, the Claimant won her case but with the court explicitly applying a traditional narrow Wednesbury approach (the Defendant having specifically contradicted the submissions made by the Party Concerned to this Committee).<br><br>Please note that we addressed this case in some length in our Response from the Communicants to the Questions to both the Party Concerned and the Communicants (see pages 11-16) |
| *R. (Plan B Earth) v. Secretary of State for Transport* [2020] EWCA Civ 214 England and Wales Within scope of Articles 9(2) and (3)<br><br>This challenge was to the National Policy Statement concerning the expansion of Heathrow Airport. It was a high-profile and significant environmental | As it happens, one of the Claimants (and a Communicant in this case - Friends of the Earth) won its case but with the court explicitly applying a traditional narrow Wednesbury approach (the Defendant having specifically contradicted the submissions made by the Party Concerned to this Committee). |

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| judicial review claim.<br><br>The Court of Appeal considered points regarding the Habitats Directive at paras 63-124. This included detailed consideration at paras 66-80 that the Wednesbury standard of review was applicable and appropriate in the context of a challenge under the Habitats Directive.<br><br>The Court of Appeal considered points regarding the Strategic Environmental Assessment Directive at paras 125-183 and 242-247. This included detailed consideration at paras 126-144 of the appropriate role of the courts in such challenges.<br><br>At paras 222-233, the Court of Appeal found the claim made out that the Paris Agreement on Climate Change constituted Government policy which the Secretary was required to take into account. At paras 234-238, the Court of Appeal held that the Secretary of State had failed to comply with domestic law by failing to ask himself the question of whether the Paris Agreement could be taken into account. The Court of Appeal held at para. 237 that "the only reasonable view open to him was that the Paris Agreement was so obviously material that it had to be taken into account". | Please see paragraph 179 of the judgment:<br><br>"For our part, we consider **Mott** is a helpful reminder of well-established good law: **the court should accord an enhanced margin of appreciation to decisions involving or based upon "scientific, technical and predictive assessments" by those with appropriate expertise**. The degree of that margin will of course depend on the circumstances: but, where a decision is highly dependent upon the assessment of a wide variety of complex technical matters by those who are expert in such matters and/or who are assigned to the task of assessment (ultimately by Parliament), the margin of appreciation will be substantial. That will be a potentially important consideration when we examine some of the grounds of challenge, which do relate to matters of technical judgment and expertise, modelling and predictive assessments, some of which were made by independent expert bodies or by the Secretary of State assigned to make such assessments on the basis of expert evidence." |
| *Gladman Developments Ltd v. Secretary of State for Housing, Communities and Local Government* [2020] EWHC 518 (Admin) England and Wales<br>Within scope of Articles 9(2) and (3)<br><br>"As the authorities make clear, and needs to be re-emphasised, not all planning policies are suitable for judicial interpretation. Development plans and other documents are full of broad statements of policy, many of which may be mutually irreconcilable, so that one must give way to another. Many policies may be framed in language the application of which requires the exercise of judgment by the decision maker, which may only be challenged in the courts on the ground of irrationality. Where the interpretation of a policy is truly justiciable, the court must interpret it "objectively, in accordance with the language used, read as always in accordance in its proper context". Development | Traditional narrow **Wednesbury** approach. |

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| plans are not analogous in nature or purpose to a statute or contract and should not be interpreted as if they were… Similarly, where submissions on the interpretation of a policy may properly be made to a court, they must also<br>conform to those interpretative principles." [74] | |
| *R. (Ross) v. Secretary of State for Transport*<br>[2020] P.T.S.R. 79937 England and Wales<br>Within scope of Articles 9(2) and (3)<br><br>When considering a *Wednesbury* challenge in the context of the evaluation of technical or scientific evidence: "in my view the position in relation to Wednesbury based challenges to the legality of decisions which have been informed or influenced by scientific or technical material is well settled. The approach is based upon the fundamental principle that the court is not retaking the decision: it is not equipped procedurally or substantively to do so. Whilst the court will not abandon all curiosity as to how the decision has been reached, and can (as was emphasised in Mott) expect that the decision-taker will provide a full and accurate explanation of the facts and scientific analysis relevant to the decision, nevertheless it is not the role of the court to embark on its own technical appraisal of the issues. The court must recognise and respect the expertise which has been brought to bear in reaching the decision, and appreciate that there may be more than one scientific view of an issue, as well as more than one way of modelling or forecasting an impact or effect. A decision-taker is entitled to give particular weight to a suitably scientifically qualified consultee and rely upon their advice in reaching a conclusion. All of these factors, and no doubt others, comprise the margin of appreciation to which the authorities refer. As Sullivan LJ observed in the case of Downs [2010] Env LR 7, this does not mean that the decisions are immune from judicial review, but that the hurdle for a claimant to surmount is one which is formidable." [77]<br><br>"The claimants' contentions in relation to the reliability of the model bring into focus the discussion addressing the standard of review set out above. In my view there are formidable difficulties in | As per Langton above, that is the court proceeding on the basis that, because there was some expert support for the Defendant's approach, it was substantively legal, but without the court examining the basis for that expert support at all. But, as the Communicant has repeatedly made clear, that would not involve the court retaking the decision on a merits basis. The quote above erects a false dichotomy between the traditional narrow Wednesbury approach and a merits appeal.<br><br>In particular, see paragraph 77 of the judgment cited by the Party concerned (opposite), in which the court states that "the hurdle for a claimant to surmount is one which is formidable." |

