

Michaelmas Term
[2026] UKSC 37
On appeal from: [2025] EWCA Civ 624

JUDGMENT

R (on the application of Foodrise Ltd (formerly Global Feedback Ltd)) (Appellant) *v* His Majesty's Treasury and others (Respondents)

before

Lord Sales, Deputy President
Lord Hamblen
Lord Leggatt
Lady Simler
Lord Doherty

JUDGMENT GIVEN ON
25 November 2026

Heard on 11 June 2026

Appellant
Victoria Wakefield KC
Conor McCarthy
Ben Mitchell
(Instructed by Leigh Day Solicitors)

Respondent
Sir James Eadie KC
Malcolm Birdling KC
Richard Howell
Adam Riley
(Instructed by the Government Legal Department)

Intervener – Environmental Law Foundation
Richard Wald KC
Ravi S Mehta
Jake Thorold
Aislinn Kelly-Lyth
(Instructed by Richard Buxton Solicitors)

Intervener – Friends of the Earth Ltd
David Wolfe KC
Nikolaus Grubeck
Margherita Cornaglia
Will Perry
(Instructed by Mishcon de Reya LLP)

LORD SALES (with whom Lord Hamblen, Lord Leggatt, Lady Simler and Lord Doherty agree):

1. This appeal is concerned with the ambit of the costs protection rules in relation to litigation on environmental issues set out in article 9 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("article 9" and "the Convention" or "the Aarhus Convention", respectively) as given effect in domestic law by Section IX of the Civil Procedure Rules ("CPR") Part 46. Where the costs protection rules apply, claims to challenge decisions by public authorities can be pursued with less financial risk in relation to costs than is associated with the usual rule in England and Wales that the costs incurred by the successful party are paid by the losing party, as set out in CPR Part 46.26. The practical effect of costs protection is that it is easier for a claimant who benefits from it to bring a claim and they are less likely to be deterred from doing so by the possible costs liability. To that extent, access to justice in environmental matters (that is, access to the courts to vindicate claims to enforce laws for the protection of the environment) is promoted.

2. Article 9 is headed "Access to justice". Article 9(3) provides in relevant part that each state party to the Convention:

> "… shall ensure that, where they meet the criteria, if any, laid down in its national law, 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."

It is common ground that the phrase "acts and omissions" encompasses decisions made by public authorities, as was held in *Venn v Secretary of State for Communities and Local Government* [2015] 1 WLR 2328 ("*Venn*"), para 13.

3. Article 9(4) provides in relevant part that the judicial procedures referred to shall provide adequate and effective remedies and "be fair, equitable, timely and not prohibitively expensive".

4. Section IX of CPR Part 46 gives partial effect to article 9(4) in domestic law by imposing costs limits on "Aarhus Convention claims". Such a claim is defined as "a claim brought by one or more members of the public by judicial review or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions, and which is within the scope of article 9(1), 9(2) or 9(3) [of the Convention]": CPR Part 46.24(2)(a).

5. In these proceedings the appellant ("Foodrise"), which was previously called Global Feedback Ltd, submits that pursuant to article 9(4) and CPR Part 46 it should have the benefit of a costs protection order in respect of a claim for judicial review brought against the respondents (HM Treasury and the Secretary of State for Business and Trade) in relation to their decision on 23 February 2023 to make the Customs Tariff (Preferential Trade Arrangements and Tariff Quotas) (Australia) (Amendment) Regulations 2023 (SI 2023 No 195) ("the 2023 Regulations"). The 2023 Regulations give effect to tariff preferences on Australian imports under a Free Trade Agreement between the UK and Australia signed on 16/17 December 2021 ("the FTA"), which came into force on 31 May 2023. The FTA and the 2023 Regulations provide for preferential tariffs on the importation of beef produced in Australia for consumption in the UK.

6. Foodrise is a charity concerned with environmental protection. It seeks to regenerate nature by transforming food production. Foodrise contends that the FTA and the 2023 Regulations have a negative effect on the environment through the impact they have on climate change. It says that the reduced tariffs on Australian beef will lead to a substantial increase in greenhouse gas ("GHGs") emissions from the production of beef, because beef production methods in Australia produce more GHGs per weight of beef than those in the UK and the lower price of Australian beef compared to UK beef (absent the impact of higher tariffs) is likely to lead to a net increase in production of Australian beef for consumption in the UK. For price reasons, consumer demand in the UK for beef is likely to be satisfied more than previously by purchase of Australian beef in place of beef produced in the UK and to that extent net GHGs associated with the production of beef to meet that demand are likely to increase, with a corresponding impact on climate change.

7. In its judicial review claim, Foodrise alleges that the respondents declined, for reasons which were illogical or irrational, to assess the nature and extent of the increase in GHGs associated with the likely shift in the location of beef production from the UK to Australia in consequence of the FTA and the 2023 Regulations, before deciding to make the 2023 Regulations; the decision to make the 2023 Regulations was tainted by an unlawful predetermination on the part of the respondents; it was also flawed by their misreading of article 4(1)(f) of the United Nations Framework Convention on Climate Change ("the UNFCCC"). On this basis, Foodrise seeks to quash that decision and the 2023 Regulations. Foodrise has been granted permission to bring the judicial review proceedings on the footing that the various claims it makes are reasonably arguable: [2024] EWHC 1810 (Admin) (Lang J).

8. Foodrise contends that its judicial review claim constitutes an Aarhus Convention claim falling within Section IX of CPR Part 46 and that as a result it is entitled to a costs protection order in its favour. Its application for such an order was adjourned to a later hearing before Lang J. She held that Foodrise's claim is an Aarhus Convention claim and accordingly that Foodrise is entitled to a costs protection order: [2024] EWHC 1943 (Admin); [2024] Costs LR 1107. The respondents indicated that they wished to appeal on

that issue. In order to limit the potential costs exposure of Foodrise while such an appeal was determined, Lang J stayed Foodrise's claim. Therefore the respondents have not yet filed detailed grounds of resistance and evidence in response to the claim.

9. The Court of Appeal (Coulson, Stuart-Smith and Holgate LJJ) allowed the respondents' appeal against the costs protection order made by Lang J, holding that Foodrise's judicial review claim is not an Aarhus Convention claim within the meaning of CPR Part 46.24: [2025] EWCA Civ 624; [2025] 4 All ER 187. Holgate LJ gave the main judgment, with which Coulson and Stuart-Smith LJJ agreed.

10. Foodrise appeals to this court. It submits that, on the proper interpretation of article 9(3) of the Convention and CPR Part 46.24, which gives effect to it in domestic law, its judicial review claim is covered by article 9(3) and as a result it constitutes an Aarhus Convention claim within the meaning of CPR Part 46.24. On that basis, Foodrise says that it is entitled to have a costs protection order made in its favour, as Lang J decided. The legal issue which arises on this appeal concerns the proper interpretation of article 9(3), read in the context of the Convention as a whole.

The Aarhus Convention

11. The recitals to the Convention affirm the need to protect, preserve and improve the environment and recognise that adequate protection of the environment is essential to human well-being. The recitals affirm that every person has the right to live in an environment adequate to his or her health and well-being and the duty individually and collectively to protect and improve the environment for present and future generations. They include the following, by way of introduction to the Convention's operative provisions:

> "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 acknowledging in this regard that citizens may need assistance in order to exercise their rights,
>
> Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns,

…

Desiring to promote environmental education to further the understanding of the environment and sustainable development and to encourage widespread public awareness of, and participation in, decisions affecting the environment and sustainable development,

…

Concerned that effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced,

…"

12. The objective of the Convention is stated in article 1:

> "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 wellbeing, each party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."

According to this provision, the rights guaranteed by article 1 are those set out in the Convention.

13. The Convention does not provide a definition of "the environment". However, an indication of what is meant appears in article 2(3), which defines "environmental information":

> "'Environmental information' means any information in written, visual, aural, electronic or any other material form on:
>
> (a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites,

> biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
>
> (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;
>
> (c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above; …"

14. Article 4(1) stipulates that public authorities are to make environmental information available to the public in response to a request, subject to certain limitations and exclusions. Article 4(7) states that where such a request is refused, reasons must be given and information provided about the review procedure made available by the state in accordance with article 9(1).

15. Article 5 deals with the collection and dissemination of environmental information. Each state party is to ensure that public authorities possess and update environmental information relevant to their functions and that there are systems which provide an adequate flow of information to those authorities about activities "which may significantly affect the environment" (article 5(1)). A number of requirements are set out for the dissemination of environmental information.

16. Article 6 deals with "public participation in decisions on specific activities". It applies in relation to decisions whether to permit proposed activities listed in Annex I to the Convention or other activities which "may have a significant effect on the environment" (article 6(1)). Article 6 also provides for the public to have access to information relevant to decision-making, including a description of the significant effects of the proposed activity on the environment and the measures envisaged to prevent or reduce those effects, including emissions (article 6(6)). The public is to have an opportunity to comment on such proposals (article 6(7)). The public is to be informed of the decision taken on a proposal, together with the reasons and considerations on which the decision was based (article 6(9)). In this way, article 6 reflects several of the requirements for environmental impact assessment introduced within the EU in 1985

(Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment).

17. Article 7 requires each state party to make provision for the public to participate during the preparation of "plans and programmes relating to the environment", and to provide necessary information to the public. Each state party, to the extent appropriate, shall also endeavour to provide opportunities for public participation in the preparation of "policies relating to the environment".

18. Article 8 requires each state party to strive to promote effective public participation at an appropriate stage during the preparation by public authorities of executive regulations and other generally applicable legally binding rules "that may have a significant effect on the environment".

19. Article 9 is entitled "Access to Justice". Article 9(1) requires each state party to ensure that any person who considers that article 4 has been breached has access to "a review procedure before a court of law or another independent and impartial body established by law".

20. Article 9(2) requires each state party to ensure that members of the public with a sufficient interest (or, alternatively, who maintain that their rights have been impaired) have access to a review procedure before a court of law or another independent and impartial body established by law "to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided under national law and without prejudice to [article 9(3)], of other relevant provisions of this Convention".

21. The relevant part of article 9(3) is set out at para 2 above, which is to apply "[i]n addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above".

22. Article 9(4) states:

> "In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible."

23. In summary, article 9(1) and (2) define the circumstances in which a state party should provide procedures before a court or independent body for members of the public to pursue breaches of the Convention specifically under articles 4 and 6 (public access to environmental information and participation in decisions on activities affecting the environment). In addition, article 9(3) requires a state party to provide judicial or administrative procedures for members of the public to challenge contraventions of "provisions of national law relating to the environment" by public authorities or private persons. Article 9(4) then requires each of the procedures under article 9(1) to (3) to provide adequate and effective remedies which are fair, equitable, timely and "not prohibitively expensive".

24. The Convention does not prevent a state party from having measures which provide for broader access to information and justice in environmental matters and more extensive public participation in decision-making: article 3(5).

25. A Compliance Committee has been established pursuant to article 15, which provides:

> "The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a *non-confrontational, non-judicial and consultative nature* for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention." (Emphasis supplied.)

