BEFORE:

THE AARHUS CONVENTION COMPLIANCE COMMITTEE
UNITED NATIONS, ECONOMIC COMMISSION FOR EUROPE

RE: COMMUNICATION ACCC/C/2017/156

CONCERNING COMPLIANCE BY THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND WITH THE PROVISIONS OF THE AARHUS CONVENTION ON ACCESS TO JUSTICE CONCERNING THE REVIEW OF SUBSTANTIVE LEGALITY

FURTHER OBSERVATIONS ON BEHALF OF THE UNITED KINGDOM

I. INTRODUCTION

1. These Further Observations supplement, and should be read together with, the United Kingdom's Observations dated 20 August 2018. For the Compliance Committee's convenience, the titles and subject matter of Sections II-IV below are consistent with those of Sections II-IV of the UK's Observations and adopt the same abbreviations.

2. The purposes of these Further Observations are to:

    a. respond to the letter from the Compliance Committee dated 9 October 2019;

    b. comment, where appropriate, on the Communicants' Reply (dated 2 October 2018) to the UK's Observations dated 3 October 2018, and the Communicants' Case-law update and request for expedition dated 3 July 2019.

II. LACK OF SPECIFICITY IN THE APPLICATION

3. The United Kingdom maintains that the Communication is insufficiently specific. The lack of a specific factual context renders the issues both broad and unfocussed.

4. In their Reply at paragraph 25, the Communicants refer to the judgment of Gilbart J. in ***R (Dillner) v. Sheffield City Council*** [2016] Env. L.R 31.[1] The Communicants suggest that this judgment supersedes the earlier judgment of Ouseley J. in ***R (McMorn) v. Natural England*** [2016] P.T.S.R. 750,[2] to which the UK's Observations referred at paragraph 15(b), regarding the intensity of review in relation to decisions in the environmental context that are within the scope of Article 9 of the Aarhus Convention. It is true that Gilbart J. was inclined to disagree with the earlier judgment of Ouseley J. in this respect. Crucially, however, he expressly held that his decision on the facts of the case would be the same even whatever the test was for the substantive legality of the decision under challenge. See paragraph 187 of the judgment in ***Dillner***, where Gilbart J. held (emphasis added):

> "I therefore reject Mr Streeten's submission that there is a different standard of review in an Aarhus case. He did not refer me to the Court of Appeal authorities which were contrary to his submission. <u>But even if there were a different test</u>, the evidence from Mr Caulfield, which I accept and is supported by the assessment documents, and the description of the programme, shows beyond argument that in the case of each removal of trees, the reasons for it have been approached properly."

[1] Communication Annex O.

[2] Communication Annex N.

5. The above passage, to which the Communicants' Reply did not refer, demonstrates that ***Dilner*** is not a case where the outcome was affected by the standard of review applied by the Court to determine the substantive legality of the decision under challenge.

6. Further, adopting standard principles of the English law of precedent,[3] Gilbart J.'s indication that he disagreed with the earlier judgment of Ouseley J. in ***McMorn*** was '*obiter dicta*': an expression of opinion which was not necessary for the resolution of the dispute before the Court and which therefore does not constitute binding precedent (in contrast to the '*ratio decidendi*' – the reasoning of the Court which is integral to the resolution of the dispute before it and which therefore has precedential effect). The contention by the Communicants at paragraph 25 of their Reply that Ouseley J.'s approach in ***McMorn*** (which formed part of the *ratio decidendi* of that judgment) *was "was categorically quashed"* in the ***Dillner*** case is wrong. ***McMorn*** remains the case with precedential effect.

7. ***Dillner*** is an illustration of the importance of considering a specific factual context to examine the Communicants' argument. It is relied upon by the Communicants, but Gilbart J. expressly found that the standard of review would have made no difference to the outcome. It cannot therefore support the Communicants' position.

