

JUDGMENT

R (on the application of Edwards and another (Appellant)) v Environment Agency and others (Respondents)

before

**Lord Hope, Deputy President Lord Walker Lord Brown
Lord Mance Lord Dyson**

JUDGMENT GIVEN ON

15 December 2010 Heard on 11 November 2010

Michaelmas Term [2010] UKSC 57

Appellant

David Wolfe

(Instructed by Richard Buxton Environmental and Public Law)

Respondents

James Eadie QC James Maurici Charles Banner (Instructed by Treasury Solicitor)

LORD HOPE, delivering the judgment of the Panel

1. This is an appeal against a decision by two costs officers appointed by the President of the Supreme Court under rule 49(1) of the Supreme Court Rules 2009, Mrs Registrar di Mambro and Master O’Hare, a copy of which is annexed to this judgment. From the issues they were asked to decide they selected two preliminary issues which arose in the detailed assessment of bills of costs lodged by the respondents in an appeal to the House of Lords in which they were successful. The appellant, Mrs Pallikaropoulos, had been ordered to pay the costs of the appeal. The first respondent, the Environment Agency, had lodged a bill totalling £55,810. The second respondent, the Secretary of State for the Environment, Food and Rural Affairs, had lodged a bill totalling £32,290.

2. The preliminary issues were about the proper application of article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (“the EIA Directive”) and article 15a of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (“the IPPC Directive”). Those articles had been inserted by articles 3(7) and 4(4) of Council Directive 2003/35/EC of 26 May 2003 to implement provisions which first appeared in the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998 (“the Aarhus Convention”). Among the provisions as to access to justice in article 9 of the Aarhus Convention is a requirement that the procedures to which it refers should be fair, equitable and timely and not prohibitively expensive: article 9(4).

3. In proceedings to which the EIA Directive applies, article 10a requires Member States to ensure that members of the public have access to a review

procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the directive. It also provides that

“Any such procedure shall be fair, equitable, timely and not prohibitively expensive.”

Article 15a of the IPPC Directive makes identical provision with respect to proceedings to which that directive applies.

Page 2

4. The costs officers were asked to consider the proper application of those articles to this case. The issues which were identified from the skeleton arguments provided by the parties were as follows:

(i)

(ii) (iii)

where an order for costs has been made, whether as a general rule the court assessing those costs has any jurisdiction to implement the directives; if so, whether in the particular circumstances of this case the costs officers should seek to do so; and if so, whether on the evidence presented the amount of costs payable by the appellant should be moderated or even excluded altogether.

The costs officers decided the first two issues in favour of the appellant. They reserved their opinion on the third issue until they had given written reasons for their decision on the first two issues and the parties had had an opportunity to consider whether to appeal against it.

5. The respondents appealed against the costs officers’ decision under rule 53 of the Supreme Court Rules. They asked the single Justice to refer the following questions to a panel of Justices under rule 53(2):

(1) whether it was open to the costs officers, in the circumstances of this case in which applications to the court to reduce or cap a party’s liability had been made to and considered by and rejected by the Court, to achieve that result through the detailed assessment process; and

(2) if it was, whether the test indicated by the phrase “prohibitively expensive” should be focused exclusively on the actual circumstances of the parties to the litigation and not on the question what would be prohibitively expensive for the ordinary member of the public.

The single Justice referred the application to a panel of five Justices and directed that these questions should be decided after an oral hearing. The panel, having now heard counsel, is grateful for their assistance on these issues of principle.

Background

6. The issues about costs are in respect of the appellant’s application for judicial review of the decision of the first respondent to issue a permit on 12 August 2003 for the operation of a cement works in Lawford Road, Rugby. Permission had been sought and granted to replace the fuel that had previously been used for their operation, which was coal and petroleum coke, with shredded

Page 3

tyres. The use of tyres for this purpose gave rise to a public campaign against the proposal on environmental grounds. The application was originally brought in the name of a Mr David Edwards. His claim for judicial review was dismissed by Lindsay J: [2005] EWHC 657 (Admin), [2006] Env L R 3. He appealed to the Court of Appeal, but on the third and final day of the hearing he withdrew his instructions from his solicitors, Richard Buxton & Co, and his counsel, David Wolfe. Mrs Pallikaropoulos, who had been present in court throughout the appeal and had been closely involved in opposition to the permit, was added as an appellant for the remainder of the proceedings. Her liability in the Court of Appeal was capped at £2,000. The appeal was dismissed and the respondents' costs, capped at £2,000, were awarded against Mrs Pallikaropoulos: [2006] EWCA Civ 1138. Mrs Pallikaropoulos was given leave to appeal by the House of Lords.

7. Mrs Pallikaropoulos then applied to the House of Lords for an order varying or dispensing with the requirement to give security for costs in the sum of £25,000 in accordance with House of Lords Practice Direction 10.6. She also applied for a protective costs order, in which she sought a cap on her liability for costs on her appeal under the principles set out in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600. She relied in support of these applications on the requirement of articles 10a and 15a of the EU Directives and article 9(4) of the Aarhus Convention that access to the courts should not be "prohibitively expensive". She declined to provide details of her means or details of the means of those whom she claimed to represent. Her applications were opposed by the respondents.

8. By letter dated 22 March 2007 the Judicial Office of the House of Lords wrote to the parties informing them that Mrs Pallikaropoulos's applications had been rejected. The following reasons were given for this decision:

"Their Lordships proceed on the basis that the appeal raises an issue or issues of general importance and they are prepared to assume that absence of private interest may not always preclude the making of a special costs order in such a case. But their Lordships do not accept that information about the applicant's means, about the identity and means of any who she represents and about the position generally in the absence of any special order, are or should be regarded as immaterial; further, they do not consider that the suggested protective orders regarding costs appear proportionate on the information which is before them and in the light of the nature of the issues involved; and they do not consider that any case has been made for saying that the proposed appeal would be 'prohibitively expensive' or that Directive 2003/35/EC would be breached without a special order."

Page 4

Notwithstanding the rejection of these applications Mrs Pallikaropoulos proceeded with her appeal.

