CASE NO: UKSC/2025/0119

In The Supreme Court of the United Kingdom

ON APPEAL FROM THE COURT OF APPEAL

[2025] EWCA Civ 624

BETWEEN:

R (on the application of FOODRISE LTD)

Claimant / Appellant

-and-

(1) HM TREASURY

(2) SECRETARY OF STATE FOR BUSINESS AND TRADE

Defendants/ Respondent

-and-

(1) ENVIRONMENTAL LAW FOUNDATION

(2) FRIENDS OF THE EARTH LTD

Interveners

WRITTEN SUBMISSIONS OF THE ENVIRONMENTAL LAW FOUNDATION

I. INTRODUCTION

1. These submissions are filed on behalf of the Environmental Law Foundation ("**ELF**") in this appeal.

2. The issue raised in the appeal is the scope of Article 9(3) of the Aarhus Convention, which (materially for these purposes) requires State Parties to 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*".

3. In the course of its reasoning, the Court of Appeal ("**CoA**") held that Article 9(3) does not extend to judicial review claims based on so-called "*bare principles of public law*", such as irrationality or the doctrine of relevant considerations.

4. In this respect, the CoA proceeded on the basis of an erroneous understanding of the constitutional nature of principles of public law (§§5-32 below); and the effect of that erroneous reasoning was to considerably restrict the scope of costs protection afforded under the Aarhus costs regime in the UK, contrary to the purpose of the Convention (which purpose is relevant to the interpretation of the instrument) (§§34-39 below). ELF therefore respectfully submits that the CoA erred in law and invites the Supreme Court to correct its error.

II. THE ERRONEOUS TREATMENT OF PUBLIC LAW OBLIGATIONS

A. The CoA's reasoning

5. The CoA held that in order for a claim to fall within the scope of Article 9(3) of the Aarhus Convention, the complaint must be about "*a decision, act or omission which contravenes a national law which itself relates to the environment*", i.e. "*a legal provision which concerns, or is to do with, the environment, its protection or regulation*" (at [92], [96]).

6. The CoA emphasised (at [132]) that "*public law principles do not form part of our law relating to the environment… Where a principle of public law is contravened, it would be wrong to say that that in itself amounts to a breach of environmental law*".

7. The CoA considered that if there is a "*contravention of a freestanding statutory requirement for the protection of the environment*", or where a "*law for the protection or regulation of the environment may be contravened through a breach of a public law principle, such as an irrational exercise of discretion*", Article 9(3) will apply (at [133]).

8. Where, however, "*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*", the position is

different, according to the CoA (at [134]). The CoA suggested that this will "*typically*" arise "*where a claimant alleges that the decision-maker failed to take into account a material consideration, such as the effect of his decision on the environment or some particular environmental issue, for example, climate change. Alternatively, in some cases a claimant may allege that the decision-maker acted irrationally in the manner in which he dealt with an environmental issue, having chosen to take the matter into account*" (at [135]).

9. In such circumstances, "*an essential question is whether the claimant is able to allege that the defendant has contravened a national legal provision for the protection or regulation of the environment*", and this will "*depend upon the wording, context and purpose of the provision under which the defendant has acted*" (at [137]). If the relevant legislation only contains "*a general obligation to take into account all relevant considerations without more*", then the "*purposes of such a provision is not to protect or regulate the environment*", and Article 9(3) is not engaged (at [138]).

10. The CoA reiterated this point at [142]-[143], in particular:

> *"As previously stated, the purpose of a bare principle of public law is not to protect or regulate the environment. Its purpose is to regulate the lawfulness of decisions, actions or omissions of public authorities, irrespective of the various functions they carry out. Therefore, a principle of public law, without more, does not form part of our law relating to the environment. It does not become so by being applied in a factual matrix which involves environmental impact or effect, nor could that matrix alter the nonenvironmental nature of the legal provision under which the defendant acts. Article 9(3) is not engaged.* [...]
>
> *The same analysis applies to the situation where an authority acting under a non-environmental legal provision takes into account an obviously material consideration or simply a relevant consideration, but acts irrationally in the handling of that matter. The mere fact that this concerns the environment, or an effect upon the environment, does not turn the breach of a public law principle into a breach of national environmental law. It does not alter the non-environmental*

nature or purpose of that legal provision. In such circumstances, Art.9(3) is not engaged."