8. The Communicants in their Case-law update and request for expedition dated 3 July 2019 have also referred to the first instance judgment of the Divisional Court of England and Wales in ***R (Spurrier & others) v Secretary of State for Transport*** [2019] EWHC 1070 (Admin),[4] concerning several judicial review

[3] United Kingdom Further Observations, Appendix 34.
[4] Communicant's Case-law update and request for expedition, Annex 2.

challenges to the Airports National Policy Statement which supports the principle of the expansion of Heathrow Airport. As to this:

(1) This litigation is ongoing. An appeal to the Court of Appeal is being heard 17-18 October and 22-25 October. Friends of the Earth (one of the Communicants) are a party to the litigation as one of the Claimants, and they have instructed Leigh Day (the law firm representing the Communicants). The UK Government – in the form of the Secretary of State for Transport - is the Defendant in the litigation. There may also be a further appeal to the UK Supreme Court by the party/parties who are unsuccessful in the Court of Appeal. In these circumstances, to the extent that the Communicants rely upon ***Spurrier*** as an example of where the application of the ***Wednesbury*** standard of review[5] has resulted in a breach of the Convention on the facts of the case (which is in any event denied by the UK), internal national remedies have not been exhausted. It would be inappropriate for the Communicants to seek to use this Communication as a vehicle for debating, and it would be inappropriate for the Compliance Committee to comment on, a case which is still *sub judice* before the domestic courts – particularly where the Communicant and the Party Concerned are both parties to that ongoing domestic litigation.

(2) Even if (contrary to the position stated above) the Communicants are permitted to rely on the Divisional Court's judgment in ***Spurrier***, it does not assist them. The environmental concerns of the objectors in that case were not brushed aside. The Divisional Court's judgment is detailed, running to 669 paragraphs (including Appendices, the Official Transcript runs to 188 pages). The case demonstrates the adequacy of environmental

[5] ***Associated Provincial Picture Houses, Ltd v. Wednesbury Corporation*** [1948] 1 K.B. 223; United Kingdom Response to Communication, Annex 5.

judicial review in the United Kingdom, rather than the opposite. Indeed, in relation to the alleged breach of the EU Habitats Directive, in relation to which the Claimants contended that the standard by which the substantive legality of the decision should determined should be proportionality rather than the ***Wednesbury*** test, the Divisional Court expressly stated that whether the standard of review was irrationality or proportionality would make no difference to the outcome (see paragraphs 353 and 356 of the judgment) – as was the case in ***Dillner***, the Court found that the challenged decision was lawful whichever standard of review applied.

9. The fact that, in these two recent cases relied upon by the Communicants as illustrating their complaint about the standard of review applied by the UK Courts in Aarhus Convention cases, the outcome would have been the same whichever standard of review was applied, adds further force to the contention in Section II of the UK's Observations that the Communication should fail for lack of specificity, particularly because the Communicants cannot point to a single case where they can demonstrate that the outcome would have been different on its facts if the standard of review they contend for had been applied, nor has any unsuccessful litigant who has exhausted all domestic remedies come forward to allege that the standard of review applied to their claim has resulted in a breach of their rights under the Convention.

III. ARTICLE 9(2) IS CONCERNED WITH ACCESS TO A COURT OR SIMILAR TRIBUNAL, *NOT* WITH THE RULES OF DOMESTIC LAW GOVERNING THE LEGALITY OF DECISIONS, ACTS OR OMISSIONS

10. Article 9(2) of the Convention requires that Parties ensure that Members of the Public *"have access to a review procedure"* before a court or similar body "*to challenge the substantive and procedural legality"* of certain decisions relating to the environment.

11. It is clear from the terms of Article 9(2) that it is concerned with effective access to a court of tribunal to determine the legality of relevant decisions. It is not concerned with the domestic law rules governing what is and what is not a lawful decision: the criteria for legality. It is about ensuring that someone can argue a claim before a court or tribunal. It is not about what arguments the court or tribunal will, can or should accept.

