Appeal Ref: UKSC/2025/0119

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEAL

[2025] EWCA Civ 624

BETWEEN:

THE KING

-on the application of-

FOODRISE LTD

Appellant

-and-

(1) HM TREASURY

(2) SECRETARY OF STATE FOR BUSINESS AND TRADE

Respondents

(1) FRIENDS OF THE EARTH LTD

(2) ENVIRONMENTAL LAW FOUNDATION

Interveners

FRIENDS OF THE EARTH'S WRITTEN SUBMISSIONS

A. INTRODUCTION

1. Friends of the Earth ("**FoE**") has been granted permission to intervene on two issues.[1] Its supports the Appellant's case that the Court of Appeal too narrowly construed Article 9(3) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (**"the Aarhus Convention"**). Its submissions (i) illustrate the severe ramifications of the Court of Appeal's narrow approach to costs capping under Article 9(3) on access to environmental and climate justice, and (ii) contest the Court of Appeal's reliance on the French text versions of the Aarhus Convention and its *travaux préparatoires*.

2. FoE is a not-for-profit organisation, which has operated in the United Kingdom for over 50 years. It promotes a vision for a peaceful and sustainable world based on societies living in harmony with nature. FoE undertakes litigation in furtherance of its objectives. For example, over the past decade, FoE has acted as the claimant in over 10 judicial reviews in the UK, all concerning the environment and/or the climate. FoE has also been given permission to intervene in at least 6 cases over this period.

3. On the **first issue**, the Court of Appeal's narrow approach is inconsistent with the overall purpose and aims of the Aarhus Convention. In particular, the Court of Appeal's approach would compromise the ability of FoE (and others) to bring environmental and climate litigation in the public interest across a range of issues – thereby materially undermining access justice in this field. When deciding whether to pursue a claim, the extent of any adverse costs risk (along with own costs) is generally decisive for NGOs like FoE. If significant categories of environmental claims are excluded from the scope of costs capping under Article 9(3), FoE will be unable to pursue public interest cases in those areas, regardless of their legal merit or strategic importance, for fear of ruinous costs consequences or at very least "*prohibitive[…] expense*" (per Article 9(3)). Moreover, FoE anticipates there will be a wider chilling effect on areas in which

[1] Supreme Court's order of 27 April 2026

the application of the costs capping provisions is uncertain, as well as on its capacity to act as a viable repeat player in this sphere.

4. The interpretation advanced by the Appellant not only ensures that the environment is better protected, but also furthers the rule of law in environmental cases by protecting access to justice. As Lord Reed (with whom the rest of the Court agreed) highlighted in ***R (UNISON) v Lord Chancellor*** [2017] 3 WLR 409, at §68:

> "At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade …"

5. On the **second issue**, the Court of Appeal's approach to the French text versions of the Aarhus Convention and its travaux préparatoires (**"travaux"**) was flawed. The Court of Appeal concluded, at §88 of its judgment, that these French language versions indicated *"relating to"* in Article 9(3) *"is used as a strong, not a loose or broad, connector"*. However, this approach overlooked that (i) the phrase *"droit national de l'environnement"* can be read in a broader sense; and (ii) this alternative translation is consistent with the fact that the French text went unchanged between the travaux and final text.

B. PRACTICAL IMPACT OF THE COURT OF APPEAL'S NARROW APPROACH

Overview

6. The Aarhus Convention expressly recognises at Recital 13 "*the importance of the … roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection*" (emphasis added).

7. In ***R (Badger Trust and Wild Justice) v Natural England*** [2025] EWHC 2761 (Admin), Fordham J considered the way in which environmental justice requires that responsible non-governmental organisations (**"NGOs"**) remain viable repeat players, and that costs protection is necessary to avoid chilling effects:[2]

   (1) At §2: "*[i]n the context of access to justice by judicial review, it is well-recognised that 'members of the public and associations are naturally required to play an active role in defending the environment': R (Edwards) v Environment Agency (No.2) [2013] UKSC 78 [2014] 1 WLR 55 at §22. 'Recognition of the public interest in environmental protection is especially important' and 'the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organisations': see Edwards at §§26, 28iii*".