11. At [151], the CoA summarised the position as follows (original emphasis):

> "*it would be wrong for a judge simply to ask whether a claim or ground of challenge is to do with the protection of the environment or with the effect of a decision or legal provision on the environment… Put in a nutshell, what matters is whether the purpose of the national law that has allegedly been contravened is to protect or regulate the environment, not, whether the decision being challenged has an effect on, or some connection with, the environment.*"

12. In light of this reasoning, the CoA concluded that a general obligation to "*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 the function*" imposed by s.28 of the *Taxation (Cross-Border) Trade Act 2018* (the "**2018 Act**") did not represent a provision relating to the environment, even though it may require regard to be given to environmental treaties.

13. In so doing, the CoA (at [141]) distinguished the judgment in *Venn v Secretary of State for Communities and Local Government* [2015] 1 WLR 2328 ("***Venn***"), in which a statutory duty to have regard to "*material considerations*" had been held to be a provision related to the environment, on the basis that it concerned s.70 of the *Town and Country Planning Act 1990* which was part of the framework for protecting the environment in the context of planning. The CoA considered (at [145]) that there must be a specific "*indication*" by Parliament that the provision is intended to protect the environment, which there was in the planning context.

B. The CoA's errors

Overly narrow interpretation of "provisions of… national law"

14. The CoA's reasoning in the aforementioned passages betrays a misunderstanding that the phrase "*provisions of… national law*" in Article 9(3)

refers to legislation (only), and cannot refer to common law public law principles. That necessarily follows from the Court's focus on whether a "*legal provision*" has been adopted by Parliament for the purpose of protecting the environment (see, for example, [145]).

15. The phrase "*provisions of… national law*" must, however, be interpreted in the context of the UK legal framework (*Venn* at [15]). Unlike that of many other signatories to the Convention, the law in this jurisdiction is comprised of a combination of statute and common law. In ELF's submission, Article 9(3) must be interpreted in a manner which gives effect to the purpose of the Convention, bearing in mind that it was not drafted solely for the UK constitutional context. It follows that – in the UK's particular constitutional context – obligations arising from statute and obligations arising from the common law may *each* constitute "*provisions of national law relating to the environment*" for the purposes of the Aarhus Convention.

16. Indeed, this point was explicitly recognised in *Austin v Miller Argent (South Wales) Ltd* [2015] 1 WLR 62, p.70D-E at [19]–[20] per Elias LJ ("***Austin***"), in which the CoA held that the common law of nuisance imposes specific obligations on persons which relate to the environment and that the tort of nuisance is therefore a provision of national law which may fall within the scope of Article 9(3).

17. The fact that common law obligations may fall within the scope of Article 9(3) is rightly not disputed by the Respondent (Respondent's case, §28[1]). The CoA's starting premise – i.e. that the words "*provisions of… national law*" in Article 9(3) can only refer to provisions of statute – is therefore accepted as being wrong. Once that error is stripped out, the CoA's reasoning falls apart. It provides no basis for determining whether a common law obligation constitutes a provision

1 "*The Appellant… observes that "national law" in art.9(3) can have a broader scope than "legislation" (AWC, §22, §30), which is not in dispute*".

of national law within the scope of Article 9(3), because in these circumstances there is no Act of Parliament setting out its purpose.

18. The correct distinction, for the purposes of Article 9(3), is between legal obligations which do and do not relate to the environment, however so arising. The question the court must ask itself in each case is this: in the circumstances of the case, does this obligation have a sufficiently close link to environmental considerations? If so, it is a provision of national law which relates to the environment, however it arises.