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| the way of the claimants seeking to persuade the court to adjudicate in an application for judicial review on the accuracy or reliability of a predictive model of the kind in question. The court, quite properly, has not heard any expert evidence examining whether the model is based on sound science or technical good practice. The court is not equipped to undertake the kind of scrutiny of this model which would, for instance, be undertaken at a public inquiry in relation to an appeal under section 78 of the 1990 Act, where the tribunal is seized of the merits of scientific or technical evidence of this kind." [116] | |
| *Canterbury CC v. Secretary of State for Housing, Communities and Local Government* [2019] J.P.L. 1321 England and Wales Within scope of Articles 9(2) and (3)<br><br>"The jurisdiction of the court under section 288 of the 1990 Act is an error of law jurisdiction. It includes the consideration of whether or not the decision which was reached was one which was Wednesbury unreasonable, although the demonstration of irrationality in a planning case, taken by a suitably qualified expert such as a Planning Inspector, will be a high hurdle to surmount (see Newsmith Stainless v Secretary of State for Environment, Transport and the Regions [2001] EWHC 74 (Admin). In the Canterbury case reliance is placed upon the formulation of the principle given by Sedley J (as he then was) in R v Parliamentary Commissioner for Administration *Ex Parte* Balchin [1998] 1 PLR 1 in which a legally erroneous decision was described as "a decision which does not add up- in which, in other words, there is an error of reasoning which robs the decision of logic"." [86] | Traditional narrow Wednesbury approach.<br><br>In particular, see paragraph 86 of the judgment (cited by the Party Concerned, opposite) which states that Wednesbury unreasonableness in such cases "will be a high hurdle to surmount". |
| *R (Squire) v. Shropshire Council* [2019] EWCA Civ 888 England and Wales Within scope of Articles 9(2) and (3)<br><br>A "lack of a proper assessment of the environmental impacts of the storage and spreading of manure as an indirect effect of the proposed development". [69] | As it happens, the Claimant won its case but with the court explicitly applying a traditional narrow Wednesbury approach. |

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| "The simple point here, therefore, is that neither the Public Protection Officer's comments nor the planning officer's own appraisal – nor indeed the Environment Agency's consultation response – expressly recognized the need for a meaningful assessment, in the EIA for this development, of the likely effects of odour from the disposal of large quantities of poultry manure – some 2,320 tonnes a year on farmland outside the application site, including some 1,150 tonnes on unidentified third party land. Neither acknowledged that such an assessment was required before planning permission could properly be granted for the proposed development. Neither went beyond generalities. And neither made good the lack of assessment in the environmental statement. Ultimately there was nothing within the environmental information for this project that qualified as a proper assessment, in accordance with the EIA regulations, of the effects of odour from the storage and spreading of manure." [73] | |
| *R (Cairns) v. Hertfordshire CC* [2019] Env. L.R. 6<br>England and Wales Within scope of Articles 9(2) and (3)<br><br>"On the balance of probabilities, it seems likely that the issue of the potential significant environmental effects of the proposal on the archaeological remains was accidentally overlooked by the author of the screening opinion. However, para.2(1)(viii) of Sch.3 to the EIA Regulations 2017 required the Defendant to have particular regard to sites of historical or archaeological significance." [42] If, contrary to this, the council did consider the issue, but decided that it did not need to address the effect of the proposal on archaeological remains, "then its assessment was inadequate, and it failed to state the main reasons for its conclusions in respect of it, contrary to regulation 5(5) of the EIA Regulations 2017." [43] The Judge however exercised his discretion not to quash the decision, on the basis that the outcome would inevitably have been the same. [54]-[55] | Traditional narrow **Wednesbury** approach.<br><br>In particular, see paragraph 26 of the judgment:<br><br>"In considering the Claimant's submissions, I reminded myself that the local planning authority 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 it errs in law. 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 |

