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The Scrutiny of Scientific Evidence by UK Courts in Environmental Decisions: Legality, the Fact-Law Distinction, and (Sometimes) Self-Limiting Review

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I. Introduction

In the UK, claims regarding obligations generated by the Habitats Directive (HD) are usually dealt with by challenging the legality of a decision through judicial review and statutory appeal. Whilst such claims allow for the legality of a decision to be assessed, the courts are not willing to assess the substance of a decision or to re-make a lawfully made decision of a public body. In other 'routes' of challenge, they may be so-willing, but this is rare. This is guided by the approach the courts take to the separation of powers. However, whilst judicial review helps to hold governments, local authorities and public bodies to account,[1] the reliance on a system which only allows for decisions to be challenged on legal grounds to settle often controversial environmental law cases involving scientific uncertainty can lead to concerns that environmental decision-making lacks a substantive, merits-based examination by the court. Rather, the courts are expressly conscious of the rule of separation of powers in the UK and will not assess the substance of the original decision made by the decision-maker. This is often referred to by judges in the UK as the refusal to comment on the 'merits' of the underlying case.[2]

[1] Lucinda Platt and Maurice Sunkin, 'Why Judicial Review is Valuable to Society's Most Vulnerable' (*The Conversation*, 6 November 2015), available at https://theconversation.com/why-judicial-review-is-valuable-to-societys-most-vulnerable-49781.

[2] See, eg, *R (Save Warsash and the Western Wards) v Fareham Borough Council* [2021] EWHC 1435 (Admin) [48].

This approach has been the subject of challenge brought against the UK before the Aarhus Convention Compliance Committee (ACCC),[3] which argues that the UK's use of judicial review in environmental decision-making is in breach of arts 9(2), 9(3) and 9(4) of the Aarhus Convention.[4]

Other avenues of redress in environmental law cases are available in the UK in specific circumstances and many of these do accord a greater degree of intensity of review to the adjudicator. One example is the tribunal system which scrutinises regulatory action taken in accordance with the Regulatory Enforcement and Sanctions Act 2008 (RESA 2008). Due to the constitutional underpinning of the tribunal system, tribunals are able to take a much more proactive approach to environmental decision-making whereby they are effectively required to 'stand in the shoes' of the decision-maker when assessing the decision that has been made, thus allowing for the merits of a decision to be challenged in a judicial (or quasi-judicial) setting.

This chapter will analyse the extent to which scientific uncertainty in decision-making is assessed by the courts and tribunals in the UK with respect to cases which relate to the application of the Wild Birds Directive (WBD) and HD.[5] The chapter will begin by outlining the way in which these Directives have been implemented in the UK. This will be followed by an overview of the main avenues for challenging decisions relating to the WBD and HD. The chapter will then move on to analyse relevant case law from both judicial review and the tribunal system to determine how scientific uncertainty is assessed. This case law analysis will include: a focus on the extent to which the cross-examination of witnesses is allowed in judicial review and statutory appeal cases; the way in which judicial review decisions focus on only assessing the legality of decisions; an assessment of how the courts deal with uncertainty in judicial review and statutory appeals; and finally how the tribunal system takes somewhat of a contrasting approach in the context of RESA 2008 decision-making. The chapter will then conclude with an analysis of the extent to which the current approach to assessing environmental case law in the UK allows for full scrutiny of scientific evidence. The chapter will also provide a review of the extent to which the approach in the UK conforms with constitutional norms and the extent to which the ACCC has determined the UK's compliance with the requirements of the Aarhus Convention.

[3] United Nations Economic Commission for Europe (UNECE), 'Version 13 February 2015' (ACCC), available at www.unece.org/fileadmin/DAM/env/pp/compliance/C2018-156/Communication_UK_RSPB_07.12.2017.pdf.

[4] UNECE, *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, 2161 UNTS 447, 25 June 1998 (the Aarhus Convention).

[5] For full details, see the Table of Legislation and Introduction.

II. The National Implementation of the WBD and HD in the UK

The WBD was transposed into the law of England and Wales by Pt 1 of the Wildlife and Countryside Act 1981 (WCA 1981). Under the WCA 1981 it is an offence to kill, take or injure all wild birds, with stricter requirements for species listed in the schedules of the Act.[6] The requirements under the WCA 1981 have subsequently been amended and supplemented by the Countryside and Rights of Way Act 2000 (CROWA) and the Natural Environment and Rural Communities Act 2006 (NERCA). The requirements of the HD are transposed in England and Wales through the Conservation of Habitats and Species Regulations 2017, with corresponding legislation in Scotland and Northern Ireland.[7] For offshore areas beyond the territorial boundaries of 12 nautical miles, the same legislation applies to all devolved administrations of the UK – that is the Offshore Marine Habitats and Species Regulations 2017.[8] Due to the devolved status of the UK, a variety of bodies are responsible for taking regulatory action or giving statutory advice to decision-makers in respect of the above-mentioned legislation in each nation. For the WBD and HD, each nation has its own non-departmental public body and statutory adviser dedicated to nature conservation.[9] These are: Natural England; Natural Resources Wales; NatureScot (previously known as Scottish Natural Heritage); and the Northern Ireland Environment Agency. However, it is important to emphasise that the legal systems (relevant particularly to questions of judicial precedent) of the devolved nations are organised differently: Scotland has a separate legal system, as does Northern Ireland. The primary focus in this chapter will be on judicial treatment of the HD in the English and Welsh context.

III. Avenues for Challenging Decisions Relating to the WBD and HD in the UK

The main route for challenging decisions made with respect to the WBD and HD in the UK is through judicial review or by a statutory appeal to a planning permission

[6] Wildlife and Countryside Act 1981, pt 1.

[7] Conservation of Habitats and Species Regulations 2017 (SI 2017/1012). Conservation (Natural Habitats &c) Regulations 1994 (SI 1994/2716) in Scotland, and Conservation (Natural Habitats etc) Regulations (Northern Ireland) 1995 (as amended), Northern Ireland Statutory Rules 1995/380 in Northern Ireland.

[8] The Conservation of Offshore Marine Habitats and Species Regulations 2017 (SI 2017/1013). These Regulations replaced the Offshore Marine Conservation (Natural Habitats &c) Regulations 2007 (SI 2007/1842).

