OPINION OF SENIOR COUNSEL

for

ENVIRONMENTAL RIGHTS CENTRE for SCOTLAND

INSTRUCTIONS

I am asked in a letter of instruction of 11 August 2023 to consider whether the Scottish Government (SG) has *fully complied* with the duty imposed by United Kingdom Withdrawal from the European Union (Continuity) (Scotland) Act 2021, s. 41 (the 2021 Act). This question arises in the context of ERCS' response to the SG's Report, ostensibly prepared in response to the Act.

I answer the question in the negative, for the following reasons.

I have been provided with

- ERCS' Briefing Note on post Brexit Environmental Governance, and
- ERCS Confidential Briefing on alleged breach of the duty to consult on whether to establish an Environmental Court.
- The SG's Report into the effectiveness of Governance Arrangements as required by s. 41 of the 2021 Act
- A letter to the SG Minister dated 14 July, and
- The SG Minister's Reply, dated 27 July

The provision reads

> *41 Duty to consult on effectiveness of governance arrangements*
>
> *(1) The Scottish Ministers must—*
>
> *(a) prepare a report on the matters mentioned in subsection (2)…*
>
> *(2) The matters referred to in subsection (1)(a) are—*
>
> *(a) whether the provisions of this Chapter have ensured that there continues to be effective and appropriate governance relating to the environment following the withdrawal of the United Kingdom from the EU…*
>
> *…*
>
> *(c) whether and, if so, how the establishment of an environmental court could enhance the governance arrangements referred to in paragraph (a)…*

APPROACH TO MEANING and STATUTORY CONSTRUCTION

The traditional and correct starting point for any construction issue is to ascertain the ordinary meaning of the words employed by Parliament. As a matter of straightforward English usage, the ordinary meaning of the words in s. 41(2)(a) directly imposes mandatory duties. The words require the Scottish Ministers to prepare a Report on certain specified matters listed in s.41(2). Paragraph (c) of that subsection requires the report to address whether (and if so, how) the establishment of an environmental court *could enhance* the 'governance arrangements' referred to in paragraph (a). Are those arrangements "*effective and appropriate"?*

In the Report itself the duty and the consequential duty to consult following publication of the Report are both recognised and clearly understood by the author, i.e. by the SG.

The Report considers that the third pillar of Åarhus, namely access to justice, is "*considered in detail*…" in the Report. In my opinion, it clearly is not.

Ordinarily, the intention of Parliament is to be understood by reference to the words used by Parliament in the legislation, interpreted by reference to their ordinary and natural meaning, read in the relevant context. If the meaning of the words used by Parliament is clear and unambiguous there is no need to search through external aids in support of a different interpretation.

The following passage from Lord Hodge, DPSC, in *Regina (O) v Secretary of State for the Home Department [2022] UKSC 3* , at paragraphs 29 to 31 is helpful:

Quoting Lord Reid of Drem, Lord Hodge said

"The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used': *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591* , 613 per Lord Reid.

Hodge noted that more recently, Lord Nicholls of Birkenhead stated:

'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.' (*R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd [2001] 2 AC 349* , 396.).

Hodge continued:

"*Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a*

relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in Spath Holme , p 397: 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."

CONTEXT

Section 41 is in Chapter 2 of the Act, entitled "Environmental Governance". That is the context. That Chapter is built around the establishment of a body corporate to be called Environmental Standards Scotland (ESS) whose general governance and structure are set out in Schedule 1, and whose strategy is set out in Schedule 2. ESS has been given wide ranging powers (Ss 20-48 and Sch1 para 13). It is clear, reading the 2021 Act and Report as a whole, that in many instances, ESS is to be viewed as the ultimate strategist, arbiter and decisionmaker on the widest possible range of environmental matters. ESS is not an Environmental Court. Conspicuous by its absence in this range of powers is any reference to a mechanism by which individual rights may be vindicated. In our system, that is the role of a Court.

THE QUESTION

The requirement of s. 41 is to report on whether the establishment of an environmental court *could enhance* the governance arrangements … Those arrangements must be "*effective and appropriate*".