26. In *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51 this court drew some support from a decision of the Compliance Committee for its conclusion that there had been no procedural unfairness in that case. Lord Carnwath observed that such decisions "deserve respect on issues relating to standards of public participation" (para 100); see also *Austin v Miller Argent (South Wales) Ltd* [2014] EWCA Civ 1012; [2015] 1 WLR 62 ("*Austin*"), para 9. But the Compliance Committee's decisions do not create binding rulings, nor are they analogous to the decisions of an international court or tribunal. Also, by reason of the non-confrontational, non-judicial and consultative nature of the reviews carried out by the Compliance Committee, they may not contain rigorous legal analysis of a kind which would be found in a judicial adjudication on the interpretation and application of an international treaty: compare *R (AB) v Secretary of State for Justice* [2021] UKSC 28; [2022] AC 487, paras 64–67.

27. In any event, the decisions of the Compliance Committee cited in the Court of Appeal and referred to in the submissions in this court provide only limited assistance on

the meaning of the phrase "provisions of … national law relating to the environment" in article 9(3). They indicate that the concept of "national law" is not limited to wording in legislation but also includes principles laid down in domestic case law (Report of the Compliance Committee meeting on 14–16 June 2006, Communication Belgium ACCC/C/2005/11, paras 37–38. They also indicate that an international treaty which is incorporated into national law so as to be directly applicable by the national courts forms part of national law (Report of the Compliance Committee meeting on 14 March 2005, Communication Kazakhstan ACCC/C/2004/2, paras 19–28; Report of the Compliance Committee meeting on 14 March 2005, Communication Ukraine ACCC/C/2004/3, para 24). It is unnecessary to examine these decisions further, because it is common ground in this appeal that both these forms of domestic law in England and Wales are part of "national law" for the purposes of article 9(3), as indeed follows from an interpretation of that provision which gives that phrase its natural meaning in context. The question remains whether any particular provision of national law, including a provision of those forms of national law, is a provision "relating to the environment" within the meaning of article 9(3), so as to engage the obligation under article 9(4).

28. Reference was also made to the Implementation Guide to the Aarhus Convention produced by the UN Economic Commission for Europe (2nd edition, 2014). While the Guide is an explanatory document, which, if appropriate, may be taken into consideration, among other relevant material, for the purpose of interpreting the Convention, it has no binding force: *Fish Legal v Information Commissioner* (Case C-279/12) [2014] QB 521, para 38. The Implementation Guide does not provide assistance on the point regarding the interpretation of article 9(3) at issue in this appeal.

29. The parties and interveners sought to derive support for their submissions from the travaux préparatoires for the Convention. For reasons explained below (paras 33–45), these also do not assist.

The Vienna Convention on the Law of Treaties

30. In this case, it is necessary for the domestic courts to interpret article 9(3), even though it is a provision in an international treaty, because the definition of "Aarhus Convention claim" in CPR Part 46.24(2)(a) has the effect of incorporating that provision into domestic law.

31. The Vienna Convention on the Law of Treaties ("the Vienna Convention") sets out the framework for that exercise, as explained in *JTI Polska sp z oo v Jakubowski* [2023] UKSC 19; [2024] AC 621 ("*JTI Polska*"), paras 22–36, and *Infrastructure Services Luxembourg SARL v Kingdom of Spain* [2026] UKSC 9; [2026] 2 WLR 581 ("*Infrastructure Services*"), para 75. Articles 31 to 33 of the Vienna Convention provide:

"*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:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

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) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

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, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

…

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."

32. For the Aarhus Convention the English, French and Russian texts are equally authentic: article 22. As explained in *JTI Polska* (para 22) in relation to interpretation of the international convention at issue in that case, the correct approach is to interpret the English text "in a normal manner, appropriate for the interpretation of an international

convention, unconstrained by technical rules of English law, or by English precedent, but on broad principles of general acceptation". It is legitimate to look for assistance to the French or Russian texts whenever assistance is needed, not only in cases of ambiguity (ibid). As with the international convention at issue in *JTI Polska*, the objective of the Aarhus Convention is to produce uniformity in all contracting states and the court should try to harmonise interpretation, if possible; and to that end it is appropriate to have regard to the case law of other contracting states (ibid; and see *Infrastructure Services*, para 79). In the context of the Aarhus Convention, that guidance extends to the case law of the judicial organs of the European Union, since they have referred to the Convention for the purposes of interpreting EU law applicable in Member States—all of which, along with the European Union in its own right, are parties to the Convention.

The travaux préparatoires

33. The Convention was developed under the auspices of the United Nations Economic Commission for Europe ("UNECE"). It was adopted on 25 June 1998 after two years of negotiation. Official reports of the negotiating sessions were prepared.

34. There were to be three pillars in the Convention: access to environmental information, public participation in environmental decision-making and access to justice in environmental matters. As regards the last of these an early version of what became article 9 (draft clause 6(1)), presented at the First Session (11 April 1996) of the Working Group of the Committee on Environmental Policy which was charged with drafting the Convention, referred to access to justice in "judicial and quasi-judicial proceedings relating to … matters related to the protection of the environment".

35. At the Second Session (11 November 1996) there was a broad consensus that the Convention should deal with access to justice and that the provisions would require "careful wording" (Report of Second Session, p 2) and further clarification of what was meant by "matters related to the protection of the environment" (Annex 1 to that report). An informal drafting meeting took place to address this which produced a report for consideration at the Fifth Session (7 July 1997). The report recorded that some parties proposed that the provisions on access to justice should be confined to challenges in respect of breaches of obligations imposed by the Convention while others proposed that they should extend to the right to "challenge unlawful acts or omissions by private persons or public authorities which contravened specific provisions of national environmental law". Two options were presented for consideration which reflected these different views. As regards the latter, the formulation proposed referred to challenges to contraventions of "provisions of [the contracting state's] national environmental law". The Russian text has the same meaning. The French text is "allant à l'encontre des dispositions du droit national de l'environnement" which also has an equivalent meaning. In all three cases the focus of the relevant concept is on the quality of the national law, in that it has to have the character of environmental law.

36. By the Seventh Session, the provision on access to justice had been renumbered article 9 with the same two options under consideration. At the Eighth Session (17 December 1997) a single proposal for access to justice was adopted reflecting the second of the options with a change of language to read "provisions of its national law relating to the environment" (the final text of article 9(3)). The report of that session does not give any reason for the change in language. The Russian text was changed in the same way. The language in the French text remained the same.

37. Foodrise maintains that the change in the English and Russian texts indicated an intention to broaden the type of national law which is referred to and that the French text is also capable of bearing that wider meaning. However, I do not consider that the subtle change in language has any significance for present purposes. It does not indicate that any departure from or gloss on the ordinary meaning of the English text is required or justified. The important point throughout the negotiations, and reflected in the final text of article 9(3), is that its ambit was to be challenges regarding the proper application of national law which itself had the character of being concerned with environmental protection.

38. Foodrise also filed evidence on the appeal to this court from a witness who attended the negotiations for the Convention on behalf of ECO Forum, a coalition of environmental organisations which was invited by UNECE to observe the negotiations. This evidence was not available in the courts below. ECO Forum prepared a Report on the Eighth Session of the negotiations at which the drafting options for article 9(3) were discussed. The report offered an explanation for the proposed new text for article 9(3): "It 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'". A summary of the report (without this detail) was published online and remained available for a few years, which indicated that a copy of the full report could be obtained from ECO Forum. The online summary became unavailable many years ago.

39. Foodrise seeks to rely on the ECO Forum Report as part of the travaux préparatoires in relation to the adoption of the Convention. However, I do not accept the suggestion that the report is part of the travaux préparatoires relevant to the interpretation of the Convention.

40. The significance of travaux préparatoires, properly so identified, is that they are capable of affecting the true interpretation of the treaty to which they relate: see article 32 of the Vienna Convention. This has important implications for the nature of the materials which can qualify as travaux préparatoires. They have to be publicly available through time, since a treaty provision may fall to be applied at any time after it comes into effect and in principle anyone seeking to ascertain its meaning should be able to have access at that point in time to any information bearing on its true interpretation. The requirement of accessibility in order for a document or report to constitute part of the

travaux préparatoires was emphasised in *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 278 (Lord Wilberforce); and see *JTI Polska*, paras 33–36, and *Infrastructure Services*, para 77.

41. The travaux préparatoires must also come from an appropriately authoritative source, such as the official report of the negotiations which all the states party will have seen and had an opportunity to comment on. This is important, again because of the effect which the travaux préparatoires may have on the proper interpretation of a treaty, which creates obligations binding the states which are party to it. Accounts of what happened in the course of negotiating a treaty may be controversial and if those states have not had an opportunity to comment on a purported record of what happened it cannot be assumed that they would accept the accuracy of what is said in it and is alleged to affect the content of the obligations which they have accepted under the treaty.

42. The ECO Forum Report fails to satisfy these requirements. The report was never fully publicly accessible. Publication of a summary online which did not refer to the relevant point but only refers to another report which could be obtained on request is plainly inadequate, because people could not know from this that anything significant bearing on the meaning of the treaty would be included in that other report. And even the online summary became unavailable after a few years. Also, the ECO Forum Report was not produced under the auspices of the states which negotiated the treaty nor as an official report by the secretariat with responsibility for the negotiations. There is no suggestion that the states involved in the negotiations for the Convention were put on notice of the ECO Forum Report, still less given an opportunity to comment on it before it was produced.

43. I would add that, in making these points, I do not wish to give the impression that even if the ECO Forum Report did qualify as part of the travaux préparatoires of the Convention it has any significance in the context of the present appeal. The relevant issue is the correct interpretation of article 9(3), and the primary focus has to be on the ordinary meaning of the words used in their context and in the light of the object and purpose of the Convention: article 31(1) of the Vienna Convention. The explanation given in the ECO Forum Report does not take matters further than to indicate that the formulation adopted in article 9(3) is somewhat wider than "national environmental law", which is in any event clearly the position as a matter of ordinary language. It remains the case that article 9(3) is focused on alleged contraventions of national law having the quality that it relates to the environment.

44. Also, pursuant to article 32 of the Vienna Convention, travaux préparatoires are only relevant in order to confirm the meaning resulting from the application of article 31 of the Vienna Convention or to determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable (see the discussion in *JTI Polska*, para 32, and

Infrastructure Services, paras 76–77). In this case, the meaning arrived at by application of article 31 as set out below is clear and is not ambiguous or obscure such as to call for, or be capable of, clarification by reference to any travaux préparatoires in the form of the ECO Forum Report; does not lead to a result which is manifestly absurd or unreasonable; and would in any event be confirmed by the ECO Forum Report (if it were admitted as part of the travaux préparatoires).

45. It is the text of a treaty which sets out the obligations to which the contracting states have agreed to subject themselves. When reference is made to the travaux préparatoires in an effort to inform the interpretation of that text (in the sense of determining the meaning, rather than merely confirming the meaning arrived at pursuant to article 31 of the Vienna Convention), and hence to affect the content of those obligations, a court has to be confident that the travaux préparatoires really are a fair indication as to the obligations which the contracting states agreed. The documents relied upon "need to demonstrate the common intention or understanding of the parties to the treaty": *JTI Polska*, para 35. Accordingly, as Lord Wilberforce said in *Fothergill v Monarch Airlines Ltd* at p 278, they will only qualify as an aid to interpretation of the treaty if they "clearly and indisputably point[] to a definite legislative intention". See also *JTI Polska*, paras 29–32, and *Infrastructure Services*, paras 75–77. In my view, quite apart from the other objections to making reference to the ECO Forum Report, that report does not provide clear guidance as to the meaning which the contracting states intended article 9(3) to have.

