Appeal No: UKSC/2025/0119

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL (CIVIL)
NEUTRAL CITATION [2025] EWCA Civ 624
CLAIM NO: CO/1863/2023

THE KING

(on the application of)

FOODRISE LTD

APPELLANT

- and –

(1) HM TREASURY

(2) SECRETARY OF STATE FOR BUSINESS AND TRADE

RESPONDENTS

APPELLANT'S WRITTEN CASE

References to paragraphs of the judgment under appeal are in the form: [J/paragraph]

Section A: Introduction

1. This appeal concerns the proper meaning of Article 9(3) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998 ("**the Aarhus Convention"** or **"the Convention"**). Article 9(3) provides materially that Parties to the Convention must ensure that members of the public "*have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment*". In particular, this appeal concerns the words "*provisions of its national law relating to the environment".* It is those words which, in a case such as the present, delimit the availability of costs protection under CPR 46.24.

2. In the Appellant's submission, the Court of Appeal wrongly construed those words too narrowly. As explored below, the exercise of interpretation in accordance with the Vienna Convention on the Law of Treaties 1969 (**"VCLT"**)[1] results overwhelmingly in an interpretation which is broad and which promotes effective environmental protection: see the sections of this Written Case below on (i) the purpose of Article 9(3) [8]-[10]; (ii) its text, in the context of other provisions of the Convention [30]-[34]; (iii) the findings of the Aarhus Convention Compliance Committee ("**the ACCC" or "the Committee**") [35]-[46]; (iv) the *travaux préparatoires* [50]-[52]; and (v) The Aarhus Convention: An Implementation Guide ("**the Implementation Guide**") [53]-[54], together with prior judicial consideration of these issues, where relevant.

3. The Court of Appeal wrongly adopted a narrow approach throughout its analysis. It held that: "*'relating to' is used as a strong, not a loose or broad, connector*" [J/88]; Article 9(3) should not have an *"expansive interpretation*" [J/91]; and the phrase "*relating to*" should not be given "*a broad meaning*" [J/104]. It directed itself that care must be taken not to adopt too broad or purposive an approach [J/90], and it then – in purporting to reflect the various interpretational materials and previous case-law (none of which in truth support this approach) – sought to apply a test which predominantly looks at the *"purpose"* of the provision of national law which is alleged to have been contravened (see e.g. [J/81], [J/88], [J/107]). A critical aspect of this approach is that it circumscribes "*provisions of national law*" to mean, in effect, express statutory provisions. As is developed below, the approach of the Court of Appeal in essence drew a line between express statutory language relating to the environment, on the one hand, and any other legal requirement relating to the environment with which the decision-maker had to comply, on the other. Thus, by way of example:

   a. In its application for judicial review (for which permission has been granted[2]), the Appellant argues that the Respondents were under a statutory obligation (under s.28 of the Taxation (Cross-border Trade) Act 2018 (**"the TCTA 2018"**) to have regard to Article 4(1)(f) of the UN Framework Convention on Climate Change (**"the UNFCCC"**)[3]. The Court of Appeal held that this obligation is not a provision of

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1 Entered into force on 27 January 1980. United Nations Treaty Series, Vol. 1155, pg. 331. Ratified by the UK on 25 June 1971.

2 *R (Global Feedback Ltd) v His Majesty's Treasury and the Secretary of State for Business and Trade* [2024] EWHC 1810 (Admin).

3 See [69.b] below.

national law relating to the environment. The reasoning of the Court of Appeal is that "*Parliament has not given any indication that a purpose of s.28… is to protect or regulate the environment*" [J/145]. The Court also relies on the nature of the statutory requirement being a "*have regard to*" requirement [J/146], and on Article 4(1)(f) UNFCCC itself involving evaluative judgement [J/147]. Accordingly, even though, on the Appellant's case, s.28 imposes a mandatory statutory requirement relating to the environment, this is not enough.

b. The Court of Appeal distinguished and limited *Venn v Secretary of State for Communities and Local Government* [2015] 1 W.L.R. 2328 ("***Venn***"), which concerned a draft local development policy plan which fell within a statutory requirement to have regard to *"material considerations"*. The Court of Appeal in *Venn* held that such policies formed part of national law relating to the environment. The Court of Appeal in the present case held that this judgment was explicable only by the Court being able to infer in that particular context that Parliament intended that environmental protection would be achieved through the combination of the statute and policies [J/138-141]. The Court of Appeal held that, absent such particular Parliamentary intention, the approach in *Venn* does not apply (and so, for example, environmental considerations which are *"so obviously material*" to the exercise of a statutory power that it would be irrational not to take them into account fall outside Article 9(3): [J/142]-[J/143]).

c. The Court of Appeal overturned the decision of Thornton J in *R (Friends of the Earth Limited) v Secretary of State for International Trade* [2021] EWHC 2369 (Admin) (**"*FoE (Mozambique)*"**) that a claim in relation to export finance funding, in particular a claim in relation to its compliance with the Paris Agreement, was within Article 9(3). Whereas Thornton J held that no distinction should be drawn between the Act under which finance was granted and the arrangements in place for granting such finance (a combination of the advice of a body established by statute, and the application of policies and practices in relation to climate change [11]), the Court of Appeal in the present case held that this was too broad an approach ([J/150]). Instead, it appears to be the Court of Appeal's view that, absent express statutory obligation (or the discernment of the special *Venn* purpose), the breach of legal requirements relating to

the environment with which the decision-maker must comply as a matter of national law fall outside Article 9(3).

4. As expanded upon below, the Court of Appeal fell into obvious error in its approach to Article 9(3). The approach it articulates risks critically undermining the proper scope of that provision and enfeebling the intended scope of CPR 46. This is particularly concerning at a time when, at the risk of stating the obvious, the objective and purpose of the Aarhus Convention – namely to promote and facilitate effective environmental protection, via its triple pillars of Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters – have never been of such acute relevance.[4] Now, more than ever, when faced with the planetary crises of climate change, biodiversity loss and pollution, environmental litigation plays a crucial role in allowing unlawful decisions to be challenged; and since "*the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organisations*"[5], the access to justice provisions of the Convention are of critical importance.

Section B: Construction of Article 9(3) in accordance with the Vienna Convention on the Law of Treaties

5. Article 9(3) (as a provision of an international treaty) must be interpreted in accordance with the VCLT (and applicable international law on treaty interpretation) "*unconstrained by technical rules of English law*" on statutory interpretation.[6] In this section of its Written Case, the Appellant addresses the proper interpretation of Article 9(3) under the VCLT. It also addresses case-law where the Court of Appeal, in its judgment on these issues, did so.

(i) The relevant provisions of the VCLT

6. The VCLT relevantly provides as follows:

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4 See e.g. the Grand Chamber of the European Court of Human Rights in *Verein KlimaSeniorinnen Schweiz v Switzerland* App No. 53600/20, 9 April 2024, which noted that climate change litigation was now of a sufficient importance that this would inevitably have implications for the application of its case-law on Article 6(1) of the European Convention on Human Rights and the assessment of compliance with the provision's requirements.

5 See *R (Edwards) v Environment Agency (No.2)* [2013] UKSC 78 [2014], 1 WLR 55, per Lord Carnwath JSC at [26] setting out the observations of the Advocate General Kokott of the CJEU in the same case: Opinion of 18 October 2012, *R (Edwards) v Environment Agency (No.2)*, Case C-260/11, ECLI:EU:C:2012:645, [42]. See futher e.g *R (Badger Trust) v Natural England* [2025] EWHC 2761 (Admin), [2], [21], [56], [57].

6 *J.T.I. Polska v. Jakubowski and others* [2023] UKSC 19 [2023] 3 W.L.R. 50 [23] – [25].

Article 31
General rule of interpretation

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes, […]*

3. *There shall be taken into account, together with the context:*
   a. *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
   b. *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
   c. *[…]*

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
   a. leaves the meaning ambiguous or obscure; or
   b. leads to a result which is manifestly absurd or unreasonable.

Article 33
Interpretation of treaties authenticated in two or more languages

1. *When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, […].*

2. *[…]*

3. *The terms of the treaty are presumed to have the same meaning in each authentic text.*

4. *[…] when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."*

7. Interpretation in accordance with Article 31 proceeds by way of a "*single combined operation*",[7] rather than via a "*sequential mode of interpretation*" which accords inherent

[7] *Infrastructure Services Luxembourg S.A.R.L. v Zimbabwe* [2026] UKSC 9, [75].

primacy to one or other elements.[8] As the Supreme Court explained in *Infrastructure Services Luxembourg S.A.R.L. v Zimbabwe* [2026] UKSC 9, [75]: "*[a] holistic approach is required. Context and object and purpose may be found in the treaty's text, in other words its surrounding provisions, and in the treaty as a whole, including its preamble*". Accordingly, although – for ease of presentation – various different interpretational strands are addressed in turn below, the task for the Court under Article 31 is to stand back and perform a single interpretative exercise taking all of those elements into account.

(ii) Article 31 VCLT: Application of the general rule of interpretation: the purpose of Article 9(3)

(a) The Aarhus Convention – and Article 9(3) - has the purpose of promoting and facilitating effective environmental protection

8. The Aarhus Convention has the overarching purpose of promoting and facilitating environmental protection, i.e. increasing or strengthening that protection. This means that its provisions should be construed with those gravitational pulls in mind.

9. The pro-environmental purposes of the Aarhus Convention are obvious from:

   a. The recitals: see e.g. "*affirming the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development*"; "*recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself*"; "*recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of future generations*"; "*considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters*"; and "*concerned that effective judicial mechanisms should be accessible to the public,*

[8] *J.T.I. Polska v Jakubowski and others* [2023] UKSC 19, [2023] 3 W.L.R. 50, [26] – [27].

including organisations, so that its legitimate interests are protected and the law is enforced".

b. Article 1, entitled "*objective*", which provides that: "*In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being*, *each Party shall guarantee the rights of … access to justice in environmental matters in accordance with the provisions of this Convention*".

10. Accordingly, the access to justice provisions – in particular, in this case, Article 9(3) – should be construed in a way which obtains those objectives, i.e. expansively rather than narrowly.

(b) Case-law dealing with the overarching purpose of the Aarhus Convention and its bearing on the interpretation of Article 9(3)

11. This is firmly supported by the decisions of the highest courts. As set out in the following paragraphs, the Court of Appeal wrongly misinterpreted and distinguished those cases.[9]

(i) The Brown Bear case

12. This was the approach taken in the "*Brown Bear*" case (C-240/09 *Lesoochranarske Zoskupenie VLK v Ministerstvo Zivotneho Prostredia Slovenskej Republiky* [2012] 3 W.L.R. 278). That case concerned the standing of an environmental organisation in national law. The Court of Justice first held that Article 9(3) did not have direct effect [45]. It then held that "*it must be observed*" that Article 9(3) is "*intended to ensure effective*

[9] Although not referred to in the courts below, the importance of the access to justice provisions of the Aarhus Convention is further supported by the guidance of the CJEU in the *Edwards* cases. Lord Carnwath JSC, with whom the rest of the Supreme Court agreed, has previously endorsed the guidance that the Aarhus Convention costs protection exists because "*members of the public and associations are naturally required to play an active role in defending the environment*" and the objective of the rules "*is to ensure that the public 'plays an active role' in protecting and improving the quality of the environment.*" *R (Edwards) v Environment Agency (No.2)* [2013] UKSC 78, [2014] 1 WLR 55, [22]-[23]. As noted in footnote 5 above, Lord Carnwath JSC also endorsed at [26] the observations of the Advocate General Kokott of the CJEU in the same case that: "*the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organisations*". Opinion of 18 October 2012, *R (Edwards) v Environment Agency (No.2)*, Case C-260/11, ECLI:EU:C:2012:645, [42].

environmental protection" [46]. Due to the absence of EU rules governing the matter, it was for national procedural law to ensure that the rights which derive from EU law (in this case the Habitats Directive) were effectively protected [47], in particular by observing the principles of equivalence and effectiveness [48]. It concluded that, in order not to undermine that effective protection [49], the national court must *"interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in article 9(3) of the Aarhus Convention"* [50].