12. ***Wednesbury*** reasonableness is a criterion for legality. A decision that is ***Wednesbury*** unreasonable is an unlawful decision. A decision that is ***Wednesbury*** reasonable is – provided it is compliant with with other criteria for legality (as to which see Section IV below) – a lawful decision.

13. The central rationale is that where the law (whether through legislation or the common law) confers a discretion on a public authority decision-maker, the exercise of that discretion is lawful, subject to the proviso that the governing law is not to be interpreted as authorising the decision-maker to act in in a manner that is so unreasonable that no reasonable decision maker would have acted in that manner – to do so is to be treated as having acted outside the boundaries of the discretion conferred by the governing law.

14. Our point is illustrated by the Court's reasoning in the ***Wednesbury*** case itself, [6] where Lord Greene MR stated at p.234: *"[the court is] a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them."* In other words: this case and the principle it established was about what is and is not a lawful decision – not a mere procedural rule governing access to and/or the process in Court. It is not a matter that is within the scope of Article 9(2).

15. The same point applies to Article 9(3), which concerns challenges to acts and omissions "which contravene provisions of a Party's national law relating to the environment". The ***Wednesbury*** test is part of the national law relating to the environment, in the context of acts and omissions by public authorities. 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 Communication (p.16), referring to the Aarhus Convention Implementation Guide, does not suggest that the approach under Art 9(3) is different to that under Article 9(2).

16. Article 9(4) is, broadly speaking, directed at procedures and remedies. It too does not affect what the <u>content</u> of national law should be, but rather the processes for determining breach of national law, and the remedies consequent to a finding of a breach of national law. There is therefore no basis for saying that applying ***Wednesbury*** reasonableness as a criterion of legality is contrary to Article 9(4).

[6] ***Associated Provincial Picture Houses, Ltd v. Wednesbury Corporation*** [1948] 1 K.B. 223; United Kingdom Response to Communication, Annex 5.

17. Article 3(1) does not add anything to the Communicants' complaints under Article 9(2), as it does no more than require the Parties to take measures to implement the provisions of the Convention. If there is no breach of Article 9, there is no breach of Article 3(1).

IV. JUDICIAL AND STATUTORY REVIEW PROVIDES MEMBERS OF THE PUBLIC ARTICLE 9(2) COMPLIANT ACCESS TO A COURT

18. As stated in Section IV of the United Kingdom's Observations, there are several criteria for the substantive legality of environmental decisions. The ***Wednesbury*** test is just one of them. The other criteria, non-compliance with which creates valid grounds for a judicial review claim, are summarised at paragraph 14 of the UK's Observations. Below we provide some (necessarily illustrative rather than comprehensive) examples of the application of those other grounds for judicial review that are mentioned in the UK's Observations.

Error of Fact

19. In ***R (Baroness Cumberledge of Newick) v. Secretary of State for Communities and Local Government*** [2018] P.T.S.R. 2063,[7] the Court of Appeal considered that an Inspector was mistaken as to the fact that part of a development site was within 7km of the Ashdown Forest SPA and SAC. Even though the mistake was brought about by the parties to the inquiry, the Court of Appeal still considered that this was a ground for quashing the grant of planning permission.

[7] United Kingdom Further Observations, Appendix 3.

Misunderstanding Evidence

20. In a case from the High Court of Northern Ireland, Stephens J. considered a challenge in relation to the law concerning the protection of habitats and species in ***Re Alternative A5 Alliance's Application for Judicial Review*** [2013] NIQB 30.[8] At paragraph 113, he stated:

> "I … consider that the Department has misunderstood and misdirected itself as to the evidence of the Loughs Agency incorrectly interpreting it as confined to an impact on the species rather than the integrity of the sites. Accordingly the Department has taken into account a factor which it ought not to have taken into account and on that ground also I am minded to quash the decision."

