R (on the application of Edwards and another) v Environment Agency and others (No 2)

[2013] UKSC 78

SUPREME COURT

LORD NEUBERGER P, LORD HOPE, LORD MANCE, LORD CLARKE AND LORD CARNWATH SCJJ

22 JULY, 11 DECEMBER 2013

Judicial review – Costs of application – Pre-emptive order for costs – Protective costs order – Principles – Proceedings to be not prohibitively expensive – Nature of test – Jurisdiction of Supreme Court costs officers – Supreme Court Rules 2009, SI 2009/1603 – Council Directive (EEC) 85/337 – Council Directive (EC) 96/61.

The test under the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (Aarhus, 25 June 1998; ST 24 (2005); Cm 6586) (the Aarhus Convention) for whether the cost of litigation in environmental matters is or is not prohibitively expensive is not purely subjective. The cost of proceedings must not exceed the financial resources of the person concerned nor appear to be objectively unreasonable at least in individual cases. The Court of Justice of the European Union has not given definitive guidance as to how to assess what is 'objectively unreasonable'; it has not in terms adopted an 'objective' assessment based on the ability of an 'ordinary' member of the public to meet the potential liability for costs. While the Court of Justice has not rejected that alternative as a possible factor in the overall assessment, 'exclusive' reliance on resources of an 'average applicant' is not appropriate, because it could have 'little connection with the situation of the person concerned'. A court could also take into account what might be called the 'merits' of the case, that is, 'whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages'. That a claimant has not in fact been deterred from carrying on the proceedings is not 'in itself' determinative. The same criteria are to be applied on appeal as at first instance (see [21]–[25], below).

Edwards v Environment Agency (No 2) Case C-260/11, [2013] 1 WLR 2914 applied.

Notes

For environmental information and participation: access to information and justice, participation in decision-making, see 45 *Halsbury's Laws* (5th edn) (2010) para 55, and for judicial review: costs generally and for protective costs orders, see 61 *Halsbury's Laws* (5th edn) (2010) paras 681, 686.

Cases referred to in judgment

Aannemersbedrijf P K Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland Case C-72/95 [1997] All ER (EC) 134, [1996] ECR I-5403, ECJ.

Bettati v Safety Hi-Tech Srl Case C-341/95 [1998] ECR I-4355, ECJ.

Cassell & Co Ltd v Broome (No 2) [1972] 2 All ER 849, [1972] AC 1136, HL.

CILFIT Srl v Ministry of Health Case C-283/81 [1982] ECR 3415, ECJ.
DEB Deutsche Energiehandels-und Beratungsgesellschaft mbH v Bundesrepublik Deutschland Case C-279/09 [2010] ECR I-13849, ECJ.
EC Commission v Ireland Case C-427/07 [2009] ECR I-6277, ECJ.
Lahey v Pirelli Tyres Ltd [2007] EWCA Civ 91, [2007] 1 WLR 998.
Marks & Spencer plc v Customs and Excise Comrs Case C-62/00 [2002] STC 1036, [2003] QB 866, [2003] 2 WLR 665, [2002] ECR I-6325, ECJ.
Marleasing SA v La Commercial Internacional de Alimentación SA Case C-106/89 [1990] ECR I-4135, ECJ.
R (on the application of Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192, [2005] 4 All ER 1, [2005] 1 WLR 2600.
R (on the application of Garner) v Elmbridge BC [2010] EWCA Civ 1006, [2011] 3 All ER 418, [2011] 1 Costs LR 48.
R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2) [1999] 1 All ER 577, [2000] 1 AC 119, [1999] 2 WLR 272.

Cases referred to in list of authorities

Davey v Aylesbury DC [2007] EWCA Civ 1166, [2008] 2 All ER 178, [2008] 1 WLR 878.
Decision ACCC/C/2008/23, Aarhus Convention Compliance Committee.
Decision ACCC/C/2008/33, Aarhus Convention Compliance Committee.
R (on the application of E) v Governing Body of JFS (Secretary of State for Children, School and Families and ors, interested parties) (United Synagogue intervening) (No 2), R (on the application of E) v Office of the Schools Adjudicator (Governing Body of JFS and ors, interested parties) (British Humanist Association intervening) (No 2) [2009] UKSC 1, [2010] 1 All ER 1, [2009] 1 WLR 2353.
van der Weerd v Minister van Landbouw, Natuur en Voedselkwaliteit Joined cases C-222–225/05 [2009] All ER (EC) 90, [2007] ECR I-4233, ECJ.
Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten Joined cases C-430/93 and 431/93 [1996] All ER (EC) 259, [1995] ECR I-4705, ECJ.
Walton v Scottish Ministers [2012] UKSC 44, 2013 SC (UKSC) 67, [2013] PTSR 51.