   (2) At §56: "*[i]t is in the interests of access to environmental justice, with its public interest imperative, that NGOs … should retain the viability to be 'repeat players'. Objective reasonableness does not mean room for one, or even two, more cases. Proper access to environmental justice for a responsible NGO cannot mean a system of limited 'credits', after which the NGO is bust or effectively excluded, with the environment unprotected until someone has the energy to start up a new NGO with a new set of 'credits'.*"

   (3) At §57: "*… the signals which the law gives in environmental judicial review cases matter. Especially when the rationale of environmental costs caps is to avoid inappropriate deterrence or chilling effects. All of which is because something bigger than all of us is at stake: the environment which we share with each other, and with others, and for which we are responsible.*"

[2] All emphasis added

8. The vital role of repeat-player environmental NGOs has also been recognised by the European Court of Human Rights. In ***Verein KlimaSeniorinnen Schweiz v Switzerland*** (2024) 79 E.H.R.R. 1, the Court accepted at §489 and 499 that:[3]

> "489. … in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively. This is especially true in the context of climate change, which is a global and complex phenomenon. It has multiple causes and its adverse effects are not the concern of any one particular individual, or group of individuals, but are rather "a common concern of humankind" (see the Preamble to the UNFCCC). Moreover, in this context where intergenerational burden-sharing assumes particular importance (see paragraph 420 above), collective action through associations or other interest groups may be one of the only means through which the voice of those at a distinct representational disadvantage can be heard and through which they can seek to influence the relevant decision-making processes.
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> …
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> 499. … The Court therefore considers it appropriate in this specific context to acknowledge the importance of making allowance for recourse to legal action by associations for the purpose of seeking the protection of the human rights of those affected, as well as those at risk of being affected, by the adverse effects of climate change, instead of exclusively relying on proceedings brought by each individual on his or her own behalf."

9. In the present case, the Court of Appeal's narrow construction of Article 9(3) of the Aarhus Convention has serious adverse consequences for the ability of organisations like FoE to play the important role recognised in the extracts above. These matters are highly relevant to the question of interpretation before the Supreme Court for the reasons set out in the Appellant's submissions (i) at §§5-7 of its Written Case on the applicable principles of interpretation under Articles 31–33 of the Vienna Convention on the Law of Treaties (**"VCLT"**), and

[3] Emphasis added

(ii) at §§8-29 on the purpose of Article 9(3) of the Aarhus Convention. FoE endorses those submissions.

(1) The impact of the Court of Appeal's narrow approach on FoE's ability to bring public interest litigation to protect the environment

10. FoE – no doubt like many other NGOs [4] – is highly unlikely to bring environmental claims that do not qualify for Aarhus Convention cost-capping. This is for the following reasons:

    (1) FoE's litigation decisions are tightly constrained by adverse costs risk as well as its own costs. Decisions about whether to bring proceedings turn not only on the legal merit and strategic importance of the respective issues, but critically on whether FoE can absorb adverse costs exposure without jeopardising its wider programme of work (including, but not limited to, any other litigation it is pursuing or contemplating) and its financial stability as a charity. At the outset of any potential claim, FoE must therefore generally be satisfied that there is at very least a realistic, and in many cases better than evens, prospect of obtaining Aarhus costs protection, and that any residual exposure remains within tolerable limits under its reserves policy.[5]

    (2) FoE's track record across multiple environmental judicial reviews has consistently depended upon the availability of Aarhus Convention costs protection. It has successfully obtained costs capping, with the support of financial evidence, in a range of judicial review claims in the Courts of England and Wales, including challenges relating to: (i) 2017 Government

[4] For example, in ***Badger Trust*** at §§47-48, Fordham J accepted the Claimants' evidence that varying the default Aarhus Convention costs cap would result in them reluctantly withdrawing their claims for judicial review.