9. On 16 April 2008 the House of Lords affirmed the Court of Appeal's decision and dismissed the appeal: [2008] UKHL 22, [2008] Env LR 34. The

parties were given time to make written submissions on costs. It was submitted for Mrs Pallikaropoulos that there should be no order as to costs. As in the case of her application for a protective costs order, she relied in support of that submission on the requirement of articles 10a and 15a of the EU Directives and article 9(4) of the Aarhus Convention that access to the courts should not be “prohibitively expensive”. Some information was given about her means, but it was in general terms and it was not accompanied by detailed evidence. Her submission was opposed by the respondents, who sought an order for the costs of the appeal. On 18 July 2008, following consideration of what had been offered on either side, the House of Lords pronounced a costs order in these terms:

“That the appellants do pay or cause to be paid to the respondents their costs of the appeal to this House, the amount of such costs to be certified by the Clerk of the Parliaments if not agreed between the parties.”

No reasons were given for this decision.

10. On 1 October 2009 the jurisdiction of the House of Lords was transferred to the Supreme Court by section 40 of the Constitutional Reform Act 2005. Among the transitional provisions in Schedule 10 to the Act relating to proceedings transferred to the Supreme Court from the House of Lords or the Judicial Committee of the Privy Council is para 5, which provides:

“(1) Any act, judgment or order of the original court in the transferred proceedings is to have the same effect after the transfer day as if it had been an act, judgment or order of the Supreme Court in corresponding proceedings in that court.

(2) Accordingly, after the transfer day, further proceedings may be taken in the Supreme Court in respect of such an act, judgment or order.”

11. Rule 49 of the Supreme Court Rules 2009 provides that every detailed assessment of costs shall be carried out by two costs officers appointed by the President. Rule 50, as to the basis of the assessment, provides:

Page 5

“(1) Where the Court is to assess the amount of costs it will assess those costs –

(a) on the standard basis, or

(b) on the indemnity basis, in the manner specified by rule 51 or (where appropriate) on the relevant bases that apply in Scotland or Northern Ireland.

(2) Where –

(a) the Court makes an order about costs without indicating the basis on which the costs are to be assessed, or

(b) the Court makes an order for costs to be assessed on a basis other than one specified in paragraph (1), the costs will be assessed on the standard basis.

(3) This rule applies subject to any order or direction to the contrary.”

12. Supreme Court Practice Direction 13, para 16.1 provides:

“The costs officers have discretion as to the amount to allow. In exercising this discretion they bear in mind the terms ‘unreasonably incurred’ and ‘unreasonable in amount’ in CPR 44.4, (or in appeals from Scotland the provisions of rule 42.10 of the Rules of the Court of Session 1994) and in particular consider to what

extent an item assisted the Court in determining the appeal.”

The costs officers’ judgment

13. Having identified the three preliminary issues referred to in para 4 above, the costs officers dealt with them as follows. They held that compliance with the EU Directives was a relevant factor for them to take into account on the detailed assessment of costs in cases to which the directives apply unless the court awarding costs had already done so: para 13. In deciding what costs it was reasonable for the respondents to obtain, they said that they would disallow any costs which they considered to be prohibitively expensive: para 17. As to the meaning of the phrase “prohibitively expensive”, they said that they were minded to adopt the test which had been propounded by Mr Justice Sullivan, as he then was, in the report of his Working Group, *Ensuring access to environmental justice in England and Wales* (May 2008), where he said costs, actual or risked, should be regarded as ‘prohibitively expensive’ if they would reasonably prevent an ‘ordinary’ member of the public (that is, ‘one who is neither very rich nor very poor, and would not be entitled to legal aid’) from embarking on the challenge falling within the terms of Aarhus.

14. They then addressed the respondents’ argument that, as the appellant had raised the Aarhus principles on two occasions in the House of Lords and those submissions had been rejected on both occasions, she was estopped from raising those issues again before the costs officers. They rejected it, for the reasons given in para 23 where they said:

“We neither have nor assert any right to set aside or vary any decision already made by the Law Lords or by the Justices in this case. If, in advance of the hearing before us, the Law Lords or the Justices had made any decision on the implementation of the EU Directives in this case we would of course act in compliance with that decision. However, we take the view that the pronouncements which the Law Lords have made in this case do not prevent us from applying the Aarhus principles in the course of our assessment.”

In their view no part of the decision in March 2007 ruled out their discretion to decide that the reasonable costs in the case should be nil or should be no more than a nominal amount: para 25. While the costs order of 18 July 2008 gave the respondents stronger ground for saying that the appellant had raised the Aarhus principles already and had lost them, they noted that the order did not expressly deal with them. They said that this was consistent with their finding that those matters were best dealt with at the stage at which costs are assessed rather than at the stage at which costs are awarded. The order expressly left the amount of costs to be determined. They decided that they should determine that amount taking into account the Aarhus principles: para 27.

The jurisdiction of the costs officers

15. The costs officers’ judgment raises a short but important point about the extent of their jurisdiction when they are carrying out their detailed assessment of

costs under rule 49(1) of the Supreme Court Rules 2009.

16. In *Lahey v Pirelli Tyres Ltd* [2007] EWCA Civ 91, [2007] 1 WLR 998, the Court of Appeal held that, where a costs order was deemed to have been made on the standard basis, the claimant was entitled to 100% of his assessed costs and that the costs judge had no power in advance of the assessment to vary the deemed order so as to reduce the claimant's percentage entitlement to costs. The relevant rules of the CPR were rule 44.3(1), which gives the court a discretion as to (a)

Page 7

whether costs are payable by one party to another, (b) the amount of those costs and (c) when they are to be paid; rule 44.4, which sets out the basis of assessment; and rule 44.5, which sets out the factors to be taken into account in deciding the amount of costs.

17. The Supreme Court rule which corresponds to CPR rule 44.3 is rule 46(1), which provides:

“The Court may make such orders as it considers just in respect of the costs of any appeal, application for permission to appeal, or other application to or proceeding before the Court.”

