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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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

AND IN THE MATTER OF A DECISION OF CAUSEWAY COAST AND GLENS BOROUGH COUNCIL

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The applicant, Mr Duff, appeared in person
Kevin Morgan (instructed by Causeway Coast and Glens Borough Council Legal Services) appeared for the proposed respondent
Richard Shields (instructed by Shean Dickson Merrick Solicitors) appeared for the interested party

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SCOFFIELD J

Introduction

[1] By this application the applicant, Mr Duff, seeks leave to apply for judicial review of a decision of Causeway Coast and Glens Borough Council ('the Council') to grant planning permission (reference LA01/2020/1235/O) in relation to a site between 51 and 53 East Road, Drumsurn.

[2] The Council conceded from an early stage that it would not oppose the application and, indeed, reached agreement with the applicant to this effect, on the basis that no order for costs would be made against the Council. To this end, the Council's response to the applicant's pre-action correspondence said that it had been decided that his claim "will be conceded in full to avoid the incurring of legal costs" and that it would consent to the court being invited to quash the permission. However, the planning applicant, Mr Alex McDonald, who was the beneficiary of the impugned permission, took a very different view. He opposes the quashing of his planning permission on a variety of bases; and has instructed both legal

representatives and a planning consultant to mount a case on his behalf against the grant of leave.

[3] In light of the interested party's opposition to the grant of leave or any relief, the matter was listed for a full leave hearing. Mr Duff appeared in person. The Council was represented by Mr Morgan, of counsel; and Mr McDonald was represented by Mr Shields, of counsel. I am grateful to all parties for their helpful submissions.

Factual Background

[4] This case concerns – as many of Mr Duff's challenges do – the grant of planning permission in the countryside for an 'infill' dwelling, that is to say, a dwelling which is considered permissible under Policy CTY8 of Planning Policy Statement (PPS) 21 as filling a small gap in an otherwise substantial and continuously built up frontage in the countryside. The policy provides (in the relevant part) that:

> "Planning permission will be refused for a building which creates or adds to a ribbon of development.
>
> An exception will be permitted for the development of a small gap site sufficient only to accommodate up to a maximum of two houses within an otherwise substantial and continuously built up frontage and provided this respects the existing development pattern along the frontage in terms of size, scale, siting and plot size and meets other planning and environmental requirements. For the purpose of this policy the definition of a substantial and built up frontage includes a line of 3 or more buildings along a road frontage without accompanying development to the rear."

[5] Mr McDonald has been granted permission for a dwelling in a gap between Nos 51 and 53 East Road, Drumsurn, near Limavady. This is a small roadside field, located in a rural area, of predominantly agricultural character, outside of any settlement as defined in the Northern Area Plan 2016. Mr McDonald contends that the Council was right to consider that his application complied with planning policy and, in particular, that it was entitled to consider that the proposal was for a small gap site within an otherwise substantial and continuously built up frontage comprising Nos 51, 53 and 55 East Road.

[6] A previous application (B/2012/0155/O) which was made before planning functions were transferred to district councils was refused by the Department of the Environment on the basis that the proposal would result in ribbon development along East Road and fail to integrate in the landscape, resulting in a suburban style

build-up when read with other existing development in the immediate vicinity. Mr McDonald did not appeal this decision to the Planning Appeals Commission (PAC), although he has averred that he was advised by his planning consultant that an appeal would have had good prospects of success. He contends that, in further discussion with Planning Service, his planning consultant was advised that his application had been "in the spirit of the policy and as such should have been approved".

[7] Mr McDonald made a further application for outline permission at the site (reference LA01/2020/0962/O) which was recommended for refusal and which was withdrawn prior to a decision being taken by the Council. Then, on 18 November 2020, he submitted a further application through his agent AQB Architectural Workshop Limited (AQB). This application was considered by the Planning Committee of the Council at its meeting on 25 August 2021. In advance of that, as is usual, the Council's professional planning officers prepared a report for the committee, highlighting a number of salient issues, assessing the proposal against applicable planning policy, and making a recommendation. Amongst other things, it notes that there were no objections to the proposal.

[8] Significantly, the planning officer's report included the following advice in the Executive Summary:

> "The principle of development is considered unacceptable in regard to the SPPS and PPS21 as there is no substantial and continuously built up frontage within the countryside at this location. The proposal would also have an adverse impact on rural character through the creation of ribbon development and would fail to satisfactorily integrate into the landscape.
>
> No overriding reasons have been forthcoming as to why the development is essential and cannot be facilitated within the development limit."

