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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICTION BY
DEBORAH LYNCH AND JOHN LYNCH
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW (No.4)

AARHUS CONVENTION COSTS RULING

The Applicants appeared in person
Denise Kiley KC with Gordon Anthony (instructed by Belfast City Council, Legal Services) for the Respondent
Conor Fegan (instructed by TLT Solicitors, for the Notice Party)

McLAUGHLIN J

Introduction

[1] This ruling arises out of the opposition by the proposed respondent and proposed notice party to the applicants' request for a protective costs order in accordance with Regulation 3 of the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013, as amended ("the Aarhus Regulations").

[2] Regulation 4 of the Aarhus Regulations provides a statutory costs protection mechanism for "Aarhus Convention cases." It applies if the applicant has made a request under Regulation 3, unless the respondent states that the Regulations do not apply and sets out the grounds for opposition.

[3] The proposed respondent and proposed notice party have both contended that this is not an Aarhus Convention case and that the Aarhus Regulations do not apply. At a first case management review hearing on 11 June 2026, the parties agreed that this issue may be determined by way of written submissions. The court is grateful to all parties for the co-operative and pragmatic manner in which this issue has been addressed. It is also grateful for the helpful written submissions

which were received from all parties in a timely fashion in accordance with the agreed timetable.

Background

[4] The applicants seek leave to apply for judicial review of an EIA screening decision of Newry, Mourne and Down District Council ("the Council") dated 8 May 2026 in relation to planning application LA07/2022/0885/F. The planning history is complex. In summary, the planning application relates to the development of a residential dwelling in proximity to the applicants' home. The developer is the proposed notice party and the development has been partially constructed. The current planning application was made on foot of an application notice served by the Council pursuant to section 43 of the Planning Act (Northern Ireland) 2011 and seeks permission in respect of the development as presently proposed.

[5] This is the fourth judicial review application brought by the applicants in relation to the proposed development. The first two challenges related to grants of planning permission and both resulted in quashing orders, with the consent of the Council. I refused leave for the third challenge on grounds, inter alia, that it was premature (*Re Lynch* [2025] NIKB 72).

[6] These proceedings were commenced on 1 May 2026. The challenge initially related to the Council's "*continued progression*" of the planning application and the "*failure to confront and address*" the EIA screening process in a manner which the applicants considered to be appropriate. On 8 May 2026 the Council made a screening decision and determined that the proposed development was not EIA development with the result that an environmental impact assessment was not required. The decision was taken pursuant to Regulation 12 of the Planning (Environmental Impact Assessment) Regulations (Northern Ireland) 2017 ("the EIA Regulations"). An Amended Order 53 statement was filed on 29 May 2026, to include a challenge to the screening decision of 8 May 2026. At the review hearing of 11 June 2026, the applicants confirmed that the screening decision had superseded the previous proposed grounds and that it was now the focus of the challenge.

[7] The leave application has been listed for hearing on 21 September 2026. For reasons set out in more detail below, it is therefore neither necessary nor appropriate to reach a concluded view on the merits of the challenge for the purposes of this application. However, it is necessary to have an understanding of the issues raised and the proposed grounds. Para 5.2 of the Amended Order 53 statement sets out the matters relied upon to challenge the screening decision. They include issues such as the Council's understanding of the facts; the proposals for foul drainage and wastewater; water discharge and soakaway proposals; existing land contamination; earthworks proposals and visual impacts.

Consideration

[8] The question for determination by the court is whether or not these proceedings constitute an "*Aarhus Convention case*" within the meaning of Regulation 2 of the Aarhus Regulations (as amended). It provides as follows:

> "An Aarhus Convention case" means an application by a member of the public (as defined by Article 2 of the Aarhus Convention) for judicial review under section 18 of the Judicature (Northern Ireland) Act 1978 of a decision, act or omission all or part of which is subject to the provisions of the Aarhus Convention."

[9] Where a dispute of this nature arises, Regulation 4(2) of the Aarhus Regulations requires the court to determine the dispute "*at the earliest opportunity.*" The parties are agreed that I should do so at this stage, prior to the leave hearing and on the basis of the evidence available.

[10] There is no dispute that the applicants are members of the public with a sufficient interest in the proceedings. Similarly, there is no dispute that the proceedings are an application for judicial review under section 18 of the Judicature (Northern Ireland) Act 1978. The issue in dispute is whether all or part of the decision under challenge is subject to the provisions of the Aarhus Convention.

