Neutral Citation No: [2025] NIKB 45 ***Judgment: approved by the court for handing down (subject to editorial corrections)****	***Ref:*** **HUM12795** ***ICOS No:*** **24/95795** ***Delivered:*** **26/06/2025**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY LIAM HABERLIN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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The Applicant appeared in person
Conor Fegan (instructed by Arthur Cox) for the Proposed Respondent
William Orbinson KC (instructed by TLT NI LLP) for the Notice Party

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HUMPHREYS J

Introduction

[1] The applicant is a resident of Eglinton who seeks leave to challenge a decision of the Planning Appeals Commission ('PAC') to grant planning permission for a housing development at Ballygudden Road in the village.

[2] The proposed development site is situated to the rear of the applicant's property and is adjacent to a field known as "The Points." The Castle River flows alongside The Points and close to the site.

The planning application

[3] A planning application for 97 units on the site was submitted in September 2017 by JP McGinnis/MG Famco Limited, the notice party to this application, to Derry City and Strabane District Council ('the council'). It was refused on 12 October 2021 for a single reason:

> "The proposal is contrary to the Derry Area Plan 2011 paragraph 2.5 of page 166 in that the woodland provides a strong defining edge to the south eastern edge of Eglinton and acts as a visual buffer to the more open agricultural

land along the Ballygudden Road. There will be a strong presumption against development in this area."

[4] This refusal was appealed to the PAC who dismissed the appeal on 31 March 2023.

[5] The notice party commenced judicial review proceedings and, by consent, the PAC decision was quashed on 8 June 2023 by Colton J and the appeal remitted to a different commissioner.

The commissioner's decision

[6] The notice party submitted a revised site layout plan reducing the number of dwellings from 97 to 77. A hearing took place on 6 November 2023 before Commissioner Mark Watson. On 2 August 2024 the appeal was allowed and planning permission granted for 77 units, together with the creation of new access, associated infrastructure and ancillary works, subject to a variety of conditions.

[7] The decision records that, post-hearing, the parties were afforded an opportunity to comment on flood mitigation measures to an area known as the 'scrape', which involved a change in the type of fencing. The objectors were also permitted to submit further information relating to ground works being undertaken on land adjacent to the appeal site. Both the council and the appellant developer were able to comment on this.

[8] The commissioner identified the main issues for determination on the appeal, namely whether the development would:

(i) Be in compliance with the Derry Area Plan;

(ii) Be at risk from flooding;

(iii) Constitute a quality residential environment;

(iv) Be at risk from unacceptably adverse noise and odour impacts;

(v) Adversely affect protected flora and fauna; and

(vi) Prejudice road safety and result in congestion.

[9] The commissioner found that the council's sole reason for refusal was not sustained. It had contended that there should be no development in the area of a linear strip of woodland associated with the Castle River Area of Local Nature Conservation and Amenity Importance. The commissioner held that the development was not within the area protected by this designation and the development complied with the Derry Area Plan taken as a whole.

[10] The issue of flooding was of central importance in the appeal. The objectors maintained that the proposed development was not compliant with Planning Policy Statement 15 ('PPS 15') on Planning and Flood Risk. Policy FLD 1 of PPS 15 provides that development will not be permitted within the 1 in 100-year fluvial flood plain unless the proposal falls within one of the exceptions to the policy.

[11] The commissioner found that the proposal did fall within an exception since the only area within the site which fell into the flood plain was proposed as amenity open space. Accordingly, in accordance with FLD1, planning permission would only be granted if the Flood Risk Assessment ('FRA') demonstrated that:

(a) All sources of flood risk to and from the proposed development had been identified; and

(b) There were adequate measures to manage and mitigate any increase in flood risk arising from the development.