Misunderstanding of relationship between "bare principles of public law" and statute

19. Insofar as the Supreme Court accepts the agreed position that common law obligations can in principle fall within the scope of Article 9(3) (as it must), the CoA's reasoning can only stand if the Supreme Court also accepts that there are somehow certain "*general*" or "*bare*" principles of public law which are never provisions of national law relating to the environment, irrespective of the context in which they are invoked. This necessarily implies that there exists some category of public law obligation which never serves to protect the environment. That implication is impossible, however, because public law obligations are not static – they respond to the context (both statutory and factual) in which they are invoked. *De Smith's Judicial Review* 9th Ed. puts the point as follows (at §§1-031 to 1-032):

> "*The concrete application and elucidation of broad constitutional principles are not self-evident or static. It is for the courts to articulate them.* [...]
>
> *many of the standards applied through judicial review are necessarily open-textured.* [...]
>
> *The search for precise standards will always need to be accompanied by a recognition of the particular circumstances of a special case, depending upon the breadth of the power conferred upon the decision-maker; the conditions of its*

exercise; the availability of alternative procedural protections, and the fairness to the parties involved (and to others affected by the decision)."

20. This is because the operative content of any public law principle fundamentally depends upon the statutory context in which it falls to be applied. The intervention of the courts with the exercise of powers by a public law decision-maker is in every case "*based on the proposition that such powers have been conferred on the decision maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a Wednesbury sense... reasonably*": Boddington v BTP [1999] 2 AC 143 at 171F-H per Lord Steyn (quoting R v Hull University Visitor, ex p. Page [1993] AC 682, 701).

21. As such, the juristic basis for the court's intervention in a public law case is the doctrine of *ultra vires*, including where the public law error invoked has its origins in the common law.

22. It follows that the nature of public law obligations cannot be divorced from their statutory context – indeed, they are inextricably interlinked. For example:

    22.1. As to irrationality: "[t]*he question whether to quash this decision is not answered simply by asking whether the Council behaved "unreasonably" in the general sense: in the present case it is whether it behaved "unreasonably" in the way it purported to exercise the powers granted and limited by statute." (*R v Teignbridge District Council [1995] 2 PLR 1, 10D (Judge J as he then was)).[2] As the Appellant points out, Parliament is taken to have legislated against the general principles of the common law, including the obligation that where a decision-maker takes an environmental consideration into account, he or she will do so lawfully (Appellant's Case, §80).

[2] See similarly Secretary of State for Education and Science v Tameside MBC [1977] AC 1014, at 1047F-G.

22.2. As to the doctrine of relevant considerations: "*it is only when the statute expressly or impliedly identifies considerations required to be taken into account … as a matter of legal obligation that the court holds a decision invalid…*" R (Friends of the Earth) v Secretary of State for Transport [2021] 2 All E.R. 967, p.998f-h at [117] per Lord Hodge DPSC and Lord Sales JSC, (citing CREEDNZ Inc. v Governor General [1981] NZLR 172, 183). Whether (i) a statute identifies a specific consideration to be taken into account; or (ii) a statute requires a decision-maker to have regard to all relevant considerations, which (on analysis) includes a particular factor on specific facts; or (iii) the common law requires a decision-maker exercising a particular statutory power to have regard to a certain consideration, the constitutional analysis is the same: Parliament's intention is that the decision-maker must have regard to that factor.

By way of further example, Lord Diplock in Bromley LBC v Greater London Council [1983] 1 AC 768, p.821 stated that "*the question of discretion is, in my view, inseparable from the question of construction*"; and Lord Phillips MR (as he then was) in R (Asif Javed) v SSHD [2002] QB 129, p.152 at [49] reiterated that "[*t*]*he extent to which the existence of a statutory power is in practice open to judicial review on the ground of irrationality will depend critically on the nature and purpose of the enabling legislation*."