Costs

The Supreme Court referred to the Court of Justice of the European Union (see [2010] UKSC 57, [2011] 1 All ER 785) questions relating to the expression 'not prohibitively expensive' in the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (Aarhus, 25 June 1998; ST 24 (2005); Cm 6586) (the Aarhus Convention), namely: (1) How should a national court approach the question of awards of costs against a member of the public who is an unsuccessful claimant in an environmental claim, having regard to the requirements of art 9(4) of the Aarhus Convention, as implemented by art 10a of Council Directive (EEC) 85/337 and art 15a of Council Directive (EC) 96/61? (2) Should the question whether the cost of the litigation is or is not 'prohibitively expensive' within the meaning of art 9(4) of the Aarhus Convention as implemented by those directives be decided on an objective basis (by reference, for example, 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 these two bases? (3) Or is this entirely a matter for the national law of the member state subject only to achieving the result laid down by those directives, namely that the proceedings in question are not

'prohibitively expensive'? (4) In considering whether proceedings are, or are not, 'prohibitively expensive', is it relevant that the claimant has not in fact been deterred from bringing or continuing with the proceedings? (5) Is a different approach to these issues permissible at the stage of (i) an appeal or (ii) a second appeal from that which requires to be taken at first instance? The questions arose on the application of the Environment Agency and the Secretary of State for the Environment, Food and Rural Affairs under r 53 of the Supreme Court Rules 2009, SI 2009/1603 following the decision on 15 January 2010 of costs officers (Mrs Registrar di Mambro and Master O'Hare), appointed by the President of the Supreme Court under r 49(1) of the 2009 Rules, on issues arising in the detailed assessment of the bills of costs lodged by the Agency and the Secretary of State in respect of the appeal to the House of Lords in *R (on the application of Edwards) v Environment Agency (Cemex UK Cement Ltd, intervening)* ([2008] UKHL 22, [2009] 1 All ER 57). Lilian Pallikaropoulos, the second claimant and the appellant in the House of Lords, had been ordered to pay the costs of the appeal. Following the judgment of the Court of Justice (Case C-260/11 [2013] 1 WLR 2914) the Supreme Court heard further argument on the question of costs. The facts are set out in the judgment of Lord Carnwath.

James Eadie QC and *James Maurici QC* (instructed by the *Treasury Solicitor*) for the Environment Agency, the First Secretary of State, and the Secretary of State for the Environment, Food and Rural Affairs.

David Wolfe QC (instructed by *Richard Buxton Environmental and Public Law*, Cambridge) for Mrs Pallikaropoulos.

Judgment was reserved.

11 December 2013. The following judgment was delivered.

LORD CARNWATH SCJ (with whom Lord Neuberger, Lord Hope, Lord Mance and Lord Clarke agree).

[**1**] The 'Aarhus Convention' (more fully, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (Aarhus, 25 June 1998; ST 24 (2005); Cm 6586) requires that the procedures to which it refers should be 'fair, equitable, timely and not prohibitively expensive' (art 9(4)). Although the United Kingdom is a party to the convention, it is not directly applicable in domestic law. However, the same requirements have been incorporated by amendments made in 2003 into Directives, relating in particular to environmental impact assessment (EIA Council Directive (EEC) 85/337 of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ L175 1985 p 40)) and integrated pollution prevention and control (IPPC Council Directive (EC) 96/61 of 24 September 1996 concerning integrated pollution prevention and control (OJ L257 1996 p 26)); compliance was required by 25 June 2005 (art 6 of European Parliament and Council Directive (EC) 2003/35 of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice (OJ L156 1997 p 17)). (The EIA Directive is now consolidated at European Parliament and Council Directive (EU) 2011/92 of 13 December 2011 on the assessments of the effects of certain public and private projects on the environment (OJ L26 2012, p 1)). It has not

been disputed that the present proceedings, though begun before that date, are at least at this level subject to what I will call the 'Aarhus tests' under directly applicable European law.