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| | 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." |
| *DLA Delivery Ltd v. Baroness Cumberlege of Newick* [2018] P.T.S.R. 2063 England and Wales Within scope of Articles 9(2) and (3)<br><br>In relation to an error of fact: "The inspector may have been led into error by the parties, but it is clear that he was in error, and so too was the Secretary of State." [68] This was one of the reasons for the decision being quashed. | As explained, the "error of fact" approach only applies where the parties agree that there was an error. As it happens, the Claimant won its case but with the court explicitly applying a traditional narrow Wednesbury approach. |
| *Re Sands Application for Judicial Review* [2018] NIQB 80 Northern Ireland Within scope of Articles 9(2) and (3)<br><br>In judicial review, "the court will always pay close attention to surrounding and underpinning materials" [128]. This is despite the "unmistakably elevated threshold" for Wednesbury review in the "planning and environmental compartment of public law" [125]. Considering the sliding scale of judicial review in Keyu v. Secretary of State for Foreign and Commonwealth Affairs [2016] A.C. 1355, it was not suggested that "rigorous judicial scrutiny belonging to the upper end of the notional scale is appropriate in the present case" [127]. | That is a recognition of the existence of an "elevated threshold" but, as the Communicant has explained, and these examples show, that is not the court's general, let alone universal or predictable approach.<br><br>Paragraphs 123 - 131 need to be read as a whole. This section includes statements such as:<br>"[127] I draw attention to this not least because it is not suggested that rigorous judicial scrutiny belonging to the upper end of the notional scale is appropriate in the present case.<br>[128] The court, in what is essentially an exercise of judicial evaluative assessment, will always be conscious that its role is one of supervisor superintendence."<br>See also Paragraph [41] "The elevated threshold for the imposition of the extreme stigma of Wednesbury irrationality is not in my view, overcome. And see further the court's more detailed examination of the discrete Wednesbury ground of challenge at [122]–[131] infra". This appears to mean that the applicant had not overcome the high burden of proof |

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| | necessary to enable the Court to make a finding of Wednesbury irrationality. Note that is termed as "extreme stigma" i.e. for the decision maker to have failed to that degree. |
| *Re Donnelly's Application for Judicial Review* [2018] NICA 44 Northern Ireland Within scope of Articles 9(2) and (3)<br><br>"The interpretation of a planning permission is a matter for the court. It requires the court to consider the natural and ordinary meaning of the words in the particular legal and factual context." [19] | Traditional narrow Wednesbury approach.<br><br>This statement is not about the standard of scrutiny to be applied in planning/environmental JRs. This simply says it is for the Courts to determine what any particular planning consent means – in terms of its scope. |
| *Wealden DC v. Secretary of State for Communities and Local Government* [2018] Env. L.R. 5<br>England and Wales Within scope of Articles 9(2) and (3)<br><br>A requirement that the decision-maker show he had "got to grips" with the evidence:<br>"It seems to me surprising, as it did to the judge, that the inspector should have said nothing about the council's evidence and submissions calling into question the effectiveness, deliverability and consequences of heathland management. That evidence and those submissions went to the possibility of mitigating the effects of nitrogen deposition, and so, on the inspector's own analysis, to the need for "appropriate assessment" in this case. Like the judge, I think he ought to have dealt with them explicitly. It was, of course, open to him to conclude, as a matter of planning judgment, that heathland management, if it could be secured, would be effective in reducing or preventing the harmful effects of nitrogen deposition—in particular, eutrophication—and that, in doing so, it would not itself bring about other ecological harm. But I think this required a reasoned conclusion, showing that he had got to grips with the council's evidence and explaining why he preferred that given on behalf of Knight Developments. That reasoned conclusion is lacking. It is not the court's task to supply the reasons required. That was for the inspector to do. Here again he went wrong." [38] | Traditional narrow Wednesbury approach. |

