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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND KING'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY GORDON DUFF FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE PLANNING APPEALS COMMISSION

BETWEEN:

GORDON DUFF

Appellant/Applicant

-and-

PLANNING APPEALS COMMISSION

Respondent

-and-

FP McCANN LIMITED

Interested Party

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The Appellant appeared as a Litigant in Person
Mr Conor Fegan (instructed by Arthur Cox Solicitors) for the Respondent
The Interested party: Mr William Orbinson KC (instructed by Carson McDowell solicitors) for the Interested Party

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Before: Keegan LCJ and McCloskey LJ

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McCLOSKEY LJ (*delivering the judgment of the court*)

Introduction

[1] Leave to apply for judicial having been refused by the High Court, the appellant attempts by his appeal to this court to continue his challenge to a decision by the Planning Appeals Commission (the "Commission") in appeal reference 2021/E0007

dated 15 August 2024. The planning authority concerned is Causeway Coast and Glens Borough Council (the "Council"). The developer is FP McCann Limited (the "interested party/developer"). The site under scrutiny is Craigall Quarry, Garvagh, County Londonderry (the "site"). The impugned decision of the Commission was to allow in part the developer's appeal against the Council's Enforcement Notice ("EN") relating to the developer's quarrying and associated commercial activities at the site.

The enforcement notice

[2] The EN was made by the Council and is dated 18 March 2021. It relates to the site. It rehearses the Council's contention that there have been various activities by the developer at the site in breach of planning control. It required the developer to permanently cease all quarrying activities and *inter alia* to permanently remove various buildings, vehicular accesses, plant and machinery *et al*. The developer exercised his right of appeal to the Commission.

[3] The case officer's report upon which one would expect the EN to have been based is not included in the hearing bundle before the court. There are, however, documents relating to the activities of the Planning Service (the previous planning authority) in 2012/2013 concerning a possible breach of planning control at the site constituted by the "winning and working of minerals." Their enquiries generated, inter alia, a site inspection, a discussion with the developer (then Patrick Bradley Limited) and a case officer's enforcement report. This describes Craigall Quarry as "… a large established quarry complex which has been in operation for several decades and predates [the 1972 legislation]." The report contains the following noteworthy passages:

> "… A County Council permission made under the Planning Act (NI) 1931 and 1944 was presented along with a map to the planning office. The permission is in the name of P Bradley for the re-opening of a quarry at Craigall, Kilrea and was dated 5th September 1964 to be in accordance with the submitted details. The status of the permission has been confirmed and agreed that it is legitimate and provides for the operational development taking place. According to the red line indicated on the map accompanying the approval and a recent topographical survey, substantial areas of extraction remain available for winning and working …
>
> The status of the permission has been confirmed and it is considered that it is valid. As such, the operations may continue subject to the extent of the permission issued as shown on the map accompanying the permission."
> [emphasis added.]

The impugned decision

[4] The developer's appeal against the EN to the Commission was successful. By the impugned decision, the Commission:

(a) Allowed that aspect of the developer's appeal against the Council's enforcement action based on its assertion of "unauthorised extension of quarry."

(b) Allowed that aspect of the developer's appeal against the Council's enforcement action based on its assertion of quarrying activities without planning permission on a small triangular section of the site shaded in green.

(c) Allowed that aspect of the developer's appeal against the Council's enforcement action relating to an area shaded orange on the site plan which was the subject of two certificates of lawfulness of existing use or development ("CLUDS") made by the Council.

The challenge

[5] The Order 53 Statement describes the impugned decision as the Commission's decision to uphold Planning Appeal Ref: 2021/E0007 "underground (c) thereby determining that the area shaded green on drawing RA2 has the benefit of planning permission." The primary relief pursued is an order quashing the impugned decision.

A chronology

[6] The following chronology of material dates and events, edited by the court to avoid surplusage, was prepared on behalf of the Commission in tandem with the skeleton argument of its counsel.

05/09/1964	County Londonderry County Council granted permission to re-open the quarry at Craigall, Kilrea
18/03/2021	Causeway Coast and Glens Borough Council (the "Council") serves enforcement notice on FP McCann Limited
14/04/2021	FP McCann Limited lodges appeal under section 143(3) against the enforcement notice
21/04/2021	Mr Duff initiates judicial review challenge to the Council
27/06/2022	Leave hearing
08/08/2022	Parties to appeal submit statements of case

12/09/2022	Parties to the appeal submit rebuttal statements
30/09/2022	Judgment and order of Mr Justice Humphreys refusing leave to apply for judicial review in the appellant's challenge to
18/04/2023	Informal appeal hearing before the Commission
20/09/2023	Judgment of the Court of Appeal dismissing the appellant's appeal against **.
25/09/2023	The appellant's letter to the Commission seeking to introduce late new evidence after the appeal hearing
26/09/2023	Commission refusal of the appellant's request
15/08/2023	The Commission's decision on the EN appeal
14/11/2024	Initiation of these proceedings
08/05/2025	Amended Order 53 Statement
13/05/2025	Hearing before and decision of Mr Justice McAlinden
23/05/2025	Notice of Appeal
06/06/2025	Respondent's Notice
03/12/2025	Hearing before Court of Appeal

[7] The court has also taken into account the additional milestones identified in the separate chronology provided on behalf of the appellant (which has been considered in its entirety), namely:

(i) 2020 - Enforcement investigation LA01/2020/0012/CA commenced in relation to breaches of planning control at Craigall Quarry.

(ii) 18/3/21 - Enforcement Notice served on FP McCann Ltd, the operator of Craigall Quarry (now referred to as the Notice Party).

(iii) 26 November 2024 the developer submitted planning application SPD/2024/0089/F.

