

Neutral Citation No: [2023] NIKB 37	Ref: COL12098
<i>Judgment: approved by the court for handing down (subject to editorial corrections)*</i>	ICOS No: 2021/096476/01
	Delivered: 29/3/2023

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

**KING'S BENCH DIVISION
(JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY ALAN McKEOWN
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION OF THE DEPARTMENT OF
AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS**

**Ms Niamh Horscroft (instructed by PA Duffy & Co, Solicitors) for the Applicant
Ms Maria Mulholland (instructed by the Departmental Solicitor's Office)
for the Proposed Respondent**

COLTON J

Introduction

[1] The applicant owns a trout hatchery at Muntober Streams in the Ballinderry River, Co Tyrone. Part of the Ballinderry River is an Area of Special Scientific Interest (ASSI) and a Special Area of Conservation (SAC).

[2] He avers that his hatchery has suffered from pollution going back to 1997. This pollution prevents his fish being able to feed, leading to a lack of growth and condition, which requires additional time and feed to correct. The pollution causes growth problems with the fish gills which can lead to the death of the fish. These problems have led to considerable financial loss for his business AMK Aquaculture. It has caused him considerable distress and upset.

[3] He is strongly convinced that the pollution is caused by the business now known as JB Aggregates Ltd which engages in sand washing, situate at 4 Doons Road, Cookstown, which is approximately half a mile up the stream from his property. There is no intervening property. There is a sand washing plant, Donaghy Brothers, about two miles further upstream from JB Aggregates Ltd.

[4] The business at 4 Doons Road, was successfully prosecuted for pollution in or around 2004. Notwithstanding that prosecution, the applicant complains of ongoing pollution. In 2017 he instructed an international vet, Dr Miriam McLaughlin, who advised that the fish in his hatchery were severely damaged with blood poisoning.

[5] He has made ongoing complaints about incidents of pollution to the Northern Ireland Environment Agency ("NIEA"). The NIEA is an executive agency of the Department for Agriculture, Environment and Rural Affairs ("DAERA"), the proposed respondents in this application. He avers that he reported incidents of pollution at least 17 times in 2014 and at least 16 times in 2016.

[6] His experience is that when he made complaints a representative of the DAERA would come to the hatchery and take samples and examine the stream at his property and above JB Aggregates Ltd. However, he complains that they would not enter the premises of JB Aggregates, despite having powers to do so.

[7] In 2017, the proposed respondent installed a sensor, a turbidity meter and a pipe to redirect water flow to try to rule out the possibility of pollution caused by road run off. He complains that, in fact, this resulted in further fish losses.

[8] His case is that he met with a Mr Irwin from NIEA at his home on 1 November 2017. At this meeting he says that he was assured that a prosecution would be brought in respect of the pollution about which he complained within a matter of weeks. In the course of an information tribunal hearing arising from a complaint in relation to a Freedom of Information request, Mr Irwin stated that investigations of a covert nature had been planned to determine the source of the pollution. These were found to be unlawful and could not proceed, leaving the NIEA to have to reconsider its approach. Therefore, the anticipated prosecution did not materialise.

[9] He complains the NIEA have failed to take sufficient steps to identify and apprehend the polluter despite opportunities presenting themselves by way of incidents of pollution since it installed the equipment referred to above.

[10] He says that the incidents seemed to have reduced for a period of time from 2019-2020 and that only four or five incidents occurred between summer 2019 and March 2020.

[11] However, unfortunately, in the last year the incidents of pollution have increased, again, and he has continued to report these to the pollution hotline. He has spoken to a representative of the NIEA, a Dr Deirdre Quinn, but complains that no further action has been taken.

[12] He avers that pollution continues to badly affect the stream in which his hatchery is located and is causing very serious problems for his business.

