[2022] IEHC 426

THE HIGH COURT

JUDICIAL REVIEW

[2021 No. 1110 JR]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

SAVE ROSCAM PENINSULA CLG, SOPHIE CACCIAGUIDI-FAHY, MARTIN FAHY AND PHILIP HARKIN

APPLICANTS

AND

AN BORD PLEANÁLA, GALWAY CITY COUNCIL, THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

ALBER DEVELOPMENTS LIMITED

NOTICE PARTY

(No. 4)

JUDGMENT of Humphreys J. delivered on Thursday the 14th day of July, 2022

Subject matter of the dispute

1. The primary relief sought by the applicant is an order of *certiorari* quashing the decision of the first respondent, An Bord Pleanála (the board), dated 28th October, 2021 (file reference 310797) authorising a proposed Strategic Housing Development at Rosshill, Galway involving demolition of existing silage concrete apron and the construction of 102 residential units (35 apartments, 67 houses), a crèche and associated site works.

Relevant parties

2. The applicant, the board and the State made submissions on the questions concerned. The notice party developer and Galway City Council did not take up the opportunity to do so.

Facts

3. The notice party developer applied for permission for the present development and submitted plans and particulars on 9th July 2021.

4. An appropriate assessment was conducted which concluded that the relevant European sites would not be adversely affected.

5. An environmental impact assessment was conducted which concluded that adverse effects could be mitigated.

6. The board concluded that a grant of permission would not materially contravene the Galway City Development Plan in relation to zoning, but would so contravene the plan in relation to plot ratio/ density. The board decided that this contravention could be justified by reference to government policy and ministerial guidelines.

7. Permission was granted with 33 conditions on 28th October, 2021.

8. The applicants filed a statement of grounds challenging this decision on 17th December, 2021.

9. Liberty to file an amended statement of grounds was granted on 20th December, 2021.

10. The amended statement of grounds was filed on 21st December, 2021. Certain grounds were subsequently adjourned generally, as set out below, while in relation to other grounds there was agreement that there be no order as to costs.

11. A dispute then arose as to the costs of the proceedings in relation to the remaining grounds, and the applicants filed a motion on 15th February, 2022 seeking pre-emptive orders declaring their entitlement to costs protection prior to the case being progressed substantively.

12. The board correctly makes the point that the motion regarding protective costs incorrectly covers all the grounds whereas in fact it should only apply to the grounds where there is a dispute.

13. In *Save Roscam Peninsula CLG v. An Bord Pleanála (No. 1)* [2022] IEHC 202, [2022] 4 JIC 0809 (Unreported, High Court, 8th April, 2022), I noted that there was no dispute about the no-order-as-to-costs rule in relation to certain grounds, and in relation to the rest I refused a declaration that the applicants were entitled to costs protection under s. 50B of the Planning and Development Act 2000 or the Environment (Miscellaneous Provisions) Act 2011, and adjourned the applicants' points relating to the interpretative application under the Aarhus Convention pending the present reference to the CJEU.

14. In *Save Roscam Peninsula CLG v. An Bord Pleanála (No. 2)* [2022] IEHC 328, [2022] 6 JIC 0903 (Unreported, High Court, 9th June, 2022), I granted leave to appeal under s. 50A(7) of the 2000 Act in relation to the issues under the 2011 Act on the question set out in the judgment. That does not affect the proposed reference, as matters stand.

15. In *Save Roscam Peninsula CLG v. An Bord Pleanála (No. 3)* [2022] IEHC 425 (Unreported, High Court, 14th July, 2022), I dealt with certain procedural matters not necessary for the order for reference, particularly setting out a list of relevant legal material with web links in order to assist the CJEU.