[9] A non-departmental body is 'a body which has a role in the processes of national government but is not a government department or part of one, and which accordingly operates to a greater or lesser extent at arm's length from ministers'. 'Public Bodies' (*GOV.UK*, 19 February 2013), available at www.gov.uk/guidance/public-bodies-reform.

decision (which is, in effect, a statutory authorisation for a court to carry out an exercise akin to judicial review in the context of town and country planning).[10] In addition to this, in the specialist arena of civil sanctions, which are now available for a number of habitats and species offences, the tribunal system also has a role in adjudicating decisions in accordance with RESA 2008. Therefore, this section will outline both systems, considering the procedural rules on evidence and the use of scientific knowledge for both.

A. Judicial Review, Statutory Review and Statutory Appeal in the UK

Judicial review is a legality challenge. A case for judicial review can only be brought under three grounds: illegality, procedural impropriety and irrationality.[11] Challenging a decision based on illegality ensures that 'the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it'.[12] In order to succeed on the ground of procedural impropriety, the claimant must show that the decision made has infringed either 'the rule against bias' or 'the right to be heard'. In addition to this, the right to be given reasons for a decision also falls under the ground of procedural impropriety. Finally for irrationality or unreasonableness, the decision from the public authority must be found to be 'so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'.[13] This last test is that of *Wednesbury* unreasonableness, the idea that a decision is so unreasonable that no reasonable decision-maker could have made it. All claims made for judicial review in England are brought before the general Administrative Court, with the exception of planning-related statutory appeals which are to be brought before a special division of the King's Bench, the Planning Court as explained below. Claims for judicial review must be brought promptly and cannot be brought later than three months after the grounds to make the claim first arose – this timeframe is reduced to six weeks for statutory appeals of planning decisions.[14]

Appeals relating to planning matters are dealt with in England in the Planning Court. These appeals are classed as either a statutory review or a statutory planning appeal. Statutory review and statutory planning appeal apply to a discrete

[10] This chapter focuses on the environmental decision-making approach of the courts and tribunal for judicial review and civil sanctions and not statutory appeals to the Secretary of State acting in a quasi-judicial role such as under the WCA 1981, s 28F. Please note that these decisions can be challenged using judicial review.

[11] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) 410.

[12] *ibid*.

[13] *ibid*.

[14] Civil Procedure Rules (CPR) 54.5, A1 (1) (b), A1 (5).

number of actions in planning law and are governed by specific legislation.[15] For both statutory review and statutory planning appeals, the general principles of judicial review apply, for example, the grounds of appeal are the same as outlined above,[16] however the constitutional underpinning of each form of statutory review available is dictated by the relevant legislation under which the review is being brought. Matters which will be brought before the Planning Court are outlined in the Civil Procedure Rules (CPR).[17]

An important distinction between the Planning Court and Administrative Court is that the Planning Court is made up of judges that have specialist knowledge in planning law matters, whereas a case of judicial review on environmental matters that comes before the Administrative Court will not be reviewed by a specialist judge. The reason for the introduction of specialist judges in the Planning Court was to speed up the time in which these decisions can be taken.[18] However, despite having a specialist judge present in the Planning Court, this does not mean that specialist evidence will be scrutinised differently than in the Administrative Court, as the grounds for judicial review, statutory review and statutory appeal govern the ways that decisions are reviewed. In other words, whilst the identity of the decision-maker, and the way in which power has been conferred upon them to decide, is different in these two contexts, the underpinning standard of review is the same. Whether in practice the approach is the same is less clear.

It should also be emphasised at this point that the meeting of EU law standards, as defined and articulated by the Court of Justice of the European Union (CJEU), is a question of legality, *not* reasonableness. Thus, a claim that an administrative authority has breached the HD by failing to conduct an appropriate assessment is judged according to the legality of that failure, rather than the reasonableness of the failure. However, we can add into this the complexity engendered by the law/fact distinction in this context. Questions of law, susceptible to definitive 'right or wrong' determination by a court, are reviewed under the legality standard. Questions of fact are questions which are reviewed on a reasonableness basis. To give an example, the meaning of 'appropriate' for the purposes of the HD is a question of law (determined, as we would expect, by the interplay between national courts and the CJEU). However, the question, as a matter of fact, as to whether the

[15] Statutory review can be pursued using the following provisions: Town and Country Planning Act 1990, s 287–88; Planning (Listed Buildings and Conservation Areas) Act 1990, s 63; Planning (Hazardous Substances) Act 1990, s 22; Planning and Compulsory Purchase Act 2004, s 113. Statutory planning appeal can be pursued under Town and Country Planning Act 1990, s 289 and Planning (Listed Buildings and Conservation Areas) Act 1990, s 65.

[16] This was summarised in the cases of *Seddon Properties v Secretary of State for the Environment* [1978] 2 EGLR 148 (QBD) and *Centre 21 Ltd v Secretary of State for the Environment* (1986) 280 EGLR 889 (CA).

[17] CPR 54.

[18] 'Planning Court' (*Courts and Tribunals Judiciary*), available at www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/queens-bench-division/courts-of-the-queens-bench-division/planning-court/.

assessment *in the particular case* was appropriate (judged against the correct legal benchmark) is a question of fact. The meaning of the term is a question of law: its application to the particular case, a question of fact.[19] Thus, just as important as the decision 'substance' or 'legality' review in the UK context is the question as to whether the alleged breach discloses an incorrect interpretation of the legal standard applicable to the case, or whether it discloses an unreasonable assessment of that correctly-interpreted legal standard as it applies to the facts before a decision-maker. A very great deal of normative complexity, therefore, is packaged into the seemingly simple fact/ law distinction and that complexity is particularly pertinent to the context of scientific uncertainty.