13. The Court of Appeal in the present case focussed on the fact that the *Brown Bear* case related to the Habitats Directive, which "*plainly was for the protection of the environment*" [J/78]. That is correct, but this does not detract from the general importance of the Grand Chamber's identification of the purpose of Article 9(3), namely to "*ensure effective environmental protection*".

(ii) Venn

14. The Court of Appeal in the present case summarised *Venn* as "*adopting the CJEU's explanation in the Brown Bear case that Art 9(3) applies to contraventions of national legal provisions which are for the protection of the environment ([2015] 1 WLR [2328] at [12] and [16]-[17])*." [J/79]. That is not an accurate summary of the *Brown Bear* case, and further fails to capture Sullivan LJ's reasoning in *Venn.*

15. *Venn* concerned an application under s.288 of the Town and Country Planning Act 1990 to quash a decision of an inspector appointed by the Secretary of State allowing an appeal against a refusal to grant planning permission [1]. Ground 1 was that the inspector had failed to have regard to emerging local plan policy in the form of the Development Management Local Plan Policy No.32 [2].

16. Sullivan LJ (with whom Vos and Gloster LJJ agreed) held in [10]-[12] that the *Brown Bear* case supported a broad interpretation of the term "*environmental*", noting that the Court of Justice had held that Article 9(3) is *"intended to ensure effective environmental protection"* (*Brown Bear*, [46]).

17. He then considered the Secretary of State's "*ingenious*" argument that neither the relevant policy, nor the relevant statutory provision, were "*national law relating to the environment*" ([14]-[15]). In particular, since the local plan was still at a draft stage, it engaged only (i) para 216 of the National Planning Policy Framework, which required that weight be given to emerging policy, and (ii) s.70(2)(c) of the TCPA, which provides that the authority "*shall have regard to… any other material considerations*" ([14]),[10] with the latter being (in the Secretary of State's submission) not law relating to the environment.

18. Sullivan LJ rejected that argument, holding in [15] that "*national legislation may address the issue of environmental protection in different ways. The UK has a sophisticated town and country planning system, and Parliament has chosen to implement much of the UK's environmental protection through that system"* [15]. In [16]-[17] he held that: "…*it is a characteristic of the UK's approach to environmental protection that much (if not most) of the detail is contained, not in statutory regulations, but in policies*", and "*given that this is the way in which the UK has chosen to implement a great deal of environmental protection 'within the framework of its national legislation', it would deprive Art 9(3) of much of its effect if a distinction was drawn between the policies, both national and local, which do relate to the environment, and the law which does not directly relate to the environment, but which requires those policies which do relate to the environment to be prepared and then to be taken into account, and in certain cases to be followed unless material considerations indicate otherwise. It would not be consistent with the underlying purpose of Aarhus to adopt an interpretation of article 9(3) which would, at least in the UK, deprive it of much of its effect: see the Brown Bear case [2012] QB 606, paras 49-50: para 12 above. In the Aarhus context the UK's combination of statute and policy, with the former requiring that the latter be prepared, taken into account and in some instances followed, is properly characterised as 'national law relating to the environment'."*

19. In [J/97-108] and [J/138-141] of the present case, the Court of Appeal read *Venn* as articulating a principle that a requirement to take account of environmental matters pursuant to a "*general obligation to take into account all relevant considerations*" [J/138]

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[10] Had the local plan been finalised, it would have fallen under (1) s.70(2)(a) of the TCPA 1990, pursuant to which the inspector was obliged to "*have regard to the provisions of the development plan, so far as material to the application*" and (2) s.38(6) of the Planning and Compulsory Purchase Act 2004, which further provides that, "*if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise*" [16].

or an "*open-ended statutory requirement to take into account relevant considerations*" [J/141] will only constitute national law relating to the environment where it can be inferred that Parliament specifically intended that environmental protection be attained in this way. That is an impermissibly narrow and restrictive reading of *Venn.* In particular:

a. The central thrust of Sullivan LJ's judgment is plainly that (i) Article 9(3) has the important purpose of ensuring effective environmental protection, (ii) this promotes an application to national law which is more expansive than might arise on a domestic reading of Article 9(3), and (iii) this means that "national law" stretches beyond statutory provisions to reflect the reality of the national legal framework.

b. It is of course true that Sullivan LJ referred to the particular importance of policies in the planning system. That is unsurprising on the facts. It does not follow that he was establishing a threshold test, with the intention of otherwise excluding provisions such as s.70(2) TCPA which require that a policy in relation to the environment be taken into account. Further, although the effective application of Article 9(3) is of course central, it would be wrong to read *Venn* as indicating a threshold question of whether a particular approach would deprive Article 9(3) of "*much of its effect*" (and the origin of that sort of language may lie in the fact that [49]-[50] of the *Brown Bear* case have their origin in national procedural autonomy).

c. It is also true that Sullivan LJ referred to Parliament "*choosing to implement*" environmental protection via policies. However, he more frequently refers to "*the UK*" (in [15], [16] and [17]). This is an indication that his focus was (i) on the national legal system in general (rather than a focus on Parliament) and (ii) on the critical point that different Parties will have different legal systems [15], and Article 9(3) must be applied pragmatically as a consequence.

d. Further, as to the language of "*implement"*, whilst environmental rules may well be of international or EU origin, and so the idea of *"implementation*" may be apposite, it may also be the case that the legal rules applicable to a certain area of activity evolve over time, through a patchwork of common law, legislation, policy, public law principles, etc. It would be wrong and unprincipled, and go far beyond anything said

by Sullivan LJ, to treat that sort of patchwork protection as an inherently less important or valuable part of national law.

(iii) Deutchse Umwelthilfe

20. When considering the purpose of Article 9(3), the Court of Appeal in the present case also referred in [J/80] to the post-IP Completion Day judgment of the Grand Chamber of the CJEU in C-873/19 *Deutsche Umwelthilfe eV v Bundesrepublik Deutschland* [2023] 2 C.M.L.R. 20, which related to "*defeat devices*" in diesel vehicles. In that case the CJEU again held that Article 9(3) "*is intended to ensure effective environmental protection*" [67]. The Court of Appeal in the present case wrongly treated [51]-[52] of the CJEU judgment – in which it holds that, multiple previous judgments having determined that a provision pursues an environmental objective, it "*therefore"* constitutes part of the law relating to the environment – as if it articulated a threshold test for Article 9(3). The CJEU does no such thing. It is an error to read the judgment as if the CJEU were holding that Article 9(3) applies only to statutory provisions with an environmental purpose. Indeed, the CJEU also endorses the approach in the Implementation Guide [56], addressed further below in [54], which is that "*the decisive issue is whether the provision somehow relates to the environment*" (not whether it pursues an environmental objective).

(iv) Austin

21. In [J/81], the Court of Appeal referred to *Austin v Miller Argent (South Wales) Ltd* [2015] 1 W.L.R. 62, in particular [22], in which the Court of Appeal in *Austin* held that one of the two criteria, which a claim in private nuisance should meet in order to fall within Article 9(3) is that "*the nature of the complaint must have a close link with the particular environmental matters regulated by the Convention, even although the action in private nuisance does not directly raise them*". The articulation of this criterion is not the same as identifying the purpose of Article 9(3), but even if it was, the Court of Appeal wrongly viewed this as giving rise to a principle that "*in order to fall within Art.9(3), the subject of a legal provision must be environmental or its purpose must be to protect or otherwise regulate the environment*" [J/81]. *Austin* is not support for that approach. If anything, it supports a broader approach, in which there is no need for the action in private nuisance "*directly [to] raise*" environmental matters, and the focus is on the test of the facts of the

actual complaint having a link with environmental matters, rather than a test of the "*purpose*" of the law in the abstract.

22. Further, the Court of Appeal in *Austin* emphasised the breadth of the Aarhus regime. It reasoned in [17] that "*although there is no definition of the environment in the Convention, it is plain from the broad definition of "environmental information" that it is intended to be wide. Article 1 makes it clear that it is concerned with individual well-being. It includes as an objective of the Convention the right of every person to live in an environment which is adequate to his or her health and well-being. Moreover, the focus of the Convention is on participation, and there is merit in recognising the valuable function which individual litigants can play in helping to ensure that high environmental standards are kept, even if in the process they are also vindicating a private interest*". This is further recognition of the objective of the Convention, namely promoting or maintaining high environmental standards. It is also recognition that a focus on Parliamentary intention (or "purpose") is wrong, and instead the right approach is to focus on the UK legal regime as a whole (including, in this context, common law causes of action).

23. The Court of Appeal was therefore also wrong, when it considered *Austin* again in [J/109-113], to conclude that it was "*consistent with the jurisprudence which holds that the purpose of a national law falling within the scope of Art 9(3) must be to protect or regulate the environmen*t", not least because there is no such jurisprudence, save (perhaps) for *the FCA Case* which is addressed next.

(v) R (ClientEarth) v Financial Conduct Authority [2023] EWHC 3301 (Admin)

24. In [J/81], having considered *Austin*, the Court refers to the "*FCA Case*", holding that "*this point* [i.e. the first limb of Austin] *was taken up by*" Lang J in that case, and that she articulated a test that "*to fall within Art. 9(3), the subject of a legal provision must be environmental or its purpose must be to protect or otherwise regulate the environment*". The Court of Appeal endorsed that test in [J/81] as "*accurately reflect[ing] the language of Art 9(3), read in the context of the Convention as a whole and the jurisprudence*" (and confirms again in [J/151]).

25. As summarised in [J/120-123], the FCA case concerned a judicial review (in relation to which Lang J refused permission for all grounds of challenge) which claimed that the FCA had erred in deciding that it was satisfied that a share prospectus contained the information required by Article 6(1) and/or Article 16 of the Prospectus Regulation[11] [9]. Those provisions require, in summary, disclosure of material risk factors and disclosure of information which would be material to an investor. The FCA determined that the references to climate change factors in the prospectus were adequate [25]; [28].

26. In considering whether Aarhus cost protection should apply, Lang J referred (inter alia) to the *DBEIS* case considered in [52.c] below holding that a "*purposive approach"* should be adopted to avoid an "*overly broad interpretation*" [36]. As noted by the Court of Appeal in [J/81], she referred to the approach of the Court of Appeal in *Austin*, and also to the findings of the ACCC in *Austin* (which is addressed in [38] below). Whilst it is true that she held [39]-[41] that the subject matter of the relevant provisions were not environmental and their purpose was not to protect or otherwise regulate the environment, in the Appellants' submission, this case is best understood as concerning a legal framework in which – in the Judge's view – the environmental nature of some of the information which must be provided was simply irrelevant. This is not an endorsement of a narrow "statutory purpose" test, in the Appellant's submission, but more an expression of the Judge's view that there is, in truth, no relevant connection to the environment.