Insufficient Investigation

21. In ***R (Padden) v. Maidstone Borough Council*** [2014] Env. L.R. 20,[9] the High Court considered a situation where a large number of physical changes had been made to the environment. HHJ Mackie QC held that the Council had failed in its duty to investigate the factual position to decide the application for planning permission. At paragraph 95, the Judge held:

> "When granting permission the Council had unlawfully failed to make reasonable enquiries to try to obtain the factual information necessary for its decision on the application. The views of the [Environment] Agency and its concerns about the proposed condition were not communicated to the Members. The Council had no expert or other adequate information to evaluate the issue for itself or to enable it to disregard the views of the Agency. The Council could have deferred consideration of the matter to await the report from the Agency but did not do so."

Failure to Take Into Account Material Consideration

[8] United Kingdom Further Observations, Appendix 4.
[9] United Kingdom Further Observations, Appendix 5.

22. In ***R (Squire) v. Shropshire Council*** [2019] EWCA Civ 888,[10] the Court of Appeal held that an Environmental Impact Assessment was deficient as there was 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"* (paragraph 69). At paragraph 73, Lindblom L.J. held:

> "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."

Taking into Account an Immaterial Consideration

23. ***McMorn v. Natural England*** [2016] P.T.S.R. 570 concerned Natural England's refusal of a licence for shooting raptors to protect a bird livestock business.[11] Natural England's decision was found by Ouseley J. to be unlawful: Natural England had unlawfully applied a hidden policy distinct from its published policy to carry a higher threshold for the shooting of raptors than for other birds. This made it virtually impossible for the applicant's application to succeed. Furthermore, it had taken into account public opinion, which was a legally irrelevant consideration.

Misinterpretation of Legislation

[10] United Kingdom Further Observations, Appendix 6.
[11] United Kingdom Further Observations, Appendix 7.

24. The High Court quashed a decision in ***R (Save Woolley Valley Action Group) v. Bath and North East Somerset Council*** [2013] Env. L.R. 8.[12] The local planning authority had not carried out an environmental impact assessment screening for proposals; it considered that they did not constitute development.[13] However, the EIA Directive, correctly interpreted, did require a screening exercise to be carried out. It was possible to interpret s.55 of the Town and Country Planning Act 1990 such that the proposals could fall within the definition of development; the local planning authority was required to take such an approach. Lang J. rejected the proposition that the question of whether a proposal constituted development was not a question of jurisdictional fact for the court, but an evaluative question for the decision-maker. Nevertheless, the decision-maker had failed to correctly interpret the meaning of "development".

Misinterpretation of National Policy

25. It is well-established that the interpretation of national planning policy is a matter of law for the court, rather than a matter of judgment for the decision-maker. In ***HJ Banks & Co Ltd v. Secretary of State for Communities and Local Government*** [2019] P.T.S.R. 668,[14] Ouseley J. found that the Secretary of State had erred in law in his interpretation of national planning policy regarding the extraction of coal.

Decision-maker Misinterpreting Their Own Policy

[12] United Kingdom Further Observations, Appendix 8.
[13] The question of whether planning permission is required being whether the proposal constitutes development as defined in section 55 of the Town and Country Planning Act 1990: United Kingdom Further Observations, Appendix 33.
[14] United Kingdom Further Observations, Appendix 9.

26. If a decision-maker misinterprets its own strategy or policy, this is a ground of legal challenge: see the Scottish case of ***Tesco Stores Ltd v. Dundee City Council*** [2012] P.T.S.R. 983.[15] In ***R (West London Waste Authority) v. Mayor of London*** [2007] Env. L.R. 27,[16] Goldring J. considered that the Mayor of London had misinterpreted his waste management strategy. The requirements of directions made by the Mayor were too burdensome. A requirement to have *"state of the art"* emissions abatement equipment in waste incineration contracts may in fact be counter-productive, by requiring waste to go to landfill. There was a similar error in relation to combined heat and power. Goldring J. quashed part of one direction and all of another, since *"[t]heir terms go further than the strategy when read as a whole permit"* (paragraph 121).