16. I now make the formal order for reference.

The grounds of challenge

17. The core grounds of challenge are as follows:

    (i). the board had no jurisdiction to grant permission in respect of a development that materially contravened the development plan in relation to zoning, and it infringed s. 9(6)(b) of the 2016 Act and s. 10(2)(a) of the 2000 Act;

(ii). the board granted permission in material contravention of the Development Plan for the purposes of s. 9(6) of the 2016 Act without first directing itself correctly as to the meaning of that plan as required by s. 9(2);

(iii). the board failed to have any or any proper regard to relevant guidelines and policy as required by s. 9(2) of the 2016 Act and s. 28 of the 2000 Act before deciding to grant permission for a material contravention of the Development Plan pursuant to s. 9(6) of the 2016 Act and s. 37(2) of the 2000 Act;

(iv). the board failed to have any or any proper regard to the National Planning Framework as required by s. 9(2) of the 2016 Act and s. 143 (2000 Act) before deciding to grant permission

(v). that it was not open to the board to grant permission in material contravention of the Development Plan for the purposes of s. 9(6) of the 2016 Act and s. 37(2)(b)(iii) of the 2000 Act where the Development Plan is already compliant with relevant guidelines and Government policy;

(vi). the board erred in finding that the Height Guidelines warranted a grant of permission in circumstances where the predominant part of the proposed development would involve a 2-storey, cul-de-sac dominated approach contrary to paragraph 3.7 of those guidelines;

(vii). the decision is invalid because the Board's Inspector failed to report adequately on the submissions made, or to make recommendations in relation to them, contrary to s. 146 of the 2000 Act as applied by s. 17 of the 2016 Act.

(viii). [ground 8 has been dropped]

(ix). that the developer had no interest in the site (lands comprising the L5037 Old Dublin Road) and the council in whose charge that road is has no power to authorise the Developer carry out works on it, or to apply for permission to do so and the purported consent issued by council to the developer to apply for permission in respect of road construction works on or beneath that road is *ultra vires* the council;

(x). [ground 10 has been dropped]

(xi). the board failed to carry out an EIA in accordance with the requirements of ss. 171A and 172 of the 2000 Act as applied by s. 20 of the 2016 Act, and failed to comply with arts. 1(2)(g), 2(1), 3(1), 5 and 8 of the EIA Directive, or with ss. 9(1) and 10(3) of the 2016 Act, in relation to effects on groundwater, protected sites, bats, birds, significance, alternatives, and monitoring [the application of the not-prohibitively-expensive-costs principle to ground 11 is not in dispute although the applicant seeks the no-order-as-to-costs rule];

(xii). [it is agreed that the no-order-as-to-costs rule will apply to ground 12]

(xiii). [it is agreed that the no-order-as-to-costs rule will apply to ground 13]

(xiv). [ground 14 has been adjourned generally];

(xv). the board failed to exercise its powers and duties under the 2000 and 2016 Acts in accordance with the requirements of the EIA directive, habitats directive and SEA directive where the provisions of s. 5 of the Interpretation Act 2005 require that those Acts be so interpreted [the application of the not-prohibitively-expensive-costs principle to ground 15 is not in dispute; the applicant seeks the no-order-as-to-costs rule which is partly but not wholly conceded];

(xvi). [ground 16 has been adjourned generally];

(xvii). [ground 17 has been adjourned generally];

(xviii). [ground 18 has been adjourned generally].

Relevant provisions of EU law

18. The most pertinent provisions of EU law are as follows:

(i). Directive 2001/42/EC of the European Parliament and of the Council of 27th June, 2001 on the assessment of the effects of certain plans and programmes on the environment.

(ii). Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters.

Relevant international materials

19. Also relevant as a result of the foregoing are:

(i). the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in Aarhus (Denmark) on 25th June, 1998 ('the Aarhus Convention') in particular art. 9.

(ii). The Rio Declaration on Environment and Development adopted by the United Nations Conference on Environment and Development, held at Rio de Janeiro on 3rd-14th June 1992.