27. For completeness, it might be noted that: (1) Lang J handed down this decision in December 2023, and then heard and determined the application in the present case in July 2024; and (2) she was expressly invited by the Defendants to treat the present case in the same way ([9], [11] of [2024] EWHC 1810 (Admin)), which she declined to do by reference in particular to s.28: "*arguably by section 28 TCTA 2018, the defendants were required to have regard to relevant international obligations, which included the Paris Agreement and the UNFCCC, and those obligations are directly concerned with environmental issues*" ([12]). Accordingly, in the Judge's view at least, the Appellant's application for Aarhus costs protection was consistent with the approach that she set out in *the FCA Case*.

[11] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.

(c) Conclusion on the purpose of Article 9(3)

28. The purpose of Article 9(3) is to ensure effective environmental protection. This flows not least from the recitals and Article 1, and has been repeatedly affirmed by the highest courts.

29. The Court of Appeal wrongly failed to recognise and reflect this purpose; and instead focussed on the purpose of the relevant provision of national law. At the risk of stating the obvious, it is a *non sequitur* to hold that, because Article 9(3) has the purpose of effective environmental protection, it applies only to national law which has that same purpose (still less to a subset of express statutory provisions in relation to which there is demonstrable Parliamentary environmental purpose). As is developed below, such an approach unjustifiably restricts the words "*relating to*" (as well as the words "*provisions of national law*").

(iii) Article 31 VCLT: Application of the general rule of interpretation: the text of Article 9(3) in the context of other provisions of the Aarhus Convention

30. The words "*national law*" are used in the Convention in a sense which is broader than "*legislation*". Rather, they mean requirements which need to be satisfied in order for the relevant acts or omissions to be lawful. This is apparent from the following:

a. Firstly, it is axiomatic that as a Convention with 48 Parties, spanning many different legal systems (monist and dualist), national law in each state will be diverse in form. That means that, necessarily, it cannot be assumed that the language of the Convention maps directly onto our (or any) domestic system of law.

b. Secondly, however, the drafters of the Convention do use the word "*legislation"*, and it is to be inferred that this is done intentionally (and is different from the word *"law*"). See e.g. Art 2(3)(b), Art 2(4), Art 3(1), Art 4(1), Art 5(2), Art 5(5), Art 5(5)(a), Art 6(6)(f), Art 9(1), Art 9(2).

c. Thirdly, the scope of the Convention plainly extends beyond legislation, to include policies, plans, programmes, executive regulations, etc. See e.g. Art 2(3)(b), Art 5(3)(c), Art 5(5)(a), Art 7, Art 8, Art 10(2)(a).

d. Fourthly, the drafters of the Convention use the words "*national law*" repeatedly. See e.g. Art 2(2)(b), Art 2(5), Art 4(3)(c) (in which the full phrase is "*national law or customary practice*"), Art 4(4)(a), Art 4(4)(f), Art 5(3)(d), Art 6(1)(b), Art 6(1)(c), Art 6(6), Art 6(11), Art 9(2), Art 9(3).

e. Fifthly, focussing on Article 9(3) in particular, the words "*national law*" are used twice in that provision. In particular, the Parties need only ensure access to justice for those claimants who "*meet the criteria, if any, laid down in its national law*". It is the Appellant's understanding that this is interpreted by the Respondents and by our national courts – correctly – as extending beyond requirements imposed by (primary) legislation, and instead as including, for example, the requirements of the Civil Procedural Rules, and further as including, for example, the practice of the courts (such as the requirement that a claimant in an application for judicial review must comply with the duty of candour, with sanctions for non-compliance including the refusal of permission[12]). Accordingly, it is common ground that the words "national law" there mean the requirements which must be satisfied in order to bring a claim. By parity of reasoning, the words "*national law*" must mean the same thing when used a second time in Article 9(3), on that occasion to describe the claim itself, i.e. an alleged contravention of a requirement which must be satisfied in order lawfully to take the relevant action (or omission etc).[13]

31. Turning to the words "*relating to*", upon which the Court of Appeal focussed, in [J/74-77], the Court of Appeal held that *"relating to"* can be given a broad or narrow meaning. If that is right, then in the Appellant's submission all interpretative factors (explored in this Section B of its written Case) point in favour of those words having a broad meaning. The Court of Appeal held in [J/93-94] that the Aarhus Convention expressly uses the words

[12] See eg *R (Caterpillar) v Secretary of State for Business and Trade* [2025] EWHC 1124 (Admin) [178], in which Saini J held that, if he had not refused permission on other grounds in any event, "*the seriousness of the breach of the duty of candour would have in itself justified a refusal of permission".*

[13] Moreover, the ACCC has accepted that the concept of "*national law*" also includes domestic case law (Belgium ACCC/C/2005/11 [37] endorsed in MOP decision III/6 [3]), as well as international law which has legal effect in a domestic legal system.[13] It also encompasses EU Law (including directives which lack direct effect but to which courts must have regard). See e.g. Belgium ACCC/C/2005/11 [43] where, in response to a complaint under Articles 3 and 9 the Committee noted that the direct applicability of international law in a national legal system "*may imply alteration of established court practice*" for purposes of assessing compatibility of national law with the requirements of Article 9. The Committee has also accepted that incorporated international law forms part of national law for purposes of its evaluation in other cases. See Kazakhstan ACCC/C/2004/2 [14] and [22] – [23]. Ukraine ACCC/C/2004/3 [24].

"*relating to*" in Article 9(3) rather than words which relate to significant effects on the environment, as it does elsewhere. It is true that the Aarhus Convention does use words relating to effects or impacts in some instances, and the words "*relating to*" in other instances, which would indicate that there is a difference between the two, at least in some cases. Whether this is right or not depends on the context (and, for example, it may simply be more straightforward for Article 6(1)(b) purposes to focus on significant effect rather than "*relating to*", when considering which non-listed activities should nevertheless fall within scope of that Article). In any event, the Appellant would emphasise that the Convention does not use the words "*for the purpose of protecting the environment*" (which is the Court of Appeal's core construction). Nor does the Convention use a word with a tighter connector to the environment: contrast with Article 5(3)(b) and (c) "*on or relating to",* with the word *"on"* presumably meaning directly concerning. Accordingly, the word "*relating to*" should simply have its natural meaning of connected to, but taking into account the various interpretative factors in favour of a broadening, rather than a narrowing, of scope (and critically without an overlay of purpose, still less Parliamentary purpose).

32. As a distinct issue, in [J/91], the Court of Appeal found that the fact that Article 9(3) applies to claims against private persons as well as against public bodies is a "*strong indication*" that it should not have an expansive interpretation. That is, with respect, a bad point. It ignores the fact that the Court of Appeal in *Austin* essentially considered this very issue, and set out twin criteria which apply to private law claims in nuisance. It also ignores the fact that the nature of the particular issues which are raised by the present appeal are quintessentially public law issues. They essentially relate to the legal framework which applies to decisions by public bodies exercising statutory vires. Further, and in any event, the Convention plainly extends to private operators, which is entirely sensible given the possible impact of private persons on the environment. See e.g. Article 5(1)(b), Article 5(6) and Article 6(5).

33. In [J/95], the Court of Appeal noted that Article 9(3) is "*in addition and without prejudice to*" Article 9(1) and (2). That is uninformative, since Articles 9(1) and (2) are concerned with enforcement of rights conferred by the Aarhus Convention itself (rather than with rights under national law), and further include aspects such as access to a procedure which is "*free of charge or inexpensive*" (Article 9(1)) and bespoke standing requirements (Article 9(2)).

34. Finally, in [J/96], the Court of Appeal held that there is "*nothing in Art.9 or the Convention read as a whole to indicate that the ambit of Art.9(3) extends to any decision in breach of any national law so long as that decision has an effect or impact on the environment. Instead, art 9(3) only applies to a contravention of a legal provision which concerns, or is to do with, the environment, its protection or regulation*." The Appellant makes three observations in that regard. Firstly, to the extent that the Court of Appeal distinguished between "*breach of any national law*" and "*contravention of a legal provision*", the Appellant says that there is no such distinction. The use of the word *"provision*" cannot be understood as requiring, for example, a statutory provision (as is obvious from the inclusion of private nuisance claims). Secondly, the Appellant of course agrees that the question is not whether the decision has an impact or effect on the environment, because the focus of Article 9(3) is on the legal obligation which has been contravened. Thirdly, and finally, as to the meaning of "*relating to*", those words should be given a broad meaning.

(iv) Article 31 VCLT: Application of the general rule of interpretation: subsequent agreement or practice in the form of the findings and recommendations of the Aarhus Convention Compliance Committee, as endorsed by the Meeting of the Parties

35. The Court of Appeal in [J/49] held that "*none of the decisions of the Committee cited to us support the analysis by GFL or WWF of the ambit of Art 9(3) where that differs from that of the appellants, nor do they run counter to the analysis in this judgment*". That was wrong.

36. Firstly, in *Austria* ACCC/C/2011/63, the Committee was concerned with whether a national law relating to the trade in, and importation of, wild animals and wildlife was a law relating to the environment for the purposes of Article 9(3) ([22], [55]). The Committee found in [52] that: "*Importantly, the text of the Convention does not refer to 'environmental laws' but instead to 'laws relating to the environment'. Article 9, paragraph 3, is not limited to "environmental laws", e.g. laws that explicitly include the term 'environment' in their title or provisions. Rather it covers any law that relates to the environment, i.e. a law under any policy, including and not limited to, chemicals control and waste management, planning, transport, mining and exploitation of natural resources, agriculture, energy,*

taxation or maritime affairs, which may relate in general to, or help to protect, or harm or otherwise impact on the environment".[14] The Committee then applied the test of whether the laws "*help protect or otherwise impact on the environment*" [55]. These findings:

a. run counter to the Court of Appeal's conclusion in [J/107] that "*environmental laws*" was permissible shorthand for "*relating to the environment*";
b. run counter to the overwhelming thrust of the Court of Appeal's construction of Article 9(3) which is, essentially, that absent a "*Venn* type" statutory context, there is a need for an express reference to the environment in the relevant law; and
c. run counter to the Court of Appeal's requirement of the "*purpose"* of the law being environmental protection or regulation, and instead supports a broader test of whether the law "*may relate in general to, or help to protect, or harm or otherwise impact on the environment*".

37. The ACCC's findings were presented to the Meeting of the Parties and endorsed (including by the UK) in: (i) MOP Decision V/9b (2014), at [2], which endorsed the findings of the Committee that there was a breach of Article 9(3) in conjunction with Article 9(4); (ii) MOP Decision VI/8b (2017), at [3], which reaffirmed its Decision V/9b; and (iii) MOP Decision VII/8b (2021), at [2], which reaffirms its Decision VI/8b.

38. Secondly, in *United Kingdom* ACCC/C/2013/85 and 86, the ACCC considered two separate complaints. The first was a complaint by the Environmental Law Foundation, in which it was alleged that the removal of the ability to recover ATE insurance in private nuisance proceedings in s.46 of the Legal Aid, Sentencing and the Punishment of Offenders Act 2012 breached Articles 9(3), (4) and (5) of the Convention.[15] The second was a complaint by Ms Austin, following the Court of Appeal decision in her case, that the UK fails to ensure that private nuisance proceedings comply with Article 9(4) of the Convention.[16] In [68]-[73], the Committee considered whether private nuisance proceedings are challenges alleging contravention of "*national law relating to the environment*". In [70]-[71], it referred to its findings in the Austria case, as set out above.