B. Environmental Civil Sanctions under the RESA 2008

Environmental civil sanctions were introduced in England and Wales in 2008 through the RESA 2008. This provides environmental regulators with the power to issue a civil sanction for a number of offences in place of criminal sanction (or ahead of criminal sanctions being used as a last resort). Such sanctions include fixed monetary penalties, remediation notices, stop notices and enforcement undertakings. For example, Natural England has been able to use civil sanctions from January 2012 as an alternative to prosecution for a number of offences, including those relating to the habitats and nature conservation provisions from the Environmental Liability Directive 2004.[20]

Under RESA 2008, s 54 an appeal can be made against a civil sanction on the grounds that it was based on an error of law or fact or unfair or unreasonable for any reason. An appeal is heard under the First-tier Tribunal as opposed to the court and must be made within 28 days of receiving the decision from the regulator.[21] Such appeals are generally heard by specialists who are trained to hear specific appeals and usually comprise of the tribunal judge and up to two other expert members who have been appointed by the Lord Chancellor. Witnesses can be (and often routinely are) called in First-tier Tribunal appeals and can be anyone who has first-hand knowledge of the matter.[22] Witnesses are questioned in the form of cross-examination whereby the appellant will usually call and question a witness first, followed by an opportunity for the other parties and tribunal to

[19] The distinction between questions of law and fact is considered in Elisabeth Fisher, 'EU Environmental Law and Legal Imagination' in Paul Craig and Gráinne de Búrca (eds), *The Evoluation of EU Law*, 3rd edn (Oxford University Press, 2021) 851–54.

[20] Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L143/56.

[21] The First-tier Tribunal was established by the Tribunals, Courts and Enforcement Act 2007, s 3.

[22] Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976) (as amended), r 16.

pose questions to the witness. In such cases, as we shall see, there is a good deal of scrutiny of scientific uncertainties, methods and advisors, something which is as a matter of procedure if nothing else, conspicuous by its absence in relation to judicial review and statutory appeals in respect of planning.

An appeal against the First-tier Tribunal decision can be made to the Upper Tribunal, but the grounds for such an appeal are on points of law only. So, for example, if the First-tier Tribunal: did not apply the law correctly, did not follow the correct procedures, did not have enough or any evidence to support its decision, or did not give adequate reasons for its decision. Permission to appeal must be sought within 28 days of receiving the decision from the First-tier Tribunal. Appeals in the Upper Tribunal can take place without an oral hearing, and no new evidence will be considered.[23] Appeals from the Upper Tribunal go to the ordinary courts (Court of Appeal).

IV. An Analysis of the Use of Scientific Evidence in the UK Legal System

A. Procedural Rules on Evidence and Use of Scientific Knowledge in Judicial Review and Statutory Appeal

The processes of judicial review and statutory appeal are governed by the CPR.[24] These rules apply to all judicial review cases, and there are no specific rules that apply to judicial review cases that have been brought under an environmental heading (subject to Aarhus Convention rules). There are three relevant questions here in terms of scientific uncertainties and judicial engagement with them. First, can (and will) the court allow cross-examination of witnesses from the decision-making authority to examine their assessment of scientific information? Second, can (and will) the court receive (in writing) and/ or hear (in cross-examination) evidence from experts regarding the scientific information relevant to the case (ie not experts consulted in the original decision, but experts appointed by the parties as part of the process of challenge)? Third, can the court request of its own volition or require from parties expert testimony to assist the court? These questions are answered by a combination of the rules in the CPR and their interpretation in case law.

First, in judicial review cases, in the vast majority of cases, the evidence analysed comes in the form of written witness statements.[25] There is an in-person hearing,

[23] Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), r 15.

[24] CPR 54.

[25] 'The Administrative Court Judicial Review Guide 2020' (*Courts and Tribunals Judiciary*, October 2022) 49, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913526/HMCTS_Admin_Court_JRG_2020_Final_Web.pdf.

but this is conducted between the judge and counsel. Witnesses are not required to give evidence in person. However, it is possible for the judge to order the cross-examination of witnesses if they are 'satisfied that there are reasonable grounds to consider that the statement in the report of substance of the instructions is inaccurate or incomplete'.[26] Whilst cross-examination of witnesses is an option available to the courts, this rarely happens precisely because on questions of fact, the standard is that of reasonableness.[27] The Court of Appeal has recently reaffirmed the position that considering 'live evidence' and cross-examining witnesses in cases of judicial review should only be needed in 'exceptional cases'.[28]

A rare example where permission for the cross-examination of a witness was allowed is the case of *R (Jedwell) v Denbighshire CC*[29] which concerned an application for the construction of two wind turbines and ancillary works in Denbighshire, Wales. The case concerned the reasons behind a negative Environmental Impact Assessment (EIA) screening opinion that had been provided, and the Court considered whether it was appropriate to cross-examine the Council employee who had made the decision for a negative EIA screening opinion. Foskett J initially determined that it was not appropriate to cross-examine the witness, however both Lewison LJ in the Court of Appeal and Mr Justice Hickinbottom in the High Court of Justice later disagreed with this and found that cross-examination of the witness was appropriate. Lewison LJ held that the question of fact in this case related to whether Mrs Shaw's written statement had been a justification of the negative screening opinion or a true account of her reasoning at the time of making the statement. He held that this was not a matter for the planning authority to decide but was a question for the Court, and the only way to answer this question was to cross-examine Mrs Shaw.[30] In other words, the Court became directly concerned with the basis for the negative screening opinion because it was relevant to the legality of the authority's decision under EU law.

The rarity of this step however has consequences for the degree to which a court will unpack uncertainties in the scientific basis underpinning an administrative decision. Instead, the question will become whether the decision-maker was *reasonable* in reaching the decision they did in light of the evidence before them. If the administrative decision 'black boxes' (or in Fisher's words, 'kettles'[31]) scientific uncertainty that is unlikely to be revealed in a paper-based examination with the probing of cross-examination.

[26] CPR 35.10.

[27] *O'Reilly v Mackman* [1983] 2 AC 237 (HL) 282.

[28] Hallett LJ in *R (Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841 [54].

[29] *R (Jedwell) v Denbighshire CC* [2015] EWCA Civ 1232, [2016] Env LR 17 and *R (Jedwell) v Denbighshire CC* [2016] EWHC 458 (Admin), [2016] 2 CMLR 49.

[30] *R (Jedwell) v Denbighshire CC* (EWCA) (n 29) [56].

[31] Elizabeth Fisher, 'Sciences, Environmental Laws and Legal Cultures: Fostering Collective Epistemic Responsibility' in Emma Lees and Jorge E Viñuales, *The Oxford Handbook of Comparative Environmental Law* (Oxford University Press, 2019) 749, 755–60.