The rules about the basis of assessment of costs which correspond to those in CPR rules 44.4 and 44.5 are set out in rule 49 which provides for the detailed assessment of costs to be carried out by the costs officers (see para 11, above), and in rule 51 which provides with regard to the standard basis of assessment:

“(1) Costs assessed on the standard basis are allowed only if they are proportionate to the matters in issue and are reasonably incurred and reasonable in amount.

(2) Any doubt as to whether costs assessed on the standard basis are reasonably incurred and are reasonable and proportionate in amount will be resolved in favour of the paying party.”

18. As Dyson LJ explained in *Lahey v Pirelli Tyres Ltd*, paras 20-21:

“20 There is a real distinction between (a) carrying out an assessment and deciding *as part of the assessment* to reduce the bill by a percentage and (b) deciding *in advance* of the assessment that the receiving party will only receive a percentage of the assessed costs. The figure that results from (a) represents 100% of the assessed costs. In deciding as part of the assessment to reduce the bill by a percentage, the costs judge is giving effect to an order that the successful party is entitled to his costs, to be assessed if not agreed. The figure that results from (b) represents less than 100% of the assessed costs. In deciding in advance of the assessment that the receiving party will only receive a percentage of the assessed costs, the costs judge is not giving effect to an order that the successful party is entitled to his costs, to be assessed if not agreed.

Page 8

21 Rule 44.3 gives a judge jurisdiction to make a type (b) order. There is no doubt that at the end of a hearing the judge may make an order of the kind that the defendant sought from the [costs judge] in the present case. In such a case, the judge is not purporting to vary an order if he disallows the successful party a proportion of his costs. He is *making* the order. He does not have the advantage

accorded to the costs judge of having a detailed bill of costs. He cannot, therefore, carry out a detailed assessment. But he usually has the benefit, denied to the costs judge, of knowing a good deal about the case, and is often in a good position to form a view about the reasonableness of the parties' conduct. When carrying out a detailed assessment, the costs judge is not making an order for costs. His position is quite different from that of a judge exercising the jurisdiction given by rule 44.3.”

19. The distinction in principle between carrying out an assessment and then deciding as part of the assessment to reduce the bill by a percentage on the one hand, and deciding in advance that the receiving party will receive only a percentage of the assessed costs on the other, is fully recognised by the Supreme Court Rules. The function of the costs officers under rule 49(1), read together with Practice Direction 13, para 16.1 (see para 12, above) is to carry out the detailed assessment. That is the limit of their jurisdiction. Decisions as to whether the receiving party is to receive less than 100% of the assessed costs are reserved to the Court, in the exercise of the jurisdiction that is given to it by rule 46(1).

20. The costs officers recognised the distinction that was drawn between these two functions in *Lahey v Pirelli Tyres Ltd*. But they were persuaded that the task of giving effect to the EU Directives fell naturally within the assessment of reasonableness. They drew an analogy with the task that has to be performed where a party was legally aided for some but not all of the proceedings covered by the order for costs. Section 11(1) of the Access to Justice Act 1999 provides: “Except in prescribed circumstances, costs ordered against an individual in relation to any proceedings or part of proceedings funded for him shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including –

- (a) the financial resources of all the parties to the proceedings, and
- (b) their conduct in connection with the dispute to which the proceedings relate;

Page 9

and for this purpose proceedings, or a part of proceedings, are funded for an individual if services relating to the proceedings or part are funded for him by the Commission as part of the Community Legal Service.”

Since in most cases the reasonable sum that results from this exercise is nil, the assessments of reasonableness could vary substantially between periods when a losing litigant was legally aided and when he was not. In the costs officers' view the factors which they would have to take into account in implementing the EU Directives were not wholly dissimilar from the factors that they have to take into account under section 11 of the 1999 Act when it applies: para 16.

21. This view of the costs officers' jurisdiction is, with respect, misconceived. Where section 11 of the 1999 Act applies the statute itself gives to the costs judge the authority to depart from the ordinary basis of assessment by setting a limit on the amount which it is reasonable for the paying party to pay. In this case a statutory direction of that kind is absent, and there has been no direction by the

Court that any basis of assessment other than the standard basis is to be applied. So the costs officers must confine the exercise which they carry out to that which they are directed to perform under the rules. It is not enough for them to refrain from deciding in advance of their assessment that the respondents will receive only a part of the assessed costs, which they have no jurisdiction to do for the reasons explained in *Lahey v Pirelli Tyres Ltd*. They must refrain from introducing a different basis than that prescribed by the rules when they are carrying out their assessment. The test of reasonableness which they must apply is directed to their assessment of the costs incurred by the *receiving* party: see CPR 44.5 as to the factors to be taken into account by the costs judge when exercising his discretion as to costs. It is not directed to the entirely different question whether the cost to the *paying* party would be prohibitively expensive, which is what the Aarhus test is concerned with.

22. Mr Wolfe submitted that the costs officers were obliged to give effect to the EU Directives under the principle explained in Case C-62/00 *Marks & Spencer plc v Customs and Excise Comrs* [2003] QB 866, 888, para 24 where the European Court said that in applying domestic law the national court called upon to interpret that law is required to do so, as far as possible, in the light of the wording and purpose of a directive, in order to achieve its purpose and thereby comply with the third paragraph of article 189 of the EC Treaty (now the third paragraph of article 288 TFEU): see also Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135, 4159, para 8; Case C-72/95 [1996] ECR I-5403 *Aannemersbedrijf P K Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland*, para 55, where it was said in the context of an EIA Directive that the obligation of a Member State to take all the measures necessary to achieve

Page 10

the result prescribed by a directive is a binding obligation imposed by the EC treaty and by the directive itself. He said that this obligation had to be given effect to by the costs officers unless the words of the rules precluded this, which in his submission they did not.