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14 The ACCC also noted that "*national law*" extends to applicable EU law in a Member State [54].
15 United Kingdom ACCC/C/2013/85 [26].
16 United Kingdom ACCC/C/2013/86 [29] – [30]. The Committee had decided not to examine the Austin complaint because it was ongoing domestically at the time of its deliberations, but since, after the draft findings were published, the Supreme Court refused permission to appeal, it took the case into account as an example [64].

It further referred to the Implementation Guide (addressed in [54] below). It concluded in [71] that "*the Committee finds that a broad interpretation of the term 'national law relating to the environment' should likewise be applied when considering whether article 9, paragraph 3, of the Convention applies to private nuisance proceedings*". In [72], the ACCC referred to (*inter alia*) the Supreme Court's judgment in *Coventry v Lawrence, No.1,* that common law plays "*an important complementary role to regulatory controls*"[17]. The Committee held that "*the fact that the law of private nuisance primarily relates to protecting the rights of individual property owners to enjoy their land does not exclude that it at the same time regularly concerns various components of the environment and aims to protect them*" [72]. The use of the word "*aims*" in relation to the common law is perhaps unusual, and is, in the Appellant's submission, best understood as endorsing the role of private nuisance in the national legal framework relating to the environment.

39. The ACCC concluded [73] that "*in general*" private nuisance claims concerned national laws relating to the environment, however:

> *"This does not mean that the Convention must necessarily apply to each and every private nuisance proceeding. In practice, the principal criteria for assessing the Convention's applicability to a specific private nuisance case would be whether the nuisance complained of affects the 'environment', in the broad meaning of this term (see paragraphs 70-71 above).*[18] *The number of people affected, the claimant's motivation for bringing private nuisance proceedings or the proceedings' possible significance for the public interest are not decisive to an assessment of whether the procedure falls within the scope of national law relating to the environment."*

40. These findings run counter to the Court of Appeal's decision that "*relating to*" should be a narrow and not broad connector [J/88]. Further, they focus on a test of whether the particular alleged nuisance "*affects the environment*" in its broad sense, which runs counter to the Court of Appeal's test, not least in endorsing an approach of populating the legal obligation (and its characterisation) by reference to the facts of the claim.

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17 [2014] UKSC 13, [176]

18 In these paragraphs the Committee sets out the broad interpretation which the Convention affords to the concept of the "*environment*" as explained above.

41. The ACCC's findings and recommendations were presented to the Meeting of the Parties and endorsed (including by the UK) in: (i) MOP Decision VI/8k (2017), in [5], in which it "*[e]ndorses the finding of the Committee with regard to communications ACCC/C/2013/85 and ACCC/C/2013/86 that, by failing to ensure that private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention, and for which there is no fully adequate alternative procedure, are not prohibitively expensive, the [United Kingdom] fails to comply with article 9, paragraph 4, of the Convention"*; and (ii) MOP Decision VII/8s (2021), in [2], reaffirming Decision VI/8k, in particular that the UK should ensure that the allocation of costs in all court procedures subject to article 9, including private nuisance claims, is fair and equitable and not prohibitively expensive.

42. The Court of Appeal was therefore wrong in its characterisation of the findings of the Aarhus Convention Compliance Committee [J/49].

43. As to the proper legal relevance of this material, the Appellant's primary submission is that it should be considered under Article 31(3) VCLT, namely as subsequent agreement between the parties regarding the interpretation of the Treaty, or subsequent practice in the application of the Treaty which establishes the agreement of the parties regarding its interpretation.[19] The UN International Law Commission ("**ILC**")[20], in its *Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties* ("**The ILC Conclusions**")[21], characterises this as objective evidence of the understanding of the parties, and as an "*authentic*" means of interpretation (pg.23).

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19 As noted in FN3 of the Appellant's application for PTA, this submission was not made in the Court of Appeal. The Respondents, in their Notice of Objection, note that it was not advanced, but do not express any objection to it.

20 The ILC was established in 1947 to discharge the General Assembly's responsibility under Article 13(1) of the UN Charter to encourage the "*codification*" and "*progressive development*" of international law. Its members are experts elected by UN Member States and its reports codifying international law are submitted to UN Member States in draft and revised to take these views into account. Its commentaries and codified articles on international law (including its *Conclusions on Subsequent Practice in the Interpretation of Treaties*) have often been relied on by the ICJ as authoritative statements of international law: *Hungary v Slovaia (Gabčikovo-Nagymaros Project)* Judgment, I.C.J. Reports 7 (1997) [51]; *Democratic Republic of Congo v Uganda (Armed Activities on Territory of Congo)* ICJ Reports 168 (2005) [160]; *Obligations of States Arising from Climate Change*, ICJ Advisory Opinion, July 2025 [184] (and [166] – [168], [177]). The ILC's reports have also often been relied upon in the same manner by the Supreme Court in cases where issues of public international law arise: *Belhaj v Straw* [2017] A.C. 964 [26] and [107(ii)], [195]; *Jones v Saudi Arabia* [2006] 2 W.L.R. 1424 [8], [12], [76]; *Benkharbouche v Embassy of the* Republic of Sudan [2019] A.C. 777 [31] – [32].

21 ILC's *Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties* was adopted by the International Law Commission at its Seventieth Session in 2018 and submitted to the General Assembly. UN Document **A/73/10**. Text adopted by the UN General Assembly in Resolution 73/202 (2018).

44. In *Assange v Swedish Prosecution Authority* [2012] UKSC 22, [2012] 2 W.L.R. 1275 Lord Dyson [130][22] approved the following passage from the late Professor Mark Villager's *Commentary on the Vienna Convention on the Law of Treaties* (2009)[23] as regards the role of subsequent practice in treaty interpretation:

> "*It requires active practice of some parties to the treaty. The active practice should be consistent rather than haphazard and it should have occurred with a certain frequency. However, the subsequent practice must establish the agreement of the parties regarding its interpretation. Thus, it will have been acquiesced in by the other parties; and no other party will have raised an objection."*

45. Applying those principles in this context, the ACCC was established pursuant to Article 15 of the Convention.[24] It is well established that the views of the Committee "*deserve respect*."[25] However, as indicated above in relation to both the *Austria* findings and the *UK* findings, the ACCC's findings are reported to the Meeting of the Parties, which then decides what action to take.[26] The ILC Conclusions address this issue in Conclusion 13 in relation to "*pronouncements of expert treaty bodies*", pp.106-116. In (1), it is noted that the ACCC is one such body. In (11), it is noted that pronouncements may give rise to a subsequent agreement or subsequent practice by the Parties. In (13), it is noted that one possible way of identifying an agreement is to look at resolutions of conferences of Parties, and in (15) that resolutions which refer to pronouncements (including of the ACCC) or call on States to take them into account may constitute a subsequent agreement, although this should be approached with caution. Materially to the present case, the MOP has "*endorsed*", by consensus, on more than one occasion[27], the relevant ACCC findings

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22 With whom Lord Kerr [107] – [108] and Lord Walker [92] (in the majority) agreed.

23 Marc Villager, *Commentary on the Vienna Convention on the Law of Treaties* (Martinus Nijhoff, Leiden: 2009) pg. 431.

24 See Decision 1/7: Review of Compliance, adopted at the Meeting of the Parties to the Aarhus Convention in 2002.

25 *Walton v. Scottish Ministers* [2012] UKSC 44, [2013] P.T.S.R. 51 per Lord Carnwath [100]; *Austin v. Miller Argent (South Wales) Ltd* [2015] 1 W.L.R. 62 [9]; See also *R (Edwards) v. Environment Agency* [2010] UKSC 57, [2011] 1 WLR 79 per Lord Hope [31].

26 The role of the MOP is set out in Decision 1/7: "*The Meeting of the Parties may, upon consideration of a report and any recommendations of the Committee, decide upon appropriate measures to bring about full compliance with the Convention."*

27 Additionally to the Austria case and the UK case, see e.g. In Czech Republic ACCC/C/2010/50 the Committee again cautioned against a narrow approach to Article 9(3) finding [84] that "*it is not necessary that the alleged violation concern environmental law in a narrow sense: an alleged violation of any legislation in some way relating to the environment, for example, legislation on noise or health, will suffice*". Endorsed in MOP Decision V/9f [1]

addressing this topic. That means, in the Appellant's submission, that there is compelling evidence of either a subsequent agreement, or subsequent practice, by the Parties in relation to the meaning of "*national law relating to the environment*".

46. For completeness, the Respondents' argument (in [5], Notice of Objection), that these parts of the ACCC's reasoning were not necessary for the findings in question, is wrong. In each case one of the issues which the Committee had to resolve was the proper scope of "*national law relating to the environment*", which it needed to do in order to make its findings and recommendations, and which it duly did. There is no credible way of reading (for example) the MOP's endorsement of the ACCC's findings that the UK failed to comply with the Convention in relation to "*private nuisance proceedings within the scope of Article 9"* as if that endorsement did not extend to the ACCC's resolution of the question of whether and how private nuisance proceedings fall within Article 9. Otherwise, the fact and extent of non-compliance would be in doubt. Further, the Respondents' argument (in [6], Notice of Objections), that the decisions of the Meeting of the Parties are in some sense not an expression of agreement or of practice because they "*operate under Article 15 of the Convention*", is wrong. They are an expression of the views of the Parties in relation to the proper interpretation of the Aarhus Convention, and so are squarely within Article 31(3).

(v) Article 32 VCLT: Application of the supplementary means of interpretation: *travaux préparatoires*, the Aarhus Convention Implementation Guide, and the findings of the Aarhus Convention Compliance Committee

47. Article 32 allows for recourse to supplementary material and, in particular, the *travaux préparatoires* as part of the process of treaty interpretation in certain circumstances. Where the ordinary meaning of treaty terms can be ascertained by applying the primary rule in Article 31, recourse to supplementary means of interpretation under Article 32 is permitted "*in order to confirm*" that meaning.[28] In *JTI Polska v Jakubowski* [2023] UKSC 19, [32], Lord Hamblen (giving the judgment of the Court) explained "*confirmation may consist of finding support for a given meaning. It does not necessitate the identification of a 'definite legislative intention'. It may, for example, include material which helps to identify the object and purpose of the treaty or provisions within the treaty. That will be a useful aid to interpretation but it is unlikely to disclose a definite legislative intention".*

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[28] *Infrastructure Services Luxembourg S.A.R.L. v. Zimbabwe* [2026] UKSC 9, [76].

48. Alternatively, as the Supreme Court explained in *Infrastructure Services Luxembourg v Spain* [77], where application of the rule in Article 31 produces a meaning that is ambiguous or obscure or leads to a manifestly absurd or unreasonable result, the rule in Article 32 permits supplementary means to be used to determine the meaning of treaty terms. However, such cases "*should be rare, and only where two conditions are fulfilled, first, that the material involved is public and accessible, and secondly, that the travaux préparatoires clearly and indisputably point to a definite legislative intention*."