[**2**] For reasons explained in its judgment of December 2010 ([2010] UKSC 57, [2011] 1 All ER 785, [2011] 1 WLR 79), the Supreme Court referred to the Court of Justice of the European Union (CJEU) certain questions relating to the expression 'not prohibitively expensive'. The reference followed the dismissal of the substantive appeal, and the making of an order for costs against the effective appellant, Mrs Pallikaropoulos (see *R* (*on the application of Edwards*) *v Environment Agency* [2008] UKHL 22, [2009] 1 All ER 57, [2008] 1 WLR 1587). The answers of the CJEU were given in a judgment dated 11 April 2013: *Edwards v Environment Agency* (*No 2*) Case C-260/11 [2013] 1 WLR 2914 (following an opinion of Advocate General Kokott dated 18 October 2012). We heard oral submissions from the parties on 22 July 2013. Following that hearing it was agreed that our decision would be deferred pending receipt of the same Advocate General's opinion in infraction proceedings against the United Kingdom relating to alleged non-implementation of the Directives. That opinion was delivered on 12 September 2013 (*EC Commission v UK* Case C-530/11). We have received further submissions of the parties on that opinion. We have also been informed that a request by the United Kingdom government to reopen the oral procedure in that case has been refused by the court.

JUDICIAL REVIEW PROCEEDINGS

[**3**] Before turning to those issues, it is necessary to recall briefly the subject matter, and somewhat unusual course, of the substantive judicial review proceedings, including the circumstances in which Mrs Pallikaropoulos became a party.

[**4**] The proceedings concerned a cement works in Rugby. On 12 August 2003 the Environment Agency issued a permit to continue operations with an alteration in its fuel from coal and petroleum coke to shredded tyres. This proposal gave rise to a public campaign on environmental grounds, one opponent being a local pressure group called 'Rugby in Plume'. Judicial review proceedings were begun on 28 October 2003 challenging the Agency's decision.

[**5**] The proceedings were begun in the name of a local resident, Mr David Edwards. The background to his involvement was described by Keith J, when permitting the claim to proceed ([2004] EWHC 736 (Admin) at [12]–[13], [2004] 3 All ER 21 at [12]–[13]). He noted the public campaign led by Rugby in Plume, its 'leading light' being Mrs Pallikaropoulos, who claimed to speak for 'between 50,000 and 90,000 local residents' affected by the proposals, and to have committed 'substantial funds of her own' to the campaign. Following the decision of the Rugby Borough Council, on advice from leading counsel, not to pursue its own claim for judicial review, she was reported as 'pledging to carry on the battle using legal aid', and was also reported as saying:

> 'I'm too rich [to get legal aid], because I own my own house, so someone in Rugby has to come forward who feels strongly enough to take the case forward under the legal aid scheme.'

Although there was no direct evidence from Mr Edwards that he had responded to this request for assistance, the judge found it difficult to resist the inference that he had been—

> 'put up as a claimant in order to secure public funding of the claim by the Legal Services Commission … when those who are the moving force behind the claim believe that public funding for the claim would not otherwise have been available.'

Keith J held that this somewhat unconventional background neither deprived Mr Edwards of a sufficient interest to bring judicial review proceedings, nor constituted an abuse of process. There was no appeal from that conclusion. It had the consequence that the proceedings in the High Court continued at public expense and without significant risk to the applicant, or to his supporters, of an adverse costs order if they lost.

[6] The substantive application was heard by Lindsay J and dismissed on 19 April 2005: [2005] EWHC 657 (Admin), [2006] Env LR 56. He observed (at [5]) that the public opposition was 'not unnatural':

> 'I say that that was not unnatural as burning rubber is notorious for the noxious smell given off and the dense smoke created and many, unaware of the way in which the chipped tyres would be burned in a modern "state of the art" kiln at temperatures of up to 1400 degrees, would expect and fear the worst.'

However, as he found in the course of his judgment, these fears, natural or not, were contradicted by the evidence. He dismissed an argument that the proposal was a change which 'may have significant adverse effects on the environment' (EIA Directive, Annex II, para 13), saying (at [31]):

> 'it is plain … that tyre burning in itself as a fuel has no significant adverse effects on the environment and, indeed, overall may even have beneficial effects on the environment …'

Lord Hoffmann, giving the leading judgment in the House of Lords on the substantive appeal, described this as—

> 'an unchallenged finding of fact that the only change in operation proposed by the application, namely the use of tyres, would not have significant negative effects on human beings or the environment …' (See [2009] 1 All ER 57 at [30], [2008] 1 WLR 1587 at [30].)