Two key documents

[8] It is necessary to highlight two documents in particular. The first is a grant of planning permission made by Londonderry County Council ("LCC") dated 21 August 1964. It identifies the applicant as "P Bradley", it specifies the aforementioned quarry and its location, it describes the proposed development as "reopening of quarry" and, in the operative words, states:

> "… the Council hereby PERMITS the above development in accordance with the submitted details."

The second key document (on the Appellant's case) is a map - the date of creation, antecedents (if any) and genesis whereof - are unclear. This map has one controversial feature, namely the red line therein purporting to demarcate the permitted quarrying and associated operations. (the "red line map").

[9] The following facts are uncontentious:

(a) The LCC planning permission document is regular.

(b) The "submitted details" have at no time been available to any of the protagonists or any court or other agency in this litigation or anterior processes or events or associated proceedings.

(c) The red line map, around which so much debate has revolved, relates to the grant of planning permission: we emphasise this deliberately neutral language.

The appellant's attack summarised

[10] The appellant has at no time questioned the regularity of the LCC 1964 planning permission or the authenticity of either that document or the "official" particulars appearing on the face of all available maps, including the red line map. Rather, the sole focus of his attack has been the red line visible on the red line map. His assertion is that this was inserted/added on an unspecified date subsequent to September 1964 by an unidentified person, in unspecified circumstances and for unexplained reasons. Fundamentally, he questions the authenticity of the red line. He has at times alleged unspecified skulduggery.

[11] It is important, at the outset, to correctly categorise the appellant's case. It raises a purely factual issue: an assertion, an allegation of fact, nothing more and nothing less. This truism, of fundamental importance in these proceedings, will be revisited *infra*. The appellant's case incorporates one further assertion, namely that the original map generated by the events of 1964 did not contain any line.

The Commission's decision analysed

[12] The impugned decision of the Commission is rehearsed in [2] above. It allowed in part the developer's appeal against an enforcement notice under section 143(3)(c) of

the Planning Act (Northern Ireland) 2011 in respect of a small portion of the site. The Commission was satisfied that this benefitted from an extant grant of planning permission with the result that the quarrying being undertaken there by the developer was not in breach of planning control as alleged: see section 143(3)(c) of the 2011 Act.

[13] While the heart of the Commission's decision is found at paragraphs 17 and 18, the preamble at paragraphs 14-16 is important:

> "Quarrying operations at Craigall Quarry have taken place prior to the grant of planning permission 1704/8000 for the "reopening of quarry" granted by Londonderry County Council under the Planning Acts (Northern Ireland) 1931 and 1944 and the Roads Act (Northern Ireland) 1964 on 5th September 1964 (the 1964 permission). The decision notice and a reproduced copy of the site plan pertinent to this permission have been provided by the appellant. Third parties have questioned the legitimacy of this plan particularly as they consider that it has been annotated to include a red line.
>
> …
>
> The historic nature of the 1964 approval is such that limited information is held in respect of it by the statutory authorities. The Council advised that they were not in possession of the original site plan which accompanied the approval. Nonetheless, it was a legitimate approval which allowed for the extraction of minerals at the site. The third-party objector has dissected this plan in forensic detail and has presented the view that it is a reproduction and that the red line is not an original feature of the drawing. The Council advised that they have come to accept that the red line on the reproduced site plan constitutes the approved area for the winning and working of material. The Council have relied upon this annotated version of the site plan in order to guide its enforcement actions at the site, similarly the appellant has used it as a basis for its mining operations at the site.
>
> …
>
> The submitted copy of the site plan is not to scale but has been reproduced in colour and clearly shows the approval stamp and signature. The red line which annotates the quarry area on the site plan follows a solid and dashed line around the quarry area but is incomplete at the north western corner of the site. It does appear that the red line has been added at some point to the document prior to

> being reproduced, but it has not been established by whom or when."

Paragraphs 17 and 18 follow:

> "17. The fact that the original site plan cannot be produced to this appeal is inconvenient. However, this of itself does not allow that the 1964 approval is significantly undermined or of limited value. The validity of the 1964 approval is not subject to this appeal. This permission forms the basis for most of the appellant's activities at the site. It has been relied upon by both the appellant and the planning authorities to guide their activities at the site and must be considered. The planning authority have had this plan in their possession for some time and have not questioned its legitimacy. In the absence of the original documentation and despite the third parties' submitted analysis, I consider on the balance of probabilities, that the submitted site location plan is a fair reflection of the area which constitutes the 1964 approval.
>
> 18. At the hearing, the Council accepted that the small area shaded in green upon the site plan referred to as RA2 lies within the bounds of the 1964 approval. As such it has the benefit of planning permission. The appeal underground (c) is upheld in respect of this area only."

Previous litigation

[14] In 2022, the appellant brought judicial review proceedings against the Council. The target of his challenge was the alleged failure of the Council to take enforcement action in relation to the developer's quarrying activities at Craigall Quarry. The Council's position aligned with that of its statutory predecessor, the Department, which in a 2014 letter had stated unequivocally that quarrying activities at Craigall were carried out pursuant to a grant of planning permission in 1964: see further [3] above. Humphreys J recorded at [2022] NIKB 8, paragraph [11]:

> "Effectively the applicant asserted that the [developer] or its predecessor in title had committed some fraud in the production of the purported planning permission."

The High Court made two conclusions. First, the appellant's case was unarguable, the judge stating at paragraph [34]:

> "In any event, it is simply unarguable that the Council took into account immaterial considerations or acted

> irrationally in finding that the 1964 planning permission was valid. The case advanced by the applicant, of some fraudulent modification of the documentation, amounts to a bare unsupported assertion and falls foul of the well-established principle that allegations of dishonesty must be properly pleaded, with full particulars, on the basis of credible evidence. On the material available to the court, the applicant would not be able to satisfy the burden of proof which rests on him on this central issue."