[12] The commissioner considered the FRA dated July 2021 which accompanied the planning application. The objectors contended that the data modelling underpinning this FRA was inaccurate and related to site levels which existed prior to the removal of illegally dumped infill material at The Points. The commissioner noted that both the council and the Department for Infrastructure Rivers Division ('DfI Rivers') accepted the July 2021 modelling and, based on the evidence, he also accepted it. Similarly, the commissioner accepted the proposals for attenuation and drainage infrastructure contained in the FRA.

[13] The commissioner noted that the FRA Addendum document, dated September 2023, analysed a flooding event which had taken place in July 2022. Mitigation measures were proposed, including forming a low level area known as the 'scrape' to ensure run-off of any flood water away from the proposed dwellings. This area would be separated from the houses by a 1.8 metre paladin fence.

[14] The overall conclusion was that the proposed development would have no offsite effects attributable to it.

[15] The post-hearing submissions from the objectors focussed on the work to the area known as The Points which had been undertaken in April 2024. This was done in response to an enforcement notice served by the council in December 2018 in respect of unauthorised infilling. The objectors said that these works entailed the creation of an earthen bank, 240 metres in length, which appeared to have been installed to protect the new development from flooding but which would place other properties at risk. The objectors asked DfI Rivers on 30 April 2024 to remodel the flood plain.

[16] On 23 May 2024 the developer responded stating that the findings of the July 2021 FRA remained valid, the development was situated outside the flood plain and policy FLD1 was satisfied.

[17] The commissioner was not persuaded that these works invalidated the FRA and stated:

> "The matter of a potential earthworks bank along the western site boundary does not form part of the appeal development. Whilst the Objectors considered that no development on the appeal site should be allowed until DfI Rivers remodel the floodplain at The Points to factor in the more recent flood events and final post-enforcement works levels at The Points, I am not persuaded that this would be justification for withholding planning permission given the information before me." (para [40])

[18] The commissioner concluded that the objectors' concerns were not sustained and that there was no evidence that the levels used in the FRA were inaccurate or that its conclusions had been undermined. DfI Rivers, the agency with statutory competence, accepted the levels used. He was therefore satisfied that all sources of flood risk had been identified and that adequate measures to mitigate any risk were in place.

[19] In relation to the creation of a quality residential environment, the commissioner considered policy QD1 of PPS7 and found that the mini roundabout, part of the proposed development, fell partially within the designated Area of Townscape Character ('ATC'). Various objections were considered but the commissioner found that the development was acceptable and that the proposed design and arrangements did not offend any of the criteria within the relevant policy.

[20] The commissioner held that the proposal would not have an adverse impact on the trees along the northern and eastern boundaries of the site which were subject to Tree Preservation Orders ('the TPO trees').

[21] The objectors complained that the proposals were likely to harm the bat population and, more generally, that the developer's habitats information was out of date. The bat survey submitted by the developer was dated 30 August 2017. It identified no bat roosts on the site but two areas of bat activity. Both the Northern Ireland Environment Agency ('NIEA') and the council concluded that there had been no change to the condition of the site and therefore the survey remained valid. The commissioner found no evidence of any change of circumstances which would alter the survey's assessment and conclusions. He found that the relevant hedgerows could be retained and this secured by way of condition.

[22] The developer submitted a shadow Habitats Regulations Assessment ('HRA') at the time of the original application. It indicated that the development had the potential to impact upon the Lough Foyle Special Protection Area ('SPA') and the Lough Foyle Ramsar Site. It outlined the proposed mitigation measures which would

be taken to ameliorate these effects. Shared Environmental Services ('SES') stated that the development would not have an adverse effect on the integrity of any European designated site provided the mitigation measures were conditioned.

[23] The objectors argued that the proposed mitigation was unsatisfactory but the commissioner concluded that no persuasive evidence had been put forward to substantiate that contention and therefore these objections were not sustained.

[24] The commissioner was satisfied that the access to the development would not prejudice road safety or significantly inconvenience the flow of traffic and it therefore satisfied the requirements of policy AMP2 of PPS3. DfI Roads had raised no objection to the proposed scheme.