[9] The officer's report therefore again recommended refusal on the basis that the proposal was contrary to the Strategic Planning Policy Statement for Northern Ireland (SPPS) and Policies CTY1, CTY8, CTY13 and CTY14 of PPS21. The discussion and conclusion indicated that there was no substantial and continuously built up frontage within the rural area at the location (and consequently no gap to infill) as there was not the required number of buildings to form a built up frontage. In particular, the dwelling at No 51 sat to the rear of the application site and its curtilage did not extend to East Road, terminating approximately 25 metres back from the road edge where it accessed onto the laneway. Since the curtilage of No 51 did not have a common frontage onto East Road, it could not be considered to form part of a substantial and continuously built up frontage with Nos 53 and 55. Additionally, since there was (in the officer's view) no gap site at the location, the

proposal would further add to the linear pattern of development along the roadside adding to ribbon development, which was detrimental to rural character and contrary to policy. There was no overriding reason why the development was essential at this location under Policy CTY1. The proposal would also fail to integrate into the landscape and would erode the rural character of the area, which was also contrary to policy. Accordingly, refusal was recommended on a variety of bases.

[10] A site visit occurred on 23 August, at which seven councillors and two council officers were present. The site visit report suggests that officers gave advice to those members of the Planning Committee who were present in the same vein as the officer's report – pointing out why (in the officers' view) the relevant planning policies were not complied with.

[11] However, at the committee meeting two days later, notwithstanding the recommendation to refuse from Senior Planning Officer McMath (who gave a presentation in relation to the application), the committee decided by majority vote to grant the application. This was after a presentation by the applicant's architect, Mr Boyle of AQB, in which he contended that the site complied with Policy CTY8 and that the three relevant dwellings (Nos 51, 53 and 55) all shared a roadside frontage. He also – seemingly as an alternative – submitted that the *spirit* of the policy was met. The Chair put the motion to a vote and six members voted to approve the application; five members voted to refuse the application; and there was one abstention. The Head of Planning sought reasons for voting for an approval, which are minuted as follows:

> "That the Committee approved for the following reasons:
>
> - The houses to the side are road frontage; as the frontage of no.51 goes to the road do not see a difference; if you take that as frontage, therefore infill applies and complies with policy;
>
> - A dwelling on the site will integrate with the buildings already there;
>
> - Is not ribboning, the laneway ensures ribboning does not take place."

[12] The minute also notes that Councillor Hunter (who seconded the motion to accept the officer's recommendation to refuse the application) stated her dissatisfaction with the lack of justification for the committee's decision; and that the Head of Planning "advised that she can only record what the Members have put forward for their reasoning".

The grounds of challenge

[13] Mr Duff has three broad grounds of challenge: first, that immaterial considerations have been taken into account; second, that material considerations have been left out of account; and, third, that there has been a breach of planning policy without the appropriate justification. The particulars provided in the grounds represent a number of consistent themes in Mr Duff's challenges in relation to infill development in the countryside.

[14] In particular, he contends that there is no substantial and continuously built up frontage at this location – largely because No 51 East Road should not be considered to form part of such a frontage (since it does not actually front onto East Road). He also contends that the proposed dwelling will not integrate; that it will allow suburban build-up; and that it will create or add to ribbon development in a manner which is precluded by, rather than permitted by, the relevant policy. He further contends that supplementary planning guidance in the form of Building on Tradition has not been taken into account (in breach of SPPS); and that the Planning Advice Note (PAN) issued by the Department for Infrastructure (DfI) in this subject area on 2 August 2021 was not taken into account. Save for these last two issues, it is immediately apparent that, in substance, the applicant's case is that the Council's professional planning officer got the assessment right and the elected councillors who voted in favour of the proposal got it wrong in a manner which is legally indefensible.

Submissions on the merits

[15] Mr Duff's affidavit is less full than in many of the other judicial review applications he has lodged. This is understandably so since, at the time when he lodged the application, the Council had already confirmed in pre-action correspondence that it did not intend to oppose the grant of relief. In his affidavit, Mr Duff contends that No 51 East Road is "up a lane with no frontage to East Road"; and he has provided photographic evidence which, he says, supports that contention. These averments support the central thrust of his case, which is that there was no relevant substantial and continuously built up frontage within the terms of Policy CTY8 to enable legitimate infill development to occur. In his oral submissions, Mr Duff suggested that leave should obviously be granted given the Council's concessions in the case.