Second, the challenge was held to be manifestly out of time and there was no good reason for granting an extension.

[15] The appellant's ensuing appeal to this court (differently constituted) was dismissed. The appeal was dismissed, first, on the ground that the appellant lacked standing for, *inter alia*, the following reasons, at [2023] NICA 56, at [28]:

> "The appellant has to persuade the court that he enjoys an arguable case with realistic prospects of success in order to secure a grant of leave. When alleging fraudulent behaviour the burden of proof is upon him to produce evidence in support. Mere suspicion of some fraudulent modification of documentation does not meet the well-established principle that fraud must be pleaded with full particulars and based on credible evidence. On the basis of the evidence available to the court (the appellant accepting that he is not relying on any new evidence which was not before the lower court) we are satisfied that the appellant does not satisfy the burden of proof as mere speculation on his part that the red and pink lines have been fraudulently endorsed on the site map is not sufficient to discharge the burden of proof placed upon him."

This court further endorsed the High Court's ruling on the issue of time.

This Case: Judgment of the High Court

[16] In deciding that leave to apply for judicial review should be refused McAlinden J made the following conclusions:

(i) The proceedings are not an abuse of process.

(ii) The appellant's application to adduce in evidence the report of a forensic documentary examiner, Mr Craythorne, was dismissed.

(iii) The application was "… nothing other than a disguised reopening of a merits argument that was heard before the planning appeal commissioner."

(iv) The application was further "…a blatant reopening of an argument that was made before Mr Justice Humphries and … the Court of Appeal …"

(v) The impugned decision of the Commission was not vitiated by any public law misdemeanour.

[17] In particular, the judge stated:

> "Now the issue the Court has to address is, is there anything that the Court can conclude that that is unlawful in the sense of it - the Commissioner taking into account irrelevant considerations, failing to take into account relevant considerations or otherwise acting unlawfully in a Wednesbury sense in the sense that no reasonable planning appeal commissioner could come to that conclusion. Simply there is no error of law identified by the applicant in this case. Bearing in mind that this is an expert tribunal, bearing in mind that this expert tribunal not only had to consider issues within its expertise, within its expertise, but also crucially had the benefit of detailed submissions on the merits of this argument from the judicial review applicant, from the operator of the quarry and from the council its quite clear to this court that there is no error of law identified here. There is no basis on which the Court could quash this decision or criticise this decision for any ground that is recognised as a legitimate ground of public law challenge."

Appeal to this court

[18] The gravamen of the resulting appeal to this court can be ascertained from the Appellant's detailed skeleton argument. The following excerpts are revealing:

> "[The] appellant argues that this appeal is about factual issues …
>
> The 1964 permission was granted 'in accordance with the submitted details' so therefore the details submitted in 1964 need to be known to be sure what the 1964 permission meant. There was no plan with a red line submitted in 1964 and there are no other submitted details, such as an original application form, available. …

The appellant … must first challenge the respondents consideration of the factual matrix …

The critical decision which the respondent made is that the small green shaded area has the benefit of planning permission as it lies within the bounds of the 1964 approval. This is the impugned decision. …

These arguments go to the heart of this application and are factual …

The appellant argues that the matters above are historic fact …

A coloured version of the site plan was made available by the Notice Party with its Statement of Case …

The Court of Appeal previously came to the conclusion that the appellant had not discharged the burden of proof regarding the potential fraudulent addition of the red line …

The applicant argues that his application for leave benefits from forensic evidence [GD1 Tab14] … later improper meddling with the 1964 documents … casts a shadow over the 1964 permission …

The respondent has not addressed the scope and size of the 1964 quarry operation as those factual details have been corrupted by the unlawful addition of a red line …

The appellant argues that this red line addition totally changed the meaning of the original 1964 plan which in the absence of the original application forms is the only document available …

The original 1964 plan has been reconstructed by the appellant by the removal of the red line and it is argued that apart from copying and splicing imperfections this blank plan represents the original 1964 plan. This factual evidence would be very difficult for the Parties to dispute since both the respondent and the High Court now accept that the red line is not original and has been added by unknown persons on an unknown date."
[emphasis added]

[19] It is appropriate to juxtapose the above with grounds (i)(a)-(c) of the Order 53 Statement:

> "(i) Immaterial considerations. The applicant further contends that the impugned permission is vitiated by the proposed respondent having taken into account the following inaccurate or immaterial facts/considerations:
>
> (a) That the area shaded green with plan RA2 which was attached to Appeal Decision 2021/E0007 dated 15 August 2024 has the benefit of planning permission.
>
> (b) That the submitted site location plan (which contains the red line which the [proposed] Respondent has identified is not an original feature of the 1964 permission plan and which has been added to a copy of the original 1964 plan prior to being reproduced by persons unknown, at a time unknown) on the balance of probabilities is a fair reflection of the area which constitutes the 1964 approval.
>
> That at the hearing the Council accepted that the small area shaded green upon the site plan referred to as RA2 lies within the bounds of the 1964 approval."

[20] Per his skeleton argument, the appellant accepts that ground (i)(a) rehearses "… a conclusion that is identical to the impugned decision and cannot be classed as an immaterial consideration which by being taken into account renders the impugned decision unlawful." However, the appellant argues that the judgment of the lower Court was wrong to dismiss grounds (i)(b) and (i)(c) as not being immaterial considerations.