Relevant provisions of domestic law

20. The most pertinent provisions of domestic law are as follows:

(i). Section 50B of the Planning and Development Act 2000, sub-section (2) of which provides a general rule that parties in judicial reviews of decisions under enactments

giving effect to EU law public participation rules, or article 6(3) and (4) of the habitats directive, shall bear their own costs. The section provides for limited exceptions as well as for provision in sub-section (2A) for the applicant to obtain costs to the extent that she is successful.

(ii). Section 3 of the Environment (Miscellaneous Provisions) Act 2011 Act, which provides a similar rule for proceedings to which that section applies, and section 4 of the Act, which applies the section to actions for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement or to certain other planning requirements, where the failure to ensure such compliance with, or enforcement of, such requirement has caused, is causing, or is likely to cause, damage to the environment.

Questions of European law arising

21. As discussed in the No. 1 judgment, it seems to me that seven questions of European law arise in the proceedings, that these relate to the interpretation rather than application of EU law, that these questions are necessary for the decision of this court, that the answers to these questions are not *acte clair* or *acte éclairé*, and that I consider it appropriate in all circumstances to make a reference to the Court of Justice of the European Union under article 267 TFEU.

The first question

22. The first question is:

Does the interpretative obligation whereby in proceedings where the application of national environmental law is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive, apply only within the sphere of EU environmental law.

23. The applicants' position is that the interpretative obligation in *Case C-470/16 North East Pylon* applies to the entirety of any judicial procedure where a member of the public, meeting the criteria if any laid down in national law, which is the position in this case, challenges any act or omission on the basis that it contravenes a provision of law relating to the environment, whether that provision is a provision of EU law, a provision of national law giving effect directly or indirectly to EU law, a provision of purely national law, or an instrument adopted pursuant to such a provision of national law.

24. The board's position is yes, the whole basis of the asserted competence is that the domestic sphere subjected to European regulation is, in a real sense, in the European sphere – i.e., the fields covered by EU environmental law. What the CJEU held in Case C-470/16 *North East Pylon* reflects precisely how the prior jurisprudence on exactly this issue has been applied

especially in Case C-240/09 ("*Brown Bears 1*") and Case C-12/86, *Demirel*; Case C-53/96, *Hermès*; Joined Cases C-300/98 and C-392/98, *Dior and Others* simply by way of example.

25. The State respondents' position is yes, the CJEU confirmed in *Case C-470/16, North East Pylon* that the interpretative obligation was intended to "ensure effective judicial protection in the fields covered by EU environmental law". Article 9 is not directly effective but its obligations attach *via* EU law to the fields of EU environmental law. As a consequence, the interpretative obligation applies widely, to the entire field of EU environmental law, not merely public participation. National environmental law includes all environmental law applicable within the State. As a matter of legal principle, it is not necessarily the case that all national environmental law acts within the field of EU environmental law.

26. My proposed answer to the question is "No". Article 9 of the Aarhus Convention is on its own terms not limited to the field of EU law, but applies to all decisions subject to the public participation requirements of article 6 of the Convention. That application is not limited to the public participation aspects of the decision challenged, but includes all aspects of that decision. This must include aspects in the field of purely national law. The need for consistency of interpretation in a context where the Convention is an integral part of EU law, as well as the need for a high level of environmental protection, favours an interpretation whereby member states must comply with Aarhus in full rather than merely in relation to the EU-based aspects of the challenge. In addition the pervasive need to consider at least the question of screening under the SEA, EIA and habitats directives will in effect maintain a link with EU law, albeit not confined to cases where public participation is required. Otherwise the protection for environmental applicants, particularly environmental NGOs such as these applicants, will be fragmented and ineffective.

27. The reason for the reference of this question is that as the Aarhus Convention has not been effectively implemented in Irish law, it primarily applies *via* the EU law interpretative obligation. Therefore, if that obligation has a narrow scope, some of the applicants' points may fall outside enforceable Aarhus protection.