23. The answer to this submission is to be found in the division of responsibility that the rules themselves recognise between the Court on the one hand and the costs officers on the other. The question whether the review procedure is prohibitively expensive is a matter that can, and should, be addressed by the Court itself. Preferably this should be done at the outset of the proceedings. The Sullivan Working Group recommended in Appendix 4 to its May 2008 Report that, for the proper conduct of the case, a protective costs order should be sought with the application for permission for judicial review and should wherever possible be decided at the same time as permission. No mention was made in its recommendations of what is to be done at the stage of an appeal. But the advantages of having the matter resolved at the outset apply just as much at that stage as they do at first instance. So a protective costs order to meet the requirement that the proceedings should not be prohibitively expensive should be

sought when permission to appeal is being asked for, or as soon as possible thereafter. That is what Mrs Pallikaropoulos did in this case.

24. But the refusal of a protective costs order does not preclude further consideration of the matter by the Court at the end of the proceedings. The Aarhus Convention has been authenticated in three languages: English, French and Russian. The English word “prohibitively” in the English version of article 9 suggests that the question is for consideration at the outset, as the act of prohibiting must always anticipate what is prohibited. The French language version uses the word *prohibitif*. The Russian text uses the word *недоступно*, indicating that the costs must not be inaccessibly high. The words “prohibitively” and “*prohibitif*” are carried forward into the English and French language versions of the EU directives and the adjective *απαγορευτικό* in the Greek version carries the same meaning. But the words used in the translations of the directives into German (*übermässig teuer*), Italian (*eccessivamente onerosa*) and Spanish (*excesivamente onerosos*) indicate that, so far as the directives are concerned, the question of expense is not exclusively for consideration at the outset.

25. The general rule is that EU Directives should be interpreted in a manner that is consistent with international agreements concluded by the EU: Case C- 341/95 *Bettati v Safety Hi-Tech Srl* [1998] ECR I-4355, para 20. The emphasis of the Convention, as all three language versions show, is on facilitating access to an effective remedy. But its object and purpose would not be well served if a narrow view were to be taken of the time when the issue about the expense of the proceedings can be considered. The essential question seems to be whether the bill of costs will be, or is, excessive bearing in mind the overriding requirement of

Page 11

access to justice. This is best dealt with by making a protective costs order, but the Court can deal with the matter at the end of the case by setting a limit on the paying party’s liability which meets the objective of the directives. It does not need to carry out a detailed assessment of the costs in order to do this, any more than it does when it is making a protective costs order. The costs officers, for their part, must confine their attention to the basis of assessment prescribed by rule 50, subject to any directions that may be given to them by the Court.

26. For these reasons the answer to the first question which the respondents referred to the single Justice under rule 53 (see para 5, above) must be in the negative. The ruling by the costs officers that they have jurisdiction to implement the EU Directives must be set aside.

The Court’s obligation under the Directives

27. As there is a division of responsibility, the question that must now be addressed is whether the House of Lords fulfilled its obligation to take the measures that were necessary to achieve the objects of the Directives. That is an obligation which, in its turn, rests on this Court.

28. Mr Eadie QC for the respondents submitted that the issue was fully and properly addressed in March 2007 when the appellant applied for a protective

costs order. He said that the House of Lords was right to rely on the fact that Mrs Pallikaropoulos had not provided the information that was needed for her to show that the proceedings would be prohibitively expensive. As the House made clear in the reasons that it gave for not considering it appropriate to make the order, she had not made out a case for saying that the proposed appeal would be prohibitively expensive. Furthermore she proceeded with the appeal notwithstanding that decision. So there were no grounds for taking a different view at the stage when the order for costs was made on 18 July 2008. That was a final decision, and the issue was not open to be considered again.

29. The question however is whether, when it made these decisions, the House was proceeding upon a correct understanding of the test that is to be applied in order to determine whether the proceedings in question are prohibitively expensive. There are various possible approaches to this issue. In *R (Garner) v Elmbridge Borough Council* [2010] EWCA Civ 1006 the judge had refused to grant a protective costs order because he was of the view that it was impossible to tell whether the proceedings would be prohibitively expensive unless there was detailed information about the appellant's resources to fund the proceedings. In the Court of Appeal Sullivan LJ said of his decision in para 42:

Page 12

“This raises an important issue of principle. Should the question whether the procedure is or is not prohibitively expensive be decided on an ‘objective’ basis by reference to the ability of an ‘ordinary’ member of the public to meet the potential liability for costs, or should it be decided on a ‘subjective’ basis by reference to the means of the particular claimant, or upon some combination of the two bases?”

30. Sullivan LJ observed that in an ideal world he would have preferred to defer taking a decision on such an important issue of principle until after the findings of the Aarhus Convention Compliance Committee as to whether our domestic costs rules are Aarhus compliant, and until after it was known whether the European Commission will accept or reject the United Kingdom's response to the Commission's reasoned opinion, announced in a press release dated 18 March 2010, in which the Commission was contending that the United Kingdom is failing to comply with the EIA Directive because challenges to the legality of environmental decisions are prohibitively expensive: para 43. But as the court had to reach a decision as to whether the judge was wrong to refuse to grant a protective costs order, he went on to say this in para 46:

“Whether or not the proper approach to the ‘not prohibitively expensive’ requirement under article 10a should be a wholly objective one, I am satisfied that a purely *subjective* approach, as was applied by Nicol J, is not consistent with the objectives underlying the directive. Even if it is either permissible or necessary to have some regard to the financial circumstances of the individual claimant, the underlying purpose of the directive to ensure that members of the public concerned having a sufficient interest should have access to a review procedure which is not prohibitively expensive would be frustrated if the court was entitled

to consider the matter solely by reference to the means of the claimant who happened to come forward, without having to consider whether the potential costs would be prohibitively expensive for an ordinary member of ‘the public concerned’.”

There was evidence that without a protective costs order the liability and costs of an unsuccessful appellant was likely to be prohibitively expensive to anyone of ordinary means. So the judge’s decision was set aside.