[21] The appellant's submissions continue thus (verbatim). Ground (i)(b) is not a conclusion that is similar to the impugned decision. It is a conclusion on fact reached by the respondent (Commission) which is wrong, which is very different to the impugned decision but still represents fact, as analysed and viewed by the respondent. This fact is that the site location plan (which has been tampered with) is a fair reflection of the area which constitutes the 1964 approval. This fact is wrong and therefore immaterial and clearly should not have been taken into account at all. This wrong fact is then relied on to conclude that the area shaded green on drawing RA2 has the benefit of planning permission.

[22] The next part of the appellant's submissions is as follows (again verbatim). Ground (i)(c) is also a fact and this time a correct fact quoted by the respondent that

the Council "accepted that the small area shaded green upon the site plan referred to as RA2 lies within the bounds of the 1964 approval." Attention is then drawn to grounds (ii)(a)-(d) of the Order 53 Statement:

> "(i) Material considerations. The applicant further contends that the impugned permission is vitiated by the proposed respondent having failed to take into account the following material facts/considerations:-
>
> That the original 1964 permission plan had no red line …
>
> … adding a red line at some stage to an original planning permission document and passing that off as original …" [emphasis added]

The Riposte

[23] The Commission's core propositions are:

(i) Mr Duff does not have standing; and / or

(ii) This application is an abuse of process; and / or

(iii) The grounds are unarguable.

To the extent that the submissions on behalf of the interested party differed in any material respect from those of the Council, this will be reflected in our conclusions (infra).

The appellant's challenge: Merits

[24] The first issue which we address is that of the true nature of the appellant's challenge. Paragraphs 9, 11, 13, 18, 19 and 21–22 of this judgment may conveniently be considered as a unit. Together, they demonstrate beyond peradventure that the contentious issues in these proceedings, as in the predecessor litigation, are purely factual in nature. They raise no question of law requiring judicial determination.

[25] Turning to the merits of the challenge, in common with McAlinden J this court, applying the orthodox public law template, concludes that the impugned decision of the Commission is beyond reproach. Fundamentally, the Commission made a finding of fact which is unassailable in public law terms. As regards the Order 53 grounds rehearsed above: bare, unsubstantiated assertions are not material considerations – ground (i)(a) and ground (ii)(a)–(d); the decision under challenge is not a material consideration – ground (i)(b); and the Council's stance regarding the area shaded green was incontestably a material consideration – ground (i)(c). This court further

endorses without qualification the reasoning of McAlinden J and in particular the passage in his judgment reproduced in paragraph [17] above.

[26] We add the following. As certain passages from the Order 53 pleading in paragraphs [19] and [22] above indicate, the appellant has, in places, employed the terminology "the impugned permission." Taking into account that the appellant is a vastly experienced litigant in this specialised field and was allowed to amend his Order 53 statement, and, further, that the judge, in the appellant's favour, proactively instigated certain further amendments, added to which the appellant has had full participation rights before this court, we decline to dismiss these linguistic formulations as mere inadvertent errors. On the contrary, they betray a fundamental misunderstanding of the decision of the Commission under challenge.

[27] This assessment is confirmed conclusively by the Appellant's comprehensive skeleton argument. It suffices for this purpose to draw attention to the opening sentence, which characterises the impugned decision of the Commission as "… a decision to grant deemed planning permission on the green shaded land ..." In a later passage the appellant characterises this "the critical decision" of the Commission. He further suggests that this "… effectively grants planning permission to all the lands within the red line …" Confusion and conflation reign in all of these passages. Stated succinctly, the Commission made but one decision embodying three elements, as set forth in paragraph [4] above.

[28] Furthermore, as highlighted in the written submissions of Mr Orbinson KC for the developer, these discrete contentions of the appellant are further confounded by section 145 of the 2011 Act. In short, the Commission has not exercised its statutory power to grant planning permission, in the respects alleged or at all. The question of whether it should exercise this power, contained in section 145(1)(a), is a live and unresolved matter given the intimation to this court that (for whatever reason) that aspect of the developer's appeal remains to be determined (in common with its appeal against the separate EN under the EIA Regulations 2017).

[29] The final infirmity in the appellant's case is his unremitting failure to recognise the distinction between issues of fact and questions of law. His written and oral submissions are replete with this aberration.

[30] For the reasons given, this appeal is hopeless and must be dismissed. The threshold for securing leave to apply for judicial review has not been overcome, by some distance. Notwithstanding the preceding conclusion, this court has, with a view to providing guidance, determined to address three further issues namely standing, misuse of the court's process and misunderstanding of Aarhus Convention costs protection orders.

Standing

[31] The topic of standing is addressed in all of the leading judicial review texts. It is appropriate to highlight at the outset that it belongs exclusively to the realm of procedure. Thus, the starting point is RCJ Order 53, Rule 5 which provides that leave to apply for judicial review should not be granted unless the court considers that the applicant has a "sufficient interest in the matter to which the application relates." This provision has its genesis in section 18(4) of the Judicature (NI) Act 1978. The open – textured character of 'sufficient interest' emerges clearly from an oft–quoted passage in the UK Supreme Court's decision in *Axa General Insurance v Lord Advocate* [2012] 1 AC 868, at [170]:

> "A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law. I say "might", because the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted. Even in a context of that kind, there must be considerations which lead the court to treat the applicant as having an interest which is sufficient to justify his bringing the application before the court. What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context."

[32] There is a valuable overview in Judicial Review in Northern Ireland (Third Edition) at [3.32]ff. Professor Anthony usefully draws together several of the basic precepts: the standing of the challenging party should normally (but not invariably) be determined at the leave stage; in the great majority of cases the challenger's standing is not a contentious issue; the trend of the decided cases has been liberal; and the overall context, coupled with the interests in play, is of obvious importance.