Section IX of CPR Part 46: costs protection for Aarhus Convention claims

46. CPR Part 46.25 provides that CPR Part 46.26 to 46.28 apply where a claimant who is a member of the public states in the claim form that the claim is an Aarhus Convention claim and files a schedule of his or her financial resources, unless the claimant opts out of costs protection.

47. CPR Part 46.26 sets out the standard limits on the costs recoverable against a claimant or a defendant, unless varied under CPR Part 46.27.

48. Under CPR Part 46.27 the court may vary the limit on the costs recoverable from a party or may remove that limit altogether (CPR Part 46.27(1)), subject to the proceedings not becoming prohibitively expensive for the claimant (CPR Part 46.27(2) to (4)). A claimant's application to vary costs limits must be set out in the claim form. A defendant who wishes to deny that the claim is an Aarhus Convention claim must do so in their acknowledgement of service and must set out their grounds for such denial (CPR Part 46.28(1)). Applications to vary costs limits must be determined by the court at the earliest opportunity, unless there is subsequently a significant change in circumstances (CPR Part 46.27(5) to (7)).

49. Where a defendant has denied in their acknowledgement of service that the claim is an Aarhus Convention claim, CPR Part 46.26 continues to apply unless and until the court determines that the claim is not an Aarhus Convention claim (CPR Part 46.28(1)).

50. If there is a dispute, the determination of whether a claim is an Aarhus Convention claim must be made at the earliest opportunity (CPR Part 46.28(2)). Typically, this will be when a judge first considers whether to grant permission to apply for judicial review or an equivalent statutory review. Although a decision on whether to grant permission often turns upon the arguability of the grounds of challenge, the issue of whether a claim falls within Section IX of CPR Part 46 requires a definitive assessment by the court of whether that claim is an Aarhus Convention claim within the meaning of CPR Part 46.24(2)(a), or not. It is not a question of it being arguable that it might be an Aarhus Convention claim. The parties, and in particular the claimant, need to know from an early stage of the proceedings whether costs protection is going to apply or not: the claimant may decide to discontinue if it does not. The relevant costs consequences follow from that early determination.

51. The effective operation of the costs protection regime for Aarhus Convention claims contained in Section IX of CPR Part 46 therefore depends upon there being a reasonably clear test for what qualifies as such a claim (that is, a clear test as to what qualifies as an allegation of contravention of a provision of national law relating to the environment), which is capable of being applied at the outset of legal proceedings in which it is claimed there has been such a contravention. This reflects an important implicit feature of the Convention itself. The due operation of article 9(3) and (4) requires that they should be interpreted as establishing a reasonably clear test for cases falling within their scope, because those provisions are intended to provide assurance to persons bringing claims that the cost to them of doing so will be kept within comparatively modest bounds, so as to minimise to that extent the deterrent effect of being exposed to costs liability by doing that.

52. CPR Part 46.25(1) requires a claimant to state whether the claim is said to be an Aarhus Convention claim. Form N461 also requires the claimant to give reasons in support of that statement. So ordinarily a claimant should explain whether the claim is said to fall within paragraph (1), (2) or (3) of article 9 and why that is so. Where a claimant relies upon article 9(3) they will need to explain in the claim form which provisions of national law relating to the environment are said to be contravened.

Costs capping orders under sections 88–89 of the Criminal Justice and Courts Act 2015

53. Sections 88 and 89 of the Criminal Justice and Courts Act 2015 ("the CJCA 2015") make provision for a different form of costs protection in relation to judicial review

proceedings: a costs capping order ("CCO"). A CCO may be made by the High Court or the Court of Appeal to limit or remove the liability of a party to pay another party's costs in connection with judicial review proceedings. Such an order is available in more restricted circumstances than a costs protection order in respect of an Aarhus Convention claim. A CCO may not be made in relation to a judicial review claim which is an Aarhus Convention claim within Section IX of CPR Part 46: reg 2 of the Criminal Justice and Courts Act 2015 (Disapplication of Sections 88 and 89) Regulations 2017 (SI 2017/100), made pursuant to section 90(1) of the CJCA 2015.

54. It is not necessary to examine these provisions in detail on this appeal. Foodrise applied to Lang J for a CCO in the alternative to its claim for costs protection under Section IX of CPR Part 46. It was not necessary for Lang J to determine that application, since she decided that Foodrise's judicial review claim was an Aarhus Convention claim within Section IX of CPR Part 46. The Court of Appeal did not consider Foodrise's application for a CCO. It remains open to Foodrise to renew its application for a CCO. I express no view as to its prospects of success if it chooses to do so.

Factual background

(a) The Taxation (Cross-Border Trade) Act 2018

55. Part 1 of the Taxation (Cross-Border Trade) Act 2018 ("the 2018 Act") is concerned with import duty. The remaining provisions of the Act are concerned with export duty (Part 2), VAT (Part 3), excise duties (Part 4), VAT and duties in connection with withdrawal from the EU (Part 5) and related matters (Part 6). The structure of the 2018 Act is reflected in its long title, the material part of which reads:

> "An Act to impose and regulate a duty of customs by reference to the importation of goods into the United Kingdom".

Those general purposes of the Act are not concerned with the environment, or with the protection or regulation of the environment.

56. Section 1 provides for the charging of import duty on the importation of chargeable goods into the UK. Section 2 provides that goods are chargeable to import duty unless they are "domestic goods" within the meaning of section 33.

57. By section 7(1) the amount of import duty applicable to goods is determined by the "customs tariff" in section 8, as amended or adjusted according to sections 9 to 15, which deal with preferential rates and quotas, among other things.

58. The customs tariff is a system established by regulations which classifies goods according to their nature, origin or any other factor and specifies rates of import duty applicable to goods within a class or code by reference to value, volume, weight or any other measure of their quantity or size (section 8(1) and (2)). Section 8(5) provides:

> "(5) In considering the rate of import duty that ought to apply to any goods in a standard case, the Treasury must have regard to—
>
> (a) the interests of consumers in the United Kingdom,
>
> (b) the interests of producers in the United Kingdom of the goods concerned,
>
> (c) the desirability of maintaining and promoting the external trade of the United Kingdom,
>
> (d) the desirability of maintaining and promoting productivity in the United Kingdom, and
>
> (e) the extent to which the goods concerned are subject to competition."

The customs tariff is set out in the Customs Tariff (Establishment) (EU Exit) Regulations 2020 (SI 2020 No 1430). It is subject to amendment and adjustment by regulations made under Part 1 of the 2018 Act.

59. Section 9 enables HM Treasury, on the recommendation of the Secretary of State, to make regulations for giving effect to "arrangements" made with a government of a country or territory outside the UK providing for a lower rate of duty than under the customs tariff.

60. Section 10 enables the Secretary of State to make regulations to establish a trade preference scheme reducing the rate of import duty in the customs tariff for goods originating from an eligible developing country.

61. Section 11 provides for regulations to determine the amount of import duty applicable to goods subject to a quota, either as a result of arrangements with a foreign government or a decision by HM Treasury.

62. Section 12 enables HM Treasury to suspend a tariff by making regulations for a lower rate of import duty on specified goods for a specified period. Paragraph 82 of the Explanatory Notes to the Bill which became the 2018 Act explains that the object of this is to encourage trade and support domestic production so that UK businesses have access to the supplies they need.

63. Section 13 of and Schedules 4 to 5A to the 2018 Act enable the rate of import duty to be raised in response to the dumping of foreign goods, foreign subsidies and certain increases in imports which cause serious injury to UK industry or producers.

64. Section 14 enables HM Treasury to make regulations to increase the rate of import duty on specified agricultural goods if the volume of imports exceeds, or the price of imports falls below, specified trigger levels. Paragraphs 87 to 90 of the Explanatory Notes state that, as permitted by article 5 of the World Trade Organisation ("WTO") Agreement on Agriculture, this provision enables the UK Government to protect domestic agriculture.

65. Section 15 provides that where a dispute has arisen between the UK Government and a foreign government and the former considers that (having regard to the matters set out in section 28 and any other relevant matters) it is appropriate to deal with the issue by varying the amount of import duty on goods originating from that other country, the Secretary of State may make regulations to that effect.

66. Section 28 provides:

> "**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,
>
> (c) HMRC,
>
> (d) the TRA, and

(e) any other public body,

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 the function.

(2) This section is not to be read as affecting the circumstances in which any obligation to have regard to such matters would otherwise have arisen."

67. There is no general definition of "international arrangements". Section 37(1) provides that "'arrangements' includes an understanding of any kind". The 2018 Act contains provisions where the word "arrangements" is used as part of a specific term of art, eg "international excise arrangements" (section 46(9)).

68. Paragraph 130 of the Explanatory Notes states:

"Clause 28 [which became section 28] places a requirement upon specified persons, departments, and bodies exercising functions specified in Part 1 of this Bill to have regard to international arrangements that the UK is a party to and that are relevant to the exercise of that function. This would, for example, include agreements with the WTO."

(b) The decision to enter into the FTA and to make the 2023 Regulations

69. Between 20 July 2018 and 26 October 2018 the Department for International Trade (at the time the Regulations were made, the Department for Business and Trade: "the Department") conducted a public consultation regarding the approach to a proposed FTA between the UK and Australia. On 17 June 2020 the Department published the UK's Strategic Approach to negotiations for such a proposed FTA ("the Strategic Approach"), which reflected its response to the public consultation.

70. The Strategic Approach stated that a full impact assessment would be published prior to implementation of an FTA and that once the FTA had been negotiated "the Government will publish a full Impact Assessment based upon the provisions of the agreement".

71. On 16/17 December 2021 the UK and Australia signed the FTA, which aims to establish a free trade area between the two countries. It was subject to ratification before coming into force. The FTA provides for the progressive reduction or elimination of import duty on certain goods specified by the respective countries in schedules to the FTA.

72. In relation to beef meat for importation into the UK, customs duties were not to be eliminated immediately, but gradually over time by means of a mechanism called a tariff rate quota ("TRQ"). A TRQ allows a specified volume of goods, known as "in quota goods", to be subject to a reduced (or zero) rate of duty, while goods in excess of that ("out of quota goods") are subject to the higher customs duty which is otherwise applicable. Under the FTA, customs duties on beef meat are to be eliminated on 1 January of the eleventh year of it being in force. Until that date, in quota beef meat is not subject to customs duty, while out of quota beef meat does not benefit from any reduction in duty. The volume of the TRQ for beef meat rises progressively each year until the customs duties are eliminated.

73. On 16 December 2021, the date the UK signed the FTA, the Department published an impact assessment in relation to the economic, social and environmental impacts of the FTA ("the Impact Assessment"). Its stated aim was to provide Parliament and the public with a comprehensive assessment of the potential long run impacts of the FTA.

74. Chapter 6 of the Impact Assessment addresses "Impacts on the environment", including a section on carbon leakage risk. Foodrise maintains that the analysis in this section is undermined by a number of errors which affect the lawfulness of the decision to make the 2023 Regulations.

75. On 22/23 February 2023 the respondents made the 2023 Regulations to give effect to the UK's tariff commitments under the FTA. Regulation 1(2) stated that the Regulations were to come into force when the FTA entered into force under international law. That occurred on 31 May 2023.