Second, can (and will) the court receive (in writing) and/ or hear (in cross-examination) evidence from experts regarding the scientific information relevant to the case (ie not experts consulted in the original decision, but experts appointed by the parties as part of the process of challenge)? The rules regarding expert evidence can be found in Part 35 of the CPR and are restricted to 'that which is reasonably required to resolve the proceedings'.[32] The general requirement for expert evidence is in writing unless the court dictates otherwise.[33] In 2016, it was confirmed in a non-environmental case that this provision does apply to judicial review proceedings,[34] however in practice the calling of experts to enable a judge to decide on judicial review proceedings is a rare occurrence as the courts have frequently argued that it is not their place to assess the merits of the decision of which judicial review is sought.[35] This matter was revisited in 2021 by Justice Holgate in the case of *R (Transport Action Network Ltd) v Secretary of State for Transport*.[36] Here, it was confirmed that 'where a court needs to understand technical matters to be able to appreciate the basis for a decision challenged for irrationality, expert evidence may be admissible to explain those matters'.[37] When that approach was applied by Justice Holgate to a challenge against a bat species licence issued by Natural England under the Habitats Regulations in the case of *R (Kier) v Natural England*, he noted that although the expert evidence provided by the claimant was '… proffered … in order to help the court understand technical matters … in fact those documents were largely directed at challenging the merits of the judgments reached by NE and advancing alternative expert opinions'.[38] Rather, 'where there is room for reasonable differences of opinion, including those of the decision-maker, a rationality challenge cannot succeed'.[39]

Finally, with regards expert evidence the court can request of its own volition or require from the parties expert testimony to assist it with its deliberations. Under Part 32.1 CPR, the court has the power to determine which issues it requires evidence on, the nature of the evidence that is required and the way in which such evidence is presented to the court.[40] However, from the experience of the authors, it is rare, but not unheard of, for a court to request expert evidence of its own volition.

[32] CPR 35.1.
[33] CPR 35.5.
[34] *R (K) v Secretary of State for the Home Department* [2016] EWHC 1394 (Admin), [2016] 1 WLR 4243.
[35] *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649 [36].
[36] *R (Transport Action Network Ltd) v Secretary of State for Transport* [2021] EWHC 568 (Admin).
[37] *ibid* [81].
[38] *R (Keir) v Natural England* [2021] EWHC 1059 (Admin), [2022] Env LR 3 [44].
[39] *ibid* [44].
[40] CPR 32.1.

B. The Limitations of Decision-Making in Judicial Review and Statutory Appeal: Assessing the Legality of Decisions Instead of the Merits

As outlined above, decision-making in judicial review and statutory appeals under s 288 (although not all statutory appeals) is restricted based on the grounds under which the case can be brought before the court – namely through the lens of legality. This approach is demonstrated in *Plan B Earth v Secretary of State for Transport*.[41] In this case, the High Court of Justice concluded that the appropriate standard of review, when considering whether there had been a breach of the requirements of arts 6(3) and (4) HD in the conclusion as to the significance of impact, etc, is *Wednesbury* irrationality, as long as the terms used in the Directive had been interpreted correctly as a matter of law. In coming to this conclusion, it was stated that 'the court should not adopt a more intensive standard or effectively re-make the decision itself'.[42] This position was re-emphasised in the Court of Appeal judgment where Lindblom LJ stated that 'the Court's reviewing role does not stretch to determining disputed issues of technical expert evidence'.[43] The assessment of the merits of a decision was referred to as 'forbidden territory':

> It seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law.[44]

The standard of review, and the balance of decision-making authority, was also discussed at some length in the case of *Smyth v Secretary of State for Local Community and Government*[45] by Sales LJ. Here, it was recognised that whilst the test under art 6(3) HD is a 'demanding one, requiring a strict precautionary approach to be followed',[46] the assessment is 'primarily one for the relevant competent authority to carry out'.[47] When responding to the submission that art 6(3) HD

[41] *R (Plan B Earth Ltd) v Secretary of State for Transport* [2019] EWHC 1070 (Admin), [2019] JPL 1163; *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214, [2020] JPL 1005.
[42] *R (Plan B Earth Ltd) v Secretary of State for Transport*, *ibid* [350].
[43] *Plan B Earth v Secretary of State for Transport* (n 41).
[44] *ibid* [273].
[45] *Smyth v Secretary of State for Local Community and Government* [2015] EWCA Civ 174, [2016] Env LR 7.
[46] *ibid* [78].
[47] *ibid*.

carries a more intensive standard of assessment from the Court, Sales LJ disagreed by stating:

> There is no material difference in the planning context in which both instruments fall to be applied. There is no sound reason to think that there should be any difference as regards the relevant standard of review to be applied by a national court in reviewing the lawfulness of what the relevant competent authority has done in both contexts.[48]

Lees notes how the way in which the Court is limited to the role of 'overseer, rather than allowing for a full merits review' contrasts to the approach taken by the CJEU where the robustness of scientific evidence is expressed as a matter of legality, rather than as a question of discretionary judgment.[49] However, despite these observed differences in approaches between the UK courts and the CJEU, the UK courts have strongly maintained this stance in the case of *Savage v Mansfield DC*.[50] This Court of Appeal case concerned a potential Special Protection Area and the advice that Natural England had provided to the Council with respect to this. When considering these arguments surrounding the weight that the Council should have provided to Natural England's advice, it was held that 'an attack based on an allegation that the Council gave too little weight to advice received from one particular source is almost bound to fail'.[51] This observation provides a clear confirmation of the fact that the Court is not willing to involve itself in questions of how much weight decision-makers attribute to expert advice.[52]

Even in instances where a judge appears personally to find the justification for the decision unconvincing, they will not intervene in the decision as long as they are satisfied that the decision-maker has acted rationally to the *Wednesbury* standard. In *The Royal Society for the Protection of Birds v The Secretary of State for Environment Food And Rural Affairs & Ors*,[53] the Court did not overrule the Secretary of State's assessment of facts despite being unconvinced: 'If this was an appeal on the merits I would have said that they are unconvincing, but I am unable to conclude that they are irrational'.[54]

When the court does intervene in cases on grounds of irrational decision-making it will do so only when, on its face, the decision reached appears to be inexplicable. An example of this is *Wealden DCl v Secretary of State for Communities and Local Government & Ors*,[55] a case concerned with whether to quash part of

[48] *ibid* [80].

