[SLIDE 1] Good morning. I am Richard Buxton, an Environmental Lawyer practicing in Cambridge, England. Quite a lot of my career has been spent trying to develop and enforce EU law in the UK, and it is disappointing that we have little place in its future development after Brexit. On the other hand, rest assured that we will do our best to see that existing EU law principles, including those of the Aarhus convention, continue to be applied.

I am aware that my talk is meant to be part of what is listed as “setting the scene”. Since I started work in environmental law 30 years ago the scene has expanded hugely, and I am not competent to give an informed overview of how people use the law in different ways for the benefit of the environment. Some use the law as part of campaigning work on big issues. It is alleged that even the corporate lawyers do their best. Government lawyers always seem to us instructed to resist environmental benefit.

Our scene, what I see day to day, is mostly dealing with self-contained cases for individuals or groups who are angry that something has gone wrong with a public law decision. When people are angry enough to instruct lawyers there is indeed usually something legally wrong – we say, “no smoke without fire”. And by taking these cases, one can establish useful precedent in at least two ways: for the particular decision to be re-taken in a lawful way, one hopes with benefits for the environment, and for as precedent for decision-makers and the courts to take account of in the future.

But life is not easy. Jan has specifically instructed me not to talk about the difficulties there are with the costs of litigation, the implementation

of Article 9.4 of the Aarhus Convention. So I am going to explain how we have difficulties with our appeals system, and how we see another part of Europe as a life-line – that is the European Court of Human Rights.

Although people in this country confuse the Court of Justice in Luxembourg and the Court in Strasbourg, we in the UK remain just as much part of the European Convention and the Strasbourg Court as we were before.

I have had a couple of cases recently which I hope will interest the Strasbourg Court and improve enforcement of environmental (and maybe other) law in the UK. I hope the principles may be of interest in other jurisdictions and perhaps others can offer their experience in discussion.

[SLIDE 2] The first case concerns authorisation for two housing developments near Canterbury right next to a wetland with all kinds of international and domestic designations, including SAC and SPA. **[SLIDE 3]** Here is a slide showing the way they are all adjacent and the designations. We said that the developments should be assessed jointly for environmental impact assessment purposes and that the habitats directive assessments had been done obviously incorrectly. On EIA, when considering the connection between two or more projects the UK courts are interested from a human perspective whether they are connected, for example whether the developers are different companies. The Courts seem uninterested in the real question, which is whether there is environmental connection. So, we said that cases like Ecologistas and Abraham at least meant it was

arguable that joint assessment was required as proper interpretation of the EIA directive, particularly where the Habitats Directive was relevant and what is referred to there as “in-combination” assessment is required. Then we said that the decisions were plainly wrong from the point of view of the Habitats Directive because one habitats assessment concerned only part of one of the sites, which is plainly contrary to well-established EU law.

[SLIDE 4] You will see that we were challenging not only the local government body which is fine but also two big housing developers. About 600 houses in all. Lots of money and developer profit.

Anyway, the High Court rejected the claim and we appealed. Our appeals process is now just a paper stage done by a single Judge of the Court of Appeal, and if the application for permission to appeal is rejected, “that’s it”, “end of story”. There is no further right of appeal. The appeal here made clear reference to established EU law, or at least EU law that was not acte clair. In these circumstances, because the judge is acting as a court of final instance, it is well-established human rights law that there must be reasons for not referring to the CJEU (which might include explaining that the law was clear against us). In our case, that was not done.