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| *Re Donnelly's Application for Judicial Review* [2017] NIQB 84 Northern Ireland Within scope of Articles 9(2) and (3)<br><br>Applied this test: "Planning authorities are obliged to collect the information they need to be able to exercise their discretion in a rational way. A court must be satisfied that the planner has asked himself the right question when addressing his task and that he took reasonable steps to find the information required to answer the question correctly." [40] | Traditional narrow **Wednesbury** approach. |
| *R (Wealden District Council) v. Secretary of State for Communities and Local Government* [2017] Env. L.R. 31 England and Wales Within scope of Articles 9(2) and (3)<br><br>The court found advice from Natural England, an expert consultee, to be "plainly erroneous". [111]<br>"I appreciate that this is a specialist area and that the court must avoid delving into the minutiae of expert opinion evidence which is beyond its competence. The court should be doubly slow to criticise expert opinion where there is no contrary evidence being advanced by WDC. Even so, these self-denying ordinances, although salutary, are by no means absolute." [90] | Apart from the outlier case of **McMorn** (where the close scrutiny approach was applied because the claimant's financial interests were at stake not for Convention reasons) this is the only example presented by the Party Concerned of the court taking a close scrutiny approach (albeit without saying it was doing so). The problem is that this is not predictable or routine. |
| *Al Walgate & Son v. Scottish Natural Heritage* [2017] CSOH 51 Scotland Within scope of Articles 9(2) and (3)<br><br>A decision to restrict the use of licences to control pest species by a farmer was insufficiently reasoned.<br><br>"There remains the issue of the extent of the restriction imposed. In that regard, I am not persuaded that the reasons stated are adequate. Although the terms of the decision include reference to the issue raised by the petitioner in relation to the extent of Corsehope Farm to be affected by the restriction, the operative passage is brief and it does not involve consideration of the different land uses referable to the high ground, on the one hand, and to the low ground, on the other, or to the fact that | Traditional narrow **Wednesbury** approach. |

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| the part of Corsehope Farm comprising the high ground, where the evidence informing the decision was found, is significantly different in character from that of the low land, and was subject to a different management regime." [88] | |
| *R (Thomas) v. Merthyr Tydfil CBC*<br>[2017] Env. L.R. 3 England and Wales Within scope of Articles 9(2) and (3)<br><br>The court will decide on the interpretation of policy. According to planning policy, there was a material consideration in terms of the protection of the natural environment, retaining dark skies where appropriate, preventing glare and respecting the amenity of neighbouring land uses. This was considered just from the perspective of the objector's home; there was a wider perspective which, on the correct interpretation of policy, should have been taken into account. [41]-[43] | Traditional narrow **Wednesbury** approach. |
| *Carroll v. Scottish Borders Council* 2016 S.C. 377<br>Scotland Within scope of Articles 9(2) and (3)<br><br>Disagrees with the suggestion that there would be "a lower level of scrutiny or consideration, or a lesser requirement for reasons, was appropriate for [a Local Review Body] than would be appropriate for a reporter" [56]. (A reporter is an official appointed to determine planning appeals.) | Traditional narrow **Wednesbury** approach. |
| *R (Roskilly) v. Cornwall Council* [2016] Env. L.R. 21 England and Wales Within scope of Articles 9(2) and (3)<br><br>"were it necessary to do so, I would also have been minded to conclude that no reasonable planning authority, knowing at the time when they formed a resolution to grant planning permission that there was an outstanding request of the Secretary of State to make a determination on a screening direction, would proceed to grant planning permission without knowing the outcome of that screening direction process". [39] | Traditional narrow **Wednesbury** approach. |