The use of the conditional verb "*could*" in s. 41 begs a question – if establishment of a Court happened, *is it possible that* enhancement of governance arrangements *might* occur? It does not mean that they *would* occur, merely that they *might do so.*

"*Enhance*" means "*to increase or further improve the good quality, value or status of someone or something"* (OED).

CONSIDERATION OF s.41(2)(c) IN THE SG REPORT

All that the section asks is that the SG give consideration to, and report upon, a possibility; not whether they wish it to happen, nor that they have done something differently, nor how an Environmental Court might work. The SG has not done that. The Report may infer that ESS would be all that is required for environmental governance for the public, public bodies and the SG itself, going forward, as policy evolves. But that is not the question. In this Report, nobody has asked, far less answered, the question of whether an Environmental

Court *could* enhance governance arrangements or how it might do so. That is a matter on which there is bound to be a range of opinions.

The direct consideration of the question posed by s. 41(2) (c) is found in Chapter 5 in the Report. It concludes that SG does "not see any strong argument …for the creation of a specialist court." Once again, that is not the question. The Report does not answer the question of whether an environmental court *could* enhance the governance arrangements. **On the face of it, therefore, the SG has not directly responded in its Report to the question posed by the duty imposed by s. 41(2) (c).**

Indirect consideration of the duties imposed by s. 41 is predicated upon the stance of the SG to having left the EU and the creation of ESS. The Report recognises the need to protect environmental standards and a wish to maintain alignment with key elements of the EU structure. It does not observe that, in general, UK law has tried to achieve that objective by means of the post-Brexit transposition legislation. Those matters are irrelevant to the question.

The SG response to the requirements imposed by the 2021 Act has been to create a new public body with powers, while referring to the Court as it exists, as a means to ensure "compliance with the law" and the "protection of individual rights". The Court is treated, in the Report, as a place where no one should have to go. But the creation of ESS by itself does not ensure compliance, neither does it protect individual rights. By itself, the existence of ESS does not ensure compliance with environmental law. It has no place for individual rights. It does not secure the provisions of the third pillar of the Åarhus Convention guaranteeing access to justice, to which the entire UK is subject.

Although the Report (para 2.1, last line) says that the topic (of access to justice) is considered in detail, this is plainly not the case. The Report looks to the integration of environmental law with other aspects of public policy, but it says nothing whatever about the means by which individual rights may be vindicated. The assumption of the Report is that in cases of administrative overreach, or even administrative oversight, ESS will step in or at least be enabled to do so. The public and the vindication of individual rights have no place in that process.

The Report quite fails to recognise that in modern Judicial Review practice in Scotland, and in the remainder of the UK, the Court's *locus* is confined to considering the legality of a decision. In such cases applications for Judicial Review consider only the process by which decisions are reached. It is vanishingly rare to see "planning judgment" successfully questioned. The current law is that the weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not matters for the court. For example, a local planning authority

determining an application for planning permission is free (subject to *Wednesbury*) to give material considerations "whatever weight [it] thinks fit, or no weight at all" (*Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 WLR 759, at p.780F-H, per Lord Hoffmann). As is well understood, a statutory appeal does not afford an opportunity for a review of the planning merits of an decision (*Newsmith v Secretary of State for Environment, Transport and the Regions* [2001] EWHC Admin 74, at para 6, per Sullivan J.) and many other cases in all parts of the UK.

It would not be helpful for me to speculate as to whether the founding of an Environmental Court in Scotland could improve the governance arrangements by enhancing the effectiveness and appropriateness of existing provision – for example by way of a new kind of statutory appeal or challenge by an expanded form of Judicial Review. That is a question for another day. There are many views.

However, I am firmly of the opinion that the indirect response to the duties imposed in s. 41 has been incomplete, and that the Report of the Scottish Government is not an adequate nor a sufficient response.

THE OPINION OF,

John Campbell

John Campbell KC

Advocates Library
Parliament House
Edinburgh EH1 1RF
29 August 2023