Incorrect Approach to Statutory Schemes

27. In ***Western Power Distribution Investments Ltd v. Cardiff City Council*** [2011] EWHC 300 (Admin),[17] Ouseley J. quashed the designation of a local nature reserve under the National Parks and Access to the Countryside Act 1949. The area was already designated as a statutory trust under the Public Health Act 1875. The purposes were inconsistent, and therefore the more recent designation was quashed.

Insufficient Reasoning

[15] United Kingdom Further Observations, Appendix 10.
[16] United Kingdom Further Observations, Appendix 11.
[17] United Kingdom Further Observations, Appendix 12.

28. In a Scottish case, the Outer House of the Court of Session reduced a decision to restrict the use of licences to control pest species by a farmer in ***AI Walgate & Son v. Scottish Natural Heritage*** [2017] CSOH 51.[18] Lord Armstrong found that the decision as to which areas to be included in the decision was insufficiently reasoned. At paragraph 88, he held:

> "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 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."

Impermissible Delay of Environmental Consideration

29. A screening opinion, considering whether a planning application fell to be considered within the terms of the Environmental Impact Assessment regime, was found to be defective in ***R (Hughes) v. South Lakeland District Council*** [2014] EWHC 3979 (Admin).[19] At paragraph 33, HHJ Waksman QC (as he then was) considered that the screening opinion failed to fulfil its purpose:

> "The Screening Opinion does not express a view one way or the other. This is not a case where a particular proposed remedial measure is stated, weighed up and then considered to offset an environmental impact. In such a case this might be legitimate – see paragraph 17 above. Here no weighing is done at all and in effect the Screening Opinion is saying "it will all have to be assessed later". That seems to me to be deferring an important aspect of the environmental effect question which is raised here, to the planning process and that is not a legitimate approach."

Incorrect Categorisation of Decision

[18] United Kingdom Further Observations, Appendix 13.
[19] United Kingdom Further Observations, Appendix 14.

30. The issue in ***R (Wakil) v. Hammersmith and Fulham London Borough Council*** [2013] Env. L.R. 3[20] was the question of whether a local planning authority had erred in law in determining that that a document was Supplementary Planning Document, rather than a Development Plan Document, the adoption of which is subject to different procedural requirements. Lindblom J. held at paragraph 81:

> "In my judgment, and by way of analogy with the Tesco case where, as here, the question is whether a document satisfies or does not satisfy all of the conditions identified in a statutory document, that is an application of fact to legal requirements and, as such, is a matter where the Court has to make the judgment. It is not limited to reviewing a decision made by the local planning authority, subject only to intervention only on Wednesbury grounds."

31. The local planning authority's categorisation of the document was incorrect, and therefore unlawful. Furthermore, as it was found that the document set the framework for future development, the local planning authority should have assessed whether the decision was likely to have significant environmental effects (paragraph 96). Whether the document set the framework for future development was a decision which Lindblom J. took for himself (paragraph 93).

National Environmental Initiatives

32. Air Quality Plans produced by the Secretary of State have been found to be unlawful: ***R (ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs*** [2015] P.T.S.R. 909;[21] ***ClientEarth v. Secretary of State for the Environment, Food and Rural Affairs*** [2017] P.T.S.R. 203;[22] ***R (ClientEarth) v. Secretary of State for Food, Environment and Rural Affairs*** [2018] Env. L.R.

[20] United Kingdom Further Observations, Appendix 15.
[21] United Kingdom Further Observations, Appendix 16.
[22] United Kingdom Further Observations, Appendix 17.