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| *R. (Lee Valley Park Authority) v. Epping Forest DC* [2016] Env. L.R. 30 England and Wales Within scope of Articles 9(2) and (3)<br><br>A *Wednesbury* standard of review does not mean simply rubber-stamping the administrative decision. "The site of the proposed development was not in, or adjoining, a European site, but some distance from it. The proposed mitigation measures were not novel or complicated: the re-shaping and enlargement of Langridge Scrape, with no loss of surface water area, and the creation of additional habitat for Gadwall and Shoveler. As the judge said, the "ecological works" proposed were "clearly mitigation, not compensation", having been "designed to eliminate, avoid or reduce the impact on the protected nature conservation interest in the first place" (paragraphs 79 to 81 of the judgment). When consulted on this proposal, Natural England, as "appropriate nature conservation body", maintained the position they had taken hroughout: that, with the proposed mitigation in place, there would be no "significant effect" on the Lee Valley SPA and the Ramsar site. Their advice was accepted by the council as "competent authority". It was now informed by the further material before them when consulted on this application. Once again, it was wholly unambiguous." [66] | Traditional narrow **Wednesbury** approach.<br><br>In particular, see paragraph 65 of the judgment:<br>"I cannot accept those submissions. In my view Dove J. was right to conclude, in paragraphs 74 to 83 of his judgment, that the council had lawfully discharged its duties under the Habitats Directive and the Habitats regulations, and had properly concluded that there was no need for an "appropriate assessment" to be undertaken in this case. It must be remembered, as Sullivan J. said in **R. (on the application of Hart District Council) v Secretary of State for Communities and Local Government [2008] 2 P. & C.R. 16** (in paragraph 72 of his judgment), that the Habitats Directive is "intended to be an aid to effective environmental decision making, not a legal obstacle course". Judging whether an appropriate assessment is required in a particular case is the responsibility not of the court but of the local planning authority, subject to review by the court only on conventional **Wednesbury** grounds (see the judgment of Sales L.J., with whom Richards and Lewison L.JJ. agreed, in **R. (on the application of Dianne Smyth) v Secretary of State for Communities and Local Government [2015] EWCA Civ 174**, at paragraphs 78 to 81). I cannot see how the council's decision on the need for appropriate assessment in this case could be said to be in any way vulnerable on that standard of review." |
| VI Definition of "Aarhus claim"<br><br>48. The meaning of "Aarhus claim" in a claim brought by a Member of the Public would be drawn widely, following from the decisions in Venn v. Secretary of State for Communities and Local Government.52 While these decisions concerned the scope of the Aarhus Convention for the purposes of costs protection, the courts would apply the same approach in substantive review.<br><br>49. In the High Court, Lang J considered what was an "environmental matter" such that a claim would fall within the scope of the Aarhus Convention. Following the approach of the Implementation Guide in force at the time, Lang J considered that the | The Communicant accepts that the domestic courts have correctly identified cases falling within the Convention. |

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| meaning of "environmental" could be guided by the definition of "environmental information" in Article 2(3).<br><br>50. The Court emphasised the width of environmental matters under the Aarhus Convention: "In my judgment, there is a distinction between pure planning issues and environmental issues. Not every planning decision will engage environmental matters falling within the Convention, even taking into account the broad meaning given to environmental matters in the Convention."<br><br>51. In the Court of Appeal, Sullivan LJ stated at paras 10: "Mr James Eadie QC on behalf of the Secretary of State did not take issue with Lang J's conclusion (see para 11 of the judgment) that the description of "environmental information" in article 2(3) of Aarhus was an indication of the intended ambit of the term "environmental" in the Convention, and that the Implementation Guide to Aarhus was of assistance in reaching that conclusion. The Implementation Guide, 2nd ed, (2013) says, at p 40, that: "The clear intention of the drafters, … was to craft a definition [of environmental information] that would be as broad in scope as possible, a fact that should be taken into account in its interpretation."<br><br>51. At para. 11, Sullivan LJ went on to stress the breadth of the meaning of "environmental" in the Aarhus Convention: "In his skeleton argument the Secretary of State accepted that "environmental information" is given a broad definition in article 2(3) , and further accepted that since administrative matters likely to affect "the state of the land" are classed as "environmental" under Aarhus the definition of "environmental" in the Convention is arguably broad enough to catch most, if not all, planning matters. …"<br><br>52. The Court of Appeal rejected an argument that the claimant's claim was not challenging an act or omission by a public authority which contravened a provision of national law relating to the environment. There was no distinction, for these purposes, between national law and policy. | |