[5] FoE's reserves policy is to hold between 3 and 6 months of expenditure as free reserves, using any extra to invest in strategic initiatives which move the organisation forward.

changes to how Aarhus costs caps might be varied;[6] (ii) the Government's revised National Planning Policy Framework;[7] (iii) the Airports National Policy Statement favouring the development of a third runway at Heathrow Airport;[8] (iv) the Government's Net Zero Strategy;[9] (v) the Government's decision to provide $1.15bn of export finance for the development of offshore liquified natural gas production facilities in Mozambique (**"the Mozambique LNG Claim"**);[10] (vi) the Carbon Budget Delivery Plan;[11] (vii) the grant of planning permission for the Whitehaven coalmine in Cumbria;[12] and (viii) the Government's National Adaptation Programme.[13] FoE also obtained Aarhus Convention costs capping in Northern Ireland – pursuant to Regulations 3 and 3A of the Costs

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[6] ***R (RSPB, FoE and ClientEarth) v Secretary of State for Justice*** [2017] EWHC 2309 (Admin). In this case, the Secretary of State, in the Summary Grounds of Resistance, disputed that Aarhus costs capping applied, but took the position that *"in the interests of avoiding satellite litigation in this matter, [the Secretary of State] is prepared to agree that the costs provisions of Part 45 Section VII should apply to this claim"*.

[7] ***R (FoE Ltd) v Secretary of State for Housing, Communities and Local Government*** [2019] EWHC 518 (Admin).

[8] ***R (FoE Ltd) v Secretary of State for Transport*** [2019] EWHC 1070 (Admin). This case was appealed to both the Court of Appeal ([2020] EWCA Civ 214) and Supreme Court ([2020] UKSC 52). At all levels FoE was granted Aarhus Convention costs protection.

[9] ***R (FoE Ltd) v Secretary of State for Business, Energy and Industrial Strategy*** [2022] EWHC 1841 (Admin),

[10] ***R (FoE Ltd) v Secretary of State for International Trade & President of the Board of Trade and Chancellor of the Exchequer*** [2022] EWHC 568 (Admin). Following a split decision in the Divisional Court, the claim was rejected in the Court of Appeal ([2023] EWCA Civ 14). FoE obtained cost capping at both stages of the proceedings, and the High Court's decision on this issue was set out in [2021] EWHC 2369 (Admin) (**"the Mozambique LNG Costs Capping Decision"**).

[11] ***R (FoE Ltd) v Secretary of State for Energy Security and Net Zero*** [2024] EWHC 995 (Admin).

[12] ***FoE Ltd v Secretary of State for Levelling Up, Housing and Communities*** [2024] EWHC 2349 (Admin).

[13] ***R (FoE Ltd, Mr Kevin Jordan, Mr Doug Palley) v Secretary of State for Environment, Food and Rural Affairs*** [2024] EWHC 2707 (Admin).

Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 (SI 2013/81) – in cases concerning (ix) an alleged failure by the Department for Infrastructure to comply with its statutory duty to conduct a smoke test during a state-run MOT testing of diesel vehicles;[14] and (x) a marine licence, a discharge consent and an abstraction licence to enable an underground gas storage cavern development at Larne Lough.[15]

(3) The importance of Aarhus Convention cost capping to FoE has taken on particular significance in recent years. It has had to undertake various internal restructures and begin to operate at the lower end of its cash reserves, with increasingly constrained operational budgets. This is due to it having to adapt to the challenging financial outlook arising, in particular, from rising overheads and the cost-of-living crisis.

11. In practice, where no realistic prospect of costs protection exists, FoE will not pursue proceedings, however significant the public interest. In such circumstances, FoE would otherwise be forced to litigate on an 'all-or-nothing' basis: an unsuccessful outcome could expose it to an adverse costs order that swallows up large portions of its available finance and thus renders significant parts of its other activities (or even the entire organisation) unviable. For example, a significant adverse costs judgment might leave FoE with no choice but to reduce its workforce to save cost. This risk to its financial position will almost inevitably be too great to justify litigating at all.

12. In the vast majority of cases where cost capping is unavailable, FoE would therefore not pursue the claim. In such a scenario, it is also generally unlikely that, in the absence of costs capping, any other NGO or individual claimant will have the expertise, financial means and risk appetite to bring the claim in FoE's place.

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[14] Case reference 23/10388/A01; judgment pending.

[15] ***Application By No Gas Caverns Ltd and FoE Ltd for Judicial Review*** [2023] NIKB 84. This case was appealed to the Court of Appeal (Northern Ireland) **([2024] NICA 50).** At both levels, FoE was granted Aarhus Convention costs protection.