[49] Emma Lees, 'Allocation of Decision-Making Power under the Habitats Directive' (2016) 28 *Journal of Environmental Law* 191, 206.

[50] *Savage v Mansfield DC* [2015] EWCA Civ 4.

[51] *ibid* [41].

[52] For another example of where the Court engaged with the discussion of extent to which advisors have technical expertise, see *R (McMorn) v Natural England & Anor* [2015] EWHC 3297 (Admin), [2016] Env LR 14 [144]–[146].

[53] *The Royal Society for the Protection of Birds v The Secretary of State for Environment Food and Rural Affairs & Ors* [2015] EWCA Civ 227, [2015] Env LR 24.

[54] *ibid* [34].

[55] *Wealden DCl v Secretary of State for Communities and Local Government & Ors* [2017] EWHC 351 (Admin), [2017] Env LR 31.

the Lewes District Local Plan. The environmental area at threat was the Ashdown Forest Special Area of Conservation (SAC) which is designated for its extensive areas of lowland heath (amongst other reasons) which is vulnerable to nitrogen dioxide pollution from motor vehicles. One of the grounds addressed in the case focused upon advice that Natural England had provided to say that the planning development was not likely to have a significant impact on the SAC in consequence of increased traffic flows. Natural England concluded that increased traffic would not have a significant impact on the site as long as the increase in traffic was less than 1,000 cars per day. However, the increase in housing provision in the local plan ultimately took the increase in traffic to a level that exceeded 1,000 cars per day. Despite this, the same conclusion was drawn that there would not be a significant impact on the site from this traffic.

Clearly, determining the correct threshold for when vehicle emissions will have a significant impact on an SAC is a question for scientific experts. This was recognised by Mr Justice Jay in his judgment:

> 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.[56]

However, whilst Mr Justice Jay was reluctant to question expert evidence, he nevertheless found that the conclusion arrived at by Natural England was not rational as, in effect, it contradicted the 1,000-car threshold that they had set.[57] Therefore, whilst the courts will not interfere with the scientific reasoning behind decisions taken, it does not preclude judges from quashing decisions which, on their face, appear to be irrational. In short, the courts handle questions of the robustness of scientific evidence not as a matter of right or wrong legality, but as a question of the application of discretion. This has significant implications for how *uncertainty* in the science features in judicial reasoning.

C. Dealing with Uncertainty in Judicial Review and Statutory Appeal

Since scientific uncertainty necessitates the application of judgement – weighing up the evidence, options, and risks – the UK courts have shown that they both grant discretion in assessing what the prevailing scientific opinion *is*, and in assessing what this means for the legal steps required of the decision-maker. This is evidenced by the *Plan B Earth* case explained above.[58] The assessment on the

[56] *ibid* [90].
[57] *ibid* [108].
[58] *Plan B Earth v Secretary of State for Transport* (n 41).

likelihood of harm is based on the soundness of the evidence underpinning the decision. The *Wealdon*[59] case above provides an example of the court assessing the soundness of evidence. However, whilst the court does consider the soundness of evidence, it will not second guess the decision-maker's view as to how much weight should be given to that evidence. In *R (Wyatt) v Fareham District Council and others and Natural England*,[60] this was asserted by Mr Justice Jay who stated that:

> [I]t is necessary to underscore the distinction between the degree of rigour the local planning authority must apply to the consideration of its HRAs and the approach this court must take as the reviewing body: the two processes must be kept distinct'.[61]

The case law in this section demonstrates that the court will only assess how rational the decision-maker's assessment of risk and uncertainty is. Thus, separation of powers is maintained as the judicial branch defers to the executive branch.

One area where uncertainty in cases arising under the WBD and HD has the potential to be problematic for the courts is assessing the way in which the precautionary principle has been applied under art 6(3) HD. The courts in the UK do apply the precautionary principle when making their assessment. However, this does not mean that in applying the precautionary principle the court will go beyond determining whether the decision-maker has acted rationally and reasonably.[62] Since their question is whether the decision-maker has made a reasonable decision in reaching a judgement on the scientific position, and in reaching judgement on the legal outcome premised on that scientific position, the precautionary principle can only mediate on the question of reasonableness. Thus, scientific uncertainty is viewed through the prism of *Wednesbury* rationality as per the *Plan B* case.[63]

Where there is scientific uncertainty, the court will require some evidence that the alleged risks associated with that uncertainty are tangible. This is important when considering whether the precautionary principle has been properly applied as the court will not find it sufficient for a claimant to simply posit hypothetical risks which the decision-maker ought to have considered. Rather the *Wednesbury* test requires decision-makers to consider *relevant* information and that means the court will need to take a view on what is or is not relevant when sifting through those factors which make a decision uncertain. A useful survey of the courts' approach to this is set out in the Lydd Airport case.[64] Here the Court had

[59] *Wealden DCl* (n 55).

[60] *R (Wyatt) v Fareham District Council and others and Natural England* [2021] EWHC 1434 (Admin), [2022] Env LR 7.

[61] *ibid* [29].

[62] *Smyth v Secretary of State for Local Community and Government* (n 45) [78]–[81].

[63] A good example of this is *R (Akester & Anor) (On Behalf of the Lymington River Association) v Department for Environment, Food and Rural Affairs and Wightlink* [2010] EWHC 232 (Admin), [2010] Env LR 33 [75] where the Court grapples with and applies environmental principles drawn from CJEU case law and European Commission guidance.

[64] *The Royal Society for the Protection of Birds and Lydd Airport Action Group v Secretary of State for Communities and Local Government* [2014] EWHC 1523 (Admin), [2014] Env LR 30.

to consider whether the appropriate assessment accompanying the Secretary of State's decision contained any lacunae. In determining this, the Court reviewed common law precedent relating to when an appropriate assessment is required and noted the role that it plays in deciding whether some risks are real or simply hypothetical. It was noted that 'merely expressing doubt without providing reasonable objective evidence for doing so is not sufficient'[65] and that 'there must be "credible evidence" of a "real, rather than a hypothetical risk"'.[66] Moving beyond hypothetical risks, the claimant in this case argued that an appropriate assessment would have provided further information about specific gaps in the evidence. In considering this the Judge stated:

> I accept Mr Mould's argument that an appropriate assessment might have provided further information [about specific risks to SPA birds] … But I do not accept this as supporting a case that the Inspector was bound to conclude that a reasonable scientific doubt existed, nor do I accept that any or all of those studies would have been a necessary part of a proper appropriate assessment … On an issue of this sort, the amount of study and research which experts can suggest might yield possibly useful information and the need for yet further research seems to me to be probably limitless. The Inspector was not merely the person best placed to judge the sufficiency of what he had; I am not persuaded that the possibility of further research shows that his judgment on the sufficiency of what he had is irrational.