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| 53. In the Northern Irish case *In the Matter of an Application by Rural Integrity (Lisburn 01) Limited for Judicial Review v. Planning Appeals Commission* [2019] NIQB 40, there is no indication of a different approach by the High Court. Indeed, at para. 33, McCloskey J held "[t]he importance of environmental protection is acknowledged by the court, unreservedly so". However, in the context of determining costs protection, "the court can properly consider the nature and extent of any possible environmental detriment arising out of the authorised development… I consider that the imperative of environmental protection must be evaluated according to the specific context." These comments were made in the context of "a clearly exposed costs avoidance mechanism" (para. 34).<br><br>54. In the Scottish case of *Carroll v. Scottish Borders Council* 2016 S.C. 377, the Inner House of the Court of Session considered the requirements of the Aarhus Convention in a challenge to planning permission for the erection of two wind turbines. The Inner House, whilst noting that the Aarhus Convention is not part of domestic law as such, except where incorporated through European Directives. Nevertheless, the court below had given "a detailed and fully reasoned consideration in his opinion, which we consider amounted to a sufficiently intense scrutiny" (para. 62). The challenge was clearly viewed as being within the scope of the Aarhus Convention.<br><br>55. In *Bova v. Highland Council* 2011 S.C.L.R. 751, Lord Pentland considered a challenge to a grant of planning permission for 64 houses. His approach at para. 54 makes clear that this was within the scope of the Aarhus Convention: "It seems to me that it would run counter to the policy (reflected in article 9(3)) of maximising citizens' rights of access to the courts in the sphere of environmental law to have a rule which in effect required a petitioner to challenge a conditional resolution of a planning authority under pain of losing the right to challenge the later substantive grant of planning permission which had a concrete impact on his rights." | |
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| VIII Elements of Substantive Legality<br><br>58. The Communication includes a number of matters which the Communicants claim a court on judicial review would have to consider for consideration of "substantive legality" of a decision. The United Kingdom responds to these seriatim:<br>(1) Contention: [A court must] 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;<br>Response: The United Kingdom would suggest that this is a matter of procedural legality, or possibly mixed procedural or substantive legality (to use the approach of the Implementation Guide). In any event, the United Kingdom accepts that, if a consultation is being carried out, then as a matter of UK law consultees must be given proper and sufficient information about a proposal and adequate opportunity to submit an informed response. This is Ground 17 of judicial review, set out above in relation to the answer to Question 2. The range of information which would be required to satisfy the requirements of Article 9(2) is set by Article 6(6). | The Communicants accept that the domestic courts approach is Convention-compliant. |
| (2) Contention: [A court must] satisfy itself that the decision-maker had properly considered (i.e. "due regard" 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;<br>Response: The United Kingdom would suggest that this is a matter of procedural legality, or possibly mixed procedural or substantive legality (to use the approach of the *Implementation Guide*). In any event, the United Kingdom accepts that regard must be had to points made by objectors in response to a consultation. This does not extend to a point-by-point rebuttal or response to every point which is put by a respondee. Administrative | As the Communicants have explained the UK approach to "having regard" merely requires that the decision-maker is aware of what consultees have said. The court does not consider whether the decision-maker has actually engaged with the points being made, let alone whether they have any proper basis to disagree or have explained their disagreement (as "due account" requires within the Convention).<br><br>That does not require "point by point rebuttal of every point which is put by a respondee". That submission is a good example of the way in which lawyers for defendants in the UK will respond to an absurd proposition (and one not being made by a claimant) to try and divert from the weakness of their position. |

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| decisions are not to be approached as an examination paper, for the decision-maker to provide an exhaustive response to every point made for or against a proposal. There is no basis for this in Articles 6(8)-(9) of the Convention. | |
| (3) Contention: [A court must] 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);<br>Response: As a matter of United Kingdom law, it is a ground of judicial review of a decision that a decision-maker has failed to take into account all considerations relevant to the decision it is making. See Ground (4) in response to Question 2. However, that this is so is due to the content of United Kingdom law. It is not a requirement which arises as the meaning of "substantive legality" in Article 9(2) of the Convention. The meaning of that is set out in response to Question 1. | The requirement that a decision-maker actually evaluates the evidence before it is part of the "substantive legality" of the decision (as required by the Convention). That is not met simply by the decision maker "taking into account" (i.e. being aware of) the evidence. |
| (4) Contention: [A court must] satisfy itself that the nature and scale of the information or evidence was capable, in all the circumstances, or 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;<br>Response: As a matter of United Kingdom law, a decision-maker must have sufficient evidence such that a decision is reasonably open to it. However, the level of scientific detail which a decision-maker will need in order to be justified in making a decision will depend on the nature of the decision it is making. The requirements set out by the Communicants are too prescriptive. There is no justification for requiring them to be demonstrated in order for a decision to meet the requirements of | The Party Concerned's submission is misleading. The domestic court merely checks that there was some evidence before the decision-maker. It does not check whether the evidence was sufficient. Accordingly, if considering whether (for example) the decision-maker's approach to air pollution was lawful, the domestic court would consider only whether the decision-maker was provided with some information on air pollution, not whether the information provided was sufficient for the decision in question. |