[33] Practitioners in this field will be familiar with the observation of Lord Diplock that previous "technical restrictions on locus standi" were removed with the advent

of the new judicial review procedure (introduced in two jurisdictions around the same time): *R v Inland Revenue Commissioners, ex parte NFSESB* [1982] AC 617, 41C-D. Lord Diplock simultaneously emphasised the breadth of choice that these reforms had made available to the court, observing that the new test for standing consisted of:

> "… ordinary English words … [which] … on the face of them leave the court an unfettered discretion to decide what in its own good judgement it considers to be a 'sufficient interest' on the part of [a claimant] in the particular circumstances of the case before it.
> (At 642B-E)

Lord Diplock, in common with other members of the House, also drew attention to the substitution of the broader "sufficient interest" test for its narrower predecessor namely "a person aggrieved." Lord Roskill, for his part, preferred the thematic approach of "… a mixed question of fact and law … [and not] pure discretion" (at 659A).

[34] Inevitably, the public law character of judicial review proceedings and the absence of any *lis inter-partes* dominate any discourse in this sphere. These themes are readily identifiable in one of the earlier decisions of this court providing guidance on this topic, namely *Re D's Application* [2003] NI 295 at paragraph [15]:

> "There has been much discussion of the topic of standing in textbooks and legal periodicals and examples abound in the reported cases, yet it is difficult to pin down any authoritative statement of the principles to be applied by a court in determining the question. It appears to be incontestable that the courts have tended in recent years to take a more liberal attitude to matters of standing. We would tentatively suggest that the following propositions may now be generally valid:
>
> (a) Standing is a relative concept, to be deployed according to the potency of the public interest content of the case.
>
> (b) Accordingly, the greater the amount of public importance that is involved in the issue brought before the court, the more ready it may be to hold that the applicant has the necessary standing.
>
> (c) The modern cases show that the focus of the courts is more upon the existence of a default or abuse on the part of a public authority than the involvement

of a personal right or interest on the part of the applicant.

(d) The absence of another responsible challenger is frequently a significant factor, so that a matter of public interest or concern is not left unexamined."

[35] *Re D* predated the decision of the UK Supreme Court in *Walton v The Scottish Ministers* [2012] UKSC 44. In two recent decisions this court, differently constituted, invoked *Walton* in its reasoning on the issue of standing: see *Duff v Causeway Coast and Glens BC and McDonald* [2023] NICA 22 at [21]–[22] and *Duff v Causeway Court and Glens BC and McCann* [2023] NICA 56 at [16] discussed in *Eco–Sud v Minister of Environment (etc)* [2024] UKPC 19.

[36] It is noteworthy that among the decided cases arguably the broadest approach to a litigant's standing is to be found in environmental challenges. See for example *R v HM Inspectorate of Pollution, ex parte Greenpeace (No 2)* [1994] 4 All ER 329 and *R v Secretary of State for Trade and Industry, ex parte Greenpeace* [1998] Env LR 415. In the latter case, Laws J commented that litigation of this kind had become an "accepted and greatly valued dimension of the judicial review jurisdiction." See also *R (Edwards) v Environment Agency* [2004] EWHC 736 (Admin).

[37] The test of whether the subject matter of the litigant's challenge is of "legitimate concern" to the challenging party or agency has also been invoked with some frequency in the decided cases: see for example *R v Somerset County Council, ex parte Dixon* [1998] Env LR 111, at 116–117, *R v Manchester City Council, ex parte Baragrove Properties* [1992] 4 Admin LR 171, at 184D and *In Re S* [1996] Fam 1 at 18G ("… a genuine and legitimate interest in obtaining a decision..."). Likewise, the absence of improper purpose on the part of the litigant concerned has been identified as a material factor in granting standing: see for example *Feakins v Secretary of State for the Environment, Food and Rural Affairs* [2004] 1 WLR 1761 at [23].

[38] The absence of some other available challenging litigant has also been identified as a factor inclining in favour of recognising standing: see *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement* [1995] 1 WLR 386 at 395H and *R v North Thames RHA ex parte L* [1996] Med LR 385 (per Sedley J). In addition, the reported cases have consistently highlighted the weight attaching to the public interest, the importance of the issues in play, the DNA of the judicial review jurisdiction and the rule of law. Thus, in *AXA General Insurance* ([3 1]*supra*), the Supreme Court highlighted the undesirability of a strict insistence upon the interest of the litigant which "… *might disable the court from performing its function to protect the rule of law …*" We also draw attention to the code of principles in para [21] of *Duff (McDonald):*

"(i) A wide interpretation of whether an applicant is a "person aggrieved" for the purpose of a challenge under

the relevant Scottish statutory provision is appropriate, particularly in the context of statutory planning appeals (paragraph [85]).

(ii) The meaning to be attributed to the phrase will vary according to the context in which it is found, and it is necessary to have regard to the particular legislation involved, and the nature of the grounds on which the applicant claims to be aggrieved (paragraph [84]).

(iii) A review of the relevant authorities found that persons will ordinarily be regarded as aggrieved if they made objections or representations as part of the procedure which preceded the decision challenged, and their complaint is that the decision was not properly made (paragraph [86]).

(iv) The authorities also demonstrate that there are circumstances in which a person who has not participated in the process may nonetheless be "aggrieved": where for example an inadequate description of the development in the application and advertisement could have misled him so that he did not object or take part in the inquiry (paragraph [87]).

(v) Whilst an interest in the matter for the purpose of standing in a common law challenge may be shown either by a personal interest or a legitimate or reasonable concern in the matter to which the application relates, what constitutes sufficient interest is also context specific, differing from case to case, depending upon the particular context, the grounds raised and consideration of, "what will best serve the purposes of judicial review in that context." (Paragraphs [92] and [93]).