The second question

28. The second question is:

If the answer to the first question is in the affirmative, where an applicant challenges a decision that is subject to procedures laid down in EU environmental law, is the challenge to be considered as falling within the sphere of EU environmental law even if the grounds of challenge do not relate to EU environmental law.

29. The applicants' position is that it is the nature of the decision taken, or of the legal provision under which it is adopted, that causes a challenge to be considered as falling within the sphere of Article 9(3) of the Convention, and therefore within the sphere of EU environmental law; and the grounds of review laid down by national law must provide an adequate and effective

remedy to enable this challenge to take place in accordance with Article 9(4) and Article 4(3) TFEU.

30. The board's position is no, if a ground of challenge does not relate to EU environmental law, the fact that a decision is subject to procedures laid down in EU law none of which are called in aid or even relevant to the contours of the legal dispute is irrelevant. If that was not the case, the judgment in *Case C-470/16, North East Pylon* would have been decided differently and the CJEU would have said that the interpretative obligation would arise regardless of the grounds, and only by reference to the wider context.

31. The State respondents' position is no, if the provisions of national law alleged to have been breached are not sourced in EU environmental law, but it happens that the procedure in question also, separately, contains provisions (of which no breach is alleged) that are sourced in EU environmental law, the extension of the NPE regime to such purely national provisions is arbitrary and likely to give rise to different outcomes in different member states on the basis of mere drafting structure. The Court of Appeal correctly applied EU law and *Case C-470/16, North East Pylon* in *Heather Hill* in recognising the divisibility of grounds in such a manner.

32. My proposed answer to the question is that it is not necessary to answer this question if the first question is answered No, but if this question does arise, the answer is "No". Again, the need for consistency of interpretation of Aarhus in a context where the Convention is an integral part of EU law, as well as the need for a high level of environmental protection, favours a wide interpretation of its protections. Where the decision-making process has considered EU law such as at least the question of screening or assessment under the SEA, EIA and habitats directives, that exercise provides a sufficient link with EU law, such that the challenge to the decision resulting from such a process should be considered, in full, as within the field of EU environmental law. Otherwise the protection for environmental applicants, particularly environmental NGOs such as these applicants, will be fragmented and ineffective.

33. The reason for the reference of this question is that if the Aarhus interpretative obligation is construed in a narrow sense, much of the applicants' Aarhus rights will not be enforceable in the domestic courts in a member state such as Ireland which has not incorporated the Aarhus convention directly into domestic law.

The third question

34. The third question is:

In particular, is a challenge that relates to alleged material contravention of an instrument of general application that was subject to strategic environmental assessment under directive 2001/42/EC (the strategic environmental assessment directive) to be considered as a challenge falling within the sphere of EU environmental law.

35. The applicants' position is that any challenge alleging breach of an instrument of general application that was subject to strategic environmental assessment is to be considered as a challenge falling within the sphere of EU law relating to the environment, because if this were not the case it would set at naught the entire purpose of the Directive, which is to secure the objectives set out in Article 191 TFEU, namely preservation, protection and improvement of the quality of the environment, the protection of human health and the prudent and rational utilisation of natural resources with a view to promoting sustainable development.

36. The board's position is no, the fact that the underlying plan was subject to SEA is not determinative. It is not credible in law that any single argument about a plan or programme subject to SEA is included under costs protection without any scrutiny of the relationship between the argument and SEA or, indeed, European environmental law itself. The point must also be raised, why is SEA special here? Why not EIA or Habitats? If the fact that an underlying European directive is engaged is determinative then there was no purpose to *Case C-470/16 North East Pylon*.

37. The State respondents' position is no, the posited challenge does not assert a breach of the SEA Directive at all. It is two steps removed from that. Indeed if the answer were in the affirmative, then – since all development plans will have been subject to SEA – literally any challenge to any development consent on any grounds would fall within the costs protection/NPE regime. That runs starkly contrary to *Case C-470/16, North East Pylon* as construed in *Heather Hill* (see §174).