[16] In Mr Morgan's submissions, at my request, he provided further details of the aspects of the Council's consideration which, on reflection and with the benefit of legal advice, it now accepted gave rise to a legal vulnerability in its decision warranting the grant of a quashing order so that the application would be reconsidered. There were two key aspects to this. First, the Council accepts that it is arguable that, as already outlined in the summary of the officer's report above, there is no relevant frontage to East Road at the dwelling at No 51 and that the committee's minuted reasoning that "the frontage of no.51 goes to the road" could

not be stood over. Relatedly, it was accepted to be arguable that the three dwellings said to form the continuous frontage were not visually linked given the extent to which No 51 was set back. Second, the Council also accepts that the further committee reasoning that "the laneway ensures ribboning does not take place" arguably cannot withstand scrutiny. Indeed, it is difficult to see that the mere presence of a laneway between two properties would have any significant impact on the issue of visual linkage which is relevant as part of the assessment of whether ribbon development has been created or added to. The Council accordingly did not oppose the grant of leave and, indeed, consented to the grant of relief even at this early stage.

[17] In his submissions, Mr Shields for Mr McDonald emphasised that in this case the Planning Committee had undertaken a site visit. This is something for which Mr Duff commended the committee (since in many cases he has brought part of his complaint is that the planning decision-makers could not make a proper assessment of the issue of compliance with policy without seeing the proposal site and its surroundings for themselves). Having done so, Mr Shields submitted, the majority of the committee were entitled to take their own view on the planning merits and also on (what he submitted to be) the question of fact as to whether or not the curtilage of No 51 extended down to the road. The mere fact, he contended, that a different composition of the Planning Committee – or even the same committee – has more recently changed its mind on these questions did not render the view taken by the committee which granted the application on 25 August unlawful. In addition, the interested party supported his case by providing a report from a newly instructed planning consultant, Gemma Jobling BSc Dip TP MRTPI of JPE Planning, which maintained the view that the relevant policies were complied with (including by virtue of the fact that the driveway access to No 51 East Road formed a frontage to the road).

[18] Manful though Mr Shields' submissions were, the leave threshold in this case is comfortably surmounted in my view, particularly in light of the concessions made on behalf of the Council. Although the application of Policy CTY8 calls for the exercise of planning judgment in places, there are limits to how far that may go for three reasons. First, as authority establishes, planning authorities do not live in the world of Humpty Dumpty where the words used in a policy can be applied so flexibly as to render them devoid of sensible meaning (see Lord Reed in *Tesco* [2012] UKSC 13, at paragraph [19]). Second, albeit judgment may require to be exercised in matters of evaluation, there are other matters (such as the ascertainment of physical features on the ground) which may require assessment as a matter of fact, rather than the exercise of judgment, where judicial review will lie more readily in the case of a clearly established error. And, third, even where judgment is concerned, although the court's role is then extremely limited, it retains a residual discretion to review for irrationality or *Wednesbury* unreasonableness. In my judgment, there is plainly an arguable case in these proceedings that the Council has acted unlawfully by granting planning permission on the basis set out at paragraph [11] above, set against the clear advice of the planning officer's report which is summarised at

paragraphs [8] and [9] above, particularly in light of the previous planning history of the site.

The issue of standing

[19] The more difficult and interesting question in relation to the application for leave in this case relates to the issue of whether the applicant has standing to bring the proceedings. Section 18(4) of the Judicature (Northern Ireland) Act 1978 provides that:

> "The court shall not grant any relief on an application for judicial review unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

[20] Before one gets to the stage of the grant of relief however, the applicant must be granted leave to proceed under the Rules of the Court of Judicature (NI) 1980 ("RCJ") Order 53, rule 3(1). Order 53, rule 3(5) provides that:

> "The Court shall not, having regard to section 18(4) of the Act, grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

[21] This is an issue which should be considered at the leave stage, therefore; and is an issue which has been specifically raised by the interested party in opposition to the grant of leave in this case.

Mr Duff's contentions in relation to standing

[22] In his grounding affidavit, Mr Duff has averred the following:

> "I am bringing this application for leave for judicial review because I am passionate about protecting Northern Ireland's countryside and I believe that it is being systematically and cumulatively destroyed by huge numbers of infill houses which are being approved contrary to policy."

[23] This is also an issue which was addressed in Mr Duff's pre-action correspondence, which dealt also specifically with standing, in the following terms:

> "The Applicant has established in a number of judicial reviews that he is committed to protection of the environment and in particular the protection of the Northern Ireland countryside.