31. The importance that is to be attached to Sullivan LJ’s observations in *R (Garner) v Elmbridge Borough Council* gathers strength when they are viewed in the light of the proposal in para 4.5 of Chapter 30 of the Jackson Review of Civil Litigation Costs (December 2009) as to environmental judicial review cases that

Page 13

the costs ordered against the claimant should not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, and the entirely different proposal in para 30 of the Update Report of the Sullivan Working Group (August 2010) that an unsuccessful claimant in a claim for judicial review should not be ordered to pay the costs of any other party other than where the claimant has acted unreasonably in bringing or conducting the proceedings. They have to be viewed too in the light of the conclusion of the Aarhus Convention Compliance Committee which was communicated by letter dated 18 October 2010 that, in legal proceedings in the UK within the scope of article 9 of the Convention, the public interest nature of the environmental claims under consideration does not seem to have been given sufficient consideration in the apportioning of costs by the courts and that despite the various measures available to address prohibitive costs, taken together they do not ensure that the costs remain at a level which meets the requirements of the Convention: see paras 134-135. It is clear that the test which the court must apply to ensure that the proceedings are not prohibitively expensive remains in a state of uncertainty. The balance seems to lie in favour of the objective approach, but this has yet to be finally determined.

32. It is unclear too whether a different approach is permissible at the stage of a second appeal from that which requires to be taken at first instance. The question in *R (Garner) v Elmbridge Borough Council* was about the approach that was required to be taken at first instance. In this case Mrs Pallikaropoulos did not appear at first instance. She was given a protective costs order in the Court of Appeal, where her appeal was unsuccessful, because her liability in costs was capped at £2,000. By the stage when her appeal reached the House of Lords the question which she wished to raise had already been considered twice in the courts below without the claimant having been deterred from seeking judicial review on grounds of expense. It is questionable whether the public interest is best served if a limit must be set on the amount of the costs payable to the successful party in the event of a second appeal as this will inevitably mean that, if the public authority wins, some of the costs reasonably incurred by it will not be recoverable.

33. It is plain from the reasons that were given by the House of Lords for its decision to refuse a protective costs order on 22 March 2007 that these difficult issues were not addressed at that stage. It took a purely subjective approach to the question whether a case for such an order had been made. No reasons were given for the costs order of 18 July 2008. But it is to be inferred from its terms that the House was not satisfied that a case had been made out for any modification of its approach. It must be concluded that here too the House took an approach to this issue which was a purely subjective one. It is to say the least questionable whether in taking this approach, which has now been disapproved by the Court of Appeal in *Garner v Elmbridge Borough Council*, it fulfilled its obligations under the directives.

Page 14

Conclusion

34. In *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, 132 Lord Browne-Wilkinson observed that the respondents' concession that their Lordships had jurisdiction in appropriate cases to rescind or vary an earlier order of the House of Lords was rightly made both in principle and on authority:

“In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In *Broome v Cassell & Co Ltd (No 2)* [1972] AC 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.”

He went on to say that it should be made clear that the House would not reopen any appeal save in circumstances where, through no fault of a party, he or she had been subjected to an unfair procedure.

35. The Supreme Court is a creature of statute. But it has inherited all the powers that were vested in the House of Lords as the ultimate court of appeal. So it has the same powers as the House had to correct any injustice caused by an earlier order of the House or this Court. It would however be more consistent with the principle which Lord Browne-Wilkinson described to say that the power is available to correct any injustice, however it may have arisen. In this case it seems that, through no fault of the appellant, an injustice may have been caused by the failure of the House to address itself to the correct test in order to comply with the requirements of the directives.

36. The appellant has submitted that, taken overall, no clear and simple answer is available to the question as to what is the right test. That indeed does seem to be the position. In any event it cannot be said to be so obvious as to leave no reasonable scope for doubt as to the manner in which the question would be resolved: *CILFIT (Srl) v Ministry of Health (Case C-283/81)* [1983] 1 CMLR 472. In these circumstances the Court will refer the issue to the Court of Justice of the

European Union for a preliminary ruling under article 267 TFEU (ex article 234 EC). The order for costs of 18 July 2008 will be stayed pending the reference. The parties are invited to make submissions in writing within 28 days on the questions to be referred to the Court of Justice.

Page 15

ANNEX

IN THE SUPREME COURT OF THE UNITED KINGDOM

Before :

MRS REGISTRAR DI MAMBRO AND MASTER O'HARE

Between :

THE QUEEN ON THE APPLICATION OF [DAVID EDWARDS] LILIAN PALLIKAROPOULOS - and - THE ENVIRONMENT AGENCY THE FIRST SECRETARY OF STATE SECRETARY OF STATE FOR THE ENVIRONMENT FOOD AND RURAL AFFAIRS - and - CEMEX UK CEMENT LIMITED

Mr Wolfe (instructed by **Richard Buxton**) for the **Appellant Mr Maurici** (instructed by **Environment Agency Legal Services** and the **Treasury Solicitors**) for the **Respondents**
Hearing date: 4 December 2009 -----

Approved Judgment

..... Page 16

Parliament Square London,

Date: 15 January 2010

Appellant

Respondents Intervener

Mrs Registrar di Mambro and Master O'Hare:

1. This is our decision on two preliminary issues which arose in the detailed assessment of the bills of costs lodged by the Respondents in respect of the appeal to the House of Lords in this case. The appeal arose out of a Judicial Review, which was initially brought by a Mr David Edwards. He instructed Mr Richard Buxton, whose fees were funded by the Legal Services Commission. The claim was dismissed by Lindsay J ([2005] EWHC 657) and Mr Edwards brought an appeal to the Court of Appeal. On the third and final day of that appeal Mr Edwards withdrew his instructions from Messrs Richard Buxton, and, at that stage, Mrs Pallikaropoulos was added as an additional party in order to continue the appeal. Mrs Pallikaropoulos was not eligible for legal aid, but the Court of Appeal made a costs capping order limiting her exposure to the Respondents' costs to the sum of £2,000.

2. The appeal to the Court of Appeal was dismissed ([2006] EWCA Civ 1138) and Mrs Pallikaropoulos successfully petitioned the House of Lords for leave to appeal to that court. Having obtained leave she then applied for a waiver of the security sum payable on such an appeal, and also applied for a protective costs order. By letter dated 22 January 2007 the Judicial Office indicated to her that, on the basis of the information then before them, the members of the Appeal

Committee were not then minded to grant either application.