13. Two examples illustrate the point:

    (1) In the **Mozambique LNG Cost Capping Decision**, Thornton J at §14 accepted FoE's evidence that it would *"in all likelihood … withdraw if the costs cap is not granted"*.

    (2) In 2019, FoE applied to vary a persons unknown injunction obtained by Cuadrilla Bowland Limited, restricting peaceful anti-fracking protests. As part of that application, FoE applied for a costs protection order (on the basis of the court's discretion under section 51 of the Senior Courts Act 1981) at the level of the Aarhus default cost cap of £10k. The High Court refused to grant any cost protection, on the basis the proceedings were based on private rather than public law. As Cuadrilla Bowland Ltd had threatened to recover £85,000 of costs from FoE in the event its application to vary the injunction did not succeed, FoE had to withdraw from the proceedings altogether. As such, its application to vary the injunction was never considered on its merits. Following this experience, FoE has chosen not to participate as a main party in legal challenges to any other persons unknown injunctions restricting environmental protest (and has instead limited itself only to third party interventions in such proceedings). FoE provides further details of this experience in its report, *"A Pillar of Justice II: The continuing impact of legislative reform on access to justice in England and Wales under the Aarhus Convention"* (2023) (**"Pillar of Justice II"**), which was co-authored with the Royal Society for the Protection of Birds (**"RSPB"**) and the Environmental Law Foundation (**"ELF"**).[16]

14. In summary, where there is no realistic prospect of obtaining costs protection, FoE will almost certainly not pursue a case. The only exception to this general

[16] Pillar of Justice II sets out at pp.14-16 several examples of ELF cases which demonstrate that *"legal costs are still 'prohibitively expensive' for many communities seeking to bring environmental claims", and that this prevents some meritorious environmental claims from being brought."* FoE anticipates that the ELF will address these in more detail in its written intervention.

position would be if a strategic external funder was prepared to underwrite the adverse costs exposure. However, FoE has never in practice obtained such funding, and the chance it might do so in the future is exceptionally low, not least given the short judicial review limitation periods and/or promptness requirements, as well as the uncertainty regarding the amount of any costs liability in the absence of costs capping (which would need to be fully indemnified as no specific numbers could be fundraised to).

15. It follows that, had Aarhus Convention costs capping been unavailable, none (or, at best, a small minority) of the cases listed at §10(2) above would have been brought – irrespective of the clear public interest in challenging the legality of Government decision-making in each. FoE has obtained successful outcomes in around half of these claims. As considered further below, even in cases it did not win, the courts' judgments have often significantly helped advance and clarify the scope of environmental legal issues, and to shape environmental policy in the medium-to-long term.

16. The adverse impact of the Court of Appeal's approach is likely not to be limited to the specific types of cases in which costs capping would no longer be available. Rather, FoE anticipates that it will have a wider chilling effect in relation to borderline cases, where it may be unclear whether cost capping would be available. Depending on the circumstances, FoE may be reluctant to proceed even to the permission stage for fear of having to pay the defendant's costs of preparing an Acknowledgment of Service and Summary Grounds of Resistance, save perhaps in cases of particular strategic importance. For the reasons given above, even where a claim is brought, FoE would most likely have to withdraw following a decision not to impose a costs cap.

(2) The importance of broad cost capping provisions to Friends of the Earth's status as a 'repeat player' in public interest environmental litigation

17. The availability of broad Aarhus Convention cost-capping is fundamental to FoE's status as a 'repeat player' (per ***Badger Trust***), whereby it plans and pursues a number of public interest cases across a range of environmental issues over

time, rather than restricting itself to isolated, *ad hoc* challenges. This permits FoE to pursue strategic priorities in the public interest and allows long-term oversight and accountability of Government decision-making.

18. The importance of FoE's and others' ability to act as a 'repeat-player' cannot be overstated. In public interest environmental litigation, the issues are complex and relevant time horizons extend over many years. Many of FoE's most significant contributions to domestic climate and environmental law have emerged cumulatively, through related litigation across different legal and factual contexts, often over years. Even ostensibly unsuccessful or partially successful stages have often established groundwork or clarified limits, enabling better and more effective subsequent decision making and oversight.