23. The Respondent necessarily accepts this position (Respondent's case, §§93-95), but seeks to overcome its obvious implications by asserting that where a public law failing is in dispute, one must assess whether the empowering statute is itself "*a law for the protection or regulation of the environment*" (Respondent's case, §94).[3] It submits that Article 9(3) should be applied in a way that is "*focused on the nature of the legal provision said to have been contravened in the abstract, not on the facts of the particular case*" (Respondent's case, §30, emphasis added). The suggestion

[3] This means that the Respondent is unable to advance any case in relation to prerogative powers, and takes the extreme position that an exercise of such powers will *never* contravene a provision of national law, unless a breach of statute is alleged: Respondent's case, §102.

appears to be that where (for example) an individual alleges that a decision-maker failed to have regard to a mandatory environmental consideration, Aarhus protection should *only* be afforded if the decision-maker's powers are derived from legislation which has, as its purpose, the protection or regulation of the environment (see also Respondent's case, §98).

24. The Respondent's Case is that (§§93-94, emphasis added):

> "*a claim against a public authority may raise an allegation of a contravention of public law principles. The mere fact that this does not in terms allege a breach of a provision of legislation does not necessarily exclude it from the scope of art.9(3) [...]*
>
> *an allegation of breach of a public law principle will typically, on analysis, involve an allegation that the authority acted outside its powers under statute insofar as the enactment does not, on its proper construction, confer a power to act in breach of public law principles [...]*
>
> *art9(3) will <u>only</u> apply where <u>a law for the protection or regulation of the environment</u> is contravened through a breach of a public law principle, such as an irrational exercise of discretion*".

25. It is certainly true that where the empowering legislative regime exists to protect the environment, a challenge to the lawfulness of a decision-maker's act or omission must be afforded Aarhus costs protection. The problem with the Respondent's analysis, however, is that it repeats the CoA's error of assuming that only *legislation* is capable of being a "*law for the protection or regulation of the environment*" (an error with the Respondent expressly disavows: see §17 above). The reasoning invites an exclusive focus on the apparent purpose of legislation. It ignores the fact that public law principles, which dictate the outer limits of a decision-maker's statutory powers in any particular case, may *themselves* operate to protect the environment in a particular case.

26. Restricting costs protection only to cases where the empowering legislation exists "*for the protection or regulation of the environment*" would be absurd and excessively narrow. In many (if not most) cases, the relevant legislation does not, on its own, have an identifiably environmental purpose, and environmental obligations imposed on a decision-maker will not be express. They will arise, and become capable of identification, only on particular facts. That is a feature of the UK's common law system. The fact that such obligations are implied, rather than being expressly stipulated within the overarching statutory scheme, does not mean that the court is somehow not engaged in a process of statutory construction and application when considering the content of public law obligations. If the decision-maker is legally obligated to take steps relating to the environment, that must be because there is a provision of national public law (which relates to the environment) requiring them to do so.

27. Ultimately, in ELF's submission, where public law obligations regulate (procedurally or substantively) decision-making under a legal regime which itself regulates the environment, those public law principles are "*provisions of… national law relating to the environment*" for the purposes of Article 9(3). It is only through this broader interpretation of Article 9(3) that proper effect can be given to the need to interpret the Aarhus Convention in line with its object and purpose to promote effective environmental protection (as required under the 1969 Vienna Convention on the Law of Treaties).