49. In the Appellants' submission, the present case is in the first category, namely in which the supplementary material confirms the meaning resulting from the Article 31 exercise, namely that the words "*provisions of national law relating to the environment*" should promote effective environmental protection, and thus have a broad meaning (both in terms of the meaning of "*provisions of national law*" and the meaning of "*relating to the environment*"). Alternatively, if the Court forms the view that the meaning of "*provisions of national law relating to the environment*" is ambiguous or obscure, then the supplementary material (limited to those which are in the public domain) clearly and indisputably point to that same definite legislative intention, i.e. the promotion of effective environmental protection.

(a) <u>The travaux préparatoires</u>

50. By way of brief context, the Aarhus Convention was developed under the auspices of the United Nations Economic Commission for Europe (which is one of five regional UN commissions which promote economic development and mutual cooperation on a range of matters, including the environment, in Europe). The Convention was adopted on 25 June 1998 following two years of negotiations which began in April 1996. Negotiations occurred through ten negotiation sessions during that period, which were attended by both governments and NGOs. Reports of the negotiations were prepared in the three official languages of UNECE: English, French and Russian.

    a. <u>First and Second Sessions</u>: It was determined at an early stage that there would be three overall pillars to the proposed convention: access to environmental information; public participation in environmental decision-making; and access to justice in environmental matters. At the First Session, a draft Article 6 (which later became Article 9) was

proposed on the issue of access to justice.[29] As the Court of Appeal noted in [J/83], this initial draft referred (in draft Article 6(1)) to access to justice in "*judicial and quasi-judicial proceedings in matters covered by the provisions of this Convention as well as matters related to the protection of the environment."* At the Second Session (at which the broad structure of the Convention was agreed[30]), it is recorded that there was broad agreement among participants that the Convention should include substantive provisions on access to justice in environmental matters, but that its provisions would require "*careful wording*."[31] It was suggested that various terms in draft Article 6(1) needed further clarification, including "matters related to the protection of the environment."

b. Fourth Session: Contemporaneous documentation indicates that the delegation of Belgium, led by the late Professor Marc Pallemaerts, was asked to prepare options for an article on access to justice, with an informal meeting scheduled to take place immediately before the fifth session to work on this[32].

c. Fifth Session: The overall structure of the provision, which ultimately became Article 9, began to emerge. The Report of the Informal Meeting of Access to Justice[33] explains that there were three issues within this pillar: obligations in relation to review mechanisms in respect of access to information; review mechanisms for public participation in environmental decision-making; and "*[a]ccess to justice in environmental matters generally (i.e. access to justice for purposes other than those of the specific review mechanisms…"*[34] The report records that there was debate on the part of some delegations as to whether such access to justice arrangements should be included. The report noted that "*some delegations*" proposed that individuals should have the right to "*challenge unlawful acts or omissions by private persons or public authorities which contravened specific provisions of national environmental law*",[35] while other delegations considered that this should be limited to challenges in respect of breaches of obligations imposed by the Convention.

29 Report of the First Session, 11 April 1996 pg. 10.
30 Report of Second Session, 11 November 1996 pg. 2 [7].
31 Report of Second Session, 11 November 1996 pg.7 (Annex 1).
32 Report of the Fourth Session, 21 March 1997, pg.2 [12]; Report of the Fifth Session, 7 July 1997, pg.2 [10].
33 Referred to in the Report of the Fifth Session, 7 July 1997 pg.2 [10].
34 Report of the Fifth Session, 7 July 1997, Annex III pg. 10.
35 Report of the Fifth Session, 7 July 1997, Annex III pg. 11 [5].

d. In the event, two options regarding the language of what became Article 9 were presented, reflecting this debate.

i. Option 1 proposed the following formulation "*each Party shall ensure that, where they meet the criteria laid down in its national law, individuals and/or organizations shall have access to administrative or judicial procedures to challenge acts or omissions by private persons or public authorities which contravene provisions of its national environmental law*."[36] It may be noted that this does not include the word "specific" before the word "provisions." As to the other language versions, the authentic Russian text of the same provision also refers to "*national environmental legislation*."[37] The authentic French text is: "*allant à l'encontre des dispositions du droit national de l'environnement.*"[38] The Court of Appeal recorded, in [J/85] of its judgment, that this means exactly the same as the English. As Friends of the Earth Ltd notes in its application to intervene[39], however, it may be the case that the meaning of the French text is more nuanced. In particular it may be capable of bearing both the meaning "*provisions of national environmental law*" and "*provisions of national law relating to the environment*". FoE has sought permission to support this point with translation evidence which makes clear that both translations are linguistically defensible.[40]

ii. Option II, on the other hand, limits access to justice to acts which contravene provisions of the Convention.

e. Seventh Session: By the Seventh Session, the provision on access to justice had become Article 9. The two options, and relevant language, set out above were still present.[41] There was no substantive discussion of proposed Article 9 at the Seventh Session.

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36 Report of the Fifth Session, 7 July 1997, pg. 16.

37 Russian version of Report of the Fifth Session, 7 July 1997, pg. 19 which, in the original Russian, states "которые нарушают положения ее национального законодательства в области охраны окружающей среды".

38 French version of Report of the Fifth Session, July 1997 pg.16.

39 FoE Ground of Intervention [25]-[27].

40 See Certification of Translation, prepared by James Rose, Global Lingo Ltd.

41 Report of the Seventh Session, September 1997, pg.15.

f. Eighth Session: At the Eighth Session a single proposal for access to justice was adopted. It is not clear when precisely this change was made (although there were intersessional discussions between the parties in which this change is likely to have occurred).

g. Importantly, the language of Article 9(3) was changed by States' Parties negotiators from a right of access to courts to challenge contravention of "*provisions of its national environmental law*" to "*provisions of its national law relating to the environment*" (the formulation, of course, which appears in the final text).[42] It is also significant that the language in the authentic Russian text was also changed matching the broader formulation in the English text.[43] The language in the French draft remained the same as previously (as to which, see [51.b] below). Taken together, the amendment of these language versions indicates that the language of Article 9(3) was deliberately changed so as to adopt ensure a broader formulation than may have been indicated by the term "*national environmental law*".

h. Further comfort (if needed) in this regard is provided by contemporaneous documentation exhibited by the witness statement of Jeremy Wates. As explained in his statement [10] – [13] Mr Wates attended the negotiations on behalf of ECO Forum, which is a prominent coalition of environmental organisations active in the European region. ECO Forum was one of a number of respected NGOs formally invited to attend the negotiations by the UNECE. Mr. Wates explained that an in-session note (Note 6), prepared by an informal group chaired by Professor Pallemaerts and circulated by the secretariat with the date 10h00 on 4 December 1997, contains the new language in Article 9 (referred to above). In addition, a contemporaneous ECO Forum Report on the Eighth Session of negotiations, where the options for Article 9(3) were discussed, provides context for the change in position. The document pg 36-37 explains in relation to the new text in Article 9(3) " *[i]t was agreed that the scope of laws the breach of which could be challenged should not be limited to 'national environmental law' but should extend to the broader concept of 'national law relating to the environment' (as first proposed by the* [Regional Environmental Centre for Central

42 Report of the Eighth Session, December 1997, pg.9.

43 Russian language Report of the Eighth Session, December 1997 pg.11; Certified Translation of Article 9(3) Aarhus Convention (Translation from Russian).

and Eastern Europe] *REC)."* This report provides further confirmation of negotiators' rationale for amending the terms of Article 9(3) at the Eighth Session. Although this report is not produced by a state it nevertheless forms part of the corpus of material which the Court can have regard to under Article 32 VCLT. It provides a detailed, contemporaneous account of the Eighth Session. It was prepared by a party (ECO Forum) which was formally invited to attend the negotiations by the UNECE which convened the negotiations. Mr. Wates explains that ECO Forum published reports of each of the negotiation sessions online. Although only a summary of the Eighth Session was published, that summary made clear that interested parties could obtain a copy of the full report from ECO Forum. Thus, the report complies with the requirement of accessibility referred to in the case law (*Fothergill v Monarch Airlines Ltd* [1981] AC 25, p 278B (per Lord Wilberforce)).

51. Against this background, the *travaux* confirm that the term "*national law relating to the environment*" is to be understood broadly. In particular:

    a. Whilst it is right that the Parties did not adopt the initial drafting of "*proceedings relating to… matters related to the protection of the environment"*, which would have been extremely broad, nevertheless the parties changed the text (in English and Russian) from "*environmental law*" to "*law relating to the environment*." The Appellant respectfully does not agree, as a matter of natural language, with the Court of Appeal's view that there is no difference between these two latter formulations (see eg [J/87]), and nor (of course) does the ACCC (see [36] above). In any event, the further material in the witness statement is clear, namely that "*related to"* was intended to broaden the scope of the provision.

    b. The Court of Appeal in [J/87] erroneously placed reliance on the fact that the French language text did not change between the Fifth Session and final text[44]. However, this ignores the fact that there was clearly a decision, reflected in two of the three authentic language texts, to adopt a formulation which is different from "*environmental law*". Article 33 (2) VCLT provides that "*[t]he terms of the treaty are presumed to have the*

[44] For completeness, it is noted that the Court of Appeal [82] – [90] do not address the authentic Russian text. The point was raised in argument by Foodrise before the Court of Appeal. Counsel for Foodrise put the Secretary of State on notice several days prior to the hearing that Foodrise relied on the authentic Russian text in support of their position regarding the *travaux*.

same meaning in each authentic text." The Court of Appeal's approach of assuming that there was no significance in the drafting change in two of the official languages of the treaty deprives the decision of states to amend, and broaden, the language of Article 9(3) of any meaning or effect. Further, as noted by Friends of the Earth Ltd [as in [50.d.i] and [b] above], the explanation may be that the French text can bear both meanings, whereas the English and Russian texts needed to be amended to convey the broader meaning. Finally, there is no reason to think that the decision to change language was the result of the *nettoyage* (polishing).[45] This cannot be so, since the change occurred in the Eighth Session, months prior to the treaty text being finalised following the Tenth Session. The change was therefore substantive and deliberate.

c. Further, and in any event, Article 33(4) states that "*...when a comparison of the authentic texts discloses a difference of meaning which the application of articles and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted*." If, and insofar as, there is a substantive difference in meaning between, on one hand, the English and Russian versions of Article 9(3) and the French text (i.e. if the true position is not that the French text can accommodate the English and Russian approach), the broader approach of the English and Russian text is to be preferred. Such an approach is consistent with the object and purpose of Article 9, and the Convention as a whole, as explained above.

52. Finally, for completeness in relation to the Court of Appeal's judgment on this issue:

a. in [J/88] it held that the relevant legal provision should be "*to do with, or be concerned with*" the environment, which it held *"is consistent with saying that to fall within Art 9(3) the purpose of the legal provision in question should be for the protection or regulation of the environment*." The Appellant respectfully disagrees that, even on the Court of Appeal's reading of the *travaux*, they support a "*purpose*" test. There is no suggestion of this being the test, and as the Court of Appeal noted the words were carefully chosen.

