Ms Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
UN Economic Commission for Europe
Environment Division
Palais des Nations
CH-1211 Geneva 10
Switzerland

27 September 2024

Dear Ms Marshall,

Re: PRE/ACCC/C/2017/156: *R (on the application of Fighting Dirty) v Environment Agency and Secretary of State for the Environment (Interested Party) [2024] EWHC 2029 (Admin)*

We write to update the Compliance Committee on the above judgment of the High Court of England and Wales.

We would not normally draw the Committee's attention to a single judgment, but in this case, the Hon Mr Justice Fordham adjudicates on the point asserted by the UK Government that *Wednesbury* is a flexible threshold in the context of specific and relatively detailed consideration of the relevant provisions of the Aarhus Convention (and did so having specifically considered a copy of the UK's Observations to the Committee).

Justice Fordham's conclusion ultimately demonstrates a narrow interpretation of *Wednesbury* in the context of environmental claims on matters of policy. It is therefore a further example of how *Wednesbury* is being applied in a way that does not meet the requirements of Articles 9(2) and 9(3) of the Convention.

Summary of the Case

The case concerns the environmental regulation of sludge when it is spread on farmland, an issue of pressing environmental and potentially human health consequences. Evidence was presented to the court on the level of contamination in sludge being spread on farmland. A 2020 report found that some samples were "*vastly different*" to their description in consignment documents, that the sludge was contaminated with harmful chemicals and organic pollutants, at levels that could pose a risk to human health. The Environment Agency (EA) itself agreed that there were "*emerging concerns about risks from chemicals and microplastics in particular"* [12 of the judgment].

The issue was whether the **EA's** decision to remove the Target Date for implementing a Sludge Strategy, without identifying a replacement Target Date, was reasonable in public law terms. The claim for judicial review was dismissed. The question about the intensity of reasonableness review in environmental judicial review cases was addressed by Mr Justice Fordham in paragraphs 29-35 of the attached judgment.

Carol Day and Rosie Sutherland
The Royal Society for the Protection of Birds
[redacted]
Sandy
Bedfordshire [redacted]
Tel [redacted]
Email: [redacted]
Email: [redacted]

Will Rundle
Friends of the Earth
[redacted]
London
Tel [redacted]
Email: [redacted]

Imogen Dow
Friends of the Earth Scotland
[redacted]
Edinburgh
[redacted]
Tel: [redacted]
Email [redacted]

Rowan Smith
Leigh Day
[redacted]
London
[redacted]
Tel [redacted]
Email: [redacted]

The judge starts by drawing attention to *R (Justice for Health Ltd) v Health Secretary*[1] in which Green J stated the "*cardinal truth*" that: "*In determining whether a decision maker has acted irrationally the intensity of the scrutiny to be applied by a court is context sensitive".*

He explains that he was shown two environmental cases: a recent challenge to the lawfulness of the Government's Carbon Budget Delivery Plan (*Friends of the Earth) v Energy Security Secretary*[2]*)* and a challenge in 2020 to HS2, a major railway connecting London, Leeds and Manchester (*R (Packham) v Transport Secretary*[3]*.* The context for the Friends of the Earth case was "*a long-term evaluative predictive judgment in a polycentric context, over which the judicial review court had no real expertise or competence".* In *Packham*, the decision was a "*political judgment on matters of national economic policy".* In both cases, a low intensity of review was considered appropriate.[4]

The judge confirmed that it was common ground between the Parties that this case was not an environmental case in which Convention rights were engaged (cf. *Verein Klimaseniorinnen Schweiz v Switzerland* (2024) 79 EHRR 1).

The judge then asked what is meant by a "*contextually variable intensity of scrutiny*" in a reasonableness Judicial Review (**JR**). He held that one approach is that the court takes a closer look at the case ("*careful scrutiny*"). Another is that the court needs more, in terms of the strength of the reasons required to justify the public authority action as reasonable. He concluded that where a court does more, and in particular where a court needs more, greater deference is afforded to the public body, giving rise to the so-called "*light touch*" approach approved in *Packham* (at paragraph 51).

The judge summarised the arguments of the Parties as follows.

Counsel for the Claimants submitted that on a principled basis, environmental cases can and should attract a close intensity of review; that the correct position was articulated by Ouseley J in *R (McMorn) v Natural England*[5], which should be followed notwithstanding the observations of Gilbart J in *R (Dillner) v Sheffield City Council*[6]; that the Observations the UK made to the Aarhus Convention Compliance Committee (20.8.18 and 22.10.19 available here and here) are correct on this point; and that this is a case which should attract a close scrutiny of review as it is an Aarhus Convention claim, but in any event given the environmental protection context and circumstances in play.

The Interested Party (Defra) argued it is well established the intensity or standard of review is context specific. Where, for example, fundamental human rights are at issue, a more intense scrutiny or standard of review may be appropriate – but this was not such a case. The content and timing of any legislative proposal involved complex socio-economic and environmental judgment on matters of policy (as in *Friends of the Earth* at paragraph 141), with an essentially "*political*" quality of the decision under challenge needing to be accorded a broad margin of discretion (see *Packham* at paragraphs 48-52).