This response shows the court's position when it comes to encroaching upon the powers of the decision-maker (the Inspector in this instance). It also demonstrates an air of realism from the Judge with respect to the comment about the potential for limitless research even into potential 'actual' gaps in the evidence as opposed to merely 'hypothetical' ones. By acknowledging this, the court is not only acknowledging that it is not best placed to determine where the line is drawn, but is also discretely recognising the vastness of scientific uncertainty.

Similarly, the court will also give further deference or 'margin of appreciation' to bodies which have recognised expertise in a technical field relevant to the environmental decision. This approach can be seen in a number of cases covered in the remainder of this section. For example, in *R (Akester & Anor) (On Behalf of the Lymington River Association) v Department for Environment, Food and Rural Affairs and Wightlink*[67] Mr Justice Owen found that a decision-maker is bound to give 'considerable weight' to Natural England's advice on ecological issues and there had to be 'cogent and compelling reasons for departing from it',[68] thus demonstrating that democratically accountable decision-makers must not ignore the expert scientific advice when making decisions.

> It is submitted on behalf of the claimants that Wightlink could not reasonably have concluded that no doubt remained as to adverse effects given the formal advice given by

[65] *R (Hart DC) v SSCLG [2008]* EWHC 1204 (Admin), [2008] 2 P & CR 16 [81].
[66] *The Royal Society for the Protection of Birds and Lydd Airport Action Group* (n 64) [22].
[67] *R (Akester & Anor)* (n 63).
[68] *ibid* [112].

> Natural England. The fact that Natural England had given contrary advice does not of itself render the decision Wednesbury unreasonable. In making its appropriate assessment Wightlink was not obliged to follow the advice given by Natural England; its duty was to have regard to it. But given Natural England's role as the appropriate national conservation body, Wightlink was in my judgment bound to accord considerable weight to its advice, and there had to be cogent and compelling reasons for departing from it. Unless Wightlink was to come to the conclusion that the conclusion at which Natural England had arrived was simply wrong, it is difficult to see how it could come to the conclusion that no doubt remained as to whether there would be significant adverse effects on the protected sites.[69]

Similarly, in the context of protected species licensing, the Court in *Wild Justice v Natural Resources Wales*[70] recognised Lord Justice Beatson's approach in *R (on the application of Mott) v Environment Agency*[71] as being the correct approach to follow. This is that:

> The very helpful submissions from both parties showed that it was common ground that in principle the court should afford a decision-maker an enhanced margin of appreciation in cases, such as the present, involving scientific, technical and predictive assessments.[72]

Furthermore, in terms of assessments as to the strengths and weaknesses of the evidence underpinning a licensing decision, this is ultimately a matter of judgment for the authority issuing the species licence:

> These assessments were a matter for NRW in the context identified by Mr Corner. Accepting for present purposes that the precautionary principle applies, I am not persuaded that it has been shown that the NRW's judgment on the evidence, either in respect of risk, or other satisfactory solutions, is irrational.[73]

This approach was also followed in *R (BACI) v Environment Agency*[74] in the context of a permission to allow a large waste facility. In that case Lindblom LJ said:

> There may be disagreement over the appropriateness of the intended operating techniques, or on the likely effectiveness of measures proposed for the prevention or acceptable mitigation of polluting emissions. Objectors may suggest other measures … But these are in the end matters for the Environment Agency to resolve.[75]

In conclusion, the courts in this area have been consistently careful to ensure that they do not put themselves in the shoes of the decision-maker and try to re-make decisions which have been taken using scientific evidence. When it comes to

[69] *ibid*.
[70] *Wild Justice v Natural Resources Wales* [2021] EWHC 35 (Admin), [2021] Env LR 24 [30].
[71] *R (Mott) v Environment Agency* [2016] EWCA Civ 564, [2016] 1 WLR 4338.
[72] *ibid* [69].
[73] *Wild Justice v Natural Resources Wales* (n 70) [66].
[74] *R (BACI) v Environment Agency* [2019] EWCA Civ 1962, [2020] Env LR 16.
[75] *ibid* [98].

assessing scientific uncertainty, the court adamantly draws the line that it will only consider matters of scientific uncertainty if, in doing so, this demonstrates that the decision-maker acted unreasonably in making their decision. As the court does not possess the scientific understanding or expertise needed to understand the intricate details of scientific uncertainty, it must instead rely on seeking out any inconsistencies within the decision-maker's use of scientific evidence.

D. An Alternative Approach in the Tribunal System

Turning now to how the Tribunal has approached environmental decision-making under RESA 2008, we can see a glimpse of how the judiciary could take a more proactive role in environmental decision-making. As McKenna J has said:

> In this context the general approach in regulatory appeals to this Chamber is that, unless the legislation indicates otherwise, the appeal is *de novo* i.e. it requires the Tribunal to stand in the shoes of the regulator and to take a fresh decision on the evidence, giving appropriate weight to the original decision-maker's decision.[76]

Two cases concerning stop notices issued by Natural England help to illustrate the Tribunal's *de novo* approach together with the limitations to this. The first case, *Forager Ltd v Natural England (Environment)*,[77] concerned several reports between 2013 and 2014 to Natural England from members of the public who spotted individuals harvesting wild sea kale on the beach at Dungeness. Natural England issued a stop notice to prevent this harmful activity and succeeded at the First-tier Tribunal in defending its actions. The hearing was presided over by a Judge and an expert member due to the technical nature of the submissions. The stop notice was successfully appealed to the Upper Tribunal on several grounds – the successful one being that the notice failed to contain the steps that could be taken to comply with the stop notice.[78] As the activity of harvesting here was directly harmful of the Site of Special Scientific Interest (SSSI) feature, this portion of the stop notice was left blank. In light of submissions that this omission rendered the stop notice invalid, and in order to avoid the time and expense of a further hearing in the First-tier Tribunal, Natural England requested that the Upper Tribunal exercise its powers to correct the stop notice by inserting into it a series of steps which could be taken. The Judge refused to do this,[79] and accordingly, the matter was referred back to the First-tier Tribunal to specify the steps to be taken under the stop notice. The Upper Tribunal was reluctant, therefore, to exert its authority, even at the invitation of the regulator, preferring instead for further evidence to be heard by a judge and an expert member.