[13] Specifically, he avers that on 1 June 2021 the hatchery was visited by Dr Keith Maxwell (a DAERA Fisheries Vet). His examination of fish samples from the hatchery revealed the very poor environmental conditions which had resulted in the fish stocks being infected with a protozoa infection resulting in a daily and ongoing mortality which could only be cured by chemical treatment. This will adversely affect his fish stocks as his site is classed as an organic production.

[14] He refers to a meeting which took place on 10 September 2021 at which two representatives from the Department were present along with a local MLA. At the meeting the Department representatives confirmed that they had carried out investigations which were now complete. They could not determine from where the pollution was coming and, as a result, could not initiate any prosecutions.

[15] The applicant places particular emphasis on two pieces of evidence. Firstly, he refers to a "Redox survey" carried out by the Ballinderry River Enhancement Association which he says found the site at Doons where JB Aggregates is located to be "the most polluted site on the whole of the Ballinderry River system." Secondly in relation to the meeting which took place on 10 September 2021 the representatives from DAERA admitted that they were unaware of the existence of a settlement tank which he believed was a potential source of the pollution.

[16] In relation to the Redox report at the initial leave hearing the proposed respondent complained about a lack of candour in that the Redox report was not exhibited to the grounding affidavit and further that the report did not say what the applicant averred it to say.

[17] Accordingly the applicant was granted leave to file a further affidavit from a Mr Alan Keys. Mr Keys has averred to having carried out investigations for the purpose of what is referred to as the Mussel Rescue report that the pollution was worst at the sand washing plant and that he suspects the sand washing plant to be the source of same. It may be that there was some confusion about the relevant reports. In any event with the leave of the court the proposed respondent filed further affidavit evidence to deal with the factual issues that arise in this application.

[18] The applicant contends that the NIEA has failed in its duty to promote the conservation of water resources and promote the cleanliness of water and waterways by not fully using its powers to ascertain the source of the pollution and, thereafter, bring a prosecution. He believes that it is clear who is responsible for the pollution. He contends that the Department and the NIEA have allowed their staff to be intimidated and threatened by the owners of the site responsible for the pollution as evidenced by the fact that NIEA staff no longer attend the property to ascertain and test whether this is the source of the pollution.

The impugned decision/omission

[19] The applicant is challenging the proposed respondent's ongoing failure to discharge its duties under the Water (Northern Ireland) Order 1999 regarding the pollution of Muntober Streams, Cookstown, Co Tyrone, having not properly investigated and, thereafter, brought enforcement action within a reasonable time.

Grounds of challenge

[20] The grounds of challenge are as follows:

“Breach of statutory duty:

(a) The applicant contends that the proposed respondent has failed to comply with its statutory duty under the Water (Northern Ireland) Order 1999 by failing to promote the conservation of water resources and promote the cleanliness of water in waterways and by failing to properly use its powers of investigation and bring enforcement action within a reasonable time.

(b) The applicant contends that the proposed respondent has failed to comply with its statutory duty under Article 38 of the Environment (Northern Ireland) Order 2002 to take reasonable steps, consistent with the proper exercise of their functions, including the taking of enforcement action, to further the conservation and enhancement of the flora, fauna or geological and physiographical features by reason of which the streams at Muntober Streams are an ASSI.

(c) The applicant also alleges that the proposed respondent has failed to comply with its obligations under the Habitats Directive and under the Conservation (Natural Habitats, etc) Regulations (Northern Ireland) 1995, in that it has failed to take appropriate steps to avoid, in special areas of conservation, the deterioration of natural habitats of species as well as disturbance of the species to which the area has been designed, contrary to Article 6(2) of the Habitats Directive (Council Directive 92/43/EEC).

(d) The applicant argues that the proposed respondent's failure to properly investigate and, thereafter, bring enforcement action against the polluter, constitutes an interference with his Article 8 rights under the ECHR

and consequently a breach of section 6 of the Human Rights Act 1998.

(e) Further, and in the alternative, he argues that the proposed respondent has acted incompatibly with the applicant's right to peaceful enjoyment of his possessions, his fisheries, pursuant to Article 1 Protocol 1 of the ECHR by failing to prevent the pollution of which he complains and thereby is in breach of section 6 of the Human Rights Act 1998."