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[45] This is the process by which treaty text is checked and cleaned prior to text being finalized e.g. for spelling, grammar and consistency of cross-references and so forth. See Anthony Aust, *Modern Treaty Law and Practice* (3rd edition) (Cambridge: CUP 2013) pp.71-74.

b. as to [J/89], the Appellants are not inviting the Court to depart from the language of the Convention. Rather, this case is concerned with the construction of that language.

c. as to [J/90], the Court of Appeal stated that "*the courts have made it clear that a broad purposive approach to the meaning of the Aarhus Convention must not be taken too far*." The case which the Court of Appeal cited in support is *Department for Business, Energy and Industrial Strategy v the Information Commissioner* [2017] EWCA Civ 844; [2017] PTSR 1644 at [16]-[17] ("the ***DBEIS case***"), which the Court says holds that "*the information sought must fall within the language used in the Convention*" and "*it is that language which determines the purposes and ambit of the Convention*." In fact, that case stands for a different proposition, namely that, although the literal language of the environmental information provisions is extremely broad [45], it should be construed purposively [47], with the particular purpose of citizens being informed "*to enable them to participate in environmental decision-making more effectively, and the contribution of access to a greater awareness of environmental matters, and eventually, to a better environment*" ([48]; applied in [54]). The Court of Appeal was wrong to take the view that the literal words trump the purpose (or set the purpose).

(b) <u>*The Implementation Guide*</u>

53. Article 32 allows other documents to be taken into account as supplementary means of interpretation, including guidance documents prepared by bodies established by the Parties to a treaty. This is recognised in the ILC Conclusions.[46] The Implementation Guide to the Aarhus Convention, currently in its second edition, is such a document. It was drafted at the request of the Meeting of the Parties[47], and subject to several rounds of comments on its draft terms.[48] The Guide describes itself as a "*non-legally binding and user-friendly reference tool to assist policymakers, legislators and public authorities in their daily work*

46 The ILC explain that "*[e]ven if a pronouncement of an expert treaty body does not give rise to, or refer to, a subsequent agreement or a subsequent practice that establishes the agreement of all parties to a treaty, it may be relevant for the identification of other subsequent practice under article 32 that does not establish such agreement*" in Conclusions on Subsequent Practice in the Interpretation of Treaties paragraph 16, pg. 112.

47 *See* Meeting of Parties Resolution ECE/MP.PP/2008/2/Add.17 (decision III/9), annex I, pg.3.

48 Drafts of the Implementation Guide were circulated to national focal points on the Convention for three rounds of comments, in November 2010, June 2011 and July 2012. See Implementation Guide pg.4.

of implementing the Convention".[49] Nevertheless, it is recognised as an authoritative guide to the interpretation of the Convention, given its official status and the role of Parties in its preparation. As such, it forms part of the corpus of "*supplementary means of interpretation*" for the purposes of Article 32. The Court of Appeal (as well as other domestic courts and the CJEU Grand Chamber) has afforded significant respect to the Implementation Guide in interpreting the requirements of the Aarhus Convention.[50]

54. Turning to the content of the Implementation Guide[51], it explains "*national laws relating to the environment are neither limited to the information or public participation rights guaranteed by the Convention, nor to legislation where the environment is mentioned in the title or heading".* Instead, the Implementation Guide explains that *"the decisive issue is if the provision in question somehow relates to the environment".* As a result, *"acts and omissions that may contravene provisions on, among other things, city planning, environmental taxes, control of chemicals or wastes, exploitation of natural resources and pollution from ships are covered by paragraph 3, regardless of whether the provisions in question are found in planning laws, taxation laws or maritime laws*". The Appellant particularly emphasises the looser language of "*somehow relates*", as well as the restatement that there is no need for the provision to be labelled as environment (i.e. the substantive content of the legal obligation is what matters, and that content must only "*somehow relate*" to the environment).

(c) The findings and recommendations of the Aarhus Convention Compliance Committee – supplementary means

55. In the alternative to the Appellant's primary case that the ACCC's findings (as endorsed by the MOP) fall within Article 31(3), they should be taken into account under Article 32. The ILC Conclusions provide for this.[52] Paragraphs [35]-[46] above are therefore repeated.

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49 Implementation Guide pg.9.

50 See e.g. *Venn v Secretary of State for Communities and Local Government* [2015] 1 W.L.R. 2328 (CA) [10]. The CJEU has adopted a similar approach as regards the Implementation Guide. *See* C-182/10 *Solvay and others* [2012] 2 C.M.L.R. 19 [27] and C-873/19 *Deutsche Umwelthilfe* [2023] 2 C.M.L.R. 20 [55] (Grand Chamber).

51 Implementation Guide pg.198.

52 In its Conclusions on Subsequent Practice in Treaty Interpretation pg.115 [24], drawing on ICJ jurisprudence on the issue, the UN ILC explains that "*pronouncements of expert treaty bodies are to be used in the discretionary way in which article 32 describes supplementary means of interpretation and that they also contribute to the determination of the ordinary meaning of the terms in their context and in light of the object and purpose of the treaty*".

(vi) Conclusion on the VCLT interpretation exercise

56. As set out above, the application of Articles 31 and 32 provide overwhelming support for a broad interpretation of Article 9(3), which furthers and promotes its purpose of ensuring effective environmental protection.

Section C: Further case-law referred to by the Court of Appeal

57. In a section of the Court of Appeal's judgment entitled "*case-law*", the Court considers five cases. The Appellant has addressed *Venn* [J/97-108], *Austin* [J/109-113] and the *FCA Case* [J/120-123] above in [14], [21] and [24]. It now addresses the two further cases dealt with by the Court of Appeal in this section of its judgment.

(a) FoE (Mozambique)

58. The *FoE (Mozambique)* case (referred to in [3.c] above) concerned a judicial review claim in relation to the Defendants' decision to provide up to $1.15 billion export finance for the development of offshore deepwater gas production facilities in North Mozambique [1]. The funding decision was made in exercise of a power under the Export and Investment Guarantees Act 1991 ([1], [11]), with those powers exercised by UK Export Finance. Section 13 of the Act provides for an Export Guarantees Advisory Council, the function of which (the Judge was told) is to advise the Secretary of State in respect of any matter relating to the exercise of her functions under the Act [11). The Judge was further informed that the body was specifically asked to provide specialist advice in relation to climate change. Further, UK Export Finance assessed risks and impacts by way of (inter alia) a Climate Change Review and further had a policy on environmental due diligence and to "*comply with*" international arrangements.

59. Thornton J held that to draw a distinction between the Act and the arrangements in place for UK Export Finance funding would be, as in *Venn*, to deprive Article 9(3) of much of its broad effect [12]. She referred in that regard to the *ClientEarth* biomass case (considered below [62]).

60. The Court of Appeal in the present case held that Thornton J's judgment was inconsistent with its consideration of the interpretation of Article 9(3), *Venn* and *Austin* [J/119]. In [J/150], the Court of Appeal relied on the fact that the statute did not have the purpose of environmental protection, and there was no statutory provision requiring the environment, or requiring policies relating to the environment, to be taken into account. Instead, the Court said, "*the Secretary of State chose to take advice on climate change*", and so this meant that all errors of law committed in that exercise should not be characterised as breaches of national law relating to the environment.

61. In the Appellant's submission this is a stark error. This is a classic case of a patchwork of different elements of a legal regime (including an advisory body established by the Act), where the decision-maker, in the world in which she or he is making the decision, plainly has to meet certain legal requirements in order to make that decision lawfully. Those legal requirements relate to the environment. It is a narrow and artificial reading of Article 9(3) to exclude some or all of those obligations from a definition of "*national law*".

(b) ClientEarth v European Investment Bank (Biomass) [2021] EUECJ T-9/19 (27 January 2021)

62. In [J/124-131], the Court of Appeal considered this Court of Justice case, which was cited by Thornton J in her judgment in *FoE (Mozambique*) ([12]). As noted in [J/128], this case concerned a claim that the EIB had failed properly to apply its loan eligibility criteria in relation to the environment, when approving financing for a biomass power generation plant. As noted in [J/129], the Court of Justice held in [123] that "*it should be recalled that, for the purposes of achieving the objectives of the TFEU, the bodies of the EIB adopt, in particular in the form of policies, strategies, appraisals, principles or standards, internal policies of general scope, duly published and implemented, which, irrespective of their binding nature or not in the strict sense, limit the exercise of the EIB's discretion in the exercise of its activities*". Further, "*when the Courts of the European Union examine the legality of an act adopted by the EIB, they take into account the internal rules adopted by the EIB*" [123]. The Court of Justice held that, for that reason, those rules must be viewed in the same way as EU legislation in the field of environmental law [124] [J/129].

63. The Court of Appeal in the present case held that, on a proper reading, *EIB* is similar to *Venn.* "*They both involved a legal requirement when reaching a decision under non-environmental legislation, to apply either a policy or an eligibility rule, the purpose of which was to protect the environment*" [J/130]. That description, however, does not reflect either (i) the Court of Appeal's analysis of *Venn*, which is that a legal requirement to take the relevant draft policy into account would have been insufficient absent the special *Venn* purpose being present; and (ii) the fact that the relevant legal requirement in the *EIB* case (as in the *FoE (Mozambique)* case) was not to be found in primary legislation, and instead the discretion of the public body was limited by (inter alia) policies in both the *EIB* case and the *FoE (Mozambique)* case. Contrary to [J/131], the *EIB* case plainly supports the ruling of Thornton J in *FoE (Mozambique)*, in particular that, where a public body has adopted a policy, that policy forms part of the rules with which that public body must comply, and therefore form part of the relevant applicable law relating to the environment.

Section D: Application to National Law and to the Claim brought by the Appellant

64. As the Appellant has sought to draw out in the preceding paragraphs, the Court of Appeal fashioned a construction of Article 9(3) which was much too narrow and much too focussed on demonstrable Parliamentary purpose. This comes to the fore in [J/132-143], headed "*public law principles and environmental law*", and [J/144-148], headed "*the Judge's decision in the present case*".

65. The Appellant will make eight submissions in that regard, but first it summarises its application for judicial review.

(i) Summary of the claim

66. The Appellant challenges the Respondents' decision to make the Customs Tariff (Preferential Trade Arrangements and Tariff Quotas) (Australia) (Amendment) Regulations 2023 ("**the 2023 Regulations**"). In particular, the challenge relates to beef meat, the trade in which will be progressively liberalised under the 2023 Regulations, as summarised in [11]-[12] of the Statement of Facts and Issues ("**the SFI**").

67. In deciding to make the 2023 Regulations, the Minister of State for International Trade "*had regard*" to an Impact Assessment by the then DIT, including in relation to "*meat and*

dairy" ("**the IA**") (see [16], SFI; and further [28]-[29], PAP Reply). The aim of the IA, the publication of which coincided with the signing of the Free Trade Agreement between the UK and Australia (**"the FTA"**), was "*to provide Parliament and the public with a comprehensive assessment of the potential long run impacts of the negotiated agreement*" (pg.10). The key section for the purpose of the Appellant's claim falls under the heading "*Carbon leakage*". Having noted that "*one area which might see increasing Australian imports and some shift in relative production levels is cattle meat*" and that *"differences may also exist in the [green house gas] mitigation policies in force in this sector*", the IA stated "*However, data on emissions intensity tend to vary according to the source*". The footnote to that contention (FN 91) is as follows: "*The Food and Agriculture Organization of the United Nations (FAO STAT database and the Global Livestock Environmental Assessment Model database) finds very high emission intensities in Australia, whilst Poore and Nemecek (2018) estimate lower differences*".