Lindsay J rejected grounds alleging non-compliance with the two Directives. He upheld a complaint of procedural unfairness by the Agency arising from failure to disclose an internal assessment report 'AQMAU 1' relating to emissions of 'particulate matter' (PM_{10}), but exercised his discretion to refuse relief. He also declined to make a reference to the CJEU.

[7] Mr Edwards appealed to the Court of Appeal with permission granted by Keene LJ. The appeal was heard over three days beginning on 6 February 2006, and was dismissed on similar grounds, including the exercise of discretion ([2006] EWCA Civ 877, [2007] Env LR 126). The court held that the change was not a 'project' within the meaning of the EIA Directive, but that if that were wrong there had been substantial compliance. On the procedural issues, Auld LJ observed (at [126]):

> 'given the judge's finding on the evidence before him of no environmental harm from the plant and the continuous and dynamic nature of the PPC regulatory system enabling assessments to be made on what is known rather than predicted by AQMAU [Air Quality Monitoring and Assessment Unit] over three years ago, it would be pointless to quash the permit simply to enable the public to be consulted on out-of-date data.'

The court again declined to make a reference to the CJEU.

[**8**] There had been an unexpected development on the third and final day of the hearing. Mr Edwards, while wishing to continue with his appeal, withdrew his instructions from both solicitors and counsel (Mr Wolfe QC). Mrs Pallikaropoulos, described by Auld LJ as 'a prime mover', who had been in court throughout the appeal, applied without objection to be joined as an additional appellant. This course was described by Auld LJ as 'plainly in the public interest' to enable the appeal to be concluded. He agreed to Mr Wolfe's proposal that her potential liability to costs in the Court of Appeal should be capped at £2,000. Following dismissal of the appeal, the respondents' costs capped at this level were awarded against her.

[**9**] She was given leave to appeal by the House of Lords. She applied to the House of Lords for an order varying or dispensing with the ordinary requirement, under the applicable practice direction of the House (not replicated in the new Supreme Court rules), to give security for costs in the sum of £25,000, and for a protective costs order, under the principles set out in *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 4 All ER 1, [2005] 1 WLR 2600. On 22 March 2007 the Judicial Office wrote to the parties informing them that the applications had been rejected for the following reasons:

> 'Their Lordships proceed on the basis that the appeal raises an issue or issues of general importance and they are prepared to assume that [existence] 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.'

[**10**] Mrs Pallikaropoulos was evidently not deterred by that ruling. The security was duly paid and the appeal proceeded. In the substantive hearing before the House of Lords, the main issues came down to two, one of interpretation of the EIA Directive, the other procedural. The first was whether the proposed use of tyres and the related adaptations constituted 'a waste disposal installation' within para 10 of Annex I to the Directive, rather than a 'change or extension' of an Annex I project, within para 13 of Annex II. The main practical difference was that para 13 was limited to changes which 'may have significant adverse effects on the environment', and therefore (on the findings of Lindsay J) would have had no application to this case. The second issue was one of fairness, relating to failure to disclose the AQMAU report.

[**11**] The House split on the issue of interpretation: the majority held that the proposal was not within para 10, but accepted that, if this point had been determinative, a reference to the European court would have been necessary. However, all were agreed that it was not determinative, because, if the EIA Directive applied, its requirements had been complied with (see para [58], per Lord Hoffmann; para [82], per Lord Mance). On the procedural issue,

Lord Hoffmann doubted whether a common law duty arose as claimed (see [44]), but held in agreement with the courts below that relief should in any event be refused since the relevance of the reports had 'been completely overtaken by events', in the shape of more recent reports showing 'no exceedances as a result of the Cemex plant' (see [64]–[65]).