38. My proposed answer to the question is that it is not necessary to answer this question if the first question is answered No, but if this question does arise, the answer is "Yes". If an instrument of a general nature such as a development plan is subject to SEA, there is a direct engagement with EU law inherently involved in any complaint that a material contravention of that instrument was unlawfully carried out without SEA, even if the unlawfulness alleged is not in itself directly based on EU law grounds. There is no compelling legal policy reason for EU law to facilitate contravention of democratically adopted development plans by excluding cases about such contravention from the concept of the field of EU law. Contextually, such material contravention has become increasingly common in recent years in Ireland. It should be noted here that directive 2001/42 is directly relied on by the applicants in this case to challenge the validity of the decision here (core ground 13), as well as the validity of the ministerial guidelines.

39. The reason for the reference of this question is that if the answer is Yes then the applicants' material contravention points would benefit from enforceable Aarhus protection.

The fourth question

40. The fourth question is:

Is a challenge to be considered as falling outside the interpretative obligation whereby in proceedings where the application of national environmental law is at

issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive, either as not being one where the application of national environmental law is in issue or as not within the sphere of EU environmental law, merely because it involves classic judicial review grounds that are not environment-specific but that are raised in the context of a challenge to a development consent or other environmental issue.

41. The applicants' position is that No: the grounds of judicial review are part of the standard of review and are not to be confused with the concept of provisions of national law related to the environment, which itself is an autonomous concept determined by whether a law has an environmental object or effect.

42. The board's position is that yes, this issue has already been determined by the Court of Appeal in *Heather Hill* based on an extensive analysis of the case-law, including the judgment of the CJEU in *Case C-470/16, North East Pylon*. Where the grounds of challenge are not pleas of law that come from European law, they are not covered. If they are, they are covered. If Irish law imposed obligation N on a decision maker where obligation N is not required by European law, the costs protection does not arise.

43. The State respondents' position is yes, the equivalence of treatment between national environmental law and EU environmental law mandated by the Aarhus Convention (per *Case C-470/16, North East Pylon* at §50) nevertheless requires that the law at issue be a provision of environmental law. The happenstance inclusion of administrative legal requirements in the same piece of legislation as includes "provisions of ... national law relating to the environment" (per Article 9(3) Aarhus) does not make those legal requirements a provision of national law relating to the environment. The Court of Appeal in *Heather Hill* (at §§177-178) correctly applied *Case C-470/16, North East Pylon* in distinguishing allegations of lack of *vires* and breach of fair procedures from breaches of environmental law.

44. My proposed answer to the question is "No". The meaning of national environmental law is autonomous and, therefore, does not depend on how the grounds of challenge are characterised by the law of a particular member state. It follows that the fact that particular grounds are so characterised as "classic judicial review grounds" or in any other way is irrelevant for the purposes of the application of the obligations under Aarhus, if the grounds of challenge are aimed, directly or indirectly, at securing an environmental objective such as challenging a particular development consent or other environment-related decision.

45. The reason for the reference of this question is that if the "classic judicial review" grounds are excluded from the protection of enforceable Aarhus convention rights here then much of the applicants' challenge will not benefit from costs protection.

The fifth question

46. The fifth question is:

> **Whether art. 9(3) of the Aarhus Convention has the effect that if domestic legislation in a particular member state implements that provision in relation to specified matters by means of an express legislative rule that there be no order as to costs, leaving all other matters to be dealt with by judicial discretion which is subject to the EU law interpretative obligation that it is to be exercised in accordance with the Aarhus Convention, such discretion should be exercised in that member state along the same lines as the express legislative rule of no order as to costs.**

47. The applicants' position is yes, where national law has only partially implemented Article 9(3) and (4) providing a particular form of order as to costs, but a further discretionary power allows the national court to give full effect to the unimplemented obligation thereby imposed, it would create a risk of divergent and unduly complex rules, and be contrary to the requirements of legal certainty, if that discretionary power were to be exercised in a manner that diverges from the national implementing law (provided the existing national implementing law, within the limits of its scope, adequately implements the right conferred).