(c) Foodrise's judicial review claim

76. The grounds of challenge in the judicial review claim brought by Foodrise for which Lang J granted permission have been summarised by Foodrise as follows:

> (1) Ground 1: The respondents erred in law in adopting the conclusion in the Impact Assessment that the available data was too inconsistent to allow for a meaningful assessment of the risk of carbon leakage from the implementation of

the FTA, in particular from a possible shift in the production of beef meat from the UK to Australia because:

> "(a) The Impact Assessment referred to two datasets, first the United Nations Food and Agricultural Organisation's 'Global Livestock Environmental Assessment Model' ('GLEAM') which indicates that Australian beef production is materially more emissions intensive than that in the UK and second a paper by Poore and Nemecek ('P & N') showing that it is less. The treatment by the Impact Assessment of the P & N data as a valid alternative source to GLEAM was obviously wrong. GLEAM data relates to all beef produced from beef herds and dairy herds, whereas P & N data relates to dairy herds only;
>
> (b) The [respondents] failed to consider and to obtain information to answer an obvious question: which types of herd in the UK would be affected by the FTA—dairy herd, beef herd or both? The majority of the UK's production is from dairy herds which are less emissions-intensive than beef herds. This was a failure of the *Tameside* duty of reasonable inquiry (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014—"*Tameside*");
>
> (c) The [respondents] could not rationally have taken the decision to make the 2023 Regulations without knowledge of the matters set out in ground 1(a) and (b);
>
> (d) The conclusions in the Impact Assessment were influenced by the understanding of officials as to what would be acceptable to Ministers, or in other words predetermination."

(2) Ground 2: The respondents erred in adopting the conclusion in the Impact Assessment that GLEAM alone could not provide a reliable basis for assessing the risk of carbon leakage arising from the FTA. The concerns raised in the Impact Assessment about the uncertainty of future policy changes and technological advances were not a proper basis for declining to assess the impact of carbon leakage.

(3) Ground 3: The respondents failed to comply with section 28 of the 2018 Act by failing to take into account article 4(1)(f) of the UNFCCC and/or by misinterpreting that provision and the 2015 Paris Agreement on Climate Change

("the Paris Agreement"). The respondents wrongly considered that any increased generation of GHGs emissions through increased production of beef in Australia was a matter for assessment by the Australian Government, not the UK Government.

77. Neither the UNFCCC nor the Paris Agreement has been incorporated into domestic law. For the purposes of deciding this appeal it has not been suggested that the Paris Agreement adds anything to the claim under Ground 3 based on the UNFCCC.

78. Article 4 of the UNFCCC is entitled "Commitments" and provides so far as is relevant:

> "1. 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 change 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;
>
> …"

The decisions by Lang J and the Court of Appeal

79. Lang J reviewed a number of decisions on the scope of Aarhus Convention claims. In particular, she referred to her own decision in *R (ClientEarth) v Financial Conduct Authority* [2023] EWHC 3301 (Admin); [2024] Env LR 20 ("the *FCA* case") in which she had held that a challenge to the Financial Conduct Authority's approval of a share prospectus issued by a public company was not an Aarhus Convention claim because the relevant statutory provisions under which the approval had been given did not form part of national law relating to the environment. The purpose of the legislation was not to protect or regulate the environment.

80. However, in the present case Lang J decided (paras 12–14) that the claim falls within article 9(3) and (4), with the result that it is an Aarhus Convention claim and she was required to make a costs protection order. It was arguable that section 28 of the 2018 Act required the respondents to have regard to relevant international obligations, including obligations under the UNFCCC and the Paris Agreement which were directly concerned with environmental issues. Even absent section 28, the UNFCCC and the Paris Agreement were arguably relevant considerations in public law to which the respondents were required to have regard when making the 2023 Regulations. These points were sufficient to bring the claim within the scope of article 9(3), adopting a broad purposive approach.

81. HM Treasury and the Secretary of State appealed. They maintained their objection that Foodrise's judicial review claim is not an Aarhus Convention claim, because the laws which are said to have been contravened are not provisions of the UK's law "relating to the environment", within the meaning of article 9(3). Foodrise maintained its contention that its claim is an Aarhus Convention claim because section 28 of the 2018 Act required HM Treasury and the Secretary of State to take into account the UNFCCC and because the failure to have regard to increased GHG emissions through increased production of beef in Australia was in breach of principles of public law. Since the appellants adopted a policy to have regard to environmental matters, they were obliged to do so rationally and lawfully. The relevant laws or legal principles which were alleged to have been contravened were provisions of national law "relating to the environment", within the meaning of article 9(3).

82. The Court of Appeal gave permission to WWF UK ("WWF"), a charity concerned with environmental protection, to intervene by way of written submissions to support the decision of Lang J that Foodrise's claim is an Aarhus Convention claim. WWF made submissions which went beyond those made by Foodrise, to contend that the relevant phrase in article 9(3) covers all national rules which have some bearing, or are capable of producing some effect, on the environment.

83. The Court of Appeal allowed the appeal, rejecting the submissions made by Foodrise and the wider submissions made by WWF. The court accepted that the connection stated by the phrase "relating to" can have a broader or a narrower meaning depending on its context (para 76). The relevant caselaw of the Court of Justice of the European Union ("the CJEU") (*Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* (Case C-240/09) [2012] QB 606 ("the *Brown Bear* case"); *Deutsche Umwelthilfe (Réception des véhicules à moteur)* (Case C-873/19) [2023] Env LR 17) and the domestic courts (*Venn*, *Austin* and the *FCA* case) indicated that as used in article 9(3) in the context of the Convention the connection required between the relevant national law said to be infringed and the protection of the environment was comparatively narrow and tight. The subject of the relevant legal provision must be environmental or its purpose must be to protect or otherwise regulate the environment: para 81. The travaux préparatoires and the French text of the Convention

confirm that the phrase "relating to" is used as a strong, not a loose connecting concept (para 88). There is nothing in the scheme of the Convention as a whole to indicate that article 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 (para 96). Article 9(3) did not apply in relation to the public law claims brought by Foodrise.

84. In relation to Grounds 1 and 2 the Court of Appeal considered the interaction of general principles of public law and environmental law at paras 132–143. The court's view was that public law principles regulate the legality of administrative action taken by public authorities across the wide range of functions they carry out and do not form part of the UK's law relating to the environment (para 132). However, where a legal provision for the protection or regulation of the environment is contravened through a breach of a public law principle (eg a failure to comply with a duty or an irrational exercise of discretion in the carrying out of that law), a legal challenge would fall within the scope of article 9(3) (paras 63, 133 and 138). The Court of Appeal referred to the analysis by this court in *R (Friends of the Earth Limited) v Secretary of State for Transport* [2020] UKSC 52; [2021] PTSR 190 ("the *Heathrow Airport* case"), paras 116–121, of different categories of relevant consideration (para 136); if a legislative provision "requires a particular factor to be taken into account and the language and context demonstrates that the object of that provision is to protect or regulate the environment" then article 9(3) "will most likely be engaged", but if a piece of non-environmental law "simply impose[s] a general obligation to take into account all relevant considerations without more" it does not apply (para 138). The decision and approach in *Venn*, in which a challenge to the lawfulness of application of planning policy in relation to a planning decision was held to fall within article 9(3), was approved, but the reasoning in that case was held not to be applicable in the present case (paras 97–107, 133 and 138–142). Foodrise's claim was taken to raise the issue whether article 9(3) applies 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, as was suggested by the decision of Thornton J in *R (Friends of the Earth Limited) v Secretary of State for International Trade* [2021] EWHC 2369 (Admin) ("*Friends of the Earth*") (paras 66 and 134–135). The Court of Appeal held that article 9(3) does not apply in such a case and disapproved *Friends of the Earth* (paras 135–143 and 150).

85. As to Ground 3, the claim based on section 28 of the 2018 Act, the Court of Appeal held that the purpose of that provision was not to protect or regulate the environment, but that it only imposed an obligation to have regard to international arrangements to which the UK is a party that are relevant to the function being exercised (although the court did not say so in terms, it seems that they took the view that this was the function of regulation of trade rather than the function of protecting or regulating the environment): para 145. Further, the obligation imposed by section 28 was only that the Secretary of State or other authority should have regard to any arrangements relevant to the function being exercised, it then being left to their discretion how such arrangements should influence the decision to be taken (including whether any weight at all should be given to them), meaning that

this obligation could not amount to a legal provision for the protection or regulation of the environment: para 146. In addition, article 4(1)(f) of the UNFCCC contains only a high level requirement to take climate change considerations into account and to employ appropriate methods, such as impact assessments, with a view to minimising adverse effects on the environment; this again is a matter for evaluative judgment for the relevant decision-makers, and the complaint about how the respondents went about doing this (including as to whether they adequately fulfilled any *Tameside* duty of inquiry) depends upon an irrationality challenge pursuant to general public law principles and not any breach of the UK's law relating to the environment: paras 147–148.

The issues in the appeal to this court

86. The agreed statement of facts and issues states that the sole issue in the appeal is whether the Court of Appeal erred by construing article 9(3) too narrowly and concluding as a result that Foodrise's claim for judicial review did not fall within its scope. To address that question, it is necessary to construe article 9(3) by application of articles 31–33 of the Vienna Convention and to examine the interaction of article 9(3) and principles of English public law.

The parties' submissions

87. Ms Wakefield KC, for Foodrise, maintains the submissions presented by Foodrise in the courts below. Foodrise does not adopt the wider submissions made by WWF in the Court of Appeal regarding the interpretation and application of article 9(3). The Aarhus Convention has the purpose of promoting and facilitating environmental protection, meaning that article 9(3) should be interpreted expansively. In terms of the scheme of relevant considerations set out in *Heathrow Airport*, para 116, and discussed in *R v Somerset County Council, Ex p Fewings* [1995] 1 WLR 1037 ("*Fewings*"), 1049, article 9(3) applies (a) where there is a challenge to the lawfulness of a decision by reason of an alleged failure to have proper regard to a consideration of an environmental nature which statute requires, expressly or by implication, the decision-maker to take into account, as the Court of Appeal appears to have accepted; (b) where the challenge is by reason of an alleged failure to have proper regard to a consideration of an environmental nature which is not specified in statute as a mandatory consideration but which is an optional consideration which the decision-maker is entitled in its discretion to take into account or to disregard, and in the particular circumstances in which the decision was taken it is said that it was or would have been irrational for the decision-maker to fail to have regard to it because it is alleged to be so obviously material; and also (c) where a consideration of an environmental nature is of the type described in (b) and the decision-maker exercises its discretion to have regard to it, thereby coming under an obligation to assess it in a lawful and rational manner (including by reference to the *Tameside* duty to act reasonably in taking steps to inform itself about that consideration) and it is alleged that in doing so the decision-maker failed to have proper regard to that consideration. (These categories

are discussed in more detail at paras 132–142 below.) There is no basis for drawing any distinction between these three types of cases. The Court of Appeal erred by distinguishing the second and third types of case and holding that article 9(3) does not apply in relation to them.

88. In a situation where a decision-maker adopts a policy to have regard to considerations of an environmental nature even though there is no statutory obligation to do so, it comes under a legal obligation to have regard to its own policy, to direct itself correctly as to the meaning of its policy, and to comply with its policy in the absence of good reason to depart from it (see *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7; [2021] AC 765, para 124). Such an obligation is a provision of national law and it relates to the environment. The Government issued policy papers which stated that environmental factors would be taken into account before making the 2023 Regulations (in particular the Strategic Approach, para 69 above), which engaged this obligation. A complaint that the decision-maker breached the obligation falls within the scope of article 9(3). *Venn* supports this view and the Court of Appeal erred in treating it as a special case by reference to the way in which the general planning regime is used as the principal means for regulating and protecting the environment in domestic law.