THE DISPUTE OVER COSTS

[12] The present dispute arises out of the order for costs of the appeal in the House of Lords made on 18 July 2008 in favour of both respondents, the Environment Agency and the Secretary of State. They submitted bills totalling respectively £55,810 and £32,290. In the course of the assessment, following transfer of jurisdiction to the Supreme Court, the costs officers determined, as a preliminary issue, that in accordance with the Directives they should disallow any costs which they considered 'prohibitively expensive' ([2011] 1 All ER 785 at [13], [2011] 1 WLR 79 at [13] et seq). On the defendants' application to the full court for a review, it was decided that the costs officers had had no jurisdiction to consider this issue, but that it was a matter that could be considered by the court under its jurisdiction to correct a possible injustice arising from the original costs order ([2011] 1 All ER 785 at [35], [2011] 1 WLR 79, per Lord Hope). As to the application of the Aarhus test, the court referred to the judgment of Sullivan LJ in *R (on the application of Garner) v Elmbridge BC* [2010] EWCA Civ 1006, [2011] 3 All ER 418, in which he had identified an 'important point of principle', as to whether the question should be approached objectively or subjectively:

> '[42] … 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?'

Sullivan LJ had taken the view that a purely subjective approach would not be consistent with the objectives underlying the Directive. On the facts of *Garner*'s case, which was concerned only with the position at first instance, he held that an order should have been made capping the claimant's potential costs liability to the defendant at £5,000.

[13] Lord Hope thought it plain that the 'difficult issues' highlighted by Sullivan LJ had not been previously addressed by the House of Lords in the present case, either when declining to make a protective costs order or in its final order for costs, both decisions apparently being based on a 'purely subjective' approach (see [33]). He concluded that there was 'no clear and simple answer', and that accordingly a reference should be made to the CJEU for guidance, the order for costs being stayed in the meantime (see [36]).

GOVERNMENT CONSULTATION

[14] While the reference was pending, the government issued a consultation paper on the issue of cost capping, and the scope for providing clearer guidance in the procedural rules: 'Costs Protection for Litigants in Environmental Judicial Review Claims' (CP16/11 October 2011). This consultation ran in parallel with the consultation on the proposals for reform of costs rules generally, following the report of Jackson LJ. The paper noted the developing practice of the courts:

'18. A number of domestic cases dating from [*R* (*on the application of Corner House Research*) *v Secretary of State for Trade and Industry* [2005] 4 All ER 1, [2005] 1 WLR 2600] including [*R* (*on the application of Garner*) *v Elmbridge BC* [2010] EWCA Civ 1006, [2011] 3 All ER 418, [2011] 1 Costs LR 48] (8 September 2010), have set out the basic principles underpinning the use of PCOs [protective costs orders] in judicial review proceedings.

19. The cases did not provide detailed guidance on the level at which a PCO should be set, but *Garner* made it clear that a level of twice the national average income would be too high. In *Garner* itself the court awarded a PCO at £5,000.'

[**15**] One question raised was whether any figure laid down by the rules should be 'absolute', or merely 'presumptive':

'27. An absolute cap would have the advantage for users of providing the most certainty, but it would also provide the same protection for wealthy organisations and individuals as for those of more limited means. A presumptive limit would be more capable of being targeted at those most in need, but if too flexible could give rise to unnecessary and time consuming arguments about costs.'

[**16**] As to the level of cap a figure of £5,000 was proposed:

'35. Taking account of the levels which are currently being used by the courts as well as the importance of setting a level which could not be further reduced, it is proposed that the cap should be set at a level of £5,000. This is on the basis that any claimant who is so impecunious that the possibility of being liable for £5,000 would present an insuperable barrier to proceeding would in most cases be eligible for legal aid, with its attendant cost protection in any event.'

[**17**] The conclusions on these issues were given in a report on response to consultation (CP(R) 16/11 August 2012). As to the level of the cap, it was noted that while there was only minority support for the proposed cap of £5,000 there was no strong consensus for any alternative:

'3 … On the basis of the results of this consultation and the evidence of current practice in the courts, the Government takes the view that a cap of £5,000 is a proportionate amount to ask individual claimants to pay. On the same basis it believes that it is reasonable to make a distinction between the position of individuals and organisations and therefore proposes to set a cap of £10,000 for organisations.'

[**18**] Consideration was also given to the position on appeal:

'8. The similarity of the proposals to a fixed costs regime indicates in the Government's view, and as one respondent strongly argued, that it will be appropriate for appeals to be dealt with in accordance with the rule proposed by Lord Justice Jackson for appeals in cases to which a fixed or restricted costs regime applied at first instance. Under that rule, when it is implemented as part of the wider Jackson reforms, the judge considering whether to give permission to appeal in a case which was subject at first instance to a fixed or restricted costs regime will at the outset determine the appropriate costs limit or limits having had regard to the decisions in the lower court.'