(vi) Paragraph [94] also refers to the need for persons to demonstrate some particular interest to demonstrate that he is not a mere busybody. The court was clear that "not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally

> affected by an unlawful act, no-one was able to bring proceedings to challenge it."
>
> (vii) The interest of the particular applicant is not merely a threshold issue, which ceases to be material once the requirement of standing has been satisfied: it may also bear upon the court's exercise of its discretion as to the remedy, if any, which it should grant in the event that the challenge is well-founded (paragraph [95] and [103]).
>
> (viii) Lord Hope added at paragraph [52] that there are environmental issues that can properly be raised by an individual which do not personally affect an applicant's private interests as the environment is of legitimate concern to everyone and someone must speak up on behalf of the animals that may be affected.
>
> (ix) Individuals who wish to do this on environmental grounds will have to demonstrate that they have a genuine interest in the aspects of the environment that they seek to protect, and that they have sufficient knowledge of the subject to qualify them to act in the public interest in what is, in essence, a representative capacity (paragraph [53]). It will be for the court to judge in each case whether these requirements are satisfied."

This court subsequently espoused the same approach, in substance, in *Duff (McCann) (supra)*, at paragraph [14]. This passage was quoted by the Privy Council at paragraph [78]. This court subsequently espoused the same approach, in substance, in *Duff (McCann)* , at paragraph [17].

[39] Summarising, the liberal approach to the issue of a challenging party's standing can be traced to the jurisprudence of the House of Lords dating from 1982. Some four decades later this theme remains essentially unaltered by any binding authority. It continues to dominate and illuminate the more particularised approach found in certain decisions of appellate courts, including this court, in the United Kingdom. Its flexibility accommodates both those cases in which the court considers that a stricter approach is appropriate and those in which the court considers that the appropriate course belongs towards the outer limits of the notional spectrum. The liberal approach to standing in environmental cases particularly is illustrated in the recent decisions (of this court) in *Duff (McDonald)* at paragraphs [35]–[38] and (of the Privy Council) in *Eco–Sud* at paragraph [90].

[40] What are the competing arguments? The appellant argues as follows:

> "The applicant therefore argues that he does have standing in this case because he did fully participate in the Planning Appeal (a) by submitting a statement of case, submitting a rebuttal to the Council and Quarry Operator evidence and participating in the hearing itself and (b) forensic evidence is before the Court and (c) the respondent's own appraisal supports the forensic evidence that the red line has been a later addition to the 1964 plan."

The applicant also argues that he has been recognised as having standing in bringing cases of environmental interest and merit as in *Glassdrumman*, *Duff v Newry Mourne and Down District Council* [2024] NICA 42, [at] paragraphs 91-94. A further ingredient of the Appellant's argument is that he has been successful in certain previous judicial review challenges, citing one illustration namely *Duff v Newry, Mourne and Down DC* [2024] NICA 42. This court also takes cognisance of the appellant's success in respect of both the issue of his standing and the substantive challenge in *Duff v Causeway Coast and Glens BC and McDonald* (*supra*).

[41] In oral submissions the Appellant canvassed the following additional argument. He pointed to the EIA Regulations determination of the Council (which is the subject of a separate, undetermined appeal by the developer to the Commission) and the evidence contained therein relating to ecology issues, in particular damage to priority habitats, related to the developer's quarrying and associated operations on the site. He submitted that he had standing because by virtue of this evidence he did not have to demonstrate personal expertise in ecology.

[42] The argument of Mr Fegan, of counsel, on behalf of the Commission acknowledges (correctly) that the fact of the appellant's participation in the underlying decision making process of the Commission is a matter of some substance. Counsel's submissions highlighted, on the other hand, the following amalgam of facts and factors; the vagueness of the appellant's interest in protecting the environment at the site in question; the appellant's (acknowledged) lack of expertise in quarrying activities and ecological harm; the availability of "better placed challengers" (unidentified); the lack of any impact on the appellant personally or his private rights; the manifest lack of merit in the appellant's challenge ; and, finally, the "relitigation" issue (see paragraph [49]ff *infra*). As regards the developer, the submissions of Mr Orbinson KC had a distinct "floodgates" flavour and also echoed of Lord Fraser's image of the meddling busybody in the *Inland Revenue* case (*supra*).

[43] Whither leads the immediately preceding analysis in the determination of the standing issue in this appeal? The answer is uncomplicated. In the present context, the most important principle, especially prominent in *Eco–Sud* and other cases noted above, is that of the breadth and flexibility of standing in environmental challenges. As Lord Hope stated in *Walton v Scottish Ministers* [2012] UKSC 41, at paragraph [152], "… the environment is of legitimate concern to everyone." This principle has previously been recognised, and applied, by this court, in *Duff (McDonald)* at

paragraphs [35]–[38]: liberality is the hallmark of these passages, notwithstanding what preceded them at paragraph [21](ix).

[44] The question of standing will invariably be case sensitive and context sensitive. Furthermore, in every judicial review challenge in which the High Court or, on appeal, this court, the issue of the challenging litigant's standing requires to be determined, there will usually be a multiplicity of facts and factors to be considered. The judicial duty, in the first place, is to identify all facts and factors properly having a bearing on the question of the litigant's standing. Having done so, the second judicial duty will entail the formation of a rational evaluative judgement. At this stage, the court will stand back and survey the landscape before it. A rudimentary tick box exercise will never be appropriate. The judicial task will involve a relatively wide margin of appreciation, such that interference by this court on appeal will be the exception rather than the rule. Finally, as a matter of law, the court in every case will be alert to acting compatibly with the principles and trends to be distilled from the material decisions of the House of Lords, the Supreme Court and this court.

[45] In the present case, at first instance the trial judge was not persuaded by arguments that the appellant did not have standing. We are mindful of the reluctance of an appellate court to interfere with a first instance assessment of this kind and decline to do so, for the reasons which follow.