[76] *Warren v Natural England* [2018] UKFTT NV_2018_0006 (GRC) [9].
[77] *Forager Ltd v Natural England (Environment)* [2015] UKFTT NV_2015_0002 (GRC).
[78] *Forager Ltd v Natural England* [2017] UKUT 148 (AAC).
[79] *ibid* [32].

The second case, *Warren v Natural England*[80] concerned a stop notice served by Natural England on a commercial shoot on a Suffolk estate adjacent to Minsmere-Walberswick Heaths and Marshes SSSI causing ecological harm. The stop notice issued by Natural England prevented the release of gamebirds to levels which it considered ecologically sustainable. On appeal, the First-tier Tribunal exercised its *de novo* powers to substantially vary the stop notice to levels which it felt, after hearing detailed witness evidence, were 'proportionate'. In reaching this conclusion, the First-tier Tribunal went so far as deciding that it was not 'bound by the Habitats Regulations'[81] because it did not feel bound by principles which apply to a decision-maker in an appeal. The First-tier Tribunal also questioned the status and expertise of Natural England's 'unsatisfactory' witnesses, giving their evidence less weight than the Appellant's witnesses.

The conclusions of the First-tier Tribunal were later successfully appealed by Natural England. In allowing the appeal, the Upper Tribunal scrutinised the First-tier Tribunal's approach to core issues such as the relevance of the Habitats Regulations and the application of the precautionary principle in light of scientific uncertainty as well as the weight to be given to Natural England's expert advice. With regards the relevance of the Habitats Regulations, whilst the Tribunal concluded that it was not a competent authority for the purposes of the Habitats Regulations, nevertheless 'the tribunal was bound to act consistently with the precautionary principle because the duties on Member States under Article 6(2) are binding on all authorities of a Member State including the courts'.[82] With regards the application of the precautionary principle, the Upper Tribunal concluded that because the Tribunal 'stood in the shoes' of Natural England it was: '… bound to apply the principles that governed Natural England's decisions … these included giving effect to the Habitats and Birds Directive (and therefore to the precautionary principle) in exercising its functions in serving the stop notice'.[83]

With regards the status of Natural England's expert evidence, the Upper Tribunal found that the First-tier Tribunal was incorrect to conclude that Natural England's witnesses could not be regarded as expert witnesses because they were employed by Natural England.[84] As far as witness impartiality is concerned, the Upper Tribunal concluded that as long as any employment links of witnesses are declared, then this will not impede on the Tribunal's ability to hear the evidence.[85] This approach by the Upper-tier Tribunal is realistic as it recognises the fact that often expert witnesses can be called from the same organisation as the defendant.

The *Warren* case is therefore an interesting example of the Tribunal exercising its powers to re-make environmental decisions, provided this is done within the

[80] *Warren v Natural England* (n 76).
[81] *ibid* [98].
[82] *Natural England v Warren* [2019] UKUT 300 (AAC) [88].
[83] *ibid* [89].
[84] *ibid* [103].
[85] *ibid* [103]–[104].

proper legal parameters. Where the First-tier Tribunal failed to do this, the Upper Tribunal provided the appropriate corrective. This dynamic provides an insight into how the court system might operate if it was to have more expansive powers scrutinising the merits of environmental decisions.

V. Conclusion: Assessing Conformity with Constitutional Norms

By comparing the approach of the tribunals in RESA 2008 appeals with the approach of the courts in judicial review and statutory appeal, it is clear to see that the former has been granted with the constitutional power to 'put themselves in the shoes of the decision-maker' when assessing environmental decisions, whereas the latter is limited by the grounds of judicial review to the strict tests of *Wednesbury* unreasonableness and whether the law has been interpreted correctly (*ultra vires*). In the UK, the courts defer assessment of how robust the scientific evidence is to the decision-maker. This is because the separation of powers limits the scope of judicial review in this way and because the courts acknowledge that they are not best equipped to pass judgment on whether scientific evidence has been used correctly by the decision-maker. This message has consistently shone through in the judgments from the court outlined in this chapter where in judicial review and statutory appeal, the sustained message is that it is not the court's place to pass judgment on the scientific reasoning and uncertainty that has been used by the decision-maker[86] – even in instances where the judge may not feel personally convinced by the decision that has been made.[87] The court will only assess the use of scientific evidence/uncertainty through the lens of *Wednesbury* unreasonableness, as was the case in *Wealden DCl*[88] where the decision-maker had contradicted its own guidance when it came to imposing a threshold. In this case, the Court did not attempt to assess the scientific evidence present, but simply recognised that the decision-maker had contradicted itself.

The assertion that the courts in judicial review and statutory appeal are bound to assess cases through the lens of legality, as opposed to reviewing the substantive merits of the decisions that have been made, is further evidenced by the limited way in which the courts are able to review evidence from both witnesses and experts. As demonstrated above, the courts have wide-ranging powers from the CPR when it comes to being able to hear evidence from both witnesses, from experts who can comment on scientific information relevant to the case and even from experts who the court has requested to hear from of its own volition. However, despite having

[86] *Plan B Earth v Secretary of State for Transport* (n 41) [350].
[87] *The Royal Society for the Protection of Birds* (n 53) [34].
[88] *Wealden DCl* (n 55) [108].

these powers available, a common law precedent has developed which states that it is rare to examine evidence from witnesses,[89] and even rarer to examine expert evidence on scientific matters.[90] Where witness and expert evidence is used by the courts, it is restricted to being used to help the court understand the basis for the decision which is being challenged.[91] This has not happened by mere happenstance but is rather the product of a view that,

> [T]he facts … can seldom be a matter of relevant dispute under an application for judicial review, since the tribunal or authority's findings of fact, as distinguished from the legal consequences of the facts that they have found, are not open to review by the court.[92]