68. By way of summary of Grounds 1 and 2:

    a. In Ground 1(a), the Appellant submits that that conclusion was irrational, essentially since the sources cited are *"apples and pears*". In particular, the GLEAM[53] data concerns all beef (whether from beef herd or dairy herd) whereas the Poore and Nemecek data concerns beef herd beef only (see [74], Amended Statement of Facts and Grounds ("**ASFG**")). Since the majority of the UK's beef production is from dairy herds and, in the UK, the production of meat from dairy herd is significantly less emissions intensive than from beef herd[54], this is a serious logical or methodological error.

    b. The Appellant's Ground 1(b) responds to the Respondents' argument (raised in correspondence after the issuing of the claim: [78D], ASFG) that UK beef-herd beef would be displaced by Australian beef more than UK dairy-herd beef. The Appellant argues that the Respondents' failure to identify or investigate that issue at the time was a breach of its *Tameside* obligation.

    c. The Appellant's Ground 1(c) relates to the failure to brief the Minister on the matters set out above (both the *"apples and pears*" nature of the comparison in FN 91 and the

53 This refers to the "*Global Livestock Environmental Assessment Model*".
54 See eg [11](b) and [19], Appellant's skeleton for the hearings of 26 and 28 June 2024.

(after the event) justification in relation to displacement of beef-herd beef). They were so obviously material that the Defendant should have been informed of them.

d. The Appellant's Ground 1(d) relates to predetermination, in particular an apparent corporate predetermination to reach a certain outcome (see e.g. [78T] and [78U], ASFG)

e. By Ground 2, the Appellant challenges the Respondents' error in concluding that the GLEAM data alone did not provide a reliable basis for conducting an impact assessment of carbon leakage.

69. The Appellant's challenge also includes Ground 3, in relation to s.28 TCTA combined with Article 4(1)(f) of the UNFCC. As to these provisions:

a. s.28 provides as follows:

> "*Requirement to have regard to international obligations*
> *(1) In exercising any function under any provision made by or under this Part –*
>
> *a. the Treasury,*
> *b. the Secretary of State,*
>
> *...*
>
> *must have regard to international arrangements to which Her Majesty's government in the United Kingdom is a party that are relevant to the exercise of this function.*"

b. Article 4(1)(f) of the UNFCCC provides as follows:

> "*All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:*
>
> *...*
>
> *(f) take climate chance considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the*

economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change".

70. In their PAP response, the Respondents confirmed that, in the process of making the 2023 Regulations, the Minister had regard to the UK's obligations under the Paris Agreement, the Aarhus Convention and the UN Convention on Biological Diversity (albeit that it is said he did not consider these to be relevant, and instead simply had regard to them in the exercise of his discretion ([31], PAP reply)). However, he did not "*have regard to*" the Article 4(1)(f) obligation, which the Appellant challenges as an error of law (and this is its Ground 3 (see [89]-[95], ASFG)). This error was particularly material, because, in focussing only on the Paris Agreement, the Respondents considered that it was for Australia, rather than for the UK, to address any increased greenhouse gas emissions in relation to beef imported into the UK from Australia (see [91], ASFG).

71. As noted in [3.a] above, Lang J granted permission in relation to all grounds of challenge. In the particular context of Aarhus costs protection, she relied on Ground 3 as "*sufficient to bring the claim within the scope of Article 9(3) of the Aarhus Convention"* [13]. For the avoidance of doubt, this reflects the approach of the CPR and the courts in this jurisdiction, namely that costs protection is granted to the judicial review proceedings as a whole.[55] As highlighted by Eyre J in *R (Lewis) v Welsh Ministers* [2022] EWHC 450 (Admin) ("***Lewis***") [34], this straightforward approach avoids complex satellite litigation and the complexity of allocating different costs or different cost capping arrangements to different aspects of the same claim (and the cost and expense of arguments in respect of this), but is subject to the safeguard that a court can decline Aarhus protection where an environmental claim is brought abusively or illegitimately.

(ii) Submissions

72. Firstly, the Court of Appeal held that where there is a statutory obligation "*which requires a particular factor to be taken into account and the language or context demonstrates that*

[55] See e.g. *R (Lewis) v Welsh Ministers* [2022] EWHC 450 (Admin), *Green Lane Association Limited v Central Bedfordshire Council* [2025] EWHC 2251 (Admin), [43]. For completeness, it is noted that the CJEU has held that Aarhus protection need only apply under national law respect of that "*part of the challenge"* which involves an environmental challenge but that the scope of protection was a matter for national legal systems. See C-470/16 *Pylon Pressure Campaign v An Bord Pleanála* EU:C:2018:185 [58].

the object of that provision is to protect or regulate the environment… Art 9(3) will most likely be engaged", but where a provision "*simply imposes a general obligation to take into account all relevant considerations*" it will not [J/138]. Similarly, Article 9(3) will not apply "*to open-ended statutory requirements to take into account relevant considerations in … legislation enacted for non-environmental purposes*". Thus:

a. Where the Parliamentary drafter has enumerated relevant considerations and has included amongst them "*environmental considerations*", the obligation will presumably fall within Article 9(3), but where the drafter has instead drafted without so enumerating, the obligations will fall outside Article 9(3).

b. This is unprincipled and wrong. Under well-established principles of statutory construction, a neutrally drafted "*must have regard to*" obligation imposes a mandatory duty to consider those considerations which are properly in its scope, and which have not been explicitly excluded. In cases in which, following that exercise in statutory construction, the decision maker is obliged, as a matter of law, to consider environmental considerations, that should mean that Article 9(3) is engaged. There is no basis for further glossing or narrowing that domestic legal obligation relating to the environment. It is functionally identical to occasions on which the drafter has listed all mandatory considerations.

73. The Appellant submits that the above is correct regardless of whether – using the well-known *Fewings* categories[56] – the environmental consideration is a *Fewings* category 1 considerations (which a statute requires, whether expressly or impliedly, a decision-maker to take into account) or that subset of *Fewings* category 3 which it would be irrational not to take into account. As to the former, it makes no difference that the mandatory consideration is impliedly rather than expressly required. As to the latter, namely a consideration which is "*so obviously material*" that it would be irrational not to take it into account, the Court of Appeal held that – absent the *Venn* overlay – they are outside Article 9(3). This is apparent from [J/142] and [J/143]. The Court of Appeal reasoned that this is because the obligation arises as a "*bare principle of public law*", which does not become part of the law relating to the environment "*by being applied in a factual matrix which*

[56] See *R (FoE) v Secretary of State for Transport (Heathrow Airport)* [2020] UKSC 52, [2021] 2 All ER 967, [116].

involves environmental impact or effect" [J/142]. Even on its own terms, however, this is wrong. It fails to recognise that the identification of "*so obviously material*" considerations is itself a reflection of Parliamentary intent. This is obvious not least from the classic statement of Cooke J in *CREEDNZ Inc v Governor General* [1981] NZLR 172 at 183: "*there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by [the public authority] … would not be in accordance with the intention of the Act*." (emphasis added).

74. Secondly, the Court of Appeal applied its erroneous approach in the present case, in relation to s.28. In [J/145], they held that "*Parliament has not given any indication that a purpose of s.28 … is to protect or regulate the environment*" and that s.28 is just a "*general statutory obligation to have regard to relevant considerations*". Absent the special *Venn* statutory matrix, this is said to be not enough. This is an error of law, for the reasons set out above. If, on its proper construction, s.28 required the Defendants to have regard to Article 4(1)(f) UNFCCC, that is a mandatory obligation under national law relating to the environment.

75. However, for completeness:

    a. even if the Court of Appeal was right in seeking an extra layer of Parliamentary intention (beyond the actual legal obligation imposed on the Respondents), which it was not, Parliament must be taken to have intended that s.28 would require regard to be had to relevant "*international arrangements*" concerning the environment. This is the case not least since a very large corpus of international environmental treaties and arrangements[57] have a fundamental bearing on the domestic implementation of trade arrangements.[58] This includes international conventions on: climate change[59]; trade in endangered species of plants and animals[60]; trade in environmentally hazardous

[57] There are numerous important environmental treaties which impact on trade, including: the UNFCCC; Convention on International Trade in Endangered Species of Wild Fauna and Flora ("**CITES**") 1973 993 U.N.T.S. 243; the Stockholm Convention on Persistent Organic Pollutant 2001 2256 UNTS 119.

[58] e.g. trade in plants and animals, trade commitments to level playing field in respect of the environment, impact of trade on climate change obligations, etc.

[59] Eg UNFCCC; Paris Agreement 1994 1771 UNTS 107 (and its various protocols)

[60] CITES.

substances;[61] biodiversity;[62] the regulation of trade in organic pollutants and pesticides;[63] and many others.

b. the implementation of FTAs in particular is plainly likely to raise environmental issues; issues which the Government committed to assessing before making the 2023 Regulations. This is obvious from two policy papers which apply to the present case (as set out in [59], ASFGs):

i. The Government Food Strategy 2022[64] which includes "*decisions on the liberalisation of products through FTAs will consider factors such as climate change, animal welfare and the environment*" [3.4.3]; and "*we will consider options to address risks of carbon leakage (displacement of production and emissions due to unequal pricing/regulation across jurisdictions) within the food system*" [3.5.4].

ii. "*The UK-Australia free trade agreement: the UK's strategic approach*" (17 July 2020)[65], which includes (in Chapter 3) explanation that "*the government is firmly committed to maintaining our high domestic standards of environmental protection, as well as to reaffirming and maintaining our commitments to international environmental standards. … We will continue to consider how our FTAs can be used to pursue strong environmental commitments and, in particular, to support the government's aims in the low carbon economy*." And (in Chapter 4) "*DIT is committed to a transparent and evidence-based approach to trade policy. Therefore, following the conclusion of negotiations, a full impact assessment will be published prior to implementation. … The full impact assessment will include: … further analysis of the … environmental impacts of the agreement*".

61 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1992 1673 UNTS 57.

62 The Convention on Biological Diversity 1992 1760 UNTS 79.

63 Stockholm Convention on Persistent Organic Pollutants and Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade.

64 Policy paper: Government food strategy (13 June 2022). This was published on the gov.uk website and was also presented to Parliament as a Command Paper.

65 This was published on the gov.uk website.

c. Even the UK-Australia FTA itself repeatedly refers to climate change matters; Chapter 22 is entitled "*Environment*" and, in particular, Article 22.5(1) it states that each party "*affirms its commitment to address climate change*" including under the UNFCCC and the Paris Agreement.

76. Accordingly, even if the Court of Appeal were right to require some extra Parliamentary cognisance of the environmental nature of potential relevant considerations, and of their importance, that is satisfied in relation to s.28.

77. Thirdly, the Court of Appeal further, in [J/146], appeared to rely on the fact that s.28 imposes a "*have regard to*" obligation, rather than imposing a requirement as to how the decision-maker should deal with any such arrangements. It held that "*the object of s.28 is simply to ensure that the decision-maker is aware of, or advised of, such arrangements*" and that it is "*impossible to treat the obligation in s.28, and any potential application to environmental arrangements, as amounting to a legal provision for the protection or regulation of the environment*" [J/146]. This shows quite how significant the Court of Appeal's approach to Article 9(3) and domestic legal obligations is. It is entirely orthodox for a statute to impose a "*have regard to*" obligation. That obligation must be complied with. The mere fact that a decision-maker is in general free to determine the weight to attach to a relevant consideration does not mean that he or she is absolved from having regard to it. Plainly, an obligation to at least consider international commitments in relation to the environment is an obligation relating to the environment, and the Court of Appeal was wrong to hold otherwise.