21.[23] The Air Quality Plans were found to be contrary to the requirements of the European Air Quality Directive 2008/50.[24]

Weight to be Given to the Protection of the Historic Environment

33. The built fabric and the settings of statutorily listed buildings have a high level of protection in English law and policy. In ***East Northamptonshire District Council v. Secretary of State for Communities and Local Government*** [2015] 1 W.L.R. 45,[25] the Court of Appeal considered that the requirement in section 66(1)[26] of the Planning (Listed Buildings and Conservation Areas) Act 1990 to have *"special regard to the desirability of preserving"* the setting of a listed building imposed a substantive requirement of weight. A decision-maker was obliged to give considerable importance and weight to the preservation of the asset. In ***East Northamptonshire***, the planning inspector had merely carried out a balancing exercise between heritage harms and other planning considerations, and therefore the Court of Appeal quashed the decision.

Successful ***Wednesbury*** Challenges

34. In this part of our Further Observations, we provide examples of circumstances where challenges to environmental decisions have succeeded on ***Wednesbury*** grounds. This selection does not purport to be comprehensive, or even representative of the success rate of ***Wednesbury*** environmental challenges. However, once it is understood that environmental challenges can and do succeed on the basis of ***Wednesbury***, it is clear that there is no systemic issue as alleged by the Complainants.

[23] United Kingdom Further Observations, Appendix 18.
[24] United Kingdom Further Observations, Appendix 31.
[25] United Kingdom Further Observations, Appendix 19.
[26] United Kingdom Further Observations, Appendix 32

Whether a greater intensity of substantive review would have made a difference to the outcome of a case, and if so whether that means that there has been a breach of the Convention (assuming, contrary to the UK's primary position as set out in Section II above, that the standard of review is a matter that is within the scope of Article 9 in the first place), is something that needs to be determined on the facts of a particular specific case e.g. where a communication is brought by a Member of the Public has exhausted their domestic remedies in relation to a challenge to an environmental decision and who contends that the application of the ***Wednesbury*** test was material to the failure of their challenge (in contrast to the ***Dillner*** and ***Spurrier*** cases relied upon by the communicants in the present case, referred to above).

35. In ***R (Wealden DC) v. Secretary of State for Communities and Local Government*** [2017] Env. L.R. 31,[27] Jay J. found a decision of a local authority and national park authority to adopt a local plan to be unlawful, where it was based on advice from Natural England which was *"plainly erroneous"*. Natural England is the United Kingdom government's adviser for the natural environment in England. Natural England had applied a threshold for how great an increase in traffic would need to be in order to have a potential environmental impact. However, it had failed to aggregate increases coming from two sources. At paragraph 90, Jay J. held:

> "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."

36. Jay J. went on to consider the scientific logic of the case:

> "[Counsel for the Secretary of State] came close to submitting that anything below 1,000 AADT was nugatory, and that this was a "zero sum game" (my

[27] United Kingdom Further Observations, Appendix 20.

> attempt in oral argument to summarise the point he was making). I cannot accept that. A toxicologist would no doubt agree with Mr Moules that a rat subjected to one million of the lowest homeopathic doses of a toxin (i.e. zero) would suffer no adverse effects. But the same toxicologist would also point out that one dose at 95% of the relevant safety threshold for the toxin might have an effect if added to another small dose. This is very basic science. There can be no difference for these purposes between adverse animal and environmental effects."

37. In ***R (Roskilly) v. Cornwall Council*** [2016] Env. L.R. 21,[28] a grant of planning permission by a Council was quashed on the basis that it had been granted whilst awaiting a decision from the Secretary of State in relation to screening under the Environmental Impact Assessment regime. The Secretary of State's subsequent decision, contrary to that of the Council, was that the proposal fell within the scope of the EIA regime. The Council's grant of planning permission was therefore quashed. At paragraph 39, Dove J. also held:

> "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".