> The Applicant has brought 40 judicial reviews (most in the name of various Rural Integrity Companies) and has never been found to have been a mere busybody or vexatious in any case.
>
> All cases were challenging environmental harm and were brought on merit.
>
> The Court is consistently accepting that cases which are brought for environmental protection of the countryside are Aarhus Convention cases.
>
> I claim standing on the basis that the environment cannot protect itself and all people have a genuine interest in the environment and responsibility to protect the environment."

[24] Mr Duff then relied on two authorities – the opinion of the Advocate General in the *Protect Natur* case and the decision of the United Kingdom Supreme Court in *Walton v The Scottish Ministers* – both of which are discussed below.

The interested party's submission on leave

[25] For his part, the interested party argued strongly that the applicant did not enjoy standing to bring these proceedings on a range of bases. The applicant does not live in the locality of the development proposal: he lives many miles away in Belfast. He has no known connection to the locality of the development proposal; nor does he live in, or have any known connection with, the Council's district. Significantly, he did not participate in any way in the planning process of which he now complains. This last factor was emphasised by Mr Shields as being of especial significance given the approach taken by the court in *Re Doyle's Application* [2014] NIQB 82, which I consider below.

[26] For completeness, I should add that the Council's position was neutral on the question of whether or not the applicant had standing in these proceedings. Lack of standing was not a point it had taken against him; but nor did it positively assert that Mr Duff had standing. In Mr Morgan's submission, this was a matter for the court.

Relevant authorities on standing in this context

[27] Mr Duff founded himself on recent authorities which emphasise the broad approach to standing in environmental cases and that the environment cannot speak for itself but needs citizens to do so. In particular, he relied upon dicta of Lord Hope in *Walton v Scottish Ministers* [2012] UKSC 44. That was a case in which an

individual protester challenged a decision to permit construction of a road network around Aberdeen. The project required environmental impact assessment (EIA). When the case reached the Supreme Court, one of the issues addressed was the question of standing and whether the applicant was a "person aggrieved" for the purpose of a challenge under the relevant Scottish statutory provision. This was considered not to be a straightforward matter and one which depended on the particular legislation involved and the nature of the complaint made.

[28] However, the Supreme Court considered that a wide interpretation was appropriate, particularly in the context of statutory planning appeals, since the quality of the natural environment was of legitimate concern to everyone. A person would ordinarily be regarded as aggrieved if they made objections or representations as part of the procedure which preceded the decision challenged and if their complaint was then that the decision was not properly made. In that case, the appellant was considered to be a person aggrieved, taking into account that he had made representations to the ministers in accordance with the procedures laid down in the relevant Act; that he had taken part in the local inquiry; and that he lived in the vicinity of the road scheme (although his home would not be affected), and was an active member of various local environmental organisations.

[29] On the other hand, in the *Doyle* case (supra), relied upon by the interested party, Treacy J refused leave in a planning challenge on the basis that the applicant did not have standing because of her non-participation in the relevant planning process. At paragraphs [10]-[11] of his judgment, he said this:

> "[10] The clear legislative purpose underpinning Art 21 and Art 32(6) of the [Planning (Northern Ireland) Order 1991] is that following the prescribed public advertisement any member of the public with an interest in the application/appeal has been given a reasonable opportunity to become aware of it and make representations if they so wish.
>
> [11] I accept the submission of the PAC that where, as here, members of the public are provided with a reasonable opportunity to participate in a quasi-judicial process, a person who does not so participate cannot ordinarily be said to have a sufficient interest in the outcome of that process."

[30] Having considered the UKSC's decision in *Walton*, Treacy J observed that, although the position may be different where the challenger had failed to participate in the planning process because they had been actively misled in relation to the nature of the application, mere ignorance was not enough. It would undermine the statutory purpose of the advertising regime required for planning applications if

being unaware of an application was a sufficient basis to confer standing. The judge went on (at paragraph [12]):

> "Further, it would introduce uncertainty since a person not involved in the process could, as here, emerge late in the day to mount a challenge including seeking to rely on points not taken by any of the participants in the appeal and even though better placed challengers who actually participated in the process have not sought judicial review."

[31] Mr Shields made the point that the *Doyle* case post-dated the Aarhus Convention (on which the applicant relied) and also involved, in his submission, a much more environmentally significant development than the present case.