[21] In addition to these breaches of statutory duty the applicant relies on irrationality and failure to take into account material consideration.

The proposed respondent's position

[22] The proposed respondent took issue with factual issues in the applicant's grounding affidavit evidence for the purposes of the leave hearing. As a consequence, the court had the benefit of affidavits from Mr Kerry Anderson, dated 18 February 2022, Dr Deirdre Quinn dated 16 March 2022, and on direction of the court a second affidavit from Dr Deirdre Quinn dated 20 January 2023. Mr Anderson is a Senior Principal Scientific Officer employed by the Northern Ireland Environment Agency. Dr Deirdre Quinn is a Principal Scientific Officer employed by the Northern Ireland Environmental Agency.

[23] Mr Anderson, takes particular issue, with the applicant's averment that:

"A Redox survey carried out by the Ballinderry River Enhancement Association found the site at Doons where JB Aggregates is located to be the most polluted site on the whole of the Ballinderry River system."

[24] Mr Anderson exhibited the report which runs to some 73 pages. This report was prepared in 2017 as part of an environment fund project funded by DAERA. He points out that nowhere in the report does it state that the site at Doons Road where JB Aggregates is located is the most polluted site on the whole of the Ballinderry river system.

[25] He points out that the Upper Ballinderry River is designated as an area of special scientific interest and a special area of conservation. The part of the Muntober Streams where the applicant's fish farm is located is not so designated. It is a tributary that flows into the Upper Ballinderry River.

[26] His affidavit continues as follows:

“6. The report presents the results of Redox surveys at a number of locations on the Ballinderry River located upstream and downstream. From the map in the report at page 36, the downstream survey section (21-22) begins approximately 2km from where the Muntober Stream enters Ballinderry River; this location is approximately 2.5km from the applicant’s fish farm and 4km from the sand washing plant at Doons Road. The report states at page 39:

‘Redox assessment was carried out in sections 16 and 21-22. Redox potential difference between open water and interstitial water at 5cm depth were greater than 20%. (The target ideally should be <20%.) Redox potential differences had decreased since the survey in 2006 (Killen) but could not be assessed against the 2011 survey (Reid et al) as Redox was not measured.’

This means that as the Redox potential differences have decreased (slightly) since the 2006 survey, and this would indicate less fine sediments in the substrate which demonstrates an improvement and, indeed, some progress towards the ideal target of less than 20%.

7. Furthermore, at page 42 of the report it states the following:

‘There is excessive siltation of mussel habitat in survey section 20-22 at the mouth of the Tirmacshane Tributary (H756 792) with 30-50cm of silt in places. The source of the silt is being investigated by NIEA.’

The Tirmacshane Tributary is another name for the Muntober Stream.

8. In addition to Redox assessments, water quality parameters are also assessed which were all above the threshold targets. The report states at page 37:

‘Analysis of the results shows that phosphorus, nitrogen nitrate and BOD were all above the target thresholds for fresh water pearl mussel (JNCC 2015). Only suspended solids were

generally lower than the threshold of 10mg/l, although on several occasions rose above this threshold at each site.'

This means that only suspected solid levels were found to be generally under the accepted threshold levels that are ideal for the conservation of the Freshwater Pearl Mussel. The other parameters exceeded the threshold levels.

9. I also refer to paragraph 22 of the applicant's grounding affidavit where he states:

'I believe it is clear who is responsible for the pollution and, indeed, a survey carried out for NIEA by River Care Ltd, pinpointed the suspected source as the sand washing plant.'

[27] Mr Anderson points out that this survey is not exhibited to the applicant's affidavit.

[28] He refers to further work being undertaken by the Ballinderry River's Trust which has been funded through the DAERA environmental fund. He also refers to two documents produced by NIEA arising from the 2017 report which includes:

- (a) A 'threats table' identifying issues, the likely cause and features affected ...
- (b) An action plan.