We thought the Court of Appeal decision was so obviously wrong and the law was so clear in our favour that we went through a tortuous process of trying to reopen the case in the Court of Appeal. This we knew would be difficult, but we said that the Court was acting ultra vires by not dealing properly with the EU law matters and that it must be able to reopen a case in such circumstances. Put another way,

there must be injustice (which is the main basis for reopening) if a court is acting unlawfully. This was firmly rejected at a full hearing of the Court of Appeal, partly due to the traditional reliance of our courts on the exercise of discretion, and partly because it said that reasons for not referring to the CJEU could be inferred. Our courts are hugely deferential to decision makers, including lower courts. And the Court of Appeal wanted to make an example of us, for daring to suggest it was acting unlawfully. In fact, it avoided addressing that question. Instead it basically said we had abused the process by trying to re-open the case and drew comparison with plainly improper conduct such as broadcasting court proceedings. It made severe costs orders against us, we say contrary to Aarhus principles.

[SLIDE 5] We had a similar situation, soon following, in relation to a proposed Holocaust memorial and learning centre in a little park just next to Parliament in London called Victoria Tower Gardens. This is basically a government project and is highly controversial for all sorts of reasons. **[SLIDE 6]** One of the legal problems is that the main promoter in government is the Secretary of State himself whose office will take the final decision on whether planning permission should be given. We say that this infringes obligations under the EIA Directive, which under the 2014 amendments to the directive require separation of powers, and here there is a blatant conflict of interest. We judicially reviewed the government's failure to implement the 2014 EIA Directive amendments requiring this. This was rejected by the High Court. We tried to go to the Court of Appeal but, like our wetland case, the Court of Appeal rejected the matter on paper without giving proper attention (in our opinion) to the requirement to refer to the CJEU: we said the matter was plainly not acte clair against us. It furthermore issued dire

warnings (in the light of the other case) against any attempt to question its decision.

[SLIDE 7] So we will now try to go to Strasbourg, partly to try and protect this “jewel in the crown” nature conservation site and the much loved park in the heart of London, and partly to restore our own reputation, and importantly also to improve our appeals system. The basic point is that the domestic courts should respect the rules by thinking through applications for permission to appeal properly. If there is an appeal system in a jurisdiction, it must be one that is compliant with Article 6 of the Convention – the right to a fair trial. That means looking at the court’s legal obligations properly. In turn that must mean being able to question an obviously incorrect decision on paper even if there is no way to review it in the ordinary course of events. (The system we used to have was stopped for cost-cutting reasons). It is sad to say that we feel very let down by our court system, but will strive to have things put to right in the interests of justice and in my area of law, environmental justice. We hope that the result will be an improved appeals system and recognition that the courts themselves are not above the law.

[SLIDE 8] I was going to stop there but Jan said I should add some successes because he was sure we had some. Well, yes, life is not too bad. We have had some successful environmental cases over the past year. For example, we had a major win against central government for not requiring EIA in a case where the land had been contaminated by slaughtering of cattle during the foot and mouth crisis about 20 years ago. That should encourage the government to be more careful in its rulings on EIA screening in other cases.

[SLIDE 9] But the one I was most pleased about involved rescue of a site called Warren Farm in West London after everyone had given up. That's about 25 hectares which is quite big for the urban area. You can see from the map how relatively large this area is, it is a big chunk of a network of parks, and how it was extraordinary that the local council wanted to develop the open space into an enclosed training ground for Queens Park Rangers, a well-known football club. It is an old farm site that became sports fields and was then left to go wild. It has huge biodiversity. Plans had been started in around 2012, and there had been several court battles. **[SLIDE 10]** This in fact was part of the football club's fans' twitter account but it and some other comments like kill all lawyers were a bit scary so the case was anonymised. You can see this was all about getting rid of the skylarks which is under threat in the UK and Warren Farm is place for them in London. Fortunately, in 2020 we were able to persuade the High Court that the council had failed to screen the development proposals for EIA in the light of new information about environmental quality. The football club then realised there was a big problem and decided to go back to its old training ground, the council gave up, and we think London now has 25 hectares more permanent green space than was expected. **[SLIDE 11]** So here we hope we have some happy skylarks and it was nice that the law came to the rescue. It gave much needed confidence that if you fight resolutely, the law can achieve things for the environment.

Richard Buxton
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