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| substantive legality. The requirements of Article 9(2) in relation to substantive legality are set out in answer to Question 1. | |
| (5) Contention: [A court must] 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;<br>Response: As a matter of United Kingdom law, there must be sufficient evidence to reasonably justify a decision-maker's conclusion. A decision which does not logically follow from the decision-maker's factual findings may be subject to judicial review on the basis of it being unreasonable. However, that this is so is due to the content of United Kingdom law. It is not a requirement which arises as the meaning of "substantive legality" in Article 9(2) of the Convention. The meaning of that is set out in response to Question 1. | The Party Concerned's submission is misleading. The domestic court merely checks that there was some evidence before the decision-maker. It does not check whether the evidence was sufficient. Accordingly, if considering whether (for example) the decision-maker's approach to air pollution was lawful, the domestic court would consider only whether the decision-maker was provided with some information on air pollution, not whether the information provided was sufficient for the decision in question. |
| (6) Contention: [A court must] 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;<br>Response: There is no basis for this in the text of the Convention. The Convention does not provide for a duty of environmental investigation on the part of Parties. Whether, applying the precautionary principle (where applicable), the effect of evidential gaps is (i) that a proposed project must be refused consent, or (ii) not meaningful to the decision in question, e.g. because the evidential gaps do not relate to relevant or important matters, or (iii) that the parties should be asked to provide more information before a decision is taken – is a matter for the decision-maker's discretion in the circumstances of the case, applying the relevant substantive and procedural rules of the State party in question. | This requirement is a manifestation of the requirement set out in Sweetman and considered above. |
| (7) Contention: [A court must] 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 | This is part of substantive review. A decision by decision-maker A (for example) that a proposed development will be acceptable in terms on (for example) water pollution simply because another |

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| challenged decision-maker needs to check and show to the court that) the second decision maker's assessment and approach has 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.<br>Response: The Communication indicates that "substantive review" includes a requirement that a decision-maker's approach includes the above technical steps. There is no basis for concluding this in the text of the Convention. The Convention does not set the requirements of substantive law. This is not what the Parties agreed to and is beyond its scope. | agency (B) might act if water pollution were caused is not substantively legal. |
| IX. Article 9(2) and 9(3)<br>59. The United Kingdom agrees with the Communicants that Article 9(3) is about access to administrative and judicial procedures. It says nothing about the content of a Party's substantive or procedural law. Article 9(3) does not refer to a standard of review, and therefore does not impose any obligations upon the Parties in terms of a standard to be applied in a challenge to acts or omissions on the basis of national law. Article 9(3) does not concern the content of that national law, but merely effective access to a court or tribunal able to determine whether that law has been breached. | The Communicant has dealt with this above. |
| X. A sliding scale of review<br>(A) Awareness in advance of the standard of review<br><br>60. The standard of review in United Kingdom law is set by caselaw. This is publicly available. A claimant or his/her legal advisors would be able to access existing case law in order to consider the standard of review which would be applicable to a challenge. | The problem, as well illustrated by the cases considered above, is that consideration of case law leads a claimant to conclude that, in almost all cases, a traditional narrow **Wednesbury** approach would be adopted. Occasionally, and entirely unpredictably, an individual judge will decide to apply a close scrutiny approach. |
| (b) Factors in determining the nature and | That is indeed the domestic approach. But it provides |