---

1 [2016] EWHC 2338 (Admin) at paragraph 186

2 [2024] EWHC 995 (Admin) at Paragraph 112

3 [2020] EWCA Civ 1004 [2021] at paragraph 51

4 While the Friends of the Earth challenge was successful, the Packham challenge was not. To emphasise, that the Friends of the Earth challenge succeeded in this instance does not dispel the inherent problem to routinely applying a low standard of review in environmental claims, and its non-compatibility with the Aarhus Convention. That the FoE claim succeeded is symptomatic of how intensely problematic and riddled with holes the Government's adoption of the carbon budget delivery plan was, such that the former Chair of the Committee on Climate Change, the Government's own independent advisor, provided a witness statement in support of Friends of the Earth's claim

5 [2015] EWHC 3297 (Admin) [2016] PTSR 750 at paragraphs 174, 204-205

6 [2016] EWHC 945 (Admin) [2016] Env LR 31 at paragraphs 184-187

The Defendant maintained "*context is everything in judicial review*". The fact that a claim is an Aarhus Convention claim does not change the standard of review (*Dillner* at paragraph 187). It was the facts in *McMorn* (at paragraph 205) that justified a closer examination, not simply its status as an Aarhus Convention claim. This is not an anxious scrutiny case, because it does not engage fundamental rights or human rights, and it is not of real importance to individuals. A greater intensity of review is not warranted simply by reference to the importance of the issue, at least where, as here, there are complex factors in play (*Friends of the Earth* at paragraph 141). The context here is an update to a policy, whose propagation is for the policy maker and lies in the "*political*" arena (*Packham*).

The judge concluded that while environmental JRs can attract a close intensity of reasonableness review, Aarhus cases do not, by definition, qualify for a uniformly heightened scrutiny. He observed there will always be context-specific features which point in favour of, or away from, a heightened intensity of review or a narrower latitude. For example, a legislative function can point towards a lower intensity of review, as would the political, policy-laden, complex or predictive quality of a decision.

As such, Aarhus claims do not attract "*a different standard of review*". The public law unreasonableness standard recognised in *R (Evans) v Communities Secretary*[7] involves "*variations in the intensity of Wednesbury review that reflect the nature of the interest affected*". This, he held, was the crucial point made in the UK's submissions to the Aarhus Compliance Committee and, in a domestic context, the crucial point adopted in *McMorn*, where it was the standard of public law unreasonableness which "*can accommodate a more intensive review*" (paragraphs 174, 204-205). That is the position in environmental JRs, where the focus then turns to the contextual features of the individual case, by which the intensity of review is then calibrated.

The judge accepted the case in question warranted careful scrutiny in terms of what the court does, but he did not accept it as a case in which the court needed more, in terms of the strength of the reasons required to justify the EA's action as reasonable; nor that the context and circumstances served to narrow the discretion afforded to the EA. In particular, there was no imperative urgency and the necessary regulatory change would have involved the Government exercising its legislative powers. This was a collaborative decision-making setting in which the rate of progress and expectations about future progress collided with questions of policy prioritisation the EA would inform, but did not own and could not dictate. As such, the EA should be afforded a broad latitude in deciding whether a new Target Date was required and, if so, what Target Date, should form part of the reissued Sludge Strategy. He dismissed the case, concluding that the omission of a new target date could not be said to be "*outside the range of reasonable responses open to the decision-maker*" [para. 45 of the judgment].

The implications of the Judgment

As stated in our response to the UK's submissions to the Compliance Committee (attached and here, para 19 onwards), the Communicants do not dispute the *Wednesbury* test has the potential to act as an effective form of substantive review consistent with Articles 9(2) or 9(3) of the Convention. The problem, as we have described it, is that the *Wednesbury* is almost universally understood and applied narrowly, and in a way that does not meet the requirements of Articles 9(2) and 9(3). Unfortunately, Justice Fordham's judgment amounts to, overall, a continuation of this ongoing trend.

And ironically, as we will explain below, the factors that militate towards a lower intensity or standard of review serve to ensure that most major, contentious and environmentally damaging projects challenged by way of JR are afforded a low intensity of review.

---

7 [2013] EWCA Civ 114

We welcome Mr Justice Fordham's recognition that cases involving fundamental or human rights may attract a higher intensity of review and that other factors – including the seriousness of an environmental problem, the importance of the issue and a publicly recognised necessity for change - may support that conclusion. However, it reaffirms that cases involving legislative proposals, complex socio-economic and environmental judgment on matters of policy (*Friends of the Earth* at paragraph 141) and/or "*political*" judgment (*Packham* at paragraphs 48-52) should be accorded a broad margin of discretion as a matter of course.

The judge held that this case warranted careful scrutiny in terms of what the JR court does, but not – crucially - what the court needs, and will therefore do little to dispel the general view that public bodies enjoy a broad latitude when it comes to such decisions. The paradox of this is that a case concerning the construction of a major infrastructure project involving billions of pounds with substantial climate and biodiversity implications (HS2) attracts a lower level of scrutiny than a residential garage extension.

The Communicants accept that macro political considerations can, and will, override major environmental concerns in exceptional cases. Such an approach is hard-wired into EU legislation such as Article 6 of the Habitats and Species Directive, in which the presence of Imperative Reasons of Overriding Public Importance (IROPI) can justify the damage and/or destruction of protected sites. However, for this to happen the decision-maker must first be fully aware of, and carefully scrutinise, the potential environmental impacts of the plan or project before deciding that it is justified.

We would argue that the Convention requires the court to operate in the same way, i.e. that its purpose is to ensure the decision-maker has properly (i.e. with no less scrutiny) considered the environmental impacts of the decision, act or omission in dispute, as opposed to excusing a failure to do so (i.e. a less scrutiny of environmental implications) on the basis that it is a complex matter of policy and/or political judgment. As previously stated, to exert a lower standard of review in such cases is not equality before the law, or public access to environmental justice.

Finally, we would be very grateful for an update on when draft Findings may be released for this Communication.

Yours sincerely,

Carol Day and Rosie Sutherland, The RSPB
Will Rundle and Katie de Kauwe, Friends of the Earth England, Wales and Northern Ireland
Imogen Dow, Friends of the Earth Scotland
Rowan Smith, Leigh Day