[32] Mr Shields also referred to a decision of the English Court of Appeal in which a similar approach had been taken: *Ashton v Secretary of State for Communities and Local Government* [2010] EWCA Civ 600. That case also considered the meaning of the term "person aggrieved" in the Town and Country Planning Act 1990; but concluded that an individual who had not made representations at a public inquiry (albeit he had been a member of a development group which had) did not have sufficient standing to later challenge the Secretary of State's decision to grant planning permission. At first instance, the judge had stated that the relevant question in relation to standing was whether the applicant had taken a "sufficiently active role in the planning process" (citing Buxton LJ in *Eco-Energy (GB) Ltd v First Secretary of State* [2005] 2 P&CR 5, at paragraph [7]); and had found that, although he did not doubt the genuineness of the applicant's interest in the outcome of the decision-making process, he had not played a sufficiently active role in the planning process properly to be described as aggrieved.

[33] After a detailed review of a range of authorities in this area, Pill LJ helpfully summarised the court's conclusions on standing at paragraph [53] in the following terms:

> "The following principles may be extracted from the authorities and applied when considering whether a person is aggrieved within the meaning of section 288 of the 1990 Act:
>
> 1. Wide access to the courts is required under section 288 (article 10a, *N'Jie*).
>
> 2. Normally, participation in the planning process which led to the decision sought to be challenged is required. What is sufficient participation will

depend on the opportunities available and the steps taken (*Eco-Energy*, *Lardner*).

3. There may be situations in which failure to participate is not a bar (*Cumming*, cited in *Lardner*).

4. A further factor to be considered is the nature and weight of the person's substantive interest and the extent to which it is prejudiced (*N'Jie* and *Lardner*). The sufficiency of the interest must be considered (article 10a).

5. This factor is to be assessed objectively. There is a difference between feeling aggrieved and being aggrieved (*Lardner*).

6. What might otherwise be a sufficient interest may not be sufficient if acquired for the purpose of establishing a status under section 288 (*Morbaine*).

7. The participation factor and the interest factor may be interrelated in that it may not be possible to assess the extent of the person's interest if he has not participated in the planning procedures (*Lardner*).

8. While recognising the need for wide access to the courts, weight may be given, when assessing the prior participation required, and the interests relied on, to the public interest in the implementation of projects and the delay involved in judicial proceedings (Advocate General Kokott in *Ireland*)."

[34] In the *Ashton* case the applicant was both a local resident whose property would be affected to some degree by the development *and* a longstanding member of a development group which had campaigned against the proposal, including by making submissions at the planning inquiry on behalf of a range of people (including the applicant). Notwithstanding these features, the court concluded, as had the judge below, that he did not have sufficient standing to mount his intended legal challenge.

[35] This decision obviously pre-dates, and is inferior in status to, the guidance given by the Supreme Court in *Walton*. However, the themes are common. *Walton* also holds that persons will ordinarily be regarded as aggrieved if they made objections or representations as part of the procedure which preceded the decision challenged, maintaining such participation as an important touchstone in this

context (see paragraphs [86]-[87] of the judgment of Lord Reed). Whilst an interest in the matter for the purposes 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 (see paragraph [92] of Lord Reed's judgment), what constitutes sufficient interest is *also* context specific, differing from case to case, and requiring consideration of the issues raised and of "what will best serve the purposes of judicial review in that context" (see paragraphs [92]-[93] of Lord Reed's judgment). Lord Carnwath agreed with Lord Reed in relation to these issues, as did Lords Kerr and Dyson (see paragraphs [102] and [157]).

[36] Lord Hope wished to add a few words of his own on the question of standing in the context of environmental law, with which Lords Kerr and Dyson also agreed. He considered that the observations of the court below in relation to the appellant's lack of status as a person aggrieved was to take too narrow a view. At paragraph [152] of his judgment, he said that:

> "An individual may be personally affected in his private interests by the environmental issues to which an application for planning permission may give rise. Noise and disturbance to the visual amenity of his property are some obvious examples. But some environmental issues that can properly be raised by an individual are not of that character. Take, for example, the risk that a route used by an osprey as it moves to and from a favourite fishing loch will be impeded by the proposed erection across it of a cluster of wind turbines. Does the fact that this proposal cannot reasonably be said to affect any individual's property rights or interests mean that it is not open to an individual to challenge the proposed development on this ground? That would seem to be contrary to the purpose of environmental law, which proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone. The osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf."