19. To take two examples:

    (1) FoE has litigated and engaged with the Government over the treatment of downstream greenhouse gas emissions. In ***R (FoE Ltd) v North Yorkshire CC*** [2016] EWHC 3303 (Admin), FoE raised arguments (see §§11(i) and 37-38) that downstream emissions were an indirect effect of a fossil fuel extraction project for Environmental Impact Assessment purposes. A decade later, these arguments were accepted by the Supreme Court in ***R (Finch on behalf of the Weald Action Group) v Surrey County Council & Ors*** [2024] 4 All ER 717, at §103. FoE's experience in pursuing the Mozambique LNG Claim[17] has contributed significantly to its expertise in this area. Arguments in the High Court about market substitution[18] (e.g. as addressed at §§306-314 and 334 of Thornton J's judgment) subsequently informed its successful arguments on similar issues in the Whitehaven coalmine judicial review[19] (e.g. at §§163-189 of Holgate J's judgment). This expertise on downstream emissions has also allowed it to engage with

[17] As referred to at §10(2) and fn.10 above.

[18] A "market substitution" approach proceeds on the basis that hydrocarbons extracted as a result of a given project will replace, rather than add to, other hydrocarbons that would otherwise be extracted in a counterfactual without the project.

[19] As referred to at §10(2) and fn.12 above.

UK Export Finance following the Mozambique LNG Claim, as well as participate effectively in a 2024-25 Government consultation on guidance on scope 3 emissions.

(2) FoE's intervention in this appeal provides another illustration of the benefits of its repeat player status. As detailed in FoE's application to intervene, it has a long-standing strategic interest in access to justice in environmental matters, which has included (i) its 2017 judicial review ***R (RSPB, FoE and ClientEarth) v Secretary of State for Justice***;[20] (ii) two Pillar of Justice reports; (iii) a contribution to the "Statement on Costs Protection" made by Environment Links UK to the Eighth Aarhus Convention Meeting of the Parties in November 2025; and (iv) its pending communication (ACCC/C/2017/156 United Kingdom) before the ACCC concerning the standard of review in domestic judicial review proceedings and its compliance, *inter alia*, with Articles 9(2)–(4) of the Aarhus Convention.

20. These matters are detailed further in FoE's two Pillar of Justice Reports:

(1) The 2019 Report co-authored with RSPB, *"A Pillar of Justice: The impact of legislative reform on access to justice in England and Wales under the Aarhus Convention"* **("Pillar of Justice I")**, notes at p.5 that access to justice is *"especially important in environmental matters where there is an accepted and well-established public interest in such cases coming forwards – win or lose"* (p.5).

(2) Pillar of Justice II explains that *"even ostensibly unsuccessful cases have been shown to influence decisions and shape public policy, and it can also take several unsuccessful cases before a point of law is successfully established"* (p.7). It refers to ***R (Wild Justice) v Water Services Regulation Authority*** [2023] EWCA Civ 28, where, as summarised in the Report, *"Wild Justice was refused permission to challenge Ofwat's failure to systematically enforce s.94(1) Water Industry Act 1991. However, as of June 2022, Ofwat was progressing enforcement*

[20] See fn.16 above.

action against six water companies due to 'heightened concerns about its environmental performance across a number of metrics'."

21. FoE's ability to defend the environment as a 'repeat player' across the full range of environmental issues would be seriously undermined if the Court of Appeal's narrow interpretation of Article 9(3) of the Aarhus Convention is upheld. Whilst costs capping would still be available in some environmental cases, its unavailability in others would prevent FoE from pursuing litigation in several other, often closely interconnected, areas. In consequence, such 'out of scope' claims would not be brought at all, or (at best) would be left to individuals or local groups to litigate on an *ad hoc* basis without any costs protection. This would undermine the cumulative development of norms and boundaries of environmental law described above. In particular, such claimants are rarely positioned to absorb the costs risk of repeated litigation, pursue appeals, monitor subsequent legal developments on an ongoing basis and/or to bring follow-on cases that test related issues in different contexts. Nor would they be able to build up the deep institutional expertise that comes with being a 'repeat player' in public interest environmental litigation.