Indeed, as Lord Diplock has observed, 'to allow cross-examination presents the court with a temptation, not always easily resisted, to substitute its own view of the facts for that of the decision-making body upon whom the exclusive jurisdiction to determine facts has been conferred by Parliament'.[93] The sum total of this is that the scope for reviewing the merits of scientific evidence is limited as the judiciary do not see this as its proper role, in the context of judicial review. Rather, as stated in the abovementioned case *Mott*, the court will afford a decision-maker 'an enhanced margin of appreciation' in cases 'involving scientific, technical and predictive assessments'.[94]

The approach of the UK courts to judicial review has recently and historically led to compliance challenges being made before the ACCC which asserts that the UK's strict judicial review criteria mean that it is in breach of arts 9(2), 9(3) and 9(4) of the Convention. Specifically, the allegations related to the lack of substantive review in procedures for judicial review; the prohibitively expensive costs of judicial proceedings; the lack of rights of action against private individuals for breaches of environmental law; and the restrictive time limits for judicial review. In 2008, the ACCC found that the UK was compliant with the Convention's requirements, however noted that the *Wednesbury* test of unreasonableness provided for a 'very high threshold for review'.[95] Another challenge was raised again in 2017.[96] In this instance the UK continued to argue that the complainants failed to provide any evidence or overview to suggest that access

[89] *O'Reilly v Mackman* (n 27) [282].
[90] *R (Law Society) v Lord Chancellor* (n 35) [36].
[91] *R (Transport Action Network Ltd) v Secretary of State for Transport* (n 36) [81].
[92] *O'Reilly v Mackman* (n 27) [282].
[93] *ibid* [282].
[94] *R (Mott) v Environment Agency* (n 71) [69].
[95] United Nations Economic Commission for Europe, 'Findings and Recommendations of the Aarhus Convention Compliance Committee with Regard to Communication ACCC/C/2008/33 Concerning Compliance by the United Kingdom' (ACCC) [125], available at www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/C33_Findings.pdf.
[96] United Nations Economic Commission for Europe, 'Version 13 February 2015' (ACCC), available at www.unece.org/fileadmin/DAM/env/pp/compliance/C2018-156/Communication_UK_RSPB_07.12.2017.pdf.

to justice would be improved if the process of judicial review were to be changed so as to incorporate a different standard of review.[97] At the time of writing, the results of the proceedings have not yet been released. The Office of Environmental Protection (OEP)[98] may, when it gets underway, choose to look into this in future. The OEP is the body created under the Environment Act 2021 to fill the governance role in the UK to scrutinise compliance with environmental law previously occupied by the European Commission.[99] Indeed, the OEP's statutory powers of Environmental Review under the Environment Act 2021 may open the door to a more merits-based scrutiny of environmental decisions. However, it will not be possible to predict this until the OEP is fully operational.

In somewhat of a contrast to the approach in judicial review and statutory appeal, an analysis of the tribunal system under RESA 2008 shows that not all decision-making in the UK is limited to assessment on legal grounds only. The constitutional underpinnings of the tribunal system allow for the judge to put themselves 'in the shoes' of the decision-maker when it comes to scrutinising the decision. The *Warren* and *Forager*[100] decisions outlined above show how the tribunal is willing to exercise this discretion.

Whilst some may argue that the grounds of judicial review and statutory appeal should be widened so as to allow judges to grapple with the merits of environmental decisions, it is contended that the current degree of scrutiny allowed is compliant with constitutional norms (ie the grounds of judicial review and compliance with the separation of powers). As outlined above in section III, the grounds for judicial review are stricter than those under the tribunal system. Therefore, any suggested change to the status quo would require a constitutional overhaul of the judicial review and statutory appeal system in order to allow for merits-based decision-making. Whilst the benefits of such an overhaul could lead to greater accountability of decision-makers, the arguments on the other hand are that such a move would dilute the separation of powers and could result in requiring courts who are not well-equipped in terms of scientific expertise to pass judgment on complicated scientific matters.

Environmental decision-making does not only concern technical questions, but questions that are based on political, moral, cultural and even religious

[97] United Nations Economic Commission for Europe, 'Re Communication ACCC/C/2017/156 Observations on behalf of the United Kingdom' (ACCC) [6], available at www.unece.org/fileadmin/DAM/env/pp/compliance/C2018-156/Correspondence_with_the_Party_concerned/Party_s_response/C156_UK_Party_s_response_21.08.2018.pdf. These arguments were furthered in the oral presentation by Charles Banner to the Committee: United Nations Economic Commission for Europe, 'Re Communication ACCC/C/2017/156 Note of the Oral Presentation by Charles Banner to the Committee on the 5 November 2019 on behalf of the Government of the United Kingdom' (ACCC), available at www.unece.org/fileadmin/DAM/env/pp/compliance/C2018-156/Correspondence_with_the_Party_concerned/frPartyC156_05.11.2019.pdf.

[98] 'Office for Environmental Protection' (OEP), available at www.theoep.org.uk/office-environmental-protection.

[99] Environment Act 2021, ch 2.

[100] *Warren v Natural England* (n 76) and *Forager Ltd v Natural England (Environment)* (n 77).

values.[101] Even if we were to introduce a court with specialist judges who have scientific expertise, there is much more to environmental decision-making than deciding upon scientific uncertainty alone. Whilst the court may be viewed as a neutral and objective arbiter of scientifically uncertain environmental law cases, perhaps what is needed here is not a reform of the law or the courts, but a reinvestment in our politics. As former Supreme Court Judge, Lord Sumption has stated, whilst judges may hold higher levels of public confidence than politicians, this perception is neither justified nor conducive to achieving better decision-making:

> … the latest Hansard Report on political engagement suggests that judges are somewhere near the top of the list of public confidence and politicians pretty close to the bottom. I don't think that that reputation is really justified. We need to realise, perhaps more acutely than we do, what the political process can contribute to reconciling our differences.[102]

[101] Jane Holder and Maria Lee, *Environmental Protection, Law and Policy: Text and Materials*, 2nd edn (Cambridge University Press, 2007) 11.

[102] A transcript of this lecture is available at: 'The Reith Lectures 2019: Law and the Decline of Politics' (*BBC*, 21 May 2019), available at http://downloads.bbc.co.uk/radio4/reith2019/Reith_2019_Sumption_lecture_1.pdf.