[37] He continued, at paragraph [153]:

> "Of course, this must not be seen as an invitation to the busybody to question the validity of a scheme or order under the statute just because he objects to the scheme of the development. 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. There is, after all, no shortage of well-informed bodies that are equipped to raise issues of this kind, such as the Scottish Wildlife Trust and Scottish Natural Heritage in their capacity as the Scottish Ministers' statutory advisers on nature conservation. It would normally be to bodies of that kind that one would look if there were good grounds for objection. But it is well-known they do not have the resources to object to every development that might have adverse consequences for the environment. So there has to be some room for individuals who are sufficiently concerned, and sufficiently well-informed, to do this too. It will be for the court to judge in each case whether these requirements are satisfied."

[38] A number of Lord Hope's comments are to similar effect to the opinion of Advocate General Sharpston in Case C-644/15, *Protect Natur-, Arten- und Landschaftsschutz Unweltorganisation v Bezirkshauptmannschaft Gmünd* on which Mr Duff also relied, at paragraph 77:

> "The natural environment belongs to us all and its protection is our collective responsibility. The Court has recognised that the rules of EU environmental law, for the most part, address the public interest and not merely the protection of the interests of individuals as such. Neither water nor the fish swimming in it can go to court. Trees likewise have no legal standing."

[39] However, that case concerned the standing of an environmental organisation and the above passage is taken from a discussion of the role of such organisations which, as the Advocate General observed, both act as a filter and contribute specialised knowledge, thereby putting the courts in a better position to decide the case. Also pertinent is her observation at paragraph 81 of her opinion that the authors of the Aarhus Convention (discussed further below) did not opt to introduce an actio popularis in environmental matters. They chose instead to strengthen the role of environmental organisations and, in so doing, steered a middle course between the maximalist approach (actio popularis) and the minimalist approach (a right of individual action available only to parties having a direct interest at stake) as a sensible and pragmatic compromise.

[40] These sentiments resonate with the approach of Lord Hope in the *Walton* case discussed above. Lord Hope – himself an avid birdwatcher – recognised the force in the points made by Mr Duff that someone must speak up for affected wildlife and that we all have a legitimate concern about protection of the environment. The

insistence in every case on a private interest on the part of the applicant would therefore be inappropriate. However, the ability to bring proceedings in a representative capacity was not, even in Lord Hope's estimation, untrammelled. In each case, this would be an issue for the court, taking into account, inter alia, the knowledge, ability and resources of the challenger. Normally, one would look to expert Non-Government Organisations (NGOs) to perform this function. There has to be "some room" for individuals to do so; but it is not unlimited.

The effect of the Aarhus Convention

[41] As I understand it, Mr Duff relies to some degree on the Aarhus Convention in support of his claim to have standing, on a generalised basis that it supports wide access to environmental justice. In terms of costs protection in environmental judicial reviews, the Convention has been given statutory force in domestic law (see paragraph [59] below). On the issue of standing, however, it remains unincorporated (save insofar as incorporated through European Union (EU) law which is still retained EU law).

[42] In addition, as explained in the Advocate General's opinion in the *Protect Natur* case, and indeed in the later decision of the CJEU itself in that case, where (as here) the case is not one to which Article 6 of the Aarhus Convention applies, the provisions on access to environmental justice (under Article 9(3), rather than Article 9(2)) are weaker. Article 9(3) provides as follows:

> "In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, <u>where they meet the criteria, if any, laid down in its national law</u>, 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."
>
> [underlined emphasis added]

[43] In the *Ashton* case discussed above, the proposal required EIA. In those circumstances, the domestic requirements on standing had to conform with Article 10A of the Environmental Impact Assessment Directive (85/337/EEC), which reflects the requirements of Article 9(2) of the Aarhus Convention where Article 6 is engaged. In each case, the relevant provisions refer to members of the public having access to a review procedure before a court where they had "sufficient interest" (or maintaining impairment of a right, where the administrative procedural law of the relevant state requires this as a precondition). Article 10A of the EIA Directive (reflecting Article 9(2) of the Aarhus Convention) went on:

> "What constitutes a sufficient interest and impairment of a right shall be determined by the Member States,

> consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article."

[44] The Court of Appeal pointed out that NGOs promoting environmental protection and meeting any requirements under national law were deemed to have an interest under Article 10A. That obviously does not apply in this case, nor did it in the *Ashton* case, since the applicant is not an environmental NGO. The court also went on to refer to Case C-427/07, *Commission of the European Communities v Ireland* (16 July 2009). In that case, under Irish law the applicant was required to prove a peculiar and personal interest of significant weight which was affected by or connected with the development in question; yet the Court of Justice found Irish law to be compatible with the Directive on the issue of standing, although there were findings against Ireland on other grounds.