89. Section 28 of the 2018 Act is a provision of national law which relates to the environment, in view of the obligation it imposes on HM Treasury and the Secretary of State to have regard to article 4(1)(f) of the UNFCCC. The reasons given by the Court of Appeal for rejecting that conclusion are unsustainable. That provision of the UNFCCC is part of a large corpus of international environmental treaties and arrangements which have an important bearing on the domestic implementation of trade arrangements, including international conventions on climate change (such as the Paris Agreement), trade in endangered species of plants and animals, trade in environmentally hazardous substances, biodiversity and the regulation of trade in organic pollutants and pesticides.

90. Sir James Eadie KC, for HM Treasury and the Secretary of State, maintains the submissions made in the courts below and seeks to uphold the decision of the Court of Appeal. He submits that article 9(3) applies to contraventions of domestic law, the purpose of which is to protect or regulate the environment.

91. Sir James Eadie rightly accepts that, where the provision of domestic law is statutory in form, there is no requirement for the whole of an enactment to be for that purpose. It suffices if a relevant provision serving that object is alleged to be contravened. The word "contravene" in article 9(3) does not have the effect that the provision only applies where a claim succeeds in establishing a contravention of a relevant law, "it includes a challenge founded on the contention that there has been such a contravention" (see *R (McMorn) v Natural England* [2015] EWHC 3297 (Admin); [2016] Env LR 15, para 239, per Ouseley J). Further, whether a claim falls within article 9(3) does not depend on its prospects of success: claims regarding an alleged contravention of a relevant

provision which are found to be unarguable so that permission to apply for judicial review is refused are within its scope (see eg *R (Lewis) v Welsh Ministers* [2022] EWHC 450 (Admin) and the *FCA* case). But these points do not assist Foodrise in this case.

92. The 2018 Act is concerned with import duty and other forms of taxation. None of its provisions, including section 28, has been enacted for the protection or regulation of the environment. The fact that the implementation of the 2018 Act may have an indirect effect on, for example, economic activity and, as a result, GHG emissions does not alter the nature of the legislation so that it is to be treated as national law relating to the environment. Most tax legislation and, indeed, legislation more generally, will impact on economic and social activity and hence may have indirect effects on one or more aspects of the environment. Laws of that kind do not relate to the environment within the meaning of article 9(3). A more specific focus on or nexus with environmental considerations is required.

93. General principles of public law are not legal provisions relating to the environment within the meaning of article 9(3). A breach of a principle of public law in the taking of a decision is not a contravention of a provision of national law relating to the environment simply because that decision has consequences for the environment. By contrast, where a legal provision for the protection or regulation of the environment is contravened through a breach of a public law principle which applies in relation to it (eg by an irrational exercise of discretion in implementing that provision or a failure to comply with the *Tameside* obligation to take reasonable steps to acquire relevant information) a legal challenge would fall within article 9(3). Such a breach would be so closely associated with the legal provision relating to the environment as to amount to a contravention of that provision falling within the scope of article 9(3). But that is not a feature of the claims brought by Foodrise. The Court of Appeal was right to hold that *Friends of the Earth* was wrongly decided.

94. The Court of Appeal was right to hold that Foodrise's claim based on section 28 of the 2018 Act does not fall within the scope of article 9(3), for the reasons they gave.

Analysis

(a) "Provisions of national law relating to the environment" as an autonomous concept

95. The notion of "provisions of [a contracting state's] national law relating to the environment" in article 9(3) is an autonomous concept, meaning that it is a concept derived from the Aarhus Convention which is independent of domestic law. That concept then has to be applied to the UK's domestic law in its various forms in order to determine which parts of domestic law qualify as falling within the concept. This is an important point. Much of the thrust of Ms Wakefield's submission was to the effect that domestic

public law and the way it reflects and interacts with statutory provisions has an internal logic, meaning that it is difficult to draw hard and fast distinctions between different parts of it. Accordingly, if it transpires that some aspect of domestic public law has a functional impact regarding protection of the environment in the circumstances of any particular case, the fact that that law does not draw firm distinctions means that all such aspects of domestic public law relate to the environment and fall within the scope of article 9(3). Against this, however, in applying article 9(3) the correct starting point is not the unity of domestic law but the meaning to be given to the autonomous concept which article 9(3) sets out.

(b) Interpretation of article 9(3) pursuant to the Vienna Convention

96. The purpose of the Aarhus Convention is to promote the protection of the environment. Reading article 9(3) according to the natural meaning of the words used in it and having regard to the context and purpose of the Convention, two points are clear. First, in the phrase "provisions of [a contracting state's] national law relating to the environment", "relating to the environment" has to be a quality of the particular provision of national law itself. Secondly, "relating to the environment" means relating to the protection of the environment. Reading the provision in this way indicates that the purpose of the legal provision in issue is an important part of the autonomous concept set out in article 9(3). The same points also appear from the language used in the French version of the Convention, where the phrase used is "des dispositions du droit national de l'environnement".

97. Therefore, to fall within that autonomous concept, a legal challenge has to be based on an alleged contravention of a provision of domestic law which itself relates to the protection of the environment in the sense indicated above. The focus of the provision of domestic law in question has to be the protection of the environment.

98. There is nothing in the travaux préparatoires which suggests any different meaning for those phrases in the English and French texts of the Aarhus Convention. No one suggested that the Russian text had any different meaning.

99. There is further support for this interpretation from the fact that article 9(3) is concerned with allegations regarding contraventions of specific "provisions" of national law. The word "provisions" is used in article 9(3) to refer to identifiable and specific provisions of national law, as it is used throughout the Convention to refer to identifiable provisions of the Convention or other legal instruments (see, in particular, article 1, article 3(5) and (8)–(9), article 6(1)(a) and (b), article 9(2) and (5), and article 15). Foodrise contends that "national law" means requirements which need to be satisfied in order for the relevant acts or omissions of private persons or public authorities to be lawful, which is the foundation for its submission that all aspects of domestic law which have a tendency

in the particular circumstances of the case to operate in a way which promotes the protection of the environment are covered by article 9(3). But as the respondents point out, this approach ignores the word "provisions" in the phrase "provisions of national law". Where there is a statutory scheme in any contracting state, which is the principal type of case for application of article 9(3), the natural inference from the use of that word is that article 9(3) is concerned with the focus of the particular statutory provision which applies.

100. The same is true when, in the context of English law applicable to public authorities, one is concerned with situations where they rely on powers conferred by the common law, either in the form of prerogative powers or common law powers (such as the power to enter into contracts). I find it difficult to think of a prerogative power or a common law power which relates to the environment, in the sense of being focused on the protection of the environment, but I would not rule out the possibility that one might be identified.

101. This is not to deny that general principles of public law which inform the operation of such a statutory provision may be relevant to the way in which it can be alleged there has been a contravention of that provision in a manner which falls within the scope of article 9(3). So, for example, if it is alleged that a public authority has applied a statutory provision concerned with the protection of the environment in a way which is unfair or irrational, that unfairness or irrationality would be so intimately connected with the proper application of the statutory provision itself that the allegation would fall within the scope of article 9(3), as the respondents rightly accept. In English law it is sometimes said that a requirement to act fairly or rationally is a condition implied into a statutory power as a matter of interpretation of the provision which confers that power and sometimes it is suggested that such requirements arise as a result of the application of general principles of public law. In order to apply article 9(3) it is not necessary to embark on such a refined and potentially difficult analysis. The important thing is that the statutory provision in issue should itself be focused on the protection of the environment.

102. A similar question arises in relation to provisions of national law which apply to private parties. This was addressed in *Austin* [2015] 1 WLR 62 in relation to the law of private nuisance. The Court of Appeal considered that although that law is primarily directed to protection of the claimant's property interests it might in certain circumstances also be directed to protection of the environment in a broader sense, and in cases where the claim had a close link with environmental matters regulated by the Convention and would confer significant public environmental benefits it could fall within the scope of article 9(3) and (4): paras 21–22. There is no reason why a provision of national law may not serve two or more purposes, one of which is the protection of the environment in the sense covered by article 9(3). The distinction drawn by the court appears to be in line with the interpretation of article 9(3) set out above. However, it is not necessary to examine this further in the context of this appeal and it would not be appropriate to do so, since we heard no detailed submissions on this issue.

103. The scheme of article 9 also indicates that the purpose of the provision of law which is in issue is the protection of the environment. As explained above (para 51), the applicability of article 9(3) is something which has to be capable of being determined definitively at the commencement of proceedings, so that it can be known from the outset whether costs protection is available or not. The object of article 9(3) is to give clear assurance to a claimant at the outset as to their liability in costs so that they are not deterred from bringing a relevant claim. This cannot turn on whether particular factual allegations regarding the impact of breach of a particular provision of law will have a detrimental impact on the environment, because it may only be at the end of the proceedings that it is known whether those allegations have been made good or not: see *R (McMorn) v Natural England* (see para 91 above), paras 242 and 244–245 (Ouseley J); *White v Plymouth City Council* [2024] EWHC 2854 (Admin); [2025] PTSR 596, para 79 (Sheldon J). Although article 9(3) applies to allegations of contravention of a relevant provision of national law, it assumes that it can be determined definitively in each case whether the relevant provision relates to the environment in the requisite sense (ie as something to be determined by the nature of the provision of law itself) and it does not extend to cover provisions of national law which *allegedly* relate to the environment (ie as something to be established later in the proceedings, depending on the particular circumstances in which the provision of law falls to be applied).

104. It is also significant that article 9(3) applies to challenges to the conduct of private persons as well as public authorities, by contrast with article 9(1) and (2). The question therefore has to be asked, how far did the contracting states intend to assume an obligation to remove the ordinary rights of private persons under their usual procedural laws to recover costs when sued unsuccessfully by another person? It is a strong thing for a state to assume an obligation to remove ordinary protections for private persons in this way, and this again indicates that the obligation assumed by contracting states under article 9(3) has a narrow application by reference to the nature of the provisions of national law which are referred to.

105. This point is supported by the terms of the Convention, which recognise that the interest of a private person who is a defendant in environmental proceedings is a relevant consideration in the operation of the Convention. The general provisions set out in article 3 include the statement in article 3(6) that the Convention "shall not require any derogation from existing rights of … access to justice in environmental matters". A private person who is sued in proceedings relating to the environment is entitled to access to justice, which could be undermined if they have to bear more of the costs risk than the person suing them, since that could deter them from going to court to defend the claim and induce them to try to settle instead (this is the opposite side of the same reasoning which is the rationale for the costs protection for a claimant set out in article 9(3) and article 9(4)). The specific provision in article 9(3) takes priority over the general provision in article 3(6), but only to the extent that it is clear that it does so. This indicates that the narrower interpretation of article 9(3) as proposed by the respondents is correct.

106. Similarly, article 3(8) of the Convention provides that claimants exercising their rights under the Convention "shall not be penalized, persecuted or harassed" for doing so, but also states: "This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings". Those powers exist, in part, to protect the interests of private persons who are sued in such proceedings. As with article 3(6), the specific provision in article 9(3) takes priority over this general provision, but only to the extent that it is clear that it does so. This again indicates that the narrower interpretation of article 9(3) is correct.