3. The appeal was heard in January 2008 and lasted three days. On 16 April 2008 the House of Lords dismissed the appeal, thereby affirming the Court of Appeal's decision. The matter was then adjourned for the parties to make written representations on costs. On 18 July 2008, despite her Counsel's written submissions to the contrary, Mrs Pallikaropoulos was ordered to pay the Respondents' costs of the appeal. The First Respondent has now lodged a bill totalling £55,810, and the Second Respondent has lodged a bill totalling £32,290.

4. The preliminary issues which arose in this case concern the proper application of certain articles under the Environment Impact Assessment ("EIA") Directive (85/337/EEC), and the Integrated Pollution Prevention and Control ("IPPC") Directive (96/61/EC) both of which implement provisions which first appeared in the Treaty known as the Aarhus Convention (UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters: 25 June 1998).

5. In proceedings to which the EIA Directive applies, Article 10a requires Member States to ensure that members of the public as there defined: "... have access to a review procedure before a court of law or another independent and impartial body

Page 17

established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the participation provisions of this directive." and it also provides that:

"Any such procedure shall be fair, equitable, timely and not prohibitively expensive."

6. In proceedings to which the IPPC Directive applies, Article 15a makes provision identical to that set out above in respect of Article 10a of the EIA Directive.

7. These EU Directives were considered by the Court of Appeal in *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107 from which judgment we would like to set out two quotations. The first concerns points made in a document called the 2008 Sullivan Report, which has influenced our decision in this case. The second quotation summarised the argument heard by the Court of Appeal on these directives. The Court of Appeal did not give a ruling on these arguments since, as paragraph 47(ii) indicates, the directives were not applicable in that case.

"32. The 2008 Sullivan report, to which Carnwath LJ referred in granting permission in the present case, was a report of another informal working group representing a range of interested groups, this time under Sullivan J (*Ensuring Access to Environmental Justice in England and Wales – Report of the Working Group on Access to Environmental Justice May 2008*). The report expressed views on the application of the Aarhus principles, in the context of domestic procedures relevant to environmental proceedings, including protective costs orders. The

present case was mentioned, without further discussion, as apparently the first which has reached this court raising issues under the Convention in relation to a costs order in private law proceedings. The following points from the report are possibly relevant in the present context:

i) That the "not prohibitively expensive" obligation arising under the Convention

Page 18

..extends to the full costs of the proceedings, not merely the court fees involved (in this respect differing from the Irish High Court in *Sweetman v An Bord Pleanala and the Attorney General* [2007] IEHC 153);

ii) That the requirement for procedures not to be prohibitively expensive applies to all proceedings, including applications for injunctive relief, and not merely the overall application for final relief in the proceedings;

iii) That costs, actual or risked, should be regarded as "prohibitively expensive" if they would reasonably prevent an "ordinary" member of the public (that is, "one who is neither very rich nor very poor, and would not be entitled to legal aid") from embarking on the challenge falling within the terms of Aarhus (para 20).

iv) That there should be no general departure from the present "loser pays" principle, provided that the loser's potential liability does not make litigation prohibitively expensive in the way described above (para 38).

47. It may be helpful at this point to draw together some of the threads of the discussion, without attempting definitive conclusions:

i) The requirement of the Convention that costs should not be "prohibitively expensive" should be taken as applying to the total potential liability of claimants,

Page 19

including the threat of adverse costs orders.

ii) Certain EU Directives (not applicable in this case) have incorporated Aarhus principles, and thus given them direct effect in domestic law. In those cases, in the light of the Advocate-General's opinion in the Irish cases, the court's discretion may not be regarded as adequate implementation of the rule against prohibitive costs. Some more specific modification of the rules may need to be considered.

iii) With that possible exception, the rules of the CPR relating to the award of costs remain effective, including the ordinary "loser pays" rule and the principles governing the court's discretion to depart from it. The principles of the Convention are at most a matter to which the court may have regard in exercising its discretion.

iv) This court has not encouraged the development of separate principles for "environmental" cases (whether defined by reference to the Convention or otherwise). In particular the principles governing the grant of Protective Costs Orders apply alike to environmental and other public interest cases. The *Corner House* statement of those principles must now be regarded as settled as far as this court is concerned, but to be applied "flexibly". Further development or refinement is a matter for legislation or the Rules Committee.

v) The Jackson review provides an opportunity for considering the Aarhus

principles in the context of the system for

Page 20

costs as a whole. Modifications of the present rules in the light of that report are likely to be matters for Parliament or the Civil Procedure Rules Committee. Even if we were otherwise attracted by Mr Wolfe's invitation (on behalf of CAJE) to provide guidelines on the operation of the Aarhus convention, this would not be the right time to do so.

vi) Apart from the issues of costs, the Convention requires remedies to be "adequate and effective" and "fair, equitable, timely". The variety and lack of coherence of jurisdictional routes currently available to potential litigants may arguably be seen as additional obstacles in the way of achieving these objectives."

8. Although the EIA Directive and the IPPC Directive were not applicable in *Morgan*, both of them are applicable in the case now before us. That was accepted by Counsel for the Respondents, who also accepted that the directives were therefore directly binding upon the courts. The skeleton argument for the Appellant set out the following quotation from the judgment of the ECJ in *Marks & Spencer v Commissioners for Customs & Excise* [2002] ECR I-06325:

"24. In that regard it should be remembered, first that the member state's obligation under a directive is to achieve the result envisaged by the directive and their duty ... to take all appropriate measures whether general or particular, to ensure fulfilment of that obligation, are binding on all the authorities of the member state including, for matters within their jurisdiction, the courts ...

25. ... whenever the provisions of a directive appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the state where the latter has failed to implement the directive in domestic law ..Page 21

26. ... implementation of a directive must be such as to ensure its application in full ..."