[**19**] These proposals were given effect by amendment to the CPR. It is enough for present purposes to refer to a summary of the changes in an update to the rules dated 1 April 2013:

'Amendments are made to comply with the Aarhus Convention so that any system for challenging decisions in environmental matters is open to members of the public and is not prohibitively expensive. Two limits are set: on the costs recoverable by a defendant from a claimant (£5,000 where the claimant is an individual and £10,000 in any other circumstances) and; on the costs recoverable by a claimant from a defendant (£35,000). Consequential amendments are made to PD 25A, Part 54 and the Pre-Action Protocol Judicial Review. The amendments do not apply to a claim commenced before 1 April 2013.'

[**20**] For appeals a new rule was added in CPR Pt 52:

'**Orders to limit the recoverable costs of an appeal**

52.9A (1) In any proceedings in which costs recovery is normally limited or excluded at first instance, an appeal court may make an order that the recoverable costs of an appeal will be limited to the extent which the court specifies.

(2) In making such an order the court will have regard to—

(a) the means of both parties;

(b) all the circumstances of the case; and

(c) the need to facilitate access to justice.

(3) If the appeal raises an issue of principle or practice upon which substantial sums may turn, it may not be appropriate to make an order under paragraph (1).

(4) An application for such an order must be made as soon as practicable and will be determined without a hearing unless the court orders otherwise.'

In the Supreme Court, the Costs Practice Direction 13 (as amended with effect from November 2013) now includes specific provision for 'an order limiting the recoverable costs of an appeal in an Aarhus Convention claim' (para 2.2(c)).

THE CJEU'S DECISION

[**21**] The court reaffirmed the principles established in its judgment in *EC Commission v Ireland* Case C-427/07 [2009] ECR I-6277, noting in particular that Aarhus Convention does not affect the powers of national courts to award 'reasonable costs', and that the costs in question are 'all the costs arising from participation in the judicial proceedings' ([2013] 1 WLR 2914, paras 25–27). In response to the questions raised by the Supreme Court, it began by affirming the duty of member states to ensure that the Directive is 'fully effective', while retaining 'a broad discretion as to the choice of methods' (para 37). The national court, in turn, when ruling on issues of costs, must satisfy itself that that requirement has been complied with, taking into account 'both the interest of the person wishing to defend his rights and the public interest in the protection of the environment' (para 35).

[**22**] The following paragraphs of the judgment, which contain the substantive guidance, must be set out in full:

'40. That assessment cannot, therefore, be carried out solely on the basis of the financial situation of the person concerned but must also be based on an objective analysis of the amount of the costs, particularly since, as has been stated in para 32 of the present judgment, members of the public and associations are naturally required to play an active role in defending the environment. To that extent, the cost of proceedings must not appear, in certain cases, to be objectively unreasonable. Thus, the cost of

proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable …

41. As regards the analysis of the financial situation of the person concerned, the assessment which must be carried out by the national court cannot be based exclusively on the estimated financial resources of an "average" applicant, since such information may have little connection with the situation of the person concerned.

42. The court may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure and the potentially frivolous nature of the claim at its various stages: see, by analogy, *DEB Deutsche Energiehandels-und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* Case (C-279/09) [2010] ECR I-13849, para 61.

43. It must also be stated that the fact, put forward by the Supreme Court of the United Kingdom, that the claimant has not been deterred, in practice, from asserting his or her claim is not in itself sufficient to establish that the proceedings are not, as far as that claimant is concerned, prohibitively expensive for the purpose (as set out above) of Directives 85/337 and 96/61.

44. Lastly, as regards the question whether the assessment as to whether or not the costs are prohibitively expensive ought to differ according to whether the national court is deciding on costs at the conclusion of first instance proceedings, an appeal or a second appeal, an issue which was also raised by the referring court, no such distinction is envisaged in Directives 85/337 and 96/61, nor, moreover, would such an interpretation be likely to comply fully with the objective of the European Union legislature, which is to ensure wide access to justice and to contribute to the improvement of environmental protection.