107. Accordingly, I agree with the observation of Holgate LJ ([2025] EWCA Civ 624, para 91) that there is no reason to think that the parties to the Convention intended to entitle members of the public to have a preferential procedure for challenging the decisions, acts or omissions of another citizen simply because the latter's contravention of *any* national law might have an impact or some effect on the environment. If the citizen who is sued is to be made to bear more of the costs risk associated with the proceedings than in ordinary litigation between private parties, the inference is that this is justified because of the nature of the law which they are said to have infringed.

108. Article 3(5) provides that the provisions of the Convention do not affect the right of a contracting state to maintain or introduce measures providing for "wider access to justice in environmental matters than required by this Convention". The inference from this is that the obligation in article 9(3) on access to justice is comparatively narrow and does not extend to a requirement to provide costs protection in relation to every action by a public authority or a private person which is alleged to have a detrimental effect on the environment. That is a matter which is left to the discretion of each contracting state.

109. The Convention employs the expression "relating to the environment" in provisions apart from article 9(3) in ways which also indicate it has the narrower meaning for which the respondents contend. Article 7 provides that contracting states "shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public". This is an obligation which it is only practicable for a state to comply with if it is able to tell with reasonable certainty at the time of formulating them which plans and programmes relate to the environment. In my view, this indicates that the plans and programmes referred to are those concerned with protection of the environment. The obligation does not depend upon speculation when a plan or programme is being formulated whether circumstances might arise in future in which it might have some impact of some kind on the environment.

110. A similar point arises in relation to article 5, which imposes obligations on contracting states to collect and disseminate environmental information. States have to make electronic databases accessible to the public which include: "Texts of legislation on

or relating to the environment" (article 5(3)(b)) and "policies, plans and programmes on or relating to the environment …" (article 5(3)(c)). Article 5(5)(a) provides that states are required to disseminate "Legislation and policy documents such as documents on strategies, policies, programmes and action plans relating to the environment, and progress reports on their implementation …". These are again obligations which it is only practicable for a state to comply with if it is able to tell with reasonable certainty at the time of setting up the databases or disseminating the information what legislation and which policies, plans and programmes etc relate to the environment. On a fair reading of these provisions, it cannot be inferred that states intended to assume a set of practically open-ended obligations of the kind which would be involved if the phrase "relating to the environment" were to be given the much wider interpretation proposed by Foodrise.

111. As Foodrise emphasises, the concepts of legislation and policies "on … the environment" in article 5 are narrower than the concepts of legislation and policies "relating to the environment", but this does not assist it in its submissions. If anything, I think the use of those expressions reinforces the narrow ambit of the obligations in article 5 and the requirement that contracting states need to be able to know to what legislation, policies and so forth they apply when adopted, without having to speculate about their practical impact in a range of circumstances in the future. The difference in the concepts is that legislation or policies "on the environment" have the protection of the environment as their direct subject matter (eg the Environmental Protection Act 1990) whereas legislation or policies "relating to the environment" have the protection of the environment as one of the purposes of particular provisions set out in them. Interpreting a legal instrument like the Convention as a coherent whole, it is natural to infer that the phrase "relating to the environment" has the same meaning throughout (subject to any contrary indication according to the particular context, but there is none).

112. Finally, by contrast with these provisions and article 9(3), there are a number of provisions in the Convention which are expressed to depend upon a test based on actual environmental effects: (i) article 2(3)(b) defines "environmental information" to include "administrative measures, environmental agreements, policies, legislation, plans and programmes affecting or likely to affect the elements of the environment [as set out in article 2(3)(a)]"; (ii) article 5(6) requires states to encourage operators "whose activities have a significant impact on the environment" to inform the public about "the environmental impact of their activities and products"; (iii) article 6, concerning public participation in decisions on specific activities, applies among other things to activities "which may have a significant effect on the environment" (article 6(1)(b), and see para 21 of Annex I to the Convention) and, by article 6(6)(b), requires the provision of information including "a description of the significant effects of the proposed activity on the environment"; and (iv) article 8 requires states to promote public participation during the preparation of "executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment". As the respondents submit, the inference is that the test under article 9(3) is narrower: it is not whether an alleged contravention of the provision of national law in question may have a significant impact on the environment, nor whether the national law itself may in fact have such an impact.

113. In this way, consideration of the general scheme of the Convention and the context it provides for the interpretation of article 9(3) support the narrower reading of that provision for which the respondents contend.

(c) Interpretation of article 9(3) in the authorities

114. That reading of article 9(3) is also consistent with, and to some extent is supported by, consideration of the principal authorities which have interpreted it.

115. In the *Brown Bear* case [2012] QB 606 the authorities in the Slovak Republic refused to grant the applicant, an environmental protection organisation, standing to take part in administrative proceedings commenced by hunting associations seeking to persuade the national authorities to grant a derogation from the protection for the environment under Council Directive 92/43/EEC (the Habitats Directive). The organisation appealed and a reference was made to the CJEU. The CJEU held that the Convention had become part of the corpus of EU law and that it had jurisdiction to interpret it. Article 9(3) of the Convention did not have direct effect but informed the obligations of a member state regarding the procedural rules which it could adopt in respect of judicial protection in fields covered by EU environmental law. The CJEU observed that although article 9(3) is drafted "in broad terms" (meaning that it did not create a clear and precise obligation capable of direct effect) it is "intended to ensure effective environmental protection" (para 46). The national court should interpret the national procedural rules governing access to administrative or judicial proceedings in a way which to the fullest extent possible was consistent with the objectives laid down in article 9(3), so as to accord the organisation standing to challenge before a court a decision in administrative proceedings which was liable to be contrary to EU environmental law (paras 49–52).

116. The judgment in the *Brown Bear* case is of limited assistance in the context of the issues in this appeal. The observation by the CJEU at para 46 (set out above) was in the context of enforcement of provisions of national law (the Habitats Directive, as applicable in the Slovak Republic) which on any view related to the environment within the meaning of article 9(3), whether one adopts the interpretation proposed by Foodrise or that proposed by the respondents. The CJEU's statement (para 46) that article 9(3) is drafted in broad terms was not directed to expressing a choice between those rival interpretations, but to explaining why it was not directly effective.

117. The Court of Appeal in *Venn* was concerned with the application of article 9(3) in relation to a challenge brought under section 288 of the Town and Country Planning Act 1990 to the grant of planning permission for residential development on a neighbour's property. The claimant sought costs protection by reference to article 9(3) of the Convention. His contention was that the decision had been made without proper regard

to a policy in the emerging local plan which restricted such development. The court held that the challenge fell within article 9(3), but that this provision had not at that time been given effect in domestic law, so he was not entitled to costs protection.

118. The challenge was based on the general provision in section 70(2) of the 1990 Act requiring the decision-maker to have regard to material considerations when deciding whether to grant planning permission, which the claimant argued included the policy. The defendant Secretary of State submitted (para 14) that the challenge was not directed to a contravention of national law relating to the environment within the meaning of article 9(3) because, unlike enactments which were specifically environmental laws (such as provisions in the Environmental Protection Act 1990), the general provision in section 70(2) could not be characterised in that way.

119. In view of the disagreement between the parties regarding the significance of *Venn*, I will set out the reasoning of the court in a little detail. Sullivan LJ, giving the lead judgment in the Court of Appeal, emphasised that article 9(3), as a provision in an international treaty, has an autonomous meaning ([2015] 1 WLR 2328, para 15). At paras 15–17 he continued:

> "15. … 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. One obvious example is the environmental impact assessment process, which is tied to the grant of planning permission. Another example is the requirement that local development plan documents must include policies that are designed to ensure that development in each local plan area contributes to the mitigation of, and adaptation to, climate change: see section 19(1A) of the Planning and Compulsory Purchase Act 2004.
>
> 16. As a consequence, 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 [the National Planning Policy Framework]), and local policies adopted by local planning authorities in their development plan documents. When preparing their local development plan documents local planning authorities must have regard to national policies; including the NPPF: see section 19(2)(a) of the 2004 Act. Decision-makers are then required by section 70(2) to have regard to such policies; and if

> the policies are contained in the development plan they must be followed unless material considerations indicate otherwise: see section 38(6) of the 2004 Act and para 22 of Lang J's judgment [2014] JPL 447.
>
> 17. 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 [the Aarhus Convention] 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 …. 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'."

120. The parties all accept that this reasoning in *Venn* is correct. However, they are divided regarding its significance. Ms Wakefield argues that *Venn* illustrates the wide ambit of the concept of provisions of national law relating to the environment in article 9(3). Sir James Eadie contends that the context in *Venn* was unusual and that the reasoning is compatible with and indeed supports the interpretation of article 9(3) for which the respondents contend.

121. In my view, it is Sir James Eadie's submission which is correct. The case concerned most directly a challenge in relation to the application of a provision in a policy rather than a provision of law. However, that issue was relevant because the legislative framework for planning control was specifically structured to ensure that the protection of the environment would be considered in the decision-making process in large part through the application of policies adopted by central government and by local planning authorities, as Sullivan LJ explained. One of the purposes of the general planning control system as framed by legislation is to take account of the need to protect the environment, and that legislation contemplates that that purpose will be carried into effect via the adoption of the plans and policies for which it makes provision to fill in the detail of the protection required. Therefore, the provisions of national law relating to the environment in issue in *Venn* were the legislative provisions relied upon by the claimant (specifically section 70(2) of the 1990 Act and sections 19 and 38 of the 2004 Act). Those provisions

are the essential foundation for the planning system to operate by way of a combination of legislation and policy as intended, including to protect the environment, and hence are concerned with the protection of the environment in the requisite sense within the ambit of article 9(3).

122. As I read the judgment, the point made by Sullivan LJ at para 17 is that where the provisions of national law in legislation have as one of their objects the protection of the environment, as the provisions setting up the regime to regulate planning for the development of land clearly do, and direct that this should be achieved through the adoption of plans and policies which are given a special status within that statutory framework, then legal challenges based on alleged failures to apply policy correctly are sufficiently closely related to provisions of national law concerned with the protection of the environment as to fall within the scope of article 9(3). I agree with that reasoning.

123. This may have been what Holgate LJ in the present case was referring to when he said that national law for the protection "or regulation" of the environment fell within article 9(3) (at paras 81 and 96). But in my view, having regard to the interpretation of article 9(3) set out above, law regulating the environment only falls within article 9(3) to the extent that such regulation includes as one of its objects the protection of the environment, as usually it will do. Holgate LJ analysed *Venn* as a case concerning a statutory provision which was not concerned with the protection of the environment but which required the application of policies which are concerned with the protection of the environment (see paras 103–106 and 140). In my view, that is not correct and is potentially confusing. As explained above, *Venn* is a case concerned with statutory provisions which do have as one of their objects the protection of the environment, through the adoption of policies directed, in material part, to that end.

124. This reasoning supports the interpretation of article 9(3) for which the respondents contend and is inconsistent with the submission of Foodrise. *Venn* is an illustration of the application of that interpretation in the specific and somewhat unusual context of the planning regime. The reasoning in the case shows that application of article 9(3) depends upon identifying a legal challenge based upon provisions of national law which are themselves concerned with the protection of the environment, in the sense that this is one of their objects.

125. In *North East Pylon Pressure Campaign v An Bord Pleanála* (Case C-470/16) [2018] Env LR 28 the CJEU explained that in article 9(3) and (4) of the Convention the contracting states "clearly sought to apply the protection against prohibitive expense to challenges aimed at enforcing environmental law in the abstract, without making such protection subject to the demonstration of any link with existing or, a fortiori, potential damage to the environment" (para 64). This statement emphasises that the application of article 9(3) depends upon examination of the quality of the law in question, rather than upon how contravention of it might in fact have an impact on the environment.