9. In preparation for the hearing before us both parties supplied skeleton arguments which were extremely helpful and explicit. From these we were able to identify three preliminary issues, which are as follows:

i) Where an order for costs has been made, whether, as a general rule, the court assessing those costs has any jurisdiction to implement the EU Directives.

ii) If so, whether, in the particular circumstances of this case, we should seek to implement the EU Directives.

iii) If so, whether, on the evidence presented to the court, the amount of costs payable by the Appellant should be moderated or even excluded.

10. At the hearing we decided the first two issues in favour of the Appellant, but thought it right not to hear argument as to the third issue until we had given written reasons for our decision, sight of which by the parties might enable them to agree the third issue subject of course to any appeal against our ruling on the first two issues. We also ruled that the time for appealing our decision on the first two issues should not expire until 28 days after the delivery of our written

decision.

Issue 1 : Jurisdiction of Costs Officers Generally

11. On this point Mr Maurici, Counsel for the Respondents, argued that application of EU Directives falls wholly outside the jurisdiction of Costs Officers.

He placed reliance upon the Supreme Court Practice Direction 13 para 16.1, which states as follows:

“The Costs Officers have discretion as to the amount to allow. In exercising this discretion they bear in mind the terms “unreasonably incurred” and “unreasonable in amount” in CPR 44.4 ... and in particular consider to what extent an item assisted the court in determining the appeal ...”

12. From this he argued that Costs Officers are limited to assessing the reasonableness of the costs awarded by another court. It is for the court awarding costs to decide how and in what way to implement the European Directives. It is not a proper function of the assessing court. Counsel also placed reliance upon the Court of Appeal decision in *Lahey v Pirelli Tyres Ltd* [2007] EWCA Civ 91 which held that, where a court awards costs, the Costs Judges’ duty is to assess 100% of the reasonableness of the costs awarded. The Costs Judge has no power to vary the award of costs made so

Page 22

as to allow less than 100% of the reasonable costs. Counsel drew our attention to paragraphs 20 and 21 of the judgment in that case, which we now set out:

“20. There is a real distinction between (a) carrying out an assessment and deciding *as part of the assessment* to reduce the bill by a percentage and (b) deciding *in advance* of the assessment that the receiving party will only receive a percentage of the assessed costs. The figure that results from (a) represents 100% of the assessed costs. In deciding as part of the assessment to reduce the bill by a percentage, the costs judge is giving effect to an order that the successful party is entitled to his costs, to be assessed if not agreed. The figure that results from (b) represents less than 100% of the assessed costs. In deciding in advance of the assessment that the receiving party will only receive a percentage of the assessed costs, the costs judge is not giving effect to an order that the successful party is entitled to his costs, to be assessed if not agreed.

21. Rule 44.3 gives a judge jurisdiction to make a type (b) order. There is no doubt that at the end of a hearing, the judge may make an order of the kind that the defendant sought from the district judge in the present case. In such a case, the judge is not purporting to vary an order if he disallows the successful party a proportion of his costs. He is *making* the order. He does not have the advantage accorded to the costs judge of having a detailed bill of costs. He cannot, therefore, carry out a detailed assessment. But he usually has the benefit, denied to the costs judge, of knowing a good deal about the case, and is often in a good position to form a view about the reasonableness of the parties' conduct. When carrying out a detailed assessment, the costs judge is not making an order for costs. His position is quite different from that of a judge exercising the jurisdiction given by rule

44.3.”

Page 23

13. We take the view that compliance with the EU Directives is a relevant factor for us to take into account on the detailed assessment of costs in cases to which the Directives apply unless, of course, the court awarding costs has already taken them into account.

14. We accept the submission of Mr Wolfe, Counsel for the Appellant, that the task naturally falls within the definition of reasonableness.

Reasonableness can mean different things in different contexts. We draw an analogy here with what happens when costs are awarded against a party who was legally aided for some but not all of the proceedings covered by the order for costs. Section 11 of the Access to Justice Act 1999 provides that costs ordered against a legally aided party:

“... shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including –

(a) the financial resources of all the parties to the proceedings, and

(b) their conduct in connection with the dispute to which the proceedings relate

...”

15. The Legal Aid Regulations now leave the task of making that assessment to the Costs Officers of the courts in which those costs were awarded. In this court paragraph 4 of Practice Direction 13 requires the Costs Officers to assess the sum reasonable for a legally aided party to pay as part of the detailed assessment proceedings. Since, in most cases, the reasonable sum is nil, the assessments of reasonableness vary substantially between periods when a losing litigant was legally aided and when he was not.

16. In our judgment the factors we ought to take into account in implementing the EU Directives are not wholly dissimilar from the factors we have to take into account in applying section 11 of the Access to Justice Act when it applies. It seems to us that the implementation of any relevant EU Directive is more naturally and conveniently dealt with at the detailed assessment stage rather than at the stage of awarding costs, unless of course, the court awarding costs had already made a decision on these questions.

17. We take the view that in deciding what costs it is reasonable for the Respondents to obtain we will disallow any costs which we consider to be prohibitively expensive. Therefore, in making any such disallowance, we will be acting in compliance with, and not defiance of, the principles stated in *Lahey*.

Page 24

18. The passages from *Morgan* which we have quoted indicate that the EU Directives here in question have not yet been implemented by Parliament or by the Civil Procedure Rule Committee. In *Morgan* the Court of Appeal expressed the hope that the current Jackson Review may consider the Aarhus principles and stated that it was not appropriate to give guidance in the context of *Morgan*. In the absence of authority we are presently minded to adopt the test of “prohibitively expensive” which was propounded in the 2008 Sullivan Report:

“... costs, actual or risked, should be regarded as “prohibitively expensive” if they would reasonably prevent an “ordinary” member of the public (that is, “one who is neither very rich nor very poor, and would not be entitled to legal aid”) from embarking on the challenge falling within the terms of Aarhus.”