45. The requirement that judicial proceedings should not be prohibitively expensive cannot, therefore, be assessed differently by a national court depending on whether it is adjudicating at the conclusion of first instance proceedings, an appeal or a second appeal.'

[**23**] A number of significant points can be extracted from the *Edwards* judgment:

(i) First, the test is not purely subjective. The cost of proceedings must not exceed the financial resources of the person concerned nor 'appear to be objectively unreasonable', at least 'in certain cases'. (The meaning of the latter qualification is not immediately obvious, but it may be better expressed in the German version 'in Einzelfällen', meaning simply 'in individual cases'.) The justification is related to the objective of the relevant European legislation (referred to in para 32 of the judgment), which is to ensure that the public 'plays an active role' in protecting and improving the quality of the environment.

(ii) The court did not give definitive guidance as to how to assess what is 'objectively unreasonable'. In particular it did not in terms adopt Sullivan LJ's suggested alternative of an 'objective' assessment based on the ability of an 'ordinary' member of the public to meet the potential liability for costs. While the court did not apparently reject that as a possible factor

in the overall assessment, 'exclusive' reliance on the resources of an 'average applicant' was not appropriate, because it might have 'little connection with the situation of the person concerned'. *a*

(iii) The court could also take into account what might be called the 'merits' of the case: that is, in the words of the court (para 42):

'whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure and the potentially frivolous nature of the claim at its various stages …' *b*

(iv) That the claimant has not in fact been deterred from carrying on the proceedings is not 'in itself' determinative.

(v) The same criteria are to be applied on appeal as at first instance. *c*

[**24**] I do not understand the last point as intended to imply that the same order must be made at each stage of the proceedings, or that there should be a single global figure covering all potential stages, but rather that the same principles should be applied to the assessment at each stage, taking account of costs previously incurred. In her 2013 opinion in *EC Commission v UK* Case C-530/11, the Advocate General said of the court's reasoning on this point: *d*

'23 … that finding cannot be interpreted as meaning that in assessing the permissible cost burden in appeal proceedings the costs already incurred in courts below may be ignored. Instead, each court must ensure that the costs at all levels of jurisdiction taken together are not prohibitive or excessive.' *e*

[**25**] However, as she had recognised in her earlier opinion (2012 opinion in *Edwards v Environment Agency* Case C-260/11 [2013] 1 WLR 2914, paras 58–61), while 'prohibitive costs must be prevented at all levels of jurisdiction', the considerations may differ at each level. Thus, on the one hand, as she notes, the decision of the House of Lords as the final court was potentially of special significance, because it alone had a duty to make a reference to the CJEU in case of doubt as to EU law. On the other hand, it is possible that after the decision by the lower court, public interest in the further continuation of the proceedings would be reduced. Accordingly, she said, it was compatible with Aarhus tests 'to re-examine at each level of jurisdiction the extent to which prohibitive costs must be prevented'. *f* *g*

[**26**] More generally, in her 2012 opinion, in support of the need for account to be taken of both objective and subjective considerations, she had emphasised the importance of the public interest in the protection of the environment:

'42. Recognition of the public interest in environmental protection is especially important since there may be many cases where the legally protected interests of particular individuals are not affected or are affected only peripherally. However, the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organisations.' *h* *j*

Conversely:

'45 … A person who combines extensive individual economic interests with proceedings to enforce environmental law can, as a rule, be expected to bear higher risks in terms of costs than a person who cannot anticipate

any economic benefit. The threshold for accepting the existence of prohibitive costs may thus be higher where there are individual economic interests.'

[**27**] It is less clear how the court saw the 'merits' of the case (para [23](iii), above) being brought into account. There is in the judgment no indication as to how the identified factors might affect the ultimate level of recovery, one way or the other. (The comparison there drawn with *DEB Deutsche Energiehandels-und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* Case C-279/09 [2010] ECR I-13849 provides little direct assistance. That case was not related to environmental law, and it concerned the circumstances in which legal aid should be granted to a claimant, rather than the extent of his potential liability to the other party.)

[**28**] Taking the points in turn I would suggest the following.

(i) *A reasonable prospect of success* Lack of a reasonable prospect of success in the claim may, it seems, be a reason for allowing the respondents to recover a higher proportion of their costs. The fact that 'frivolity' is mentioned separately (see below), suggests that something more demanding is envisaged than, for example, the threshold test of reasonable arguability.