126. In *Heather Hill Management Co CLG v An Bord Pleanála* [2022] IESC 43; [2024] 2 IR 222 the Irish Supreme Court referred to its earlier decision in *Conway v Attorney General* [2017] IESC 13; [2017] 1 IR 53 and held (paras 176–181) that the application of article 9(3) depends on whether the legislative provision alleged to have been contravened is directly concerned with regulating conduct for environmental purposes, and that legislation which "may, in a remote sense, impact upon the environment" (para 179) is not within its scope. This is an approach to the interpretation of article 9(3) in line with that set out above.

127. In *Deutsche Umwelthilfe* (Case C-873/19) [2023] Env LR 17 the Grand Chamber of the CJEU held that national rules on standing should not be so strict as to make it effectively impossible for an environmental association to challenge acts or omissions falling within article 9(3). The association was seeking to bring a legal challenge based on an EU Regulation prohibiting devices which reduce the effectiveness of NOx control systems in diesel vehicles. The Grand Chamber determined that the Regulation had been promulgated for the purposes of environmental protection and therefore fell within article 9(3): see paras 51 ("the objective pursued by [the Regulation] is, as is apparent from recitals 1 and 6 thereof, to ensure a high level of environmental protection …") and 52 ("The finding that [the Regulation], and in particular article 5(2) thereof, has such an environmental objective and therefore forms part of the 'law relating to the environment', within the meaning of article 9(3) of the Aarhus Convention …"). The concern of the Grand Chamber to characterise the law as a relevant provision of law within the scope of article 9(3) by reference to its purpose in this way tends to support the interpretation proposed by the respondents.

128. The reasoning of the Court of Appeal in *Austin* also supports the respondents' submission. It held (para 22) that a private law claim for nuisance can fall within article 9(3) if "the nature of the complaint" has "a close link with the particular environmental matters regulated by the Convention", meaning the protection of the environment, and that the claim would "confer significant public environmental benefits". Thus the court considered that article 9(3) would apply where the object of the provision of national law in question was the protection of the environment.

129. Reference was also made to the decision of the General Court of the EU in *ClientEarth v European Investment Bank* (Case T-9/19) [2021] CMLR 17. This concerned Council Regulation (EC) No 1367/2006 (known as the Aarhus Regulation), introduced to apply rules derived from the Aarhus Convention to administrative decisions by EU institutions and bodies. The principal issue in the case was whether the Bank's approval of funding for a biomass power generation project was an administrative act under "environmental law" as defined in the Regulation. The Bank had adopted criteria in relation to the approval of such projects which included an emissions performance standard, so that an application which was not in line with EU targets to combat climate change could be ruled out (paras 28–31). The claimant challenged the Bank's assessment regarding the application of that standard. The court observed that it was well-established

that the criteria in the standard limited the Bank's power to approve funding for projects and for that reason were equivalent to EU legislation in the field of environmental law as defined in the Regulation; and the concept of "legislation" in the Regulation included taking into account as "environmental law" the provisions of a regulatory act adopted in that field (paras 123–124). At para 125 the General Court said that it was clear from article 9(3) and (4) of the Convention, in light of which the Regulation had to be construed, that "all acts of public authorities which run counter to the provisions of environmental law should be open to challenge" (which of course depends on what counts as a provision of environmental law in the sense that term has here). The concept of an administrative act falling within the Regulation had to be interpreted as encompassing "any measure of individual scope subject to requirements under secondary EU law which, regardless of their legal basis, are directly aimed at achieving the objectives of EU policy on the environment" (para 126). Accordingly, the General Court held that the decision of the Bank was such an administrative act and annulled it on the grounds that it had misapplied the standard. Since the Regulation was to be interpreted in light of article 9(3) of the Convention, this decision, in stating the principle that to qualify as environmental law secondary legislation had to be directly aimed at achieving the objectives of EU policy on the environment (which include the protection of the environment), tends to support the interpretation of article 9(3) for which the respondents contend. However, it is of limited assistance in the context of the present appeal, because once it was found that the standard constituted legislation, it was clear that on any view its purpose was to protect the environment.

130. On appeal by the Bank and the EU Commission, arguing that the decision of the Bank did not constitute an administrative act within the scope of the Regulation because it had not been adopted "under environmental law" and did not produce "legally binding and external effects", the CJEU (Third Chamber) upheld the decision and reasoning of the General Court: *European Investment Bank v ClientEarth* (Cases C-212/21 P and C-223/21 P) [2023] Env LR 13, in particular at paras 65–75 and 87–90. The judgment is consistent with the interpretation of article 9(3) which is set out above.

131. I consider *Friends of the Earth* and the *FCA* case at paras 150–153 below.

Application of the autonomous concept of national law relating to the environment in the context of domestic public law

(a) Provisions of national law in statute

132. It is helpful to focus in the first place on statutory provisions, including those derived from EU legislation such as the Habitats Directive. Statute is the primary source of law relating to the environment. Clearly, in the context of some statutory provisions, it may be inherently a requirement of the provision itself that considerations regarding the

protection of the environment should be taken into account, or protection of the environment may be the specific object or one of the specific objects of the provision itself (in the sense that the provision is aimed at promoting the protection of the environment). In such cases, it is straightforward to conclude that this is a provision of national law relating to the environment within the meaning of article 9(3).

133. Paradigm examples of such statutory provisions would be (i) a provision which confers a discretionary power on a public authority and states expressly that in exercising that power the authority must have regard to some aspect of environmental protection as a relevant factor; and (ii) a provision which requires a measure to be taken, eg to control the discharge of pollutants or emissions, where the (or one) clear or specific purpose of the measure is to achieve some form of environmental protection. A case which is the equivalent of example (i) would be if, instead of the statute expressly stating that some aspect of environmental protection is required to be taken into account as a relevant factor, that was a mandatory consideration by implication under the statute, on its proper construction. There is no sensible legal dividing line between relevant considerations which are made mandatory by express language or by implication.

134. A challenge to the application of a provision of national law of that kind, falling within article 9(3), would include complaints about breach of closely related obligations such as the obligations to act fairly and rationally when exercising the power and for the decision-maker to make reasonable inquiries to inform itself about the matters bearing on that relevant consideration: *Tameside* [1977] AC 1014, 1065. The significant point is that such challenges concern the proper application of the underlying provision which is itself a provision of national law "relating to the environment" in the requisite sense in article 9(3) as explained above.

135. As explained in the *Heathrow Airport* case [2021] PTSR 190, paras 116–121, there are three categories of consideration in relation to a discretionary statutory power: (1) those which the decision-maker is required to take into account (mandatory relevant considerations), (2) those to which the decision-maker is required not to have regard (mandatory irrelevant considerations), and (3) those "to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so" (per Simon Brown LJ in *Fewings* [1995] 1 WLR 1037, 1049), which I will call optional relevant considerations. As Simon Brown LJ said (ibid), considerations in the first category are "those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had". Similarly, in the New Zealand Court of Appeal in *CREEDNZ Inc v Governor General* [1981] NZLR 172, Cooke J explained (p 183) that "it is only when the statute expressly or impliedly identifies considerations required to be taken into account by [the relevant legal authority] as a matter of legal obligation that the court holds a decision invalid on the ground [of a failure to take into account a mandatory relevant consideration]".

136. Specification of mandatory relevant considerations is a matter of interpretation of the statutory provision in question: *R v Secretary of State for the Environment, Ex p Hammersmith and Fulham LBC* [1991] 1 AC 521, 597 (Lord Bridge of Harwich). Where the interpretation of the provision shows that protection of the environment is a mandatory relevant consideration, that means that Parliament has chosen to make it so and that it is an intrinsic feature of that provision of national law that, to that extent, its object is the protection of the environment so as to fall within the scope of article 9(3) if there is a challenge that proper regard has not been had to that consideration.

137. There may be cases where protection of the environment is a mandatory relevant consideration in the exercise of the statutory power, and the decision-maker has had regard to that, but the complaint being made is that it had impermissible regard to other considerations either because they were mandatory irrelevant considerations or because, even though they were mandatory or optional relevant considerations, the decision-maker acted unlawfully in some way in the manner in which it considered them (see para 134 above). In such a case it may well be that it is implicit in the legal challenge to the exercise of the statutory power that the decision-maker failed to have proper regard to the environmental protection mandatory consideration, because the other defects in the decision-making process distorted the weight given to that consideration. In other words, the application of article 9(3) would not depend on nice distinctions regarding the precise nature of the complaint being made, but once again would turn on the intrinsic quality of the provision of national law the due exercise of which is being challenged.

138. Some statutory provisions which confer a discretionary power on a public authority, while not making environmental protection a mandatory consideration, may on their proper interpretation make it an optional relevant consideration; that is to say a consideration which the decision-maker may choose to treat as relevant when exercising their discretionary power, whilst not being obliged to do so. But where in such a case the decision-maker does decide to treat the protection of the environment as a relevant consideration, general public law imposes obligations as to how it should go about doing that. In particular, the decision-maker may become subject to obligations to act fairly, to take reasonable steps to inform itself properly about that consideration (as set out in *Tameside*; see also *R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55; [2005] QB 37) and to make a rational assessment in relation to it in the same way as if it were a mandatory relevant consideration.

139. The principal question which arises on this appeal is whether those parts of public law which do not inherently relate to the environment as a function of the law itself as in the paradigm cases in para 133 above, but which give an option to a public authority decision-maker to treat protection of the environment as a relevant consideration, or potentially relevant consideration—and (if the authority chooses to do so) impose legal obligations regarding how that should be done— qualify as provisions of national law relating to the environment within the meaning of article 9(3).

140. In such cases, once a public authority decides to treat the environment as a relevant consideration and the law steps in to impose obligations as to how it should proceed, it might be said that those obligations (once brought into operation) relate to the environment. But they are not an inherent part of the law laid down by Parliament. The obligations are only triggered by a discretionary decision made by the decision-maker. In that sense they are associated with provisions of national law, but they are not an inherent feature of the statutory provision itself. Parliament has not specified that the protection of the environment should be a consideration.

141. In my view, at that point the linkage between the provisions of national law and the environment is completely contingent, depending as it does on the decision of a body which is subject to the law and is not itself a lawmaker. And looking at it from the perspective of the general rules of public law which are the source of obligations as to how the public authority should proceed if it decides to treat environmental matters as relevant, again the applicability of those general rules is entirely contingent on the choice made by the public authority. Those general rules constitute provisions of national law, but they are not inherently related to the environment; they are only brought into connection with the environment by reason of a choice made by the person who is subject to the law.

142. On the proper interpretation of article 9(3) as set out above, the contingency of the relationship between both statute law and general public law and the protection of the environment in cases where this is an optional relevant consideration, and the dependency of its relevance on a choice made by a person subject to the law, rather than a person with responsibility or authority to promulgate law, mean that these are not provisions of national law relating to the environment.

(b) Particular situations relevant to the exercise of discretionary statutory powers

143. In order to provide guidance regarding the limits of the autonomous concept of "provisions of national law relating to the environment" when applied to domestic public law, it is convenient to mention some particular cases involving the exercise of discretionary statutory powers.