C. The implications of the CoA's erroneous reasoning

28. The CoA's reasoning is contrary to this basic constitutional logic. It requires an unprincipled distinction to be drawn between implicit and express obligations. This is apparent from the recent decision in *Green Lane Association Ltd v Central Bedfordshire Council* [2025] EWHC 2251 (Admin) ("***Green Lane Association***"), in which a judicial review claim was brought against a local authority which had made a road traffic regulation order under the *Road Traffic Regulation Act 1984*. The Order was challenged on various grounds, including (i) that it was *ultra*

vires, because it was not made for the purposes specified by the Act; (ii) that there had been a failure to give reasons; (iii) that there had been a failure to balance the considerations specified in the Act; and (iv) that there had been a failure lawfully to consult (at [29] per Ridge DHCJ). The Court concluded that although the stated purpose of the relevant legislative provision was "*to secure the expeditious, convenient and safe movement of traffic and ensure suitable parking provision*", a purpose which contained "*no reference to the protection or regulation of the environment*", when read as a whole it was clear that the statutory obligations were "*directed at making decisions with environmental considerations at the forefront of the decision maker's mind*" (at [37]). The Court therefore held that Aarhus costs protection was applicable. However, the Court appeared to understand – on the basis of the CoA's judgment in this case – that the position would be different if the *Road Traffic Regulation Act 1984* did not contain any express reference to matters which could be described as 'environmental'. It stated at [41] that (emphasis added):

> *"I have set out the factors relating to amenity considerations above. There is also a specific requirement within section 122(2)(c) which requires an order making authority to have regard to the strategy prepared under Section 80 of the Environment Act 1995 in relation to the national air quality strategy. <u>That is not a general reference to have regard to all other relevant matters as was the case in Global Feedback, but rather a requirement to have regard to a specific environmental protection provision</u>."*

29. By contrast, in <u>*Venn*</u>, the obligation in issue was a statutory obligation to have regard to certain specified matters (which were not environmental) and "*any other material considerations*" (section 70(2), *Town and Country Planning Act 1990*). It was alleged by the Claimant in that case that these considerations included a policy relating to gardens (at [2]). The Defendant argued that the policy was not a "*provision of national law*", and that insofar as the Claimant was alleging a contravention of national law, the law was the (in that case statutory) requirement to have regard to material considerations, which "*could not be*

characterised as a law relating to the environment" (at [14]). That submission was correctly rejected by the CoA. As Sullivan LJ rightfully observed (at [15]-[17], emphasis in original):

> "*The Secretary of State's submission is ingenious, and it might have had some force if Article 9(3) was a domestic UK enactment, and was not a provision governing the obligations of the parties to an international Convention, each of whom has agreed to give effect to Article 9 "within the framework of its national legislation." National legislation may address the issue of environmental protection in different ways.* [...]
>
> *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, both national policies adopted by the Government (the NPPF), and local policies adopted by local planning authorities in their development plan documents.* [...]
>
> *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 article 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* […]"

30. The CoA rightly acknowledged (at [105], emphasis added) that:

> "*The clear implication of* Venn *is that an allegation that a decision-maker has failed to take into account a material consideration in breach of s.70(2) of the TCPA 1990 without more does not fall within Art.9(3). Section 70(2) is not itself a legal provision "relating to the environment". Such a claim does not fall within Art.9(3) unless, in addition, the material consideration left out of account was a policy (or*

perhaps some other measure) for the protection (or regulation) of the environment. What Sullivan LJ envisaged was that the policies applicable to most, if not all, planning applications will include some policies for the protection (or regulation) of the environment."

31. This is the correct analysis: the relevant question is the content of the obligation, not its abstract nature. Yet the CoA's judgment in this case elsewhere appears to suggest the opposite. The critical problem, as illustrated by the comments in *Green Lane Association*, is that the CoA has wrongly suggested that in cases where a public law decision-maker is required to have regard to an environmental consideration, there is some distinction to be drawn between (i) instances where the obligation is expressly imposed by statute, and (ii) instances where the obligation arises implicitly, as a matter of statutory interpretation or articulation, or as a matter of public law. No such distinction can sensibly be drawn. The authorities cited above make clear that all public law obligations reflect their statutory context; and the statute may impliedly *or* expressly impose upon the decision-maker obligations which relate to the environment.