[29] The first issue identified in the threats table is "siltation of river bed substrate resulting from high levels of suspended solids" and the likely causes are identified as:

"Agricultural run-off, cattle poaching; field drain cleaning; forestry run-off; quarrying/sand washing discharge; road run-off; development at land use change; repairing non-native invasion plants."

[30] He points out that the action plan identifies over 50 actions to be taken forward as part of the conservation action plan.

[31] Importantly, he avers as follows:

"15. Neither the threats table nor the action plan identified the suspected source of pollution at the applicant's fish farm, or indeed, the Ballinderry River, as the sand washing plant at Doons Road.

16. For the avoidance of doubt, as of the date of swearing hereof, no survey commissioned by NIEA in respect of the Ballinderry River found the site at Doons Road to be the most polluted part of the Ballinderry River system nor that the suspected source of pollution at the applicant's fish farm is the sand washing plant at Doons Road."

[32] Dr Quinn has a degree in geology, a Masters in Applied Environmental Science, a PHD and has had 20 years of experience in the field of environmental science and protection of the water environment. She has been involved in addressing the applicant's pollution complaints on behalf of the NIEA since April 2018. In her affidavit she replies to para 20 of the applicant's affidavit where he had said that, neither she nor Mr Anderson, had carried out dye tests in a settlement tank at the premises of JB Aggregates and that they were unaware of the existence of a settlement tank.

[33] She gives her account of what took place at the meeting on 10 September 2021. She accepts that they confirmed to the applicant that they were not aware of the existence of a settlement tank and that the NIEA Water Quality Inspectors had not observed a tank during their recent site visits. She claims that the applicant did not clarify the precise location of the tank. Following the meeting she advised the NIEA Water Quality Inspectors about the presence of the tank. They confirmed that they did not observe a tank on any of their site visits and believed that the applicant was referring to a chamber, in the shape of a concrete cover near the road. Dr Quinn provided a map at which the relevant point was identified. She deals with this issue in detail in her affidavit as follows:

"8. During the investigation last year excavation work was carried out by the owners of the sand washing plant; see photograph of same taken by one of my colleagues in the Water Quality Inspection Team in April 2021, which can be found in the Exhibit bundle at page 4. This shows that the roadside verge along the Muntober Road has been dug up along with the area around the road gully (point B on Map 2). NIEA WQI advise me that new pipework had been laid in this area, just inside the field, (where the concrete cover at point D would have been located). This new pipework was leading to the land locked pond that now serves as the non-connected settlement facility at point E on Map 2; this is the land locked pond that I referred Mr McKeown to at our meeting on 10 September 2021 which is referred to at para 6 above. The new pipework installed by the owner of the sand washing plant is now in the location where the chamber would have been.

9. Prior to investigations last year, NIEA had been focusing the investigation on an unknown pipe entering the road gully which we believed to be a potential source. Dye tests had been carried out to investigate the source of the unknown pipe.

10. NIEA officials along with transport NI conducted a dye test in March 2019 at point B on Map 2 (the road gully) and confirmed there was a connection between the road gully and Muntober springs at point C on Map 2; this stream joins another stream and eventually flows past the applicant's fish farm.

11. A dye test in March 2021 confirmed that the unknown pipe formed a link between the cattle grid at the sand washing plant (point A on Map 2) to the road gully (point B on Map 2) and subsequently to the stream downstream of the Muntober springs (point C on Map 2).

12. NIEA requested the operators of the sand washing plant to redirect the discharge from the cattle grid so that it would by-pass the road gully and, therefore, not flow in to Muntober springs. This work was completed in April 2021.

13. A further visit and dye test by NIEA staff in April 2021 confirmed that there is now no connection from the cattle grid (point A on Map 2) to the road gully (point B on Map 2).

14. The cattle grid is now connected via new pipework inside the field where the chamber (or settlement tank that I believe Mr McKeown is referring to) would have been located prior to the excavation work and discharges to the land locked settlement pond at point E on Map 2.