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| gravity of what is at stake in a particular case<br><br>61. The range of factors which can determine the nature and gravity of what is at stake in a particular domestic review claim is broad. The comments of Laws LJ in the Begbie case were not directed at environmental claims specifically. The court may however take into account these factors:<br>(1) Whether an individual's liberty is at stake (see e.g. R. v. Secretary of State for the Home Department, ex parte Khawaja [1984] A.C. 74);<br>(2) Whether the decision in question is the determination of an application, or a decision to revoke a licence (see e.g. McInnes v. Onslow Fane [1978] 1 W.L.R. 1520);<br>(3) Whether human rights are at stake (see e.g. General Medical Council v. Michalak [2017] 1 W.L.R. 4193);<br>(4) The nature of the statutory scheme (see e.g. Poshteh v. Kensington and Chelsea Royal London Borough Council [2017] A.C. 624). | no assistance here and certainly does not ensure that a close scrutiny approach is adopted for claims within the Convention. |
| (C) Whether a consistent standard applies to all Aarhus claims<br><br>62. In McMorn v. Natural England [2016] P.T.S.R. 750, Ouseley J considered whether a challenge to a decision to refuse a licence to shoot buzzards was an Aarhus Convention claim. It was argued by the Defendant that the claim was not an Aarhus Convention claim, because it was a claim which was seeking to cause harm to the environment. Ouseley J eschewed drawing a distinction as to whether a challenge was for the benefit of the environment or not (para. 242): "such a distinction cannot be operated without the court forming a value judgment, which it is far from best placed to reach, as to whether a decision would advance or harm or be neutral in its effect on environmental interests. Culling wildlife to protect other wildlife, damage to some environmental interest in the interests of renewable energy, illustrated the sort of problems which would have to be resolved early on in litigation in order to decide whether a claim was within the Convention or not. That is simply not how the Convention or CPR are intended to operate." | That is another example of the Party Concerned stating an absurd proposition (and one not put forward by the Communicants) so as to be able to disagree with it.<br><br>The Communicants are plainly not saying that the result of a challenge should be predictable. But what should be predictable is the approach that the court will take to checking the substantive legality of the decision under challenge.<br><br>The Committee's questions here have arisen because the Party Concerned offered up "close scrutiny" (as per McMorn) as being its answer to the need for assessment of substantive legality. The Party Concerned's problem though is that (as above) that approach is not predictably applied. Indeed, the opposite is true. |

63. At para. 246, Ousley J emphasised the need for the Aarhus Convention to apply across a number of different contexts and in relation to a number of different claimants: “there is a significant public benefit in decisions on national environmental law being lawful, and therefore in their lawfulness being tested readily by individuals. The fact that the individual's livelihood or property value may also be at stake could not disapply the Convention or the [Civil Procedure Rules], and there is nothing in the text of either to suggest that it does. The Convention is not just for the disinterested environmentalist or national body, but must have recognised that many individuals or ad hoc groups of individuals would be concerned with decisions which affected them personally, as it affected their enjoyment of their property, leisure, area or interests.”

64. Whilst this discussion was in the context of costs protection rather than the standard of review, the reasons apply nevertheless. It is not for a court on review to determine what is in the interests of the environment, particularly where there may be competing environmental concerns.

65. The primary distinction between the intensity of the standard of review in environmental claims does not depend upon whether the claim is grave or less grave. This would involve the court in carrying out a value judgment which is inappropriate according to the United Kingdom’s principles of judicial review. The role of the court is to determine the legality of the decision, applying the procedural and substantive law of the United Kingdom. The decision will either be in line with the law, or contrary to it. Whether a judge considers the subject matter to be important or not should not enter into this calculus.

66. The distinction will vary according to whether, as a matter of national law, the ground of review is one to which applies a correctness standard or a reasonableness standard.

67. Grounds of review to which apply a correctness standard include:
(1) Interpretation of law;
(2) Interpretation of policy (so long as the policy is capable of such interpretation);

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| (3) Determination of jurisdictional facts with an objectively correct answer;<br>(4) Whether a matter is capable of being a relevant consideration;<br>(5) Whether a decision-maker has acted in line with the purpose of the legislation.<br><br>68. Grounds of review which apply a reasonableness standard include:<br>(1) Whether a consideration was obviously material, and therefore which had to be taken into account;<br>(2) Whether the decision was open to a decision-maker on the facts before it.<br><br>(b) How a flexible and sliding scale of review meets the requirements in Article 3(1) of the Convention<br><br>69. As should be clear from the answers to previous questions, there is a clear, transparent and consistent framework for the implementation of Articles 9(2) and (3) of the Convention. Articles 9(2) and (3) require access to court or other suitable body for review of or challenge to environmental decisions. The Complainants do not challenge the clarity, transparency, or consistency of the framework for the access to court or other suitable body.<br><br>70. To the extent that the Convention requires this, the framework for procedural and substantive review meets the requirements of clarity, transparency and consistency. The intensity of review will depend upon the individual ground of review which is advanced, as per the answer to Question 10(c) above.<br><br>71. The Convention does not require that the result of litigation can be predicted with absolute certainty. This is an impossible goal, and not one to which the Parties agreed. It is sufficient if a reasonable Member of the Public, with knowledge of the applicable statutory law and jurisprudence, is aware of the principles according to which a court will determine a claim. | |