[46] This case is typical of its kind insofar as no single fact or consideration is determinative of the appellant's standing. Rather, there are several ingredients in the notional equation. These ingredients are, in no particular hierarchical order: the appellant participated fully in the underlying proceedings; at stake in the underlying proceedings was the question of whether protracted damage to the environment – which might include breaches of the EIA regulations (to be determined) – was lawfully authorised; as his conduct in the underlying proceedings, in these judicial review proceedings and in multiple previous judicial review challenges demonstrates, the appellant has at all times had a legitimate concern about the legality of the developer's quarrying and associated operations on the site; the purity of the appellant's motives is uncontentious; he is not actuated by any improper purpose; he brought an adversarial dimension to the underlying proceedings; and, finally, there is no indication that there is any available better placed challenging party. The ultimate touchstone to be applied is that of the rule of law. Viewed from every perspective, the conduct of the appellant has been compatible with and in furtherance of the rule of law. For this combination of reasons, his standing to bring these proceedings and this appeal is established.

[47] We would add that this court requested, and received, the Commission's published guidance relating to EN appeals in order to better understand the appellant's participation in the underlying EN proceedings. Two features of the relevant part of the publication, paragraphs [46]–[47] and [50], may be highlighted. First, the obligatory newspaper publication of the EN will normally (though not invariably) be the impetus for a response from interested persons, who thereby are

considered to be "third parties." Second, a response of this kind will trigger a formal invitation from the Commission to every respondent "… to participate in the appeal process."

Misuse of the process of the High Court?

[48] The discrete issue of misuse (sometimes more bluntly characterised 'abuse') of the process of the court arises by reason of the suggestion of both the Commission and the developer that in these proceedings the Appellant is attempting, impermissibly, to relitigate issues previously transacted in *Duff McCann.* (the "earlier Craigall case" – supra).

[49] The nub of the issue is as follows. The target of the appellant's challenge in the earlier *Craigall* case was the failure of the Council to take enforcement action regarding the developer's quarrying activities. The two parties involved are replicated in the present case. The essential factual matrix was also the same. A perusal of the judgment of this court (differently constituted) confirms that disputed maps, though not the only issue, lay at the heart of the appellant's challenge: see paragraphs [4], [9], [10] and in particular [26]–[29]. At [26] this court stated:

> "The central plank of the appellant's case is that the site map attached to the original permission granted in 1964 has subsequently been fraudulently altered by the addition of red/pink lines which effectively extend the boundary of the quarry covered by the 1964 permission."
> [emphasis added]

At [27], this court noted the appellant's acceptance that his attack on the authenticity of the relevant map was based on mere suspicion and that other key features of the map were "genuine and original."

[50] At first instance McAlinden J declined to condemn the appellant's challenge a misuse of the process of the High Court. He nonetheless observed:

> "… this issue appears to have been litigated by this applicant before the High Court and the Court of Appeal ... it's quite clear that the issue has been addressed [by those courts] … The arguments were the same ..."

Before this court, the appellant's skeleton argument concedes that:

> "… the accuracy and integrity of the 1964 site plan goes to the heart of both cases … [and this claim will] … inevitably touch upon the same issues previously examined by the court."

At the hearing before this court the appellant was afforded the opportunity of articulating precisely his suggested main difference between the earlier *Craigall* case and the instant case. Availing of this opportunity, his reply was that one of the maps in the evidence in these proceedings was not before either court in the earlier case. (In passing, its first emergence appears to have occurred in the underlying EN proceedings.) It is correct that this particular version of the map was not part of the evidence in the earlier *Craigall* case. However, we consider this fact and the Appellant's associated argument to have no traction, for the following reasons.

[51] First, the appellant accepted that the two "comparator" maps included in the evidence in both cases and the "new" map are each photocopies, or reproductions, of the same document. Second, the "new" map differs from the other two in two respects only, namely (a) it is of slightly different scale and (b) the colour of the demarcation line is red, rather than pink or black. Third, in every other respect the three maps are the same. Critically, all of the "official" data which the three maps contain (dates, signature of officials *et al*) are identical. Stated succinctly, the "red line" map which has emerged is in all material respects the same as the "comparator" maps contained in the evidence in the earlier *Craigall* quarry case.

[52] The effect of the preceding analysis is that the key distinction between this case and the earlier *Craigall* case canvassed by the appellant withers and dies. It is entirely devoid of substance. Furthermore, this court has found the merits of the present challenge to be non-existent, describing it as "hopeless." Thus, there is no supervening public interest in play which might otherwise have come to the appellant's aid. It follows that this new judicial review challenge is a misuse of the process of the High Court and, consequentially, the appeal process involving this court.

The Aarhus Convention: Costs protection orders

[53] It is timely to draw attention to how the Aarhus Convention costs protection regime operates. The Aarhus Convention (full title: The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters) is an international agreement promoting access to environmental information and public participation in environmental decision-making. It was made under the auspices of the United Nations Economic Commission for Europe (UNECE). The Convention prescribes the obligations of States Parties (there are 47) to make provisions for the public to access environmental information, to participate in environmental decision-making and to access justice when challenging environmental decisions. One of the Convention's core aims is to ensure access to justice in environmental matters. The Convention's monitoring body is the Aarhus Convention's Compliance Committee (ACCC).

[54] Article 9(3) is the first key provision:

> "… each Party 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." [emphasis added]

Followed by Article 9(4), in material part:

> "… 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."