[45] When considering the issue of standing, Advocate General Kokott, in a passage quoted by the Court of Appeal in its judgment in *Ashton*, stated, at paragraph 69, as follows:

> "However, in order to determine what constitutes sufficient interest to bring an action, a balance must necessarily be struck. Effective enforcement of the law militates in favour of wide access to the courts. On the other hand, it is possible that many court actions are unnecessary because the law has not been infringed. Unnecessary actions not only burden the courts, but also in some cases adversely affect projects, whose implementation can be delayed. Factors such as an increasing amount of legislation or a growing litigiousness of citizens, but also a change in environmental conditions, can affect the outcome of that balancing exercise. Accordingly, it cannot be automatically inferred from more generous access to the courts than was previously available that a more restrictive approach would be incompatible with the objective of wide access."

[46] In short, the Aarhus Convention, even assuming it was applicable in the present circumstances, would not assist the applicant, other than in the most general way as being supportive of the principle of wide access to justice in environmental cases, which is already reflected in domestic case-law. The approach in EU law and

under the Convention – particularly in cases where expert NGOs are not involved – leaves scope for the striking of a balance.

Application in this case

[47] In this case, I have concluded that the applicant does not have appropriate standing to permit the grant of leave to him to pursue an application for judicial review.

[48] The applicant does not have any personal substantive interest in the grant of the planning permission involved. He does not live nearby. His amenity will not be affected. No property interest of his will be affected; nor are any of his private law rights engaged. Albeit the applicant may feel aggrieved at the grant of permission in this case, he is not objectively aggrieved by it (other than in the very general sense that he considers it harmful to the environment which we all share).

[49] The absence of a direct personal interest is, of course, not a determinative factor on its own, particularly given the wide access to the courts which is generally required in the field of environmental justice. However, there are three additional factors in this case which led me to conclude that the refusal of leave is appropriate on standing grounds.

[50] First, there has been a complete failure on the part of the applicant to participate in the planning process which led to the decision which he now seeks to challenge. The authorities discussed above suggest that, normally, participation in the planning process will be required before an applicant will be considered to have sufficient interest to challenge the resulting permission. Although a failure to participate is not an absolute bar, its combination in this case with the lack of any direct personal interest in the decision is an extremely important factor tending against sufficiency of interest.

[51] Second, I accept the interested party's submission that the environmental harm at stake in this case is modest, given the limited nature of the development proposal (and the extent for this to be further controlled at the reserved matters approval stage). Whilst I entirely recognise the force of Mr Duff's point that, if policies within PPS21 such as Policy CTY8 are routinely misapplied, there will be a significant cumulative impact caused by overdevelopment in the countryside made up of many small-scale developments, the best way to address this taking into account all of the interests involved is by more strategic litigation in a limited number of cases to authoritatively establish the correct approach to policy. Mr Duff already has a range of extant applications before the court raising the same or similar points, in respect of which a lead case has been identified and heard, and other related cases have been stayed. The lead case is one of those, like many others but unlike the present case, where Mr Duff did participate actively by way of objection in the planning process. Bringing myriad applications raising the same issue is not

required and may in fact be counterproductive, insofar as it delays determination of the key issues in a lead case or small number of test cases.

[52] Third, and importantly, I must also consider the public interest in assessing the sufficiency of the applicant's interest in these proceedings and whether that merits the grant of leave to proceed. In *Rural Integrity (Lisburn 01) Limited v Planning Appeals Commission* [2019] NIQB 40, at paragraph [35], McCloskey LJ referred to Mr Duff – at that time acting through a number of registered companies – engaging in "extensive litigation activities, which I have described as of unprecedented volume." There were some 40 or so cases which had been brought by Mr Duff at that stage, many of which touched upon or concerned the same points, or substantially the same points, as he is raising in these proceedings. The vast majority of these were struck out as an abuse of the court's process given non-compliance with the Court Rules in the manner in which they had been brought: see *Re Rural Integrity (Lisburn 01) and Related Limited Companies' Applications* [2020] NIQB 25. A small number of them have been permitted to proceed: see my judgment in *Re Portinode Environmental Ltd's Application* [2021] NIQB 31. Mr Duff has also issued a further 25 or so cases since then, many of which have been dealt with in another ruling given today: see *Re Duff's and Burns' Applications* [2022] NIQB 10. A number of his other cases remain stayed pending judgment in the lead case against Newry and Mourne District Council which was recently heard.