48. The board's position is no, the NPE rule does not mandate a 'no costs order' outcome in every scenario. A blanket 'no order' in all cases would affect not just emanations of the State but private parties in that litigation. It is definitively inherent in the NPE rule that some costs might have to be awarded against an unsuccessful applicant. However, it would depend on the particular factual scenario. The CJEU has already made clear that the NPE rule does not prevent the courts from making an order for costs provided that the amount of those costs complies with that rule. In areas of law addressed by the Aarhus Convention in which they remain competent, member states remain free to implement the Aarhus Convention in their domestic law as they see fit and to interpret their domestic laws as they see fit. As to national environmental law within the sphere of EU environmental law, the CJEU has not interpreted the Aarhus Convention as requiring a blanket 'no order' in all cases.

49. The State respondents' position is no, the requirement that costs be NPE does not, as a matter of EU law, require that no order as to costs is made against an applicant. In s.50B of the 2000 Act and ss.3 & 4 of the 2011 Act, Ireland grants greater protections than are required by EU law to applicants in proceedings that meet the express requirements of those legislative provisions. This does not have the effect of making these greater protections a part of EU law (as it applies in Ireland). The converse invites the conclusion that EU law requires that NPE has a specific meaning under Irish law that it does not have as a matter of EU law across the Union. Nor does any issue arise with respect to equivalence. The greater protections afforded under s.50B apply to actions for safeguarding rights under specified EU law provisions. The greater protections provided by ss.3 and 4 of the 2011 Act apply equally to all actions that meet the requirements of those provisions, irrespective of whether those actions seek to safeguard rights under EU law or domestic law.

50. My proposed answer to the question is "Yes". While in principle, national legislation could be enacted providing for not-prohibitively-expensive costs as against an unsuccessful environmental litigant, in the absence of such legislation and where the only enacted legislation provides for no order as to costs, the principle of legal certainty as applied in the context of implementing EU law obliges a national court to apply the principle set out in the actually enacted domestic legislation by analogy rather than exercise a discretion which has not been legislated for and imposes a burden on environmental litigants that has not been expressly legislated for.

51. The reason for the reference of this question is that if the question is answered in the affirmative, the applicant would obtain no order as to costs rather than merely not-prohibitively-expensive adverse costs on the grounds where the domestic legislation does not apply and the Aarhus obligation does apply.

The sixth question

52. The sixth question is:

Whether the concept of "national law relating to the environment" in art. 9(3) of the Aarhus Convention includes national law relating to sustainable development, having regard inter alia to the preamble to the Aarhus Convention and to the Rio Declaration on Environment and Development approved by the United Nations Conference on Environment and Development, held at Rio de Janeiro in June 1992, referred to in the preamble to the Aarhus Convention.

53. The applicants' position is that it does: the Rio Declaration states that environmental protection and sustainable development cannot be separated.

54. The board's position is no, art. 9(3) could have but does not contain any reference to "sustainable development". The question involves reading into Article 9(3) text which it does not contain. The term "sustainable development" refers to the concept of development that meets the needs of the present without compromising the ability of future generations to meet their own needs. The term embodies a set of values and in general refers to an environmentally oriented approach towards economic development that meets the needs of the present generation without depriving future generations of the ability to meet their own needs. "Sustainable development" is a broader concept than merely the 'environment' or environmental protection and includes economic sustainability, social cohesion and/or equity and cultural sustainability. The national law at issue in the proceedings before the referring court is more properly categorised as national law relating to land use planning and development.