(3) Types of environmental cases excluded from the Court of Appeal's narrow approach

22. Important environmental issues arise in range of contexts. As such, FoE's experience spans several different, but interconnected, areas including challenges to planning policy, airport policy, fossil fuel developments, export finance for fossil fuels, the proper approach to environmental assessments, carbon budget delivery, climate adaptation plans and nationally significant infrastructure. Each of these engages environmental issues at scale.

23. The Mozambique LNG Claim provides a powerful example of a 'trade and finance' judicial review with wide-ranging environmental consequences that – if the Court of Appeal's narrow approach to Article 9(3) of the Aarhus Convention is upheld – would no longer benefit from cost capping. FoE endorses the Appellant's submissions at §§58-61 of its Written Case as to why the Court of

Appeal in that case was wrong to suggest (at §§119 and 150) that Thornton J's first instance judgment was wrongly decided.

24. Putting to one side whether this point (in an *ex tempore* judgment) could have been expressed more clearly, Thornton J was correct to 'take a step back' and consider the overall object and purpose of Article 9(3) of the Aarhus Convention at §13 of her judgment. The Mozambique LNG Claim had profound environmental implications: (i) it was estimated that the carbon footprint of the project under challenge could be as high as 4.5bn tonnes over its lifetime, more than the combined annual carbon emissions of all 27 EU countries;[21] and (ii) UK Export Finance was purporting to comply with environmental legal obligations in the context of its decision-making processes. FoE's ability to bring this kind of claims falls squarely within the overall purpose of Article 9(3).

25. Other categories of case that appear to fall outside the scope of the Court of Appeal's narrow interpretation of Article 9(3) include, for example:

    (1) Judicial reviews of regulators regarding greenwashing, i.e. cases concerning the regulatory treatment of untrue or misleading statements made by businesses about the environmental performance or impact of a business, product or service.

    (2) Judicial reviews brought by NGOs and other public interest groups challenging decisions under Procurement Act 2023 (**"PA 2023"**) to award contracts with significant consequences for the environment. The central importance of environmental issues in procurement decisions is recognised in the Government's "National Procurement Policy Statement",[22] which states that "*[t]he Government expects the highest standards of … environmental sustainability in business practices from suppliers delivering public contracts*";

[21] See FoE's report, "*Tip of the iceberg: The future of fossil fuel extraction*" (2021), written alongside the New Economics Foundation, p.16.

[22] Published on 13 February 2025, pursuant to section 13 of the PA 2023. Section 13(9) of the PA 2023 provides that "*[a] contracting authority must have regard to the national procurement policy statement*".

including in relation to *"the procurement of food"*, where *"the Government wants to increase the proportion of food purchased across the public sector that is certified to higher environmental standards"*. The Statement goes on to require that contracting authorities *"[e]nsure their suppliers are actively working to: tackle … environmental impact (including reducing greenhouse gas emissions and minimising waste in their operations)"*.

(3) Environmental claims that allege a breach of the Public Sector Equality Duty under section 149 of the Equality Act 2010 (**"PSED"**). The equalities implications of environmental and climate issues are well-recognised, including e.g. (i) in the Paris Agreement;[23] (ii) by the Climate Change Committee;[24] and (iii) by the Scottish Government.[25]

(4) Injunctions prohibiting peaceful environmental protests. FoE has consistently supported peaceful protest as an important means of public participation and accountability in climate and environmental decision-making. Recent litigation has focused on the increasing use of "persons

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[23] Which provides in the recitals that *"[p]arties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity"*. See, also, Articles 7(5) and 11(2).

[24] See the CCC's Equality, Diversity and Inclusion Strategy and Action Plan, 2022, which highlighted that *"[o]n a national level, evidence points to minorities and older people being most at risk from climate-related effects, including from exposure to air pollution, overheating and flooding"*.