[25] The objectors also argued that the proposed mini roundabout would adversely affect the historical character of the village given its proximity to listed buildings within the ATC. This was rejected by the commissioner in the absence of any persuasive evidence. The concerns expressed were not shared by the Historic Environment Division of the Department for Communities.

[26] The appeal was therefore allowed and planning permission granted subject to a suite of conditions.

The grounds for judicial review

[27] The grounds of challenge are as follows:

(i) Illegality

[28] This centres on the requirements of FLD1 in PPS15 and the commissioner's acceptance of the FRA. The applicant says that the commissioner has effectively sanctioned development in the flood plain by failing to consider updated and accurate information.

(ii) Procedural Unfairness

[29] It is contended that the commissioner acted in a procedurally unfair manner by failing to adequately consider the objectors' representations and consult with DfI Rivers, and/or by failing to obtain an updated flood assessment from DfI Rivers.

(iii) Irrationality

[30] The applicant says that the PAC decision was irrational in that no reasonable decision maker could have arrived at it, that there was a failure to take into account

material considerations and that it was based on immaterial considerations in the form of outdated data and analysis.

(iv) Human Rights

[31] The claim is also made that the impugned decision breaches the rights enjoyed by residents, including the applicant, by virtue of articles 2 and 8 of the ECHR alongside article 1 of the First Protocol.

[32] Since there is considerable overlap between some of these grounds, it will be convenient to consider the application thematically.

Planning decisions and judicial review

[33] Before doing so, some fundamental principles should be recalled. The proper approach of a judicial review court exercising its supervisory jurisdiction in planning matters is uncontroversial and can be found in the judgment of Girvan J in *Re Bow Street Mall* [2006] NIQB 28. It will only intervene where there is a demonstrable error of law or the decision is irrational. Matters of planning judgement fall within the exclusive jurisdiction of the relevant decision maker. That exercise of judgement will entail the consideration of the appropriate weight to be given to any particular piece of evidence or contention.

[34] It is important to recognise, as the Court of Appeal observed in *Re McLaughlin's Application* [2024] NICA 18:

> "an application for judicial review is not an appeal against the merits of a planning decision." (para [11])

[35] On this basis, matters of planning judgement can only be impugned in the courts on the ground of irrationality. This applies equally to challenges grounded on claims of inadequate environmental information or a *Tameside* claim more generally (see *Re Bow Street Mall* at paras [43] and [76]).

[36] Irrationality is inevitably context sensitive and the courts recognise the expertise of the PAC in this field. As I said in *Re Belfast City Council's Application* [2024] NIKB 47:

> "The PAC is an independent, specialist, appellate body charged with the determination of planning appeals from councils and the Department. Its Commissioners are experts in the field and are familiar with the interpretation of planning policies. A judicial review court, whilst remaining the ultimate arbiter of the interpretation of policy, should afford to the PAC an appropriate level of

> deference when exercising its supervisory jurisdiction" (para [27])

[37] The PAC is a quasi-judicial body which makes determinations on the basis of the evidence before it. It is incumbent on parties to adduce such evidence and place the material they rely upon before the commissioner – see, for instance, the decision of Holgate J in *Mead Realisations v Secretary of State for Levelling Up, Housing and Communities* [2024] EWHC 279 (Admin) at para [182]:

> "As in civil proceedings more generally, resources for planning inquiries and hearings are finite and need to be distributed efficiently between all parties seeking to have planning issues resolved. There is therefore a strong public interest in the finality of such proceedings. Parties are generally expected to bring forward their whole case when a matter is heard and determined."

[38] Section 59(1) of the Planning Act (Northern Ireland) 2011 ('the 2011 Act') specifically provides:

> "In an appeal under section 58, a party to the proceedings is not to raise any matter which was not before the council or, as the case may be, the Department at the time the decision appealed against was made unless that party can demonstrate to the satisfaction of the planning appeals commission—
>
> (a) that the matter could not have been raised before that time, or
>
> (b) that its not being raised before that time was a consequence of exceptional circumstances."