19. That seems to us to require us to start by making an objective assessment of what costs are reasonable costs. However, any allowance or disallowance of costs we make must be made in the light of all the circumstances. We presently take the view that we should also have regard to the following:

- i) The financial resources of both parties.
- ii) Their conduct in connection with the appeal.
- iii) The fact that the threat of an adverse costs order did not in fact prohibit the appeal.
- iv) The fact that a request to waive security money was refused and security was in fact provided.
- v) The amount raised and paid for the Appellant’s own costs.

Issue 2 : Issue Estoppel

20. For the Respondents, Mr Maurici submitted that the Appellants have raised Aarhus principles on two occasions in the House of Lords and those submissions were rejected on both occasions. The first occasion was in respect of the Appellant’s applications for waiver of security monies and for a protective costs order. On 22 March 2007 the Appeal Committee made the following decision: “Their Lordships do not consider it appropriate to make any order on the application made to them for a dispensation in respect of the requirement to put up security and for a protective costs order.

Page 25

Their Lordships have considered the criteria in *R (Cornerhouse Research) v Secretary of State for Trade & Industry* [2005] EWCA Civ 192 and the submissions made with regard to their application and potential relaxation. Their Lordships proceed on the basis that the appeal raises an issue or issues of general importance and they are prepared to assume that absence of private interest may not always preclude the making of a special costs order in such a case. But their Lordships do not accept that information about the Applicant’s means, about the identity and means of any who she represents and about the position generally in the absence of any special order, are or should be regarded as immaterial: further, they do not consider that the suggested protective orders regarding costs appear proportionate on the information which is before them and in the light of the nature of the issues involved; and they do not consider that any case has been made for saying that the proposed appeal would be “prohibitively expensive” or that Directive 2003/35/EC would be breached without a special order.”

21. The second occasion upon which the Aarhus principles were considered in this case preceded the making of the costs order dated 18 July 2008. In the written submissions on costs lodged on behalf of the Appellant, much greater information

about the Appellant's financial resources was given than had been given on the previous occasion. In the light of that information it was submitted that there should be no order for costs. In the alternative, the following submissions were made:

"In the event of their Lordships, notwithstanding the above, deciding to award costs in favour of the Respondents, they are requested to consider:

- ...

-

Limiting them to the costs of one Respondent

Limiting the costs to 70% of the Respondent's costs. At the High Court and Court of Appeal stages only 70% of costs were awarded ..Page 26

- Reducing the burden on the Appellant by ordering any costs in excess of the £25,000 security monies already lodged with the House of Lords to be payable by instalments of at most £5,000 per annum and without interest (other than in the event of late payment).

- In any event staying the effect of the order until the issues relating to "prohibitive expense" and Directive 2003/35/EC are resolved between the Commission and the UK Authorities."

22. In response to those submissions the House made a standard order for costs: "That the Appellant do pay or cause to be paid to the Respondents their costs of the appeal to this House, the amount of such costs to be certified by the Clerk of the Parliaments if not agreed between the parties."

23. We neither have nor assert any right to set aside or vary any decision already made by the Law Lords or by the Justices in this case. If, in advance of the hearing before us, the Law Lords or the Justices had made any decision on the implementation of the EU Directives in this case we would of course act in compliance with that decision. However, we take the view that the pronouncements which the Law Lords have made in this case do not prevent us from applying the Aarhus principles in the course of our assessment.

24. The decision made in March 2007 was made without a hearing and was made on the basis of the "information about the Appellant's means, about the identity and means of any who she represents and about the position generally". This being so the order states that their Lordships did "not consider that any case had been made for saying that the proposed appeal would be "prohibitively expensive"". In the circumstances, we do not think that that was a final ruling upon these principles in this case. On the contrary, we think the wording their Lordships there adopted invited the Appellant to provide the court with the information it would need to decide such principles.

25. In our view no part of the decision made in March 2007 rules out our discretion to decide that the reasonable costs in this case should be nil or should be no more than a nominal amount. Whilst it is difficult to imagine circumstances in which it would be appropriate for us to allow less than £25,000 if the Respondents' costs would otherwise reasonably exceed that sum, it is not in theory

impossible that we should do so. In requiring the Appellant to raise such a sum as security monies their Lordships could not

Page 27

know, for example, what terms and conditions the Appellant might be required to agree to in order to borrow such a sum. It may be appropriate for us to take any such terms and conditions into account when assessing whether the costs of this appeal would have been prohibitively expensive.

26. At the hearing before us we made reference to a Court of Appeal decision on security for costs raised for an appeal: *R v The Common Professional Examination Board, ex p. Mealing-McLeod* [2000] EWCA Civ 138. In that case the Court of Appeal overturned an earlier order which permitted monies paid as security for an appeal to be used in part satisfaction of costs orders made in earlier proceedings. The Court of Appeal made its decision on the basis of the terms of the loan agreement by which the security monies had been raised: they had been raised solely for the purpose of providing security and not for any other purpose. In fact, on examination of the decision in that case, we now appreciate that it is not directly relevant to the issues which arise in this case.

27. In our view, the costs order dated 18 July 2008 gives the Respondents stronger ground for saying that the Appellant has raised the Aarhus principles already in this case and has lost them. However, on this point also, we find in favour of the Appellant. The order dated 18 July 2008 does not expressly deal with the Aarhus principles. As such, it is consistent with our finding that these matters are better dealt with at the stage at which costs are assessed rather than at the stage at which costs are awarded. The order expressly leaves the amount of costs to be determined. In our view we should determine that amount taking into account the Aarhus principles.

NEXT STEPS

28. In a draft of this judgment which was sent to the parties some time ago we foresaw the possibility that the parties may agree what sums should reasonably be allowed as costs in this case and may make such agreement subject to the decision upon any appeal the Respondents may bring against our rulings on Issues 1 and 2. Alternatively, the parties may agree to defer any decision as to the amount of reasonable costs pending a decision on such an appeal. The draft stated that the parties are neither required nor expected to attend the hearing at which we shall formally deliver this judgment, although they may do so if they wish.

29. Accordingly, we will now consider any submissions any party wishes to make. If appropriate, we will adjourn this matter to a further hearing and, perhaps, fix a date for that hearing.

Page 28