[55] Although a measure of international law, certain of the Convention's provisions, namely those relating to the legal cost of environmental challenges, have been implemented in domestic law via the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 and the Civil Procedure Rules ("CPR") in England & Wales. (In passing, the DOJ is currently engaged in a review.) The governing legislation limits costs for environmental legal challenges in the UK, with a protective cap for unsuccessful claimants and a cap on how much a successful claimant can recover from the defendant. For individuals, the cap on what they pay is £5,000, while for organizations it is £10,000. If a claimant is successful, the maximum they can ordinarily recover from the defendant is £35,000.

[56] The English Court of Appeal has recently reviewed the scope of Article 9(3) in HM Treasury & Anor v Global Feedback Limited [2025] EWCA Civ 624. Holgate LJ identified the key passage as "provisions of national law relating to the environment." He found that the relative strength of the phrase "relating to" would determine the meaning of the phrase as a whole: [75]. Determining the nature and strength of the phrase depends upon the surrounding language, the wider context of the legislation and its purpose: [77]. The critical passage of the judgment, at [96], recites that there is:

> "… nothing in Art. 9 or the Convention read as a whole to indicate that the ambit of Art.9(3) extends to any decision in breach of any national law so long as that decision has an effect or impact on the environment. Instead, Art.9(3) only applies to a contravention of a legal provision which concerns, or is to do with, the environment, its protection or regulation."

[57] The Court of Appeal concluded that the purpose of the statutory provision under scrutiny (section 28 of the Taxation (Cross-Broder Trade) Act 2018) was to require the public authority concerned (HM Treasury) to take into account international arrangements relating to the function being exercised (in the context of

a statute aimed at regulating customs and trade) and not the environment. The net result was that while a challenge by judicial review could be mounted, an Aarhus costs protection order was not appropriate. Summarising, the Court found as follows:

(a) Article 9(3) only applies to a contravention of a legal provision of national law which concerns, or is to do with, the environment, its protection or regulation.

(b) Public law principles do not fall within that definition. Nor do legal provisions that are, on an ordinary reading, unconcerned with the environment, but which are at issue on the facts of a case which concerns the environment.

The earlier decisions in *Venn v Secretary of State for Communities and Local Government* [2015] 1 W.L.R. 2328 and *Austin v Miller Argent (South Wales) Limited* [2014] EWCA Civ 1012 were affirmed as being correct.

[58] The decision in *HM Treasury* is notable for its detailed analysis and reasoning. In the context of this appeal, we confine ourselves to the three-fold observation that (a) there has been no adversarial argument on its correctness, (b) being a decision of the English Court of Appeal it is not as a matter of precedent binding on this court (noting our recent and necessarily cursory comment in *Rana v Bouliach* [2025] NICA 62, at [15]) and (c) its interaction with the earlier decisions noted might be productively revisited. For present purposes, it suffices to observe that there may be scope for further legitimate argument on this trilogy of decisions of the English Court of Appeal in a suitable future case. Finally, this court notes that leave to appeal to the UK Supreme Court in *HM Treasury* has recently been granted.

[59] We conclude this section of the judgment by reverting to the present context. In the present case both the Council and the developer intimated to this court that there was no objection to the appellant's application for an Aarhus costs protection order and an order of this kind duly followed, specifying the maximum amount of costs recoverable from the appellant as £3,500 & VAT. This order was made in the absence of adversarial argument. Having reviewed the affidavit of the applicant grounding his application for the order, it is notable that his engagement with the key provision of the Aarhus convention, namely Article 9(3) (supra), is essentially non-existent. Alertness by all to this latter consideration will be essential in future cases. This prompts the following observations.

[60] In the present case, two crucial "Aarhus" questions arise: first, what act or omission on the part of the Commission contravened, arguably or at all, a provision of national law relating to the environment? Second, are alleged contraventions of such laws by the developer in point as the judicial review challenge is directed to the Commission only? We venture no further as the "Aarhus" issues form no part of the appeal to this court. We would, however, observe that there is evident scope for more detailed interrogation of such issues both by judicial review respondents and the High Court in future cases. This could generate rulings which this court can consider with a view to providing desired guidance in this sphere. We observe only that the

appellant appears fortunate that Arhaus costs protection was afforded without objection both at first instance and on appeal, in circumstances where there are valid questions which merited more detailed consideration.

Conclusions

[61] These are:

(i) This appeal is dismissed on its merits.

(ii) The appellant has standing to bring these proceedings.

(iii) These proceedings are a misuse of the process of the court.

(iv) With the exception of (iii), the judgment and order of McAlinden J refusing leave to apply for judicial review are affirmed in all respects.

Addendum: Costs

[62] The court has considered the further submissions directed on the issue of costs. The Commission, being the successful party at both levels, is entitled to an order for costs against the appellant. The costs protection order noted in paragraph [59] above specified £3,000 & VAT. Given the VAT rate of 20% this equates to a gross amount of £3,600. This is compliant with the statutory maximum of £5,000. It follows that the decision of the English Court of Appeal in Friends *of the Earth v Secretary of State for Transport* [2021] EWCA 13, which held that the costs ceiling specified in an Aarhus CPO is inclusive of VAT, does not arise for consideration. Adversarial argument on this decision, absent in the present case, may be considered in a suitable future case. Significantly, none of the parties addressed Regulation 3(9) of The Costs Protection (Aarhus Convention) Regulations (NI) 2013:

> "(9) The amounts specified in paragraphs (2) and (3) do not include value added tax."

It is notable that the equivalent provision in England & Wales, CPR 45.45, is silent on the issue of VAT. The Northern Irish rule is unequivocal. In passing, there was no CPO at first instance and the High Court made no order as to costs *inter–partes*.

[63] Thus, the appellant shall pay the Commission's costs of the appeal subject to an overall ceiling of £3,600, inclusive of VAT. The developer, having the status of interested party, will in accordance with standard practice bear its legal costs and outlays.