[39] Section 45 of the 2011 Act requires the decision maker to have regard to the local development plan and to any other material considerations.

[40] Planning policy statements represent material considerations which must be taken into account by the decision maker. They do not, in the words of Carswell LCJ in *Re Stewart's Application* [2003] NICA 4 form a straitjacket to be slavishly followed in all circumstances.

Flooding

[41] In essence, the applicant says that the commissioner acted unlawfully and irrationally by accepting the July 2021 FRA and misapplying both PPS15 and PPS7. It is argued that once it was drawn to his attention in April 2024 that infill was being

removed from The Points, the 2021 FRA ought to have been treated as obsolete. Reliance is placed on policy FLD1 of PPS15 which states:

> "The following flood protection and management measures proposed as part of the planning application, in order to facilitate development within flood plains, will not be acceptable:
>
> - new hard engineered or earthen bank flood defences"

[42] Policy QD1 of PPS7 states that planning permission will only be granted for a new residential development where it is demonstrated that the proposal will create a quality and sustainable residential environment. Such developments are expected to conform to certain criteria, including:

> "(h) the design and layout will not create conflict with adjacent land uses and there is no unacceptable adverse effect on existing or proposed properties in terms of overlooking, loss of light, overshadowing, noise or other disturbance; and
>
> (i) the development is designed to deter crime and promote personal safety."

[43] The applicant states that the commissioner erred by failing to consider that the proposed development would contravene these criteria and by not applying the precautionary principle.

[44] It is important to place these assertions in the evidential context. Unauthorised infill appears to have occurred at The Points in 2015 and an enforcement notice was issued on 18 December 2018. The original planning application was made on 29 September 2017 and was accompanied by the 2017 FRA.

[45] Annex D to PPS15 explains that proposals which accord with the policies must be accompanied by an FRA, carried out by a suitably qualified and competent professional. The public has access to the Strategic Flood Map for Northern Ireland, produced by DfI Rivers, and any proposed development located in proximity to the margins of the flood plain requires an FRA. DfI Rivers itself does not carry out such assessments but will consider and comment on those produced by developers in the course of planning applications.

[46] In this case, an updated FRA was produced in July 2021 by McCloy Consulting, a firm of water and environmental consultants. This followed a significant flooding event in the area in August 2017 and the updated flood maps produced in 2020. It was prompted by a request from DfI Rivers raising the issue of the change in ground profile brought about by the removal of land in response to the enforcement notice,

such works having been carried out in February and March 2019. The authors record that the ground model was updated with a site-specific survey to take account of changed levels along the western boundary.

[47] The report concluded:

> "All proposed built development lies outside the 1% AEP fluvial floodplain and complies with Policy FLD1. The flood data takes into account recent (2017) flooding and the removal of land infill along the western site boundary. Amenity space within the 1% AEP floodplain is intended to be acceptable as an exception to FLD1."

[48] A further flooding event occurred in July 2022 and, in response to this, McCloy Consulting produced the FRA Addendum dated September 2023. It concludes that the 2022 flooding was a surface water rather than fluvial event and there was no evidence that the previous assessment in relation to fluvial flooding was an underestimate or otherwise unfit for purpose. Therefore, the findings of the previous FRA in this regard were unchanged. The addendum addressed the issue of surface water flooding and concluded that the proposed development was resilient and put forward proposed mitigation measures. These included the creation of a low lying scrape to ensure the run off of any flood waters.

[49] At no time did the objectors adduce any expert evidence to contradict the evidence of the McCloy Consulting FRA and addendum.

[50] Following the appeal hearing and the commissioner's site visit, further submissions were provided by the developer in relation to the scrape, including the provision of a 1800 mm high paladin fence and these were responded to by the objectors. On 22 December 2023, it was recorded that DfI Rivers were content with the developer's proposals in this area.