15. NIEA conducted a further dye test from the road gully in May 2021 to confirm if there is still a connection to the stream downstream of the Muntober springs and this was the case. This means that run-off from the road gully (B) is still making its way to the source of the Muntober springs (C) which eventually flows past the applicant's fish farm."

[34] She then goes on to address the issue of the Redox survey. In essence, she accepts that Mr Keys, on behalf of the applicant, indicates that "he suspected Black's

sand washing plant as being the reason for the worsened redox reading at Tirmacshane.” She notes that this was only a suspicion. She avers that:

“The Redox readings do not prove the source to be the sand washing plant. NIEA know from their investigations that a number of road drains flow to the Muntober spring stream and therefore, cannot be ruled out as a source of any settlement.”

[35] In her most recent affidavit she responds to Mr McKeown’s second affidavit in which he refers to the “settlement pond.” She notes that the applicant now appears to have abandoned the references to the settlement tank but avers that the proposed respondent has not tested the Muntober Springs pond.

[36] Again, she says that this is simply incorrect. She refers to the fact that various dye tests were done in respect of this pond as set out in her first affidavit. In particular, she confirmed that a dye test in May 2021 confirmed that there is still a connection from the road gully to this pond which eventually flows past the applicant’s fish farm.

[37] She points out the fact that in his latest affidavit the applicant for the first time provides a detailed theory in respect of how he believes pollution is occurring. This detail was not provided by Mr McKeown at the meeting on 21 September 2021. Nonetheless, on foot of this information, she has instructed NIEA WQI to inspect the Muntober Springs pond and arrangements are presently being made to carry this out.

[38] She further responds to Mr McKeown’s installation of a CCTV. This was the first time that the proposed respondent had been made aware of this. She says that she is at a loss to understand why this was not provided to the proposed respondent before now. She confirms that NIEA has continued to measure turbidity at the fish farm during the tenure of these proceedings. It has also continued to analyse the data collected from a NIEA probe (or SONDE) and to act upon it accordingly.

[39] She sets out the details of reports in April, June, July and August 2022. The April 2022 report details additional investigation work carried out by NIEA and the reports in June, July and August do not identify any occurrence of potential pollution.

[40] Notwithstanding the fact that the applicant has not made any complaints to the NIEA since the issuing of proceedings in December 2021, the NIEA has continued to monitor the turbidity levels at the fish farm. In a very thorough and detailed affidavit she sets out the extent of ongoing work being carried out by the NIEA at this stream. She concludes her most recent affidavit in the following way:

“27. I should make it clear that when Mr McKeown issued these proceedings in December 2021 NIEA had not at that stage identified any recent potential pollution, occurrences or trends. The court will note that in our PAP

response dated 5 November 2021 we said that since 2018 there had been very few reported incidents of pollution with very little evidence of pollution and that the last reported incident was in April 2021. It is correct that since 2018 there had been very few reported incidents of pollution with very little evidence of pollution. At the time of finalising her PAP response I was not aware of Mr McKeown's call on 20 October 2021. I was not made aware of the call as I had been on annual leave from 25-29 October 2021 and on return from leave, I had been conducting recruitment interviews from 1-5 November 2021.

28. NIEA said in the PAP response that it would continue to investigate any pollution reports and that is exactly what it has done and continues to do in accordance with the statutory duty.

29. Finally, I wish to confirm that the above information is not intended to be a detailed precis of all the investigatory work conducted by NIEA in respect of Mr McKeown's pollution reports over the years. I am mindful that to date leave has not been granted to apply for judicial review, therefore, the above affidavit is intended only to address points made in Mr McKeown's latest affidavit."