(ii) *The importance of what is at stake for the claimant* As indicated by Advocate General Kokott, this is likely to be a factor increasing the proportion of costs fairly recoverable. As she said, a person with 'extensive individual economic interests' at stake in the proceedings may reasonably be expected to bear higher risks in terms of costs.

(iii) *The importance of what is at stake for the protection of the environment* Conversely, and again following the Advocate General's approach, this is likely to be a factor reducing the proportion of costs recoverable, or eliminating recovery altogether. As she said, the environment cannot defend itself, but needs to be represented by concerned citizens or organisations acting in the public interest.

(iv) *The complexity of the relevant law and procedure* This factor is not further explained. Its relevance seems to be that a complex case is likely to require higher expenditure by the respondents, and thus, objectively, to justify a higher award of costs. Although mention is only made of complexity of law or procedure, the same presumably should apply to technical or factual complexity.

(v) *The potentially frivolous nature of the claim at its various stages* The respondents should not have to bear the costs of meeting a frivolous claim. In domestic judicial review procedures, whether at first instance or on appeal, this issue is likely to be resolved in favour of the claimant by the grant of permission,

THE PRESENT CASE

[**29**] The present case is unusual in that the Aarhus issue did not arise in the same form at a lower level. Full protection at first instance was given by legal aid. In the Court of Appeal the costs cap provided for Mrs Pallikaropoulos reflected the unusual circumstances in which she became a party, and the court's view that it was in the public interest that the case could be completed with the same representation. It therefore provides no guide to the appropriate order on the further appeal. On the other hand, as Lord Hope recognised, the initial decision of the House itself not to provide any costs protection was made without full consideration of all the factors now known to be relevant.

[**30**] The respondents are not now seeking recovery of their full costs. They have agreed to limit their joint claim to £25,000, which is the amount of the security already paid by the appellant as the condition for bringing the appeal. There is limited evidence as to the resources of the appellant herself, and none that an order for payment of the sum of £25,000 already in court would be beyond her means or cause her hardship. Furthermore, it must be assumed that following the refusal of a protective costs order in March 2007, her decision to proceed was made with full knowledge of the risks involved. It is impossible in my view on the material before us to hold that the order sought would be 'subjectively' unreasonable.

[**31**] The more difficult question is whether there should be some objectively determined lower limit, and if so how it should be assessed. Although this was one of the main issues raised by the reference, the European court has not offered a simple or straightforward answer.

[**32**] Mr Wolfe relies on the last sentence of para 40 of the judgment in *Edwards v Environment Agency* Case C-260/11 [2013] 1 WLR 2914, supported as he says by the Advocate General's 2013 opinion in *EC Commission UK* Case C-530/11, para 55:

> 'the correct position is that litigation costs may not exceed the personal financial resources of the person concerned and that, in objective terms, that is to say, regardless of the person's own financial capacity, they must not be unreasonable. In other words, even applicants with the capacity to pay may not be exposed to the risk of excessive or prohibitive costs *and, in the case of applicants with limited financial means, objectively reasonable risks in terms of costs must in certain circumstances be reduced further.*' (Emphasis added.)

Thus, he says, it is necessary to start from an objectively defined standard, the circumstances of the particular individual being relevant only to the extent that they may reduce that figure. Furthermore, in his submission, the question of what is objectively reasonable was answered definitively by the government itself, when following extensive consultation it adopted the figure of £5,000 (as now embodied in the High Court rules). As he submits, the respondents cannot properly go behind that figure, at least without evidence to support any alternative suggestion.

[**33**] I am doubtful whether so prescriptive an approach can be extracted from the European court's decision. If it were, it is difficult to see how the 'merits' factors would play a significant part. In any event, I cannot agree that the respondents are bound by the figure of £5,000 adopted for the purpose of the new rules. The new rules only apply to proceedings commenced after June 2013. More importantly, they recognise (as did the Advocate General: para [25] above) that, while the same general principles apply in the Court of Appeal, the factors affecting the judgment of what is subjectively or objectively reasonable may have changed. This applies with even more force at the highest level, where the case for a second appeal needs special justification. Furthermore, the factors which justify a relatively low standard figure for an advance cap, including the desirability of avoiding satellite litigation in advance of a hearing on the merits, will not apply with the same force to consideration after the event. At that stage