55. The State respondents' position is no, art. 9(3) is clear in its terms; it applies to 'national law relating to the environment' and makes no reference to 'national law relating to sustainable development'. Sustainable development and the environment are distinct concepts and cannot be conflated. Environmental protection is essential to ensuring sustainable development, but

sustainable development is not limited to environmental considerations. Rather, there are three dimensions to sustainable development: the economic, the social and the environmental (see, e.g., Article 3(3) TEU, the UN Sustainable Development Agenda to 2030 and Principle 5 of the Rio Declaration). Interpreting 'national law relating to the environment' within the meaning of art. 9(3) as including 'national law relating to sustainable development' would significantly increase the scope of the obligation arising under art. 9(3), in a manner that is irreconcilable with the text of art. 9(3), and strains any objective assessment of what was envisaged by the Contracting Parties to the Aarhus Convention.

56. My proposed answer to the question is "Yes insofar as aspects of sustainable development impact directly or indirectly on the environment." The relationship between environment and sustainable development is reflected in the 14th recital to the Aarhus Convention, and while art. 10 of the Rio Declaration is specifically referenced in the Convention, the terms used in the Convention should be read in the light of the Rio Declaration as a whole, including Principle 4 that "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." Accordingly a broad definition of national law relating to the environment is appropriate which includes law relating to the environmental aspects of sustainable development and the social and economic aspects of the concept of sustainable development insofar as they relate directly or indirectly to the environment.

57. The reason for the reference of this question is if the answer to the question is to some degree in the affirmative such that a broader view of the concept can be taken, then if aspects of the applicants' challenge that do not otherwise come within the concept of national law related to the environment, they may come within that concept on such a broader view.

The seventh question

58. The seventh question is:

If the answer to the fifth question in general is no, whether art. 9(3) of the Aarhus Convention has the effect that if domestic legislation in a particular member state implements that provision in relation to the prevention of future contraventions of national law relating to the environment by means of an express legislative rule that there be no order as to costs, leaving the remedying of past contraventions of national law relating to the environment to be dealt with by judicial discretion which is subject to the EU law interpretative obligation that it is to be exercised in accordance with the Aarhus Convention, such discretion should be exercised in that member state in relation to the remedying of such past contraventions along the same lines as the express legislative rule of no order as to costs.

59. The applicants' position is that the position is the same in relation to future contravention (this question) as it is in relation to question 5.

60. The board's position is no, in areas of law addressed by the Aarhus Convention in which they remain competent, member states remain free to implement the Aarhus Convention in their domestic law as they see fit and to interpret their domestic laws as they see fit. As to national environmental law within the sphere of EU environmental law, the CJEU has not interpreted the Aarhus Convention as requiring a blanket "no order" in all cases. The question is premised on a hypothetical scenario which does not arise on the facts of this case.

61. The State respondents' position is no, for the same reasons the answer to the Fifth Question is "no". The State Respondents query whether this question properly arises on the facts of this case.

62. My proposed answer to the question is that this question does not arise having regard to my proposed answer to the fifth question, but if it does arise the answer is "Yes". While in principle, national legislation could be enacted providing for not-prohibitively-expensive costs as against an unsuccessful environmental litigant in relation to remedying past breaches of environmental law, and no order as to costs in respect of preventing future contraventions, in the absence of such legislation and where the only enacted legislation provides for no order as to costs, the principle of legal certainty as applied in the context of implementing EU law obliges a national court to apply the principle set out in the actually enacted domestic legislation by analogy rather than exercise a discretion which has not been legislated for and imposes a burden on environmental litigants that has not been expressly legislated for.

63. The reason for the reference of this question is that if the question is answered in the affirmative, the applicant would obtain no order as to costs rather than merely not-prohibitively-expensive adverse costs on the grounds where the domestic legislation does not apply and the Aarhus obligation does apply insofar as the challenge can be characterised as a challenge to past breaches of environmental law.

Order

64. Accordingly, the order will be that the questions set out in this judgment be referred to the CJEU pursuant to article 267 TFEU.