[11] The Convention requires contracting states to guarantee that the rights and guarantees contained within the Convention are provided for in their national laws [Articles 2 and 3(1)]. These include rights to environmental information [Articles 4 & 5]; rights of participation in environmental decision and policy making [Articles 6, 7 & 8] and rights of access to justice [Article 9]. For present purposes, Article 9(3) & (4) are relevant. They provide:

> "3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, 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 <u>to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.</u>
>
> 4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in

> writing. Decisions of courts and whenever possible of other bodies, shall be publicly accessible."
> [emphasis added].

[12] There is no dispute that this is a challenge to the decision of a public authority. The only question is whether it concerns a contravention of the provisions of national law "*relating to the environment.*"

[13] The current leading domestic authority on the interpretation of Article 9(3) is *HM Treasury v Global Feedback Ltd* [2025] EWCA Civ 624. The case concerned a judicial review challenge to a decision by HM Treasury in the field of customs and trade arrangements. The applicant contended that the decision would give rise to effects upon the environment. The Court of Appeal held that the challenge fell outside the scope of the Convention. The court made two key findings:

(i) Article 9(3) of the Convention applied only where a challenge relates to the contravention of a legal provision which concerns the environment, its protection or regulation. It did not apply to challenges involving any breach of national law which could give rise to an effect upon the environment (para [96]).

(ii) Public law principles regulate the conduct of public administration as a whole, not simply environmental protection and regulations. It is not therefore sufficient that the challenge relies upon public law principles (para [132]).

[14] In the key paragraph, the court stated:

> "[96] 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."

[15] In *Re Duff* [2025] NICA 70, the Northern Ireland Court of Appeal (per McCloskey LJ) recently considered the *Global Feedback* decision together with other relevant authorities. Its observations were obiter on the facts of the case and the court noted that Aarhus Convention cases may come before it in due course. It also noted that the England & Wales authorities were not strictly binding. One issue which the court identified for potential future determination was whether an "*Aarhus Convention case*" included one in which the relevant breach of national law arose from the actions of the developer rather than a public authority (at [60]).

[16] Two further authorities are relevant. *Austin v Millar* [2014] EWCA Civ 1012, was a private nuisance claim arising from dust and noise associated with an open cast coal mine. For the purposes of Article 9(3) it was therefore a claim against a "*private person*", rather than a "*public authority.*" The Court of Appeal considered that private law claims, including a claim for public nuisance could supplement the environmental regulatory powers of public authorities and therefore could, in principle, fall within the scope of Article 9(3). It considered that this may arise where there was a close link between the claim and the environmental matters regulated by the Convention and also where the claim may confer a "*significant public environmental benefit*", rather than simply provide a personal amenity benefit to the claimant. In that case, the environmental benefits were insufficient and the Court held that the case fell outside the scope of Article 9(3).

[17] Similar considerations arose in this jurisdiction in *Re Nesbitt* [2017] NIQB 116. The applicant wished to challenge the grant of planning permission for social housing units on a site adjacent to his residence. A dispute arose at the leave stage about whether it was an Aarhus Convention case. The court granted leave on two grounds, both of which involved the Council's interpretation and application of material planning policies when deciding to grant permission. The court concluded that it was <u>not</u> an Aarhus Convention case. In a succinctly reasoned conclusion, McCloskey J rejected the contention that the development would give rise to a "*major impact on the environment*" and stated:

> "[11] … I consider it clear that the Convention is not designed to provide financial protection in a neighbour/occupier v developer challenge of this genre. The application for a protective costs order is refused accordingly."

While the Court used the language of a "neighbour v developer dispute", the basis of its decision was that the issues raised by the challenge were more akin to the protection of a private amenity interest, rather than being "*related to the environment*" within the scope of Article 9(3).

[18] In this case, the applicants rely upon the *Global Feedback* decision and contend that question of whether a case is "*related to the environment*", is focused upon the nature and purpose of the relevant domestic legal provision which governs the challenge. They contend that where the provision concerns the environment, its protection or regulation, the claim will be an Aarhus Convention case. In this case, they contend that the challenge relates to a screening decision taken under the EIA Regulations and that it is incontrovertible that those Regulations both protect and regulate the environment. A screening decision is also the mechanism by which the need for an environmental assessment is determined, which in turn will regulate the procedure by which public participation in the planning decision is taken.