[51] On 30 April 2024, the objectors contacted the PAC to indicate that further works had been undertaken at The Points and that, as a result, the 2021 FRA ground levels had been rendered obsolete. By a response dated 14 May 2024, the PAC requested further information which was forthcoming from McCloy Consulting on 23 May 2024. This stated that an analysis had been undertaken to project predicted water levels from the July 2021 FRA onto the May 2024 grounds levels which revealed that water levels would reduce slightly. As a result, the findings of the July 2021 FRA remained valid.

[52] On 30 May 2024, the objectors disagreed, contending that the 2021 FRA was now void, that DfI Rivers should be required to remodel the flood plain before any planning applications could be considered and stating that the earthen bank had placed existing properties at risk of flooding.

[53] The council commented on 28 May 2024:

> "Council have also sought advice from DfI Rivers in relation to the latest issue raised by third parties to the appeal. DfI Rivers have confirmed that material has been excavated from the field between the appeal site and the Castle River. DfI Rivers also advise that it is likely that this work will alter the flood plain extents, however, the extent of this is currently unknown."

[54] It is clear that the earthen bank structure located at The Points was not "proposed as part of the planning application" and could not therefore contravene policy FLD1 of PPS15.

[55] The applicant raises a discrete point, averring in his affidavit that it is his understanding that house no. 25 in the proposed development was situated within the flood plain. At para [69] of his decision, the commissioner determined, on the evidence, that this would not be the case. He explicitly found that there would be no buildings within the floodplain.

[56] It is also evident that the commissioner had before him all the relevant and competing submissions of the parties, including the up to date opinion of the experts in the field, McCloy Consulting. It was a matter for him to give appropriate weight to the evidence and the submissions which he had received both at the hearing and subsequently.

[57] The commissioner was entitled, on the evidence before him, to accept the July 2021 FRA and to find that subsequent events did not impact upon its findings. It was always open to the objectors to adduce evidence, expert or otherwise, to gainsay the conclusions of McCloy Consulting. The commissioner correctly identified the planning policies which were in play, weighed up the evidence, applied the facts to the policy and arrived at his findings.

[58] Such findings represent a coherent and reasoned set of conclusions on the flooding issues. It is apparent that the applicant, and the other objectors, disagree with these conclusions but this is no basis upon which to impugn a decision on public law grounds. No arguable case has been made out either on the basis of illegality or irrationality.

Ecology

[59] Regulation 43 of the Conservation (Natural Habitats etc) Regulations (Northern Ireland) 1995 ('the Habitats Regulations') requires an authority to ensure that a project does not adversely affect the integrity of a designated European site, and it must carry out an appropriate assessment for this purpose. The developer in this application

submitted a shadow HRA dated 22 August 2017 and prepared by White Young Green ('WYG').

[60] This HRA concluded that there will be no significant adverse impacts on the two identified designated sites.

[61] The objectors did not adduce any expert evidence to contradict the WYG findings but contended that the information was out of date and that the proposed mitigation measures were inadequate. The commissioner carried out the appropriate assessment by considering these submissions, visiting the site and noting that the SES and the council shared the view that the proposal would not have any adverse effect on designated sites.

[62] The commissioner identified the effects on the two designated sites and the proposed mitigation measures. He found there was no persuasive evidence that such measures were inadequate, nor were any alternatives proposed. The commissioner, having analysed the evidence, was satisfied that there was no basis to conclude the HRA was out of date and accepted its conclusions. This is a decision which is unimpeachable on public law grounds. There is no arguable case that it was infected by illegality or irrationality.