The statutory framework

[41] In the Order 53 Statement the applicant refers to a number of statutory provisions and it is therefore useful to set out the relevant statutory framework. The applicant relies in a general way on an alleged failure on behalf of the proposed respondent to comply with "its statutory duty under the Water (Northern Ireland) Order 1999" ("the 1999 Order"). Article 4 sets out the general duty of the Department. It provides as follows:

"Duty of Department to promote conservation and cleanliness of water resources

4.-(1) The Department shall –

- (a) promote the conservation of the water resources of Northern Ireland;
- (b) promote the cleanliness of water in waterways and underground strata.

(2) The Department shall, in exercising its functions in relation to the conservation of water resources and the cleanliness of water, have regard to –

- (a) the needs of industry and agriculture;
- (b) the protection of fisheries;
- (c) the protection of public health;
- (d) the preservation of amenity and the conservation of flora and fauna; and
- (e) the conservation of geological or physiographical features of special interest and any feature of archaeological, historical, architectural or traditional interest.”

[42] The powers of investigation are set out in Article 25 of the 1999 Order as follows:

“Powers of entry and inspection

25.-(1) Any person duly authorised by the Department may at any reasonable time enter any premises for the purpose of performing, whether in relation to those premises or not, any functions conferred on the Department under this Part.

(2) Any person duly authorised by the Department may at any reasonable time –

- (a) enter any premises for the purpose of determining whether, and if so in what manner, any functions conferred on the Department under this Part are to be performed in relation to those premises, or whether any provision of this Part or of any regulations made under this Part has been complied with; and
- (b) carry out such inspections, surveys, measurements and tests on any premises entered by that person or of any articles found on any such

premises, and take away such samples of water or effluent or of any land or articles, as the Department –

- (i) considers appropriate for the purpose mentioned in subparagraph (a); and
- (ii) has authorised that person to carry out or take away.

...

(4) The powers which by virtue of paragraph (2) are conferred in relation to any premises for the purpose of enabling the Department to determine whether any provision of this Part or of any regulations made under this Part has been complied with, shall include power, in order to obtain the information on which that determination may be made –

- (a) to carry out experimental borings or other works on those premises; and
- (b) to install and keep monitoring and other apparatus there.

(5) The Department may, after consulting the occupier of any land or owner of any vehicle, vessel or mobile plant from which effluent is discharged, fix the points at which samples are to be taken of effluent passing into a waterway or underground strata.

(6) If it is shown to the satisfaction of a justice of the peace on sworn complaint in writing –

- (a) that admission to any premises which any person is entitled to enter under this Article has been refused to that person, or that refusal is apprehended, or that the premises are unoccupied or that the occupier is temporarily absent, or that the case is one of urgency, or that an application for admission would defeat the object of the entry; and

- (b) that there is reasonable ground for entry upon the premises for the purpose for which entry is required;

the justice may by warrant under his hand authorise that person to enter the premises, if need be by force ...”

[43] Article 26 contains supplemental provisions as to powers of entry and inspection.

[44] The 1999 Order provides for prosecutions in Article 7 and 53. Article 7 sets out the relevant offences that may be committed by a person causing pollution. Article 53 provides that no proceedings shall be instituted for an offence except by the Department or by or with the consent of the Attorney General.

[45] In the Order 53 Statement the applicant expressly refers to Article 32 of the Environment (Northern Ireland) Order 2002. It deals with “duties of owners and occupiers of land included in an ASSI.”

[46] The applicant also relies on the purported failure to comply with obligations under the Habitats Directive and under the Conservation (Natural Habitats etc) Regulations (Northern Ireland) 1995. Reliance is also placed on the duty on the proposed respondent under Article 3 of the Water, Environment (Water Framework) Directive Regulations (Northern Ireland) 2017, by failing to determine an authorisation so as to prevent deterioration of the surface water status or ground water status of a body of water and to otherwise support the achievement of the environmental objectives set for a body of water.

Consideration

[47] Unusually, in this case, at the leave stage the court has the benefit of detailed affidavit evidence from the proposed respondent. This was directed in ease of the applicant. It will be seen from the summary of the affidavit evidence filed in this case that there is a very substantial factual dispute about the background to the complaints of pollution by Mr McKeown and the ongoing investigations carried out by NIEA. This court is not well suited to determining such factual disputes.