[19] By contrast, the respondent and notice party contend that the court should look beyond the reliance upon the EIA Regulations and consider the substance of the challenge. They contend that, in substance, it is a rationality challenge involving the application of normal public law principles. Also relying upon the comments in *Global Feedback* (at [132]), they contend that public law principles are insufficient to bring the challenge within the scope of the Convention. They also invite the court to apply the reasoning in the *Austin v Millar* and *Re Nesbitt* cases. They contend that this is, in substance, a "neighbour-type dispute", very similar to that in *Re Nesbitt*, which does not raise issues of environmental significance, nor would it deliver any wider environmental benefits. Accordingly, they contend that the court should follow the approach adopted in *Re Nesbitt* and refuse to make a costs protection order.

[20] In determining this application, it is necessary to commence with the language of Article 9(3) of the Convention. It requires that the contracting state parties must make available judicial procedures for challenging the acts and omissions of private persons and public authorities "*… which contravene provisions of its national law relating to the environment*." The focus must therefore be upon the provision of national law alleged to have been contravened and there must be a connection between the relevant legal provision and the environment.

[21] The two leading decisions in which these issues were fully argued are those of the Court of Appeal in *Global Feedback* and *Austin v Millar.* When interpreting the phrase "*relating to the environment*", these authorities appear to anticipate consideration of two key issues. First, the purpose and objectives of the relevant provision of national law and the extent to which it can properly be said to relate to the environment. In *Global Feedback*, it was held that the claim must involve contravention of a legal provision concerned with "*the protection or regulation of the environment*." This test is therefore focused upon the nature of the relevant legal provision, rather than the environmental effects of the impugned measure. In many cases, the character and purpose of the legal provision will be clear. However, in other cases, the degree to which the provision regulates the environment may be more remote or it may be only one of several policy objectives. Second, the Court might consider the environmental effects of the impugned act or omission. In *Austin v Millar*, the legal provision was the common law tort of private nuisance. It is primarily concerned with the protection of private land amenity interests. However, in some cases, a private claim might confer broader public environmental benefits. The Court of Appeal in *Austin* set the bar at a reasonably high level before a private law claim will "*relate to the environment*" for the purposes of Article 9(3) of the Convention.

[22] There is an important difference between the two tests. For private law nuisance claims, the test in *Austin* is focused upon the environmental effects of the alleged wrongdoing and the extent to which the proceedings may deliver public benefits. However, for claims against public authorities, including judicial review challenges, the *Global Feedback* test is focused solely upon the nature and purpose of

the national legal provision which is alleged to have been contravened. There is nothing in *Global Feedback* to suggest that the *Austin* test of delivering significant public environmental benefits also applies, if it is clear that the applicable legal provision protects or regulates the environment. It is of note that neither the Convention nor the Aarhus Regulations provide an exception for "neighbour-type disputes", nor do they refer expressly to the need to demonstrate substantial public environmental benefits in cases with a private focus. Those aspects of the *Austin* test appear to derive simply from the need to demonstrate that the relevant legal obligation is related *"to the environment"* rather than to some private amenity interest. The interaction between the two tests is not entirely clear and may have to be considered in future cases. It is not clear to me that they can be separated solely by reference to whether or not the defendant is a private person or a public authority. Clearly, public authorities could be the subject of mixed public and private law proceedings, for example a judicial review challenge which includes a damages claim for a civil wrong (eg, the operation and/or regulation of a waste disposal site, as occurred in the *Re McAleenon* [2024] UKSC 31 case). Similarly, public law proceedings against a public authority may include claims based upon environmental law, but pursue unmistakeably private objectives, as occurred in *Re Nesbitt* [2017] NIQB 116. For present purposes, it is sufficient to observe that the correct interpretation of the phrase "*provisions of its national law related to the environment*" within Article 9(3) may require consideration of both the nature of the legal provision which has been contravened and the extent of the environmental effects. This appears to have been the approach taken by McCloskey J in *Re Nesbitt*. However, that case was decided prior to *Global Feedback* and without a detailed analysis of the relevant caselaw or principles.