38. The fact that a challenge is characterised as a merits points does not mean that it cannot succeed. In ***Obar Camden Ltd v. London Borough of Camden*** [2016] J.P.L. 241,[29] Stewart J. considered the lawfulness of a grant of planning permission for conversion of a pub to a retail and residential use. The grant of planning was quashed on a number of grounds. One of the grounds was that the Council had failed to have regard to the fact that Council's own noise consultant had suggested that the noise assessment needed to take into account noise from a further source. A further ground was based on the rationality of the imposition of a condition. There was an expert report

[28] United Kingdom Further Observations, Appendix 21.
[29] United Kingdom Further Observations, Appendix 22.

stating that the conditions could not possibly have the effect desired. There was nothing from the Council to counteract this suggestion. The Council's response was to argue that this was a merits point. This did not prevent Stewart J. indicating that the ground was made out (paragraph 43):

> "D [the Council] has throughout merely asserted that this is a merits point. Of course the difficulty is that many *Wednesbury* challenges are merits points. Nevertheless Mr Vivian's report in effect says that the conditions cannot possibly fulfill the aims they seek to achieve. There is no evidence from D. The court would not expect a detailed technical response and would not become involved in such a merits based argument. However, there is nothing apart from the fact that the conditions were drafted by [the Council's] officers, to refute any of the points made by Mr Vivian. A brief witness statement setting out in summary form why issue was taken with Mr Vivian's conclusions may well have been sufficient. Nevertheless the court is in effect left with a detailed and systematic witness statement alleging irrationality and nothing of real substance to begin to counteract it. Therefore in my judgment [the Claimant] succeeds on this ground also."

39. In ***R (Manchester Ship Canal Co Ltd) v. Environment Agency*** [2013] J.P.L. 1406,[30] the Court of Appeal considered an argument as to whether the Environment Agency had misinterpreted its own policy in relation to the designation of flood zones. According to the Environment Agency's policy, formal flood defences were to be presumed to fail for the purposes of the assessment, but the impact of *de facto* flood defences was to be taken into account. The Environment Agency took the view that sluices adjacent to locks on the canal were formal flood defences, and therefore not to be taken into account. The Environment Agency's decision was unlawful for unlawfully creating a category of formal flood defence which nowhere featured in its policies. The Court also found that the decision was irrational. At paragraph 27, Moses L.J. held:

> "The operation of the Canal creates and at the same time attenuates the risk of flooding. It makes no sense to describe the Canal as a formal flood defence: it is designed and operates so as to permit sea-going ships to be navigated inland. The operation of the sluices is integral to the operation of the Canal,

[30] United Kingdom Further Observations, Appendix 23.

> The sluices and their associated locks enable the Canal to achieve its purpose. It makes no more sense to describe the sluices as formal flood defences than the Canal itself."

40. At paragraph 29, Moses L.J. found that the judgment of the Environment Agency was "outwith the range of reasonable conclusion".

41. In ***R (Cooperative Group Ltd) v. Northumberland County Council*** [2010] Env. L.R. 40,[31] HHJ Pelling QC considered a challenge arising from a screening opinion by a local planning authority, including on the basis that the applicant offered to provide further information at a later stage. This was impermissible, following the decision in ***R (Lebus) v. South Cambridgeshire District Council*** [2003] Env. L.R. 17.[32] At paragraph 22, the Judge held:

> "I do not see how any LPA [local planning authority] properly directing itself could have answered the question whether this particular development would be likely to have significant effects on the environment other than positively by reference to traffic impact on the basis of this material."

42. This is the language of a finding that the only reasonable approach open to the local planning authority was to find that the proposal would be likely to have significant effects on the environment.

43. It may be unreasonable to make a decision without making clear that there is a good reason for doing so. Notwithstanding the advice of an Environmental Health Officer, the local planning authority granted planning permission without a condition relating to contamination in ***R (Gawthorpe) v. Sedgemoor District Council*** [2013] Env. L.R. 6.[33] John Howell QC, sitting as a Deputy High Court Judge, held at paragraph 34:

> "in my judgment, the circumstances are such that no reasonable planning authority would have proceeded to grant planning permission without a

[31] United Kingdom Further Observations, Appendix 24.
[32] United Kingdom Further Observations, Appendix 25.
[33] United Kingdom Further Observations, Appendix 26.