32. Properly interpreted, when a public law obligation imposed on a decision-maker is environmental in nature on the particular facts of the case (which is for the Court to determine) – whether that obligation be to take account of all material considerations, not to act irrationally, or to act in a procedurally fair manner (for example) – the obligation in that instance constitutes a "*provision of… national law relating to the environment*". The alternative otherwise is an odd and arbitrary dichotomy in which claims which are, on any view, equally "environmental" in nature are categorised differently for costs purposes based on the pleaded grounds of challenge. The Appellant is therefore correct in its submission that a distinction between (i) a specific statutory obligation to consider environmental matters and (ii) an obligation to consider unenumerated relevant factors which, on analysis, include environmental matters is "*unprincipled and wrong*" (Appellant's Case, §72).

33. In summary, ELF respectfully submits that:

33.1. If there exists an obligation to have regard to an environmental matter, then the provision imposing that obligation is a provision of national law which relates to the environment. That position cannot be affected by whether the provision is imposed expressly under statute, or by public law more generally. In the public law context, the contrary position would conflict with well-established constitutional principle.

33.2. Since the content of public law obligations is inherently contextual, it is impossible to say that there is any category of "*bare*" principles of public law which cannot be "*provisions of… national law relating to the environment*".

33.3. In relation to the central issue in the present appeal, there is no sensible distinction to be drawn between (i) an express statutory duty to have regard to an environmental consideration, and (ii) a duty to have regard to an environmental consideration because it is so obviously relevant to the question before the decision-maker that it would be irrational to ignore it. Both are provisions of national law relating to the environment.

III. THE EFFECT OF THE DECISION ON ENVIRONMENTAL PROTECTION

34. The CoA's interpretation means that certain identifiably 'environmental' claims will not attract Aarhus costs protection based merely on whether the challenge is attributable to legislation (either empowering legislation, or legislation said to have been breached) which itself has an identifiably environmental purpose. Contrary to the Respondent's submission (Respondent's case, §89), it is critically important that the Supreme Court should have regard to those broader ramifications, and the arbitrariness to which the CoA's interpretation gives rise.

35. As to this, the illustrative examples of *Venn* and *Green Lanes Association* can be complemented by the following hypothetical scenarios, none of which would attract Aarhus costs protection according to the CoA:

35.1. A local authority, having made an express promise to consult a particular community in relation to the environmental impacts of a particular type of decision-making, abruptly ceases doing so. Members of the community bring a challenge, claiming that the local authority was obliged to consult in relation to environmental impacts when making a particular decision – having created a procedural legitimate expectation that it would do so.

35.2. A local environmental group challenges the grant of an environmental permit for a new coal mine on the basis that the decision maker failed in its public law duty to take account of material considerations (for example, the UK's obligations under the Paris Agreement).

35.3. A county council adopts an 'accessible streets' policy under which no new street trees are planted on roads with marked parking bays, regardless of site-specific considerations (such as road width or biodiversity benefits). A residents' group challenges the refusal of their application for trees to be planted on their road, arguing that the council has applied the policy as a rigid rule, thereby fettering its discretion.

35.4. A public authority operates a discretionary fund for community-based projects, and a local eco-club applies for funding to install air quality monitors near a busy junction. The authority refuses the application without reasons. In light of the detailed appraisal criteria and significant participation it had invited, the club brings a challenge to the authority for failing to give adequate reasons.

35.5. Two household waste recycling centres are replaced with a single consolidated one, on the basis that the change will increase efficiency of

waste disposal and have positive environmental impacts. Local residents bring a challenge on the basis that the closure will markedly increase average driving distance and congestion at the consolidated site, potentially worsening emissions. They claim that the authority failed to consider these factors in line with its *Tameside* obligation.

36. Other public law obligations which may – depending on the particular case – impose duties vis-à-vis the environment include: (i) the duty to refer back to committee pursuant to the test in *R (Kides) v South Cambridgeshire DC* [2003] 1 P. & C.R. 19; (ii) the rule against unlawful delegation / acting outside the scope of delegated authority (e.g. an officer issues a permission outside the scope of what was intended by decision-making planning committee); (iii) the obligation to avoid procedural unfairness; and (iv) the duty not to act for an improper purpose. Again, none of these challenges would appear to be covered by the reasoning in the CoA's judgment.