[63] The commissioner identified that policy NH2 of PPS2 states planning permission would only be granted for a development proposal that is not likely to harm a European protected species. The objectors complained that the proposals were likely to harm the bat population and that the developer's bat survey was out of date. The bat survey submitted by the developer was dated 30 August 2017. It identified no bat roosts on the site but two areas of bat activity. Both the NIEA and the council concluded that there had been no change to the condition of the site and therefore the survey remained valid. The commissioner found no evidence of any change of circumstances which would alter the survey's assessment and conclusions. He found that the relevant hedgerows could be retained and this secured by way of condition.

[64] The applicant now seeks to rely on guidance issued by the NIEA in March 2024 which states that bat surveys should be submitted within a year of being carried out and that updates should be considered when the planning process becomes protracted.

[65] It is important to note that this document is guidance rather than policy. In any event, the bat survey was submitted within the stated time and consideration was given to whether an update was required. It was decided, on the evidence, that no such update was necessary in light of the view expressed by the NIEA.

[66] The applicant also refers to bat data dated 14 October 2024 held by the Centre for Environmental Data and Recording ('CEDaR') which, it is said, demonstrates that the 2017 bat survey was out of date. However, this evidence was not before the commissioner and post-dates his decision by two months.

[67] The approach adopted by the commissioner to the issue of bat surveys entailed an entirely lawful and rational exercise of judgement based on the evidence before him. There is no arguable case that this could be impugned by way of judicial review.

[68] The objectors argued at the PAC hearing that there had been a failure to submit an Environmental Impact Assessment ('EIA') pursuant to the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017 ('the EIA Regulations'). Regulation 4 of the EIA Regulations prohibits the grant of planning permission for 'EIA development' without an EIA having been carried out. EIA development includes:

> "Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location."

[69] The council screened the application and concluded, on 1 November 2017, that the proposal fell within Category 10(B) of Schedule 2 to the EIA Regulations ("urban development projects") but determined that no environmental statement was required with the application.

[70] The council carried out a second screening on 28 July 2020 and again concluded that no environmental statement was required as the environmental impacts of the development were not likely to be significant. Substantial reasons were furnished for this decision.

[71] The commissioner found no persuasive evidence that the council's determination was incorrect nor that its final position, reached after the more recent flooding event, was incorrect either.

[72] In *Re Sands' Application* [2018] NIQB 80, McCloskey J held that the relevant standard of review in relation to any decision to undertake a fresh EIA screening determination was that of rationality.

[73] Again, the applicant seeks to rely on CEDaR data dated October 2024 to challenge the failure to review the EIA screening determination. This is an impermissible approach in light of established legal principle.

[74] There is no arguable basis to say that the commissioner's decision on the EIA issue was irrational. It was arrived at in circumstances where he was fully sighted as to the environmental and ecological evidence relied upon by the parties at the PAC hearing, and pursuant to his own site visit.

Trees and boundaries

[75] The applicant points to an apparent contradiction between an approved drawing (6524-L-101F) which shows a planting scheme in Amenity Area 3 and condition 10 of the planning permission which states:

> "Amenity Areas 3 and 6…shall have no development, infilling, or tree or bush planting and shall be protected from future development."

[76] In the course of this judicial review application, the developer has acknowledged that any planting within this area would breach the relevant condition and therefore constitute a breach of planning control under section 131(1)(b) of the 2011 Act. The apparent conflict is therefore resolved.

[77] The applicant also makes a case, not advanced to the commissioner, that some future owners of properties in the development may seek to have trees felled. This point is demonstrably without merit since the conditions attaching to the planning permission require the retention of all existing trees on the site boundary.

[78] The applicant complains of procedural unfairness in relation to the late amendment made in November 2023 by the developer to the boundary. It is said that the objectors were denied an opportunity to comment on the paladin fence to be erected on the western boundary. This contention has no evidential foundation since the objectors were afforded a post hearing opportunity to respond and did so in a detailed document dated 22 January 2024. This submission did not make any case that the proposed paladin fencing could have an impact on flood risk.