144. First, there are cases where the statutory power, on proper construction, does not require consideration of the protection of the environment as a mandatory requirement and only makes it an optional requirement, but where in the particular circumstances of the case the only rational option available to the decision-maker is to take it into account: see *Heathrow Airport*, para 119. These cases involve the application of the general rationality standard in domestic public law (which is not a provision of national law relating to the environment within the meaning of article 9(3)) in relation to the application of a statutory power which also is not such a provision. Therefore,

notwithstanding a superficial similarity between such cases and those in which, on construction of the statutory power being exercised, protection of the environment is a mandatory relevant consideration, article 9(3) does not apply. The test for application of article 9(3) depends upon the nature of the provision of national law in question (tested at the outset of the proceedings: paras 51 and 103 above), not on allegations about how a provision of law which is not of the requisite nature should have been applied in the particular circumstances of the case.

145. Secondly, there are a number of situations in which a decision-maker may decide to have regard to optional relevant considerations where it chooses to structure the manner in which it approaches the exercise of its discretion in such a way as to attract certain legal obligations to consider the protection of the environment, by specifying that as a matter requiring consideration in its decision-making process. For example: (i) a decision-maker may adopt a structured approach to the exercise of a discretion, choosing criteria to be applied in a staged decision-making process as a guide for itself, in which case the rationality of its decision-making may in principle be tested by the rationality of its assessment whether its own chosen criteria have been satisfied: *R (The Law Society) v Lord Chancellor* [2015] EWCA Civ 230; [2016] 3 All ER 296, para 13; *R (BEL) v Secretary of State for Foreign and Commonwealth Affairs* [2025] EWHC 1970 (Admin); [2025] 4 WLR 103, para 112; (ii) a public authority may give an assurance regarding the procedure it will adopt in making a decision (so as to create a procedural legitimate expectation: eg *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629) or regarding how it will exercise a discretionary power in terms of result (so as to create a substantive legitimate expectation: eg *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755, paras 32–33) or may adopt a policy regarding its treatment of a range of cases (so that, even if the policy is not published, the authority is expected to follow the policy as a matter of good administration and in order to avoid capriciousness: eg *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59; [2015] 1 WLR 4546), in which cases an obligation arises under general public law whereby the authority is required to abide by its assurance or to follow its policy unless it can show that there is good reason to depart from it; and (iii) if a public authority gives an assurance that it will consult, or embarks upon a consultation, before taking a decision and in doing so indicates it wishes to be informed about matters regarding the protection of the environment or it is in fact given information about such matters, obligations arise under general public law requiring it to proceed in a particular way, including by consideration of those matters (eg *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, para 108; *R (Eveleigh) v Secretary of State for Work and Pensions* [2023] EWCA Civ 810; [2023] 1 WLR 3599, paras 91–92 and 98; and for the content of the duty see *R (Moseley) v Haringey LBC* [2014] UKSC 56; [2014] 1 WLR 3947, para 25, referring to *R v Brent LBC, Ex p Gunning* (1985) 84 LGR 168, 189).

146. In these situations article 9(3) does not apply, essentially for the same reasons as in relation to optional relevant considerations more generally. The statutory power in issue is not a provision of national law relating to the environment; nor are the obligations which arise by virtue of general principles of public law. Those general principles are not

focused on the protection of the environment in the requisite sense and the fact that in their application they require consideration of the protection of the environment is the result of a choice made by the decision-maker and not something which is inherent in the law itself, as required by article 9(3).

147. Thirdly, it is often the case in relation to discretionary statutory powers that unincorporated treaty obligations are an optional relevant consideration which the decision-maker may choose to take into account when exercising the power: see eg *R (Hurst) v London Northern District Coroner* [2007] UKHL 13; [2007] 2 AC 189, paras 55–56; *Heathrow Airport*, paras 118 and 122. If the decision-maker so chooses, it comes under an obligation to interpret the obligations in a way which is correct or in a manner which is at least tenable: see *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60; [2009] 1 AC 756, para 68; *R (Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport* [2024] EWCA Civ 1227; [2025] PTSR 726, paras 137–150; *R (Al-Haq) v Secretary of State for Business and Trade* [2025] EWHC 1615 (Admin), paras 68–116. The same analysis applies. The statutory power in issue in such cases is not a provision of national law relating to the environment; nor is the obligation arising under general principles of domestic public law as to how the decision-maker should approach interpretation of the treaty; nor is the provision of the treaty in issue, since it is not a provision of national law.

(c) Non-statutory provisions of national law: prerogative powers and common law powers of the Crown

148. These are addressed at paras 100-101 above. The analysis is essentially the same as for statutory powers. Other than in possible exceptional cases, protection of the environment when these powers are exercised is an optional relevant consideration which might also be chosen as a matter to be considered in the structured approaches to decision-making referred to in para 145 above. The possibility that this may be a matter which the decision-maker may choose to take into account does not bring these cases within the scope of article 9(3).

(d) Non-statutory provisions of national law: common law torts

149. As noted at para 102 above and as contemplated in *Austin*, it is possible that certain torts (eg private and public nuisance) may have as part of their objects the protection of the environment, although their primary purpose is to protect the rights of landowners to enjoy their property and the rights of the public to enjoy certain kinds of public activities. It is not necessary or appropriate to consider this possibility further here.

(e) Friends of the Earth and the FCA Case

150. The Court of Appeal analysed these decisions with care. In *Friends of the Earth* [2021] EWHC 2369 (Admin) Thornton J granted permission for the bringing of a judicial review of decisions of the Secretary of State and others under the Export and Investment Guarantees Act 1991 to provide $1.15bn of export finance for the development of offshore gas production facilities in Mozambique. The claimant contended that the defendants erred in treating the project as being consistent with the commitments of the UK and Mozambique under the Paris Agreement and failed to comply with their *Tameside* duty to obtain relevant information on that subject (the claims were also examined on an appeal to the Court of Appeal: [2023] EWCA Civ 14; [2023] 1 WLR 2011). Thornton J held that this was an Aarhus Convention claim and granted costs protection accordingly.

151. The defendants submitted that the claim fell outside article 9(3) because it was concerned with international law, not provisions of domestic law, and because it was a finance decision which did not relate to the environment. In answer to the first point, Thornton J reasoned (para 9) that the issue was whether the defendants, having chosen to comply with the Paris Agreement, had properly directed themselves on national law, including whether they took into account environmental considerations which were relevant as a result of that choice and properly investigated those considerations. In light of the interpretation of article 9(3) set out above and the reasoning at paras 132–142 above, this was an error. The Court of Appeal was right so to hold (paras 114–119 and 150).

152. In answer to the second point, Thornton J reasoned that the case was indistinguishable from *Venn*. The Secretary of State had a broad discretion under the 1991 Act in making funding decisions. He had adopted a policy to take account of government policy on environmental impacts and to comply with relevant international agreements. In light of *Venn*, no distinction could be drawn between the 1991 Act (which did not relate to the environment) and the policy to be followed in deciding whether to grant funding (paras 11–12). This too was an error. In *Venn*, unlike in *Friends of the Earth*, the applicable statutory provisions were directed to protection of the environment and the policies in issue were the means for giving effect to that statutory purpose: see paras 117–124 above. (The Court of Appeal was right to overrule Thornton J's decision on this point, but as I explain in those paragraphs some of its reasoning cannot be supported).

153. In the *FCA* case [2024] Env LR 20, on the other hand, Lang J rightly found that article 9(3) had no application. The case concerned approval by the FCA of a prospectus for investment in shares in an oil and gas company. Regulations made under the Financial Services and Markets Act 2000 required the prospectus to contain adequate information about the investment, including risk factors. The claimant challenged the FCA's decision to approve the prospectus on the basis that it did not contain an assessment of the company's climate change related financial risks. Lang J held (para 36) that a mere connection with the environment is insufficient to engage article 9(3). The 2000 Act and the regulations were concerned with investor protection and the proper functioning of the

market and did not form part of the UK's environmental law (paras 39–43): as she put it, "Their subject is not environmental, and their purpose is not to protect or otherwise regulate the environment". This reasoning is in line with the analysis set out above.

Application of article 9(3) to the claims brought by Foodrise

154. On the basis of the interpretation of article 9(3) and the analysis set out above, the first two claims by Foodrise (para 76 above) do not fall within article 9(3). They are concerned with the due application and factual analysis in respect of optional relevant considerations and are therefore not challenges based on contravention of provisions of national law relating to the environment in the relevant sense.

155. In my view, the same is true as regards Foodrise's third claim (para 76 above) involving its challenge based on alleged violation of section 28 of the 2018 Act. As explained above (paras 51 and 103), the question whether section 28 is a provision of national law relating to the environment (in the sense of having the protection of the environment as its object or one of its objects) has to be answered at the outset of proceedings by reference to the nature of the law itself, not the way in which the decision-maker might in their discretion seek to apply it.

156. According to the interpretation of article 9(3) set out above, the application of the autonomous concept of a provision of national law relating to the environment to a claim based on alleged infringement of section 28 depends upon whether Parliament itself has legislated in section 28 to require consideration of international agreements or arrangements for the protection of the environment, or has made that a specific object of the provision, or whether the decision to take them into account has been left to the administrative decision-makers. This corresponds to the division between mandatory relevant considerations and optional relevant considerations discussed in paras 132–142 above.

157. Section 28 (set out at para 66 above) states that in exercising their functions under the 2018 Act the respondents "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 the function". This is in general terms. The category of arrangements and the range of subject matters they deal with are both potentially very wide. Parliament has not specified which ones are to be identified as "relevant".

158. In my view, the effect of this mode of drafting is that there is a core of international arrangements which Parliament clearly intends must be taken into account under section 28 when exercising the statutory powers under the 2018 Act in the specific context of that statute and a penumbra of other international arrangements which may be treated as relevant if the decision-maker thinks it appropriate to do so (ie in relation to which the

obligation to have regard to them is conditional on an exercise of judgment by the decision-maker). Applying the autonomous concept in article 9(3), it is only if the Paris Agreement and/or article 4(1)(f) of the UNFCCC are in the core group of arrangements that an alleged infringement of section 28 with respect to them will qualify as an Aarhus Convention claim. If they are only in the penumbra then in substance and effect they are equivalent to optional relevant considerations and Foodrise's claim is not an Aarhus Convention claim.

159. Section 28 is located in an Act which is concerned with the imposition of import taxes. In that context, the principal object of section 28 is to require the Secretary of State and HM Treasury to consider international agreements (such as those entered into under the auspices of the WTO) which directly regulate the level at which such taxes may be charged. Those are international arrangements which Parliament intended should constitute the core set of arrangements to which the respondents were required to have regard by section 28. In the context of the 2018 Act it would plainly be contrary to the purpose of the Act and a misapplication of the respondents' discretionary powers (including the discretion accorded to them under section 28 itself) in the sense explained in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 to fail to have regard to those international arrangements.

160. However, the Paris Agreement and article 4(1)(f) of the UNFCCC are not in that core set of international arrangements. They are in the penumbra of international arrangements which the decision-makers may judge to be relevant, but are not obliged to do so. Their subject matter is peripheral and tangential to the matter for which the 2018 Act is legislating. Whether and to what extent they are to be regarded as "relevant" for the purposes of section 28 has been left to the judgment of the decision-makers. Therefore, Foodrise's third claim, based on an allegation that the respondents failed to have proper regard to article 4(1)(f) of the UNFCCC, is not an Aarhus Convention claim for the purposes of CPR Part 46.

Conclusion

161. For the reasons given above, which are somewhat different from those of the Court of Appeal, I would dismiss this appeal.