[53] There are a number of points arising from this. The court is entitled to take into account a variety of features of the public interest in assessing the adequacy of the applicant's interest in the proceedings he is bringing. A significant point in this respect, where Mr Duff brings proceedings in relation to a planning permission when he has had no prior involvement in the planning process, is that neither the planning authority nor planning applicant concerned will have had a proper opportunity to grapple with Mr Duff's objections. This deprives the planning applicant of the opportunity of making a reasoned and informed case against the objection; and deprives the planning authority of the opportunity of making a fully informed and reasoned decision dealing with the substance of Mr Duff's concerns. That is contrary to the requirements of good administration and will result in increased time and costs overall. A further result is that, as in this case, the planning applicant may be taken entirely by surprise, after the event, by a legal challenge to their planning permission. This may arise in circumstances where the beneficiary of the permission has acted to their detriment upon it, in good faith and with the reassurance that there had been no objection to the proposal during the course of the planning authority's consideration. The distress and inconvenience this may cause was apparent to the court in the representations received from affected parties both in this case and in many others which were the subject of the ruling in *Re Duff's and Burns' Applications*.

[54] The previous judgments and rulings referred to in the preceding paragraphs demonstrate the multiplicity of proceedings which have been commenced by Mr Duff in recent times. He is a prolific and seemingly indefatigable litigant. Dealing

with his cases has imposed a significant workload upon court office staff and continues to do so, in circumstances where the court's overriding objective to deal with cases justly (set out in RCJ Order 1, rule 1A) requires consideration, inter alia, of allotting an appropriate share of the court resources between cases and dealing with cases in ways which are proportionate to their importance.

[55] I accept the genuineness of Mr Duff's environmental concerns; of his passion for the countryside; and of his frustration at the lack of other challengers taking on what he perceives to be an unduly relaxed and harmful approach to piecemeal development in the countryside. His more recent cases, which are no longer being pursued through a limited company incorporated for the purpose, are taken at his own expense, without remuneration, and at personal costs risk. I would not therefore be inclined to label him as the classic 'busybody' against whom the standing rule archetypally guards. Nonetheless, I can see why the beneficiaries of planning permissions aggrieved at his challenges may view him in that way, particularly where his challenge materialises in the absence of any earlier planning objection. In addition, I must take into account that he is not an environmental representative in the sense that a specialist NGO would be; and that he acts as a litigant in person who therefore, notwithstanding his diligence and enthusiasm, is less likely to assist the court than a well-resourced organisation with access to environmental and legal expertise.

[56] Taking all of the above together, I am persuaded that the applicant should not be considered to have sufficient standing to pursue this case. In future, barring an exceptional circumstance, I would also be inclined to refuse leave to apply for judicial review in any case where Mr Duff has no direct personal interest in the planning permission under challenge and has failed to participate in the planning process resulting in the grant of that permission. I would not be inclined to refuse leave to apply for judicial review merely because the applicant does not live near the proposal site or in the proposed respondent's district, if he has earlier participated in the planning process out of legitimate environmental concern. In my judgement, this approach strikes an appropriate balance between the need to ensure wide access to justice in environmental cases but also the need to ensure that the standing test operates as a meaningful threshold in the public interest.

Conclusion

[57] By reason of the foregoing, I refuse the applicant's application for leave to apply for judicial review. I accept that a number of the grounds of challenge are arguable. However, I find that, in the context described above, the applicant does not enjoy sufficient interest in the subject matter of the proceedings for leave to be granted.

Costs

[58] In accordance with the court's normal (although not invariable) approach, I propose to make no order for costs between the parties given that the application has been dismissed at the leave stage, which is technically an ex parte application under the rules of court. Subject to any contrary view on the issue of standing which may be taken by the Court of Appeal if the refusal of leave in this case is appealed against, I would however observe that, in future, the bringing of a challenge where the applicant plainly does not enjoy standing for the reasons outlined above might well constitute an instance where departure from the normal approach to costs at the leave stage would be warranted.

[59] In case this ruling is appealed, I also record that the applicant sought a protective costs order (PCO) pursuant to the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013, as amended. The Order 53 statement stated that the application is an Aarhus Convention case within the meaning of that term in the 2013 Regulations and this was not objected to by either the Council or the interested party nor challenged under regulation 4. Had leave been granted therefore, or had costs been in issue at this stage, I would have granted a PCO in the standard terms under the 2013 Regulations to the effect that the costs recoverable from Mr Duff should not exceed £5,000 (excluding VAT).