[23] It is clear from the decision of the Northern Ireland Court of Appeal in *Re Duff* [2025] NICA 70, that these decisions are not binding upon the courts in Northern Ireland. It may be that in a future case it will be necessary to consider the extent to which public environmental benefits may appropriately be considered in a claim involving a breach of environmental legal provisions. However, for present purposes, I do not consider that there is any clear indication within the Court of Appeal's obiter comments in *Re Duff* to suggest that these cases were wrongly decided or that they involve an incorrect analysis of the Convention. For my own part, I do not consider that they reveal any clear or obvious error of principle which would preclude them from being followed in Northern Ireland at first instance.

[24] I therefore consider that the appropriate approach to this application is to apply the test set out in *Global Feedback* and to commence the analysis by identifying and evaluating the relevant provision of national law which it is alleged has been contravened. In this case, the issue is straightforward. The challenge involves a single claim that the EIA screening decision was unlawful. The obligation to undertake a screening decision is imposed by Regulation 12 of the EIA Regulations. Those Regulations were enacted as a transposing measure for the EIA Directive (as amended) which is one of the foremost and most important instruments of EU environmental protection. It cannot plausibly be disputed that its purpose and effect

is both to protect and regulate the environment. Screening is an essential aspect of the regulatory regime for determining whether an environmental impact assessment is required. The Explanatory Memorandum to the EIA Regulations makes clear that their purpose was to transpose the amendments to Directive 2011/92/EU made by Directive 2014/52/EU. EU competence for both measures was Article 192 Treaty on the Functioning of the European Union which provides the legislative basis for the attainment of the community environmental objectives set out in Article 191 TFEU.

[25] On the basis of the *Global Feedback* test, I consider that the alleged contravention clearly relates to a provision designed to protect and regulate the environment. Both the proposed respondent and the notice party contend that I should look beyond the nature of the legal provision and "*see the case for what it really is*", namely the fourth iteration of a prolonged and bitter neighbour dispute. Both parties go so far as to suggest that the reliance upon environmental law is a "*sleight of hand.*" They also emphasise the breadth of the Council's discretion when making a screening decision and contend that this is simply a rationality challenge, dressed in the language of environmental law.

[26] Having given the matter careful consideration, I have concluded for the reasons set out below that the appropriate course is to apply the *Global Feedback* test. Contrary to the invitation of the proposed respondent and notice party, I do not consider it to be appropriate to apply any further gloss to that test or to engage in a more detailed analysis of either the merits of the challenge or the extent of the environmental effects of the development at this stage. I therefore find that these proceedings are an Aarhus Convention case within the meaning of the Aarhus Regulations. I will therefore make a costs protection order in accordance with the Regulations in the terms set out below.

[27] First, a screening decision is an integral part of the EIA regime and is a statutory requirement. The mere fact that the council enjoys a wide discretion when making the decision and the challenge may be determined by ordinary public law rationality principles, does not deprive the EIA Regulations or a screening decision of their character as a provision of national law which regulates or protects the environment. I do not consider that this case falls within the scope of the principle referred to in para [132] of the *Global Feedback* decision, in which the Court of Appeal made clear that the application of public law principles alone was insufficient to bring a judicial review challenge within the scope of Article 9(3). In this case, the application of those principles provide the legal standard by which challenges to screening decisions are determined. They do not displace the fact that a screening decision remains a mechanism for environmental regulation and protection.

[28] Second, the contention that the applicant's reliance upon the EIA regulations is a "*sleight of hand*" amounts, in substance, to a contention that the challenge is either without merit or has been made for an improper purpose. In my view, it is far too early in the proceedings for the court to reach a concluded view on either of those issues. The leave application is listed for hearing on 21 September 2026. I consider

that hearing is the appropriate occasion on which the court should form a view on the merits of the claim. All parties agreed that I should decide the Aarhus Convention dispute at the earliest opportunity, on the papers and prior to leave. It appears to me inconsistent with that approach that I should engage in a more detailed examination of the evidence, without the benefit of submissions from the parties. I am conscious that sequencing an Aarhus Regulations hearing and a leave hearing in this manner could give rise to a danger of abuse of the Aarhus Regulations, if a party included a wholly unmeritorious challenge, alleging a contravention of an environmental law. In such a case, the onus should be upon the opposing party to draw this issue to the attention of the Court, including any potential need for the Court to consider the substance of the claim. This will enable the Court to make a more informed decision about the materials and submissions needed to determine the Aarhus Regulations dispute and also to determine when "*the earliest opportunity*" to do so will arise. In a judicial review application, the leave hearing may be the earliest suitable opportunity which would avoid unnecessary duplication of submissions. In an exceptional case, a pre-leave inter-partes hearing may be necessary.