[79] The commissioner stated, in his decision, that the post-hearing changes caused no prejudice to any party and did not breach section 59 of the 2011 Act. It is not open to the applicant to now make this new case, having not advanced it to the commissioner. There is no arguable case either of procedural fairness or other public law wrong.

Traffic

[80] The applicant's essential point is that the Transport Assessment was out of date and the commissioner failed to proactively seek updated data, particularly in relation to traffic collisions. In his grounding affidavit for this application, the applicant has exhibited data produced by the PSNI for the period 2015 to 2024.

[81] This rather ignores the fact that the objectors had the opportunity to adduce any evidence on this issue to the commissioner but chose not to do so. It is not open to parties to PAC hearings to fail to adduce relevant evidence and then seek to rely on an alleged breach of the *Tameside* duty in order to impugn the PAC decision.

[82] The approach of the commissioner to the road safety issue was, in light of the evidence before him, entirely rational.

Area of Townscape Character

[83] The applicant's case in relation to the mini roundabout is based on an alleged error of fact. He asserts that the mini roundabout is entirely within the boundary of the ATC, based on a map of uncertain authenticity. The relevant map is the one annexed to the Derry Area Plan which shows clearly that the commissioner was quite correct in his original conclusion.

[84] Otherwise the commissioner was entitled, on the evidence, to arrive at the conclusion that the proposed development would not adversely affect any listed building or its setting.

Human Rights

[85] The applicant asserts a breach of section 6 of the Human Rights Act 1998 in that his Convention rights have been unlawfully interfered with. In order to sustain such a claim, he must establish that he has 'victim' status for the purposes of section 7 of the of the Human Rights Act. By section 7(7), a person is a victim of an unlawful act:

> "only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act."

[86] In *Fadeyeva v Russia* [2007] 45 EHRR 10, the Strasbourg court held:

> "68. Article 8 has been invoked in various cases involving environmental concern, yet it is not violated every time that environmental deterioration occurs: no right to nature preservation is as such included among the rights and freedoms guaranteed by the Convention. Thus, in order to raise an issue under Art.8 the interference must directly affect the applicant's home, family or private life.
>
> 69. The Court further points out that the adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Art.8. The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, its physical or mental effects. The general environmental context should be also taken into account. There would be no arguable claim under Art.8 if the detriment complained of was negligible in comparison

> to the environmental hazards inherent to life in every modern city.
>
> 70. Thus, in order to fall under Art.8, complaints relating to environmental nuisances have to show, first, that there was an actual interference with the applicant's private sphere, and, secondly, that a level of severity was attained."

[87] The ECtHR has also stressed that where the complaint is one of future violation, it is necessary for a complainant to produce reasonable and convincing evidence of the real risk of harm sufficient to constitute a breach of ECHR right – see *Burden v UK* [2008] 47 EHRR 38 and *Asselbourg v Luxembourg* (App No 29121/95).

[88] The applicant's evidence in this regard, at paras [59] to [62] of his grounding affidavit, is that, by failing to consider flooding risks in the context of updated and relevant data, his Convention rights have been infringed.

[89] Such bare assertions fall well short of meeting the required threshold. It is not sufficient to say merely that there is an increased risk of flooding as a result of the PAC decision. There is no reasonable and convincing evidence of a real risk of harm. The applicant does not therefore enjoy victim status for the purpose of a claim under the Human Rights Act.

[90] Even if this test were met, there is no arguable case that any of the ECHR rights in issue were engaged. There is nothing in the evidence to substantiate a real and imminent risk to life as required for an article 2 claim, nor does it meet the minimum level of severity required for an article 8 or A1P1 claim.

[91] None of the human rights claims pleaded give rise to an arguable case with realistic prospects of success.

Conclusion

[92] Properly analysed, the applicant's case resolves to an impermissible merits-based challenge to the PAC decision to grant planning permission.

[93] For the reasons outlined, the application for leave to apply for judicial review is dismissed.