[25] Which on 6 March 2026 published *"Climate change duties: statutory guidance for public bodies"*, pursuant to its obligations under section 45 of the Climate Change (Scotland) Act 2009, which states at section 3 that *"In Scotland … impacts will not be felt equally. People and communities are differently exposed to hazards such as heat, flooding, drought, wildfires and coastal erosion depending on where they live, work or play. Factors such as age, disability or existing health conditions increase susceptibility, while poverty and limited resources can reduce the ability to prepare for, respond to and recover from events. Existing inequalities amplify climate-related risks; and it is likely that our changing climate will deepen existing inequalities within society."*

unknown" injunctions by private companies and public authorities to restrict environmental protest, particularly in relation to fossil fuel and high-carbon projects. The Aarhus Compliance Committee has taken the view that it is *"beyond argument"* that such cases fall within scope of the costs protections at Article 9(3).[26]

26. The impact of the restrictions on, and increased uncertainty over, cost capping is therefore that public interest environmental litigation would be restricted to a much narrower class of claims – regardless of the public interest and significance of the underlying issue(s) for environmental protection. This would significantly narrow the scope for FoE and others to raise legal issues with major environmental consequences, simply because of the particular legal context in which they arise.

(4) Impact on cost capping on lawful public authority decision-making

27. Finally, Aarhus costs capping is vital in encouraging lawful and effective decision-making by public authorities more generally. As Fordham J recognised in ***Badger Trust*** at §4, *"[t]he public interest enterprise of judicial review accountability secures lawfulness. It promotes discipline. It exposes unlawfulness. It promotes public confidence in public authority decision-making."* These benefits extend to situations where the possibility of a judicial review claim exists, even if that claim is not ultimately brought.

28. Guidance produced by the Government Legal Department titled *"The Judge Over Your Shoulder"* (6th Ed., 2022) at p.5 explains:

> "Your departmental lawyers in the Government Legal Profession are trained to advise on legal risk as part of their work advising government. This takes many different forms. The key is that their role is to help civil servants and ministers by identifying and quantifying risks and finding solutions and mitigations, as needed. This can include advising on the likelihood of litigation being brought (including a judicial review), on the

[26] See, for example, the ACCC's recent "Report of the Compliance Committee on decision VII/8s of the Meeting of the Parties concerning compliance by the United Kingdom" (2025) at §69, reiterating its earlier conclusions on this point.

chances of it being successful, and on its impact. This is all designed to help the decision maker and achieve good administration."

29. The reduced availability of Aarhus Convention costs capping will diminish the credible threat of environmental judicial review proceedings in the public interest, especially in certain fields. This, in turn, is likely (i) to reduce the quality of environmental decision making, in particular in areas where the cap is unlikely to apply; and (ii) tilt the balance in favour of the commercial interests of businesses affected by environmental decision-making, most of whom are better resourced than NGOs and therefore able to threaten judicial review proceedings in the face of adverse costs risks.

C. COURT OF APPEAL'S APPROACH TO THE TRAVAUX PRÉPARATOIRES

The Court of Appeal's approach

30. The Court of Appeal considered the travaux at §§82*ff* of its judgment, relying on the following chronology of events:

> "83. The original draft of the Convention prepared by the Working Group of the Committee on Environmental Policy (dated 11 April 1996) suggested that there should be access to judicial and quasi-judicial proceedings concerned with "matters related to the protection of the environment". It is worth noting that from the outset the purpose of the provision which became Art.9(3) was environmental protection. But initially it was expressed in terms of access to proceedings about *matters* relating to such protection, a plainly wider concept than proceedings to *challenge acts or omissions contravening national legal provisions* relating to that protection.
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> 84. When the Working Group reported on 11 November 1996 they recognised that the provisions on access to justice would require "careful wording" and the text "matters related to the protection of the environment" needed to be clarified.
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> 85. In its report dated 7 July 1997, the Working Group said that there was general agreement on the inclusion of provisions covering procedures for dealing with public access to information and public participation in decision-making (which became Art.9(1) and (2)). But there was an issue as to whether in addition there should be a right to "access to justice in

environmental matters generally". Some delegations considered that the convention should not contain any additional provision on access to justice, because that would be inconsistent with the agreed scope of the convention. However, others suggested that there should be a right to challenge unlawful acts or omissions by private persons or public authorities "which contravened specific provisions of national environmental law". Two options were put forward for further consideration. The second option referred only to acts or omissions by public authorities contravening provisions of the Convention. The first option was:

> *"which contravene provisions of its national environmental law"*

The French text for that first option had exactly the same meaning:

> *"allant à l'encontre des dispositions du droit national de l'environnement."*

86. Both options were on the agenda for the eighth meeting of the Working Group in December 1997. The Group's report dropped the second option and altered the English text for the first option to use the same language as became the agreed wording of Art.9(3) of the Convention. The report does not give any explanation for that alteration."