> condition addressing the contaminated land issues in the face of the advice of the Secretary of State and their own Environmental Health Officer absent a good reason for so doing. None has been shown in response to this claim. Accordingly, in my judgment, the decision to grant planning permission was unlawful and I will so declare."

44. Irwin J. found that a local planning authority had failed in law where it had not tied traffic routing conditions to the land, in ***Residents Against Waste Site Ltd v. Lancashire County Council*** [2008] Env. L.R. 27.[34] Irwin J. stated at paragraph 57:

> "It seems to me that it was, on balance, a failure not to consider it essential to ensure that traffic routeing conditions were secured to the land, by means of LCC as Waste Development Authority offering, and in any event LCC as Waste Planning Authority insisting upon, the relevant contractual stipulations as to traffic routeing being made a planning obligation, within the meaning of s.106 of the Town and Country Planning Act 1990. In the context of a highly vexed and difficult application such as this one, that should have been considered essential."

45. The Communicants' position,[35] that "***Wednesbury*** *in important environmental cases… is almost universally understood and applied very narrowly"* is not made out on a full examination of the case law. There are a number of examples of ***Wednesbury*** challenges having succeeded in the environmental context. As such, there is no systemic problem which shows that ***Wednesbury*** challenges do not or cannot succeed in the field of environmental law. If the issue is non-systemic, then it needs to be considered in the context of individual cases where the standard of review made a difference to the outcome. This is not the nature of this Communication. There is no evidence of such a case before the Committee.

V. THE DIFFERENT JURISDICTIONS OF THE UNITED KINGDOM

[34] United Kingdom Further Observations, Appendix 27.
[35] Case law update and request for expedition, 3 July 2019, p.2.

46. In its letter dated 9 October 2019, the Compliance Committee has asked for comments in relation to the different jurisdictions in Scotland and Northern Ireland.

47. The Communication is not based upon any differences between the jurisdictions (see Communication pp. 7 and 10). There are no material differences for the purposes of this communication. Indeed, the cases mentioned above include examples from Scotland and Northern Ireland.

48. In relation to Scotland, Aileen McHarg has stated,[36] "*the Court of Session has repeatedly confirmed that the grounds of review are essentially the same* [as in England & Wales]". McHarg cites ***West v. Secretary of State for Scotland*** 1992 S.C. 385,[37] which states:

> "There is no substantial difference between English and Scots law as to the grounds on which the process of decision-making may be open to review. So reference may be made to English cases in order to determine whether there has been an excess or abuse of the jurisdiction, power or authority or a failure to do what it requires".

49. In ***Somerville v. Scottish Ministers*** [2006] CSIH 52,[38] the Inner House of the Court of Session declined to introduce proportionality as an independent head of review, on the basis (paragraph 123) that this would introduce an undesirable distinction between the jurisdictions. The House of Lords declined to consider the question of proportionality in the circumstances of the case [2007] 1 W.L.R. 2734 (paragraph 56).[39]

[36] *Public Law in Scotland* – McHarg and Mullen, Avizandum (2006), p.219.
[37] United Kingdom Further Observations, Appendix 28.
[38] United Kingdom Further Observations, Appendix 29.
[39] United Kingdom Further Observations, Appendix 30.

50. In relation to Northern Ireland, John Larkin QC and David Scoffield BL state,[40] "[*t*]*here is normally little difference in the doctrinal substance of judicial review in England and Northern Ireland*".

51. Leading Counsel for the United Kingdom in relation to this Communication, Charles Banner Q.C., is called to the bars of both England & Wales and Northern Ireland, and practises in environmental litigation in both jurisdictions. His experience is consistent with the description of Larkin and Scoffield in the passage quoted above.

52. In conclusion, we suggest that there is no basis for a differing analysis in relation to this Communication as between the component jurisdictions of the United Kingdom.

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[40] *Judicial Review in Northern Ireland: A Practitioner's Guide*, SLS Legal Publications (NI), 2007.