78. Fourthly, the Court of Appeal then, in [J/147], relied on the "*high-level requirement*" in Article 4(1)(f) UNFCCC, saying: *"How that is done is a matter of evaluative judgment for the decision-maker. There is no doubt that the Secretary of State and HM Treasury did take climate change considerations into account when deciding to make the 2023 Regulations. The issue here is about the way in which that was done. Ultimately this depends upon an irrationality challenge*." [J/147] The difficulty with the Court of Appeal's analysis here is (at least) threefold. Firstly, Ground 3 is a freestanding ground of challenge, which relates to a misdirection in relation to s.28 and Article 4(1)(f), and in relation to which the Appellants have permission. Secondly, the Court of Appeal held that "*a law for the protection or regulation of the environment may be contravened through a breach of a*

public law principle" [J/133], and [J/63]. That means that, if the Appellant is right on its reading of s.28 and Article 4(1)(f), that obligation is a law for the protection or regulation of the environment, and it may be breached by public law principles, and so an allegation of irrationality falls within Article 9(3) (even on the Court of Appeal's view). Thirdly, if the Court of Appeal was in fact indicating that the Respondents' irrational consideration of climate change would have been compatible with s.28 and Article 4(1)(f), (i) that is denied, and (ii) this is entirely speculative since it is not known how the Respondents would have exercised their discretion had they correctly directed themselves in law. As to the latter point, it would be entirely unjust if the Respondents could escape Article 9(3) by misdirecting themselves in relation to their statutory obligations and then arguing that public law errors in their decision-making were thereby sheltered from Article 9(3).

79. Fifthly, as to policies[66], it flows from (and is *a fortiori*) the Court of Appeal's treatment of *Venn* as a special case that, in general, the breach of legal requirements in relation to policies which relate to the environment should fall outside Article 9(3). This is wrong. Even policies which are adopted with no statutory obligation to take them into account nevertheless take effect in a known legal framework, which can and does give rise to legal obligation. "*There are many examples of discretionary decisions being successfully challenged on the ground that the relevant authority failed to have regard to its policy, misdirected itself as to the meaning of its policy, or departed from its policy without good reason*".[67] To leave such legal obligations in relation to the environment out of Article 9(3) is to undermine the purpose of that provision, and to narrow its scope, contrary to its proper interpretation as set out above. It is nothing to the point that domestic courts have held that policies *per se* do not, in domestic law, attract the label "*law*".[68] These statements generally reflect the fact that (so far as statutory powers are concerned) the decision-maker retains discretion to depart from the policy, if there is good reason to do so.[69] But this does not negate the legal obligations which do arise in relation to the policy (in particular to have regard to it, to construe it properly, to adhere to it absent good reason to depart from it, and

66 Such as, in the present case, the National Food Strategy and the UK-Australia Free Trade Agreement: the UK's Strategic Approach, set out in [75.b] above.

67 Per Lord Reed in *R(Begum) v SIAC* [2021] UKSC 7, [2021] AC 765, [124].

68 See [11], Respondents' Notice of Objection.

69 See Lord Reed in *Begum* [124]; also *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931, [3]-[4]. As to the well known duty of adherence, see eg *R (Lumba) v SSHD* [2011] UKSC 12, [2012] 1 AC 245 [26], per Lord Dyson; *R(Lee-Hirons) v Secretary of State for Justice* [2016] 3 WLR 590 [17].

to apply it rationally). These are constraining legal obligations, which form part of the domestic legal framework. Further:

a. as set out above, there is no support in any of the materials for the exclusion of such obligations on the grounds that they arise otherwise than by bespoke statutory obligation;

b. the objection that public law principles do not in themselves have the purpose of environmental protection and regulation, and instead from part of the rule of law within the constitutional separation of functions between Parliament, the Executive and the Courts [J/132], misses the point, namely that where a policy relates to the environment and has known legal effects, the mechanism by which those legal effects arise does not need to be specific to the environment. By parity of reasoning, the legal effect of a statutory provision is determined by reference to a range of principles of general application (not least Parliamentary sovereignty), but this plainly does not mean that a provision of an Act of Parliament does not form part of "*national law relating to the environment*"; and

c. if it is suggested that, in order to form part of "*national law relating to the environment*", the obligations must have an *ex ante* connection to the environment (i.e. the relationship with the environment must be apparent in advance of any decision-making), which would be wrong for the reasons set out in the next paragraph, policies satisfy such a test. Indeed, in the Aarhus Convention itself the obligation of dissemination of environmental information includes "*policies, plans and programmes on or relating to the environment*" (Article 5(3)(c), and similarly Article 5(a)[70]). Such polices are an identifiable part of the national legal framework; and (for example) a government legal adviser is in a position to advise the relevant decision-maker that such policies form part of the body of legal requirements which apply to his or her decision. Against that backdrop, the exclusion of a claim that there has been a contravention of such obligations from Article 9(3) is wrong, and reflects an incorrectly narrow and unprincipled reading of that provision.

[70] So too do the rights of public participation: see Art 7*, "to the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment*".

80. Sixthly, even if the Respondents had simply elected to take climate change obligations into account (which is not the case here, contrary to [J/134][71]), they were obliged to do so lawfully. The Court of Appeal was wrong to dismiss this set of legal obligations on the basis that it concerns mere public law principles ([J/132], [J/148]). That characterisation underplays the importance of the obligation that public authorities must act lawfully, including in relation to considerations which they have voluntarily elected to take into account. If it is suggested, as set out in [79.c] above, that, in order to form part of "*national law relating to the environment*", a legal obligation must have an *ex ante* connection to the environment (i.e. the relationship with the environment must be apparent in advance of any decision-making), any such suggestion (i) would be wrong and (ii) is met in any event. Firstly, *Austin* is authority for an approach in which the relationship between legal obligations and the environment exists (or does not exist) by reference to the facts of the claim itself. The first criterion established by the Court of Appeal in that case is that "*the nature of the complaint must have a close link with the particular environmental matters regulated by the Convention, even although the action in private nuisance does not raise them*" [22]. Accordingly, there is nothing objectionable in the relationship with the environment being a function of the facts of the claim itself. Secondly, the legal obligation and its relationship with the environment is entirely foreseeable by reference to the facts. A government legal adviser is able to advise that, if the decision-maker chooses to take an environmental consideration into account, they must do so lawfully (e.g. rationally). Thirdly, Parliament is taken to have legislated against the general principles of the common law[72], and this includes the obligation that, where a decision-maker takes an environmental consideration into account, he or she will do so lawfully. The parliamentary draftsperson will not include language such as "*where the decision-maker elects to take an environmental consideration into account, he must do so rationally",* because it is duplicative of the common law and redundant. Such an obligation nevertheless forms an important part of the national legal framework in relation to the environment. An approach which excludes such obligations from Article 9(3) would therefore be wrong.

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[71] In [J/134], the Court of Appeal characterises the present case as raising the issue "*does Art 9(3) apply where a claim alleges that a defendant's decision or act under a legal provision not relating to the environment is vitiated by a public law error in some way connected to the environment or an effect on the environment".* That is wrong, not least since it ignores s.28 and mischaracterises greenhouse gas emissions as merely *"in some way connected to"* or having "*an effect on"* the environment.

[72] See e.g. Bennion on Statutory Interpretation (9th ed, 2017, pg.779), the legislature "*is normally presumed to legislate in the knowledge of, and having regard to, relevant common law and statute"*.

81. Seventhly, as to the role of *vires*, of course all legal errors in the exercise of a statutory power can be categorised as having the effect of rendering the exercise of the power "*ultra vires*" (because there is no power to act unlawfully). However, the critical question for Article 9(3) is not the legal characterisation of the decision which is being challenged (including its *vires*) but rather the specific nature of the legal obligation which is said to have been contravened. Accordingly, where the Court of Appeal repeatedly focused on the nature of the vires (see e.g. [J/135], [J/137], [J/142]), it falls into error, in particular since this reduces the part of the national legal framework which is made up of common law and public law obligations to nothing. However, and in any event, in the present case the nature of the vires, and the nature of the provisions of Part 1 of the TCTA 2018, is that there is plainly a likelihood of an overlap with environmental considerations, such that the responsible decision-maker may well elect to take environmental matters into account. Accordingly, if needed (which is denied), the relevant statutory scheme does have the necessary connection with the environment to render public law errors relating to the environment in the making of the 2023 Regulations relevant breaches of provisions of "*national law relating to the environment*".

82. Eighthly, drawing the above together, the Court of Appeal erred repeatedly in imposing – absent the *Venn* special circumstances – a requirement for an express statutory obligation in relation to the environment. In order that the Supreme Court is in a position clearly to articulate the law across the full range of cases, the Appellant has sought to address a variety of permutations above. However, the reality is that its case is far simpler. Ground 3 is a straightforward misdirection in relation to s.28, i.e. a statutory provision which – on the Appellant's argument – required the Respondents to have regard to Article 4(1)(f) UNFCCC. It is within Article 9(3), which means in itself, as matter of national practice (see [71] above), that costs protection applies to the proceedings as a whole. Further and in any event, on the Appellant's case, the public law errors identified in Grounds 1 and 2 occurred in the context of that statutory requirement,[73] and so are also within Article 9(3)

[73] They also occurred in the context of government policy commitments to assess the impact of carbon leakage and GHG emissions. In particular, the government undertook to consider, and assess, the environmental impact of greenhouse gas emissions and carbon leakage through food production in the National Food Strategy. *See* National Food Strategy 2022 [3.4.3] and [3.5.4]. Similar policy commitments are made in Chapter 4 of the *UK-Australia Free Trade Agreement: The UK's Strategic Approach.*

in their own right (if it is a requirement of Article 9(3) that a public law error takes place in the context of such a statutory requirement, which is denied). Overall, the Appellant respectfully submits that its claim is plainly within Article 9(3).

Section E: Conclusion

83. As emphasised in the Introduction to this Written Case, effective environmental protection has never been more important, and Article 9(3) plays a critical role in facilitating litigation which furthers that purpose. The Appellant respectfully submits that the Court of Appeal fell into error in construing Article 9(3) far too narrowly, thereby excluding claims from its scope, which properly should fall within it, to the ultimate detriment of the environment and of "*every person of present and future generations*" (Article 1). Accordingly, for all the reasons set out above, the Appellant asks the Supreme Court to uphold its appeal, and to find that the Court of Appeal erred in concluding that the Appellant's claim for judicial review did not fall within Article 9(3).

84. As required by [5.15] of *Practice Direction 5: Documents for the appeal hearing*, a numbered summary of the reasons upon which the argument is founded is that:

    a. Applying Articles 31 and 32 VCLT, Article 9(3) of the Aarhus Convention should be interpreted broadly, with the purpose of promoting effective environment protection. It should be read as applying to all legal requirements with which the defendant public body needed to comply in order to make a lawful decision, where those requirements relate to the environment (with "relate" having a broad rather than a narrow meaning).

    b. As a matter of national law, Article 9(3) should not be limited to express statutory obligations in relation to the environment, but also encompass implied statutory obligations in relation to the environment, obligations which arise where matters relating to the environment are "obviously material", obligations in relation to the environment which arise under policy, and obligations in relation to the environment which arise by operation of law to constrain an elective decision to consider the environment.

    c. Applying the approach above, the Court of Appeal was wrong to hold that the Appellant's application for judicial review fell outside Article 9(3). The Supreme

Court is invited to restore the order of Lang J; or alternatively to remit, so that the learned Judge can consider the Appellant's application for costs protection with the benefit of the Supreme Court's judgment.

Victoria Wakefield KC

Conor McCarthy

Ben Mitchell

16 April 2026