31. In the light of its analysis of the travaux, the Court of Appeal concluded that:

> "87. However, the authentic French text of the agreed Convention remained the same as the draft text referred to in [85] above. In other words, the Working Group did not see any significant difference between the earlier English equivalent of the French text "which contravene provisions of national environmental law" and the final English version "which contravene provisions of its national law relating to the environment". The meanings of "environmental" include "of or relating to the environment" and "concerned with or relating to the protection of the environment" (Oxford English Dictionary).
>
> 88. Thus, the travaux préparatoires and the French text confirm that "relating to" is used as a strong, not a loose or broad, connector."

Friends of the Earth's submissions

32. Applying the relevant principles from the VCLT set out at §§47-49 of the Appellant's Written Case, the Court of Appeal misdirected itself in its approach to the French version of the Aarhus Convention and the travaux, in particular at

§§87-88 of its judgment. The Court interpreted the French words *"dispositions du droit national de l'environnement"* as having a clear and unambiguous meaning when they did not.

33. A certified translation of the July 1997 Working Group Report was filed alongside FoE's application to intervene. This translation confirms the linguistic ambiguity in the French text, indicating that the Court of Appeal erred in this respect.

34. The translator translated the phrase *"dispositions du droit national de l'environnement"* at Option 1 of the Report as *"provisions of national law relating to the environment"* – i.e. provisions within the national legal order that concern the environment, rather than laws that exist for the specific purpose of environmental protection or regulation. As the certificate accompanying the translation explains:

> "We acknowledge that translation is an interpretive and therefore inherently subjective exercise, often involving linguistic ambiguity where words may carry multiple meanings. For example, the translator has translated "*dispositions du droit national de l'environnement*" at Option 1 of the report in question as *"provisions of national law relating to the environment"*. It could be translated as *"provisions of national environmental law"*. Both translations are linguistically defensible, and the choice between them reflects interpretive judgment given the ambiguity inherent in the original text."

35. The translation advanced by FoE provides a <u>more reliable</u> explanation for the fact that, as the Court of Appeal's judgment recorded at §87, *"the Working Group did not see any significant difference between the earlier English equivalent of the French text 'which contravene provisions of national environmental law' and the final English version 'which contravene provisions of its national law relating to the environment'"*. If the French *"droit national de l'environnement"* is ambiguous, and therefore consistent with <u>both</u> English language formulations, this explains why (i) the French text remained the same between the travaux and the final version of the Aarhus Convention, whilst (ii) the English text required amendment.

36. This supports the Appellant's wider submissions at §51 of its Written Case, explaining that nothing in the travaux suggests that a narrow, as opposed to broad, construction, was intended. To the contrary, all language versions are consistent with a broad construction and the Court of Appeal was wrong to rely on the French version to the contrary.

37. For completeness, the certified translation filed alongside these submissions provides an appropriate means of supporting these legal submissions. As Lord Wilberforce recognised in ***Fothergill v Monarch Airlines Ltd*** [1981] AC 251, at p.273, there are various ways of ascertaining the meaning of foreign language texts, which are not subject to *"any precise rule"*:

> "The process of ascertaining the meaning must vary according to the subject matter. If a judge has some knowledge of the relevant language, there is no reason why he should not use it; this is particularly true of the French or Latin language, so long languages of our courts. There is no reason why he should not consult a dictionary, if the word is such that a dictionary can reveal its significance; often of course it may substitute one doubt for another … In all cases he will have in mind that ours is an adversary system: it is for the parties to make good their contentions. So he will inform them of the process he is using, and, if they think fit, they can supplement his resources with other material, other dictionaries, other books of reference, textbooks and decided cases. They may call evidence of an interpreter, if the language is one unknown to the court, or an expert if the word or expression is such as to require expert interpretation. Between a technical expression in Japanese and a plain word in French there must be a whole spectrum which calls for suitable and individual treatment."

D. CONCLUSION

38. For the reasons set out above, the Court is invited to reject the Court of Appeal's narrow approach to Article 9(3) and CPR r.46.24; and instead endorse the broader and more purposive approach outlined in the Appellant's Written Case.

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6 May 2026 **WILL PERRY**