37. The ramifications of the CoA's approach are therefore immediate and striking. The examples demonstrate that public law principles are one way in which the UK implements its national law relating to the environment; and to exclude such cases from the scope of costs protection will give rise to serious access to justice issues, with serious implications for the extent to which the justice system in the UK facilitates environmental protection.

38. Those real-world effects are laid bare in the witness evidence of Ms Montlake, the Case Director at ELF. As Ms Montlake explains, ELF exists to assist grassroots communities by providing free information and guidance in-house on environmental issues, and the vast majority of its caseload is concerned with public law matters (EM1, §§5-7). Ms Montlake explains that in ELF's experience, one of the greatest issues for claimants as they seek to challenge environmental decisions has always been costs, both adverse and their own; and certainty as to the issue of costs plays a major role in the decision of any community to proceed with a judicial review challenge (EM1, §14). Historically, all of ELF's clients'

cases involving proposed judicial reviews have relied on Aarhus costs protection; and without that protection, most of them would not have proceeded with the litigation in question (EM1 §§15-16). That evidence demonstrates the inadequacy, in the environmental context, of the generic costs protection regime available for some judicial review claims (to which the Respondent refers in its Case, §2).

39. The impact of the narrow interpretation of Article 9(3) in the CoA's judgment, therefore, is that many communities wishing to hold public decision-makers to account for a failure to comply with public law environmental obligations will in practice be unable to do so. Indeed, Ms Montlake explains that ELF has *already* seen these impacts arising, with potential claimants being deterred from bringing litigation in the interest of the environment because of concerns or public bodies' assertions that Aarhus costs protections will be unavailable (§§23-25). Ms Montlake summarises the position at EM1 §26:

> "*Ultimately, ELF is concerned that the impact of the Court of Appeal's decision will be to reduce the number of environmental judicial reviews brought, and also further make environmental judicial review the preserve of the more wealthy members of our society. This is bad for our environment, but also bad for social justice – it should not be the case that poorer individuals / communities are required to simply accept the consequences of poor environmental decision making due to a lack of financial means, while richer individuals / communities can have recourse to judicial review*."

40. ELF therefore respectfully agrees with the Appellant's submission that Article 9(3) (as a provision of an international treaty) must be interpreted in accordance with the Vienna Convention on the Law of Treaties 1969, and must therefore be interpreted in such a way as to strengthen – rather than weaken – the overall purpose of the Aarhus Convention (Appellant's case, §8), namely to promote effective environmental protection. Indeed, the Respondent itself acknowledges that the "*evident purpose*" of Article 9(3) is "*to ensure that members of the public are not deterred from using the procedure … by exposure to a financial liability which is*

prohibitively expensive" (Respondent's case, §29(1)). This was the purpose of the introduction of the Aarhus costs regime in England & Wales (see *R (Edwards & anr) v Environment Agency and others* [2014] 1 W.L.R. 55, and the Court of Justice of the European Union's prior decision in *Edwards v Environment Agency (No 2)*, Case C-260/11), judgment of 11 April 2013, (EU:C:2013:221) [2008] 1 WLR 2914). A broad interpretation of Article 9(3) which includes all legal obligations relating to the environment is not only correct as a matter of domestic law (for the reasons set out above); it is also strongly supported by the correct interpretative approach to an international instrument like the Aarhus Convention (which is addressed by the Appellant).

IV. CONCLUSION

41. For these reasons, ELF invites the Supreme Court to find that the Court of Appeal fell into error in construing Article 9(3) too narrowly, and to find instead that all legal obligations (whether arising as a matter of statutory or common law) are capable of being provisions of national law relating to the environment for the purposes of that Article, depending on the circumstances of the particular case.

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6th May, 2026

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