[48] The impression the court has, is of the very real and ongoing concern and frustration of the applicant, coupled with his firm belief that he knows the source of the pollution about which he complains. That there has been regular and significant pollution at the applicant’s fish farm is beyond dispute. The court fully accepts the impact this has had on him and his business. Equally, the court is impressed by the detailed affidavit evidence of Mr Anderson and Dr Quinn, who are clearly alive to the complaints and have carried out very significant ongoing work in this regard.

[49] The focus of the applicant's complaint relates to a failure to investigate and prosecute the alleged offender. In relation to this type of allegation it is well-established that the applicant faces a high threshold for judicial intervention. Parliament has left the decision as to whether to investigate and to initiate a prosecution of an offender in the hands of the proposed respondent. The statute clearly provides a broad discretion to the proposed respondent. This is evident from the use of words such as "may" and "considers appropriate." It has the necessary expertise and experience to decide on appropriate measures of investigation and whether the test for prosecution has been met. On the basis of the material before the court it could not be said that in the exercise of its discretion the proposed respondent has acted unlawfully or irrationally in relation to the investigations it has carried out and in relation to its consideration of a prosecution.

[50] The fundamental difficulty faced by the applicant in this case is that from all the evidential material provided to the court, it could not be established that there is a basis upon which the court could interfere with the decision of the proposed respondent not to initiate further prosecutions against JB Aggregates.

[51] Equally, in terms of the admitted statutory obligations on behalf of the NIEA to investigate such matters and ensure the cleanliness of the stream and the protection of the environment, the evidence establishes that the proposed respondent has taken very extensive steps to do so. The duty imposed by Article 4 of the 1999 Order is couched in the most general of terms. Other than the specific complaint about the investigation and prosecution of the alleged polluter there are no detailed particulars or evidence to support an alleged breach of this very general duty.

[52] In relation to the purported breach of the 2002 Order it should be noted that this article does not impose any statutory duty on the proposed respondent. Furthermore, the locus of the pollution is not in fact included in an ASSI. Thus there are no grounds for establishing an alleged breach of this duty.

[53] In relation to the Habitats Directive, again it should be noted that the locus of the applicant's hatchery is not a special area of conservation. Neither is his hatchery or damage caused to his fish protected under the Directive in any event.

[54] It is correct that freshwater pearl mussel and the Upper Ballinderry River are covered by the Habitats Directive, but the evidence fails to establish that the proposed respondent has failed to take "appropriate steps." The evidence points to a determined effort by the proposed respondent to address this issue. Again, the evidence does not support any alleged breach of Article 3 of the 2017 Regulations and indeed it is unclear which authorisation the proposed respondent is alleged to have failed to determine and the person or entry to which the authorisation relates as required by Article 3.

[55] I do not consider that the alleged breaches of the Convention establish or add anything to the case. It is debatable whether Article 8 is engaged at all in this case. In

any event the State has provided a statutory framework in relation to the pollution of rivers in this jurisdiction. That statutory framework is in my view clearly compliant with any obligations under the Convention. No breach of the framework has been established and by complying with its obligations under the statutory framework the proposed respondent has acted in a manner which is entirely compliant with its Convention obligations.

[56] I do not consider that the general grounds of irrationality or failure to take into account material considerations adds anything to the case.

[57] There is no doubt that the applicant has suffered from significant incidents of pollution over many years. The court, therefore, has very considerable sympathy for the applicant. However, notwithstanding the able submissions of Ms Horscroft, it would provide false hope, in the court's view, to grant the applicant leave in this case based on the material available to it and expose him to the risks of substantial legal costs.

[58] The court has come to the conclusion that the applicant has not met the threshold for leave. Based on the evidential material before it, the applicant does not enjoy an arguable case with a reasonable prospect of success.

[59] Accordingly, leave to apply for judicial review is refused.