[29] Third, for similar reasons, the court in this case is not in a position to reach a concluded view about the merits and extent of the environmental concerns raised by the applicants and hence to determine whether the dispute "*relates to the environment*" as distinct from a private amenity interest. The court is clearly alive to the prolonged litigation history at this site and the bitter nature of the neighbour dispute which has been ongoing. However, such disputes are not unknown to the Courts and the mere fact that a further legal challenge has been mounted cannot, of itself, be determinative of whether the proceedings amount to an Aarhus Convention case. It may be that the challenge does not have merit or that the environmental concerns of the applicants are of a local rather than public character. However, an acceptance of the respondent's submissions would, in effect, amount to a judgment on the merits of the entire challenge, which I do not consider to be appropriate at this stage of the proceedings.

[30] Fourth, as set out above, the authorities are not entirely clear as to the application of the *Austin* test of "*significant public environmental benefits*" in a challenge to a public authority decision, based upon an alleged breach of an environmental regulation. As a court of first instance, I do not consider it to be appropriate to refine or alter the legal tests which have been established in England and Wales, based upon the same Convention and where the authorities have not been doubted at appellate level in this jurisdiction.

[31] For all of the above reasons, I therefore conclude that these proceedings are an Aarhus Convention case, within the meaning of Regulation 2 of the Aarhus Regulations.

[32] The notice party has raised a subsidiary issue about the extent of the costs cap to which the applicants are entitled. Regulation 3(2) of the Aarhus Regulations provides:

> "3(2) Subject to paragraphs (3) and (7), in an Aarhus Convention case, the court shall order that any costs recoverable from an applicant shall not exceed £5,000 where the applicant is an individual and £10,000 where the applicant is a legal person or an individual applying in the name of a legal entity or unincorporated association."

[33] The notice party relies upon the use of the singular word "applicant" to contend that there are two applicants and that each should therefore be subject to an individual cost cap of £5,000 +VAT. He also points out that CPR r.46.26(4) provides expressly for individual caps in cases involving "*multiple claimants or multiple defendants*."

[34] I acknowledge that Regulation 3(2) uses the singular form rather than the plural. However, pursuant to Regulation 2(2), the Interpretation (NI) Act 1954 applies to the Aarhus Regulations. Section 37(2) of the 1954 Act provides that in an enactment "*(a)words in the singular shall include the plural and (b)words in the plural shall include the singular*." I do not therefore consider that the use of the singular in this context can be determinative of the legislative intention behind Regulation 3(2) in every case. Approaching the matter by reference to ordinary principles of interpretation, I consider that the word "applicant" may legitimately include both Mr and Mrs Lynch, in circumstances where they are a married couple who live together, adjacent to the development site and both have complete community of interests for the purposes of standing. They also cannot properly be regarded as an "*unincorporated association*" within the meaning of Regulation 3(2) which would result in a costs cap of £10,000. It may be appropriate to apply the higher cap in other cases involving multiple individual applicants who have less community of interest. I therefore consider that the appropriate costs cap is £5,000.

[35] The notice party also contends that in these circumstances, the cap should be £5,000 plus VAT. Pursuant to Regulation 3(2), I am required to make an order that "*any costs recoverable from an applicant shall not exceed £5,000.*" If the applicants are registered for VAT and entitled to treat a costs liability as an allowable expense, they would be entitled to recover any VAT due on costs. In those circumstances, I would include an allowance for VAT within the costs order. However, if the applicants are not registered for VAT, it seems to me that the inclusion of an allowance for VAT which could not be recovered would simply amount to a costs cap of £6,000, rather than £5,000, which would be contrary to Regulation 3(2).

[36] I will therefore hear the parties on the terms of the final costs cap on the basis of the above principles. I will also hear the parties on the costs of this application,

however that decision will be reserved until the conclusion of the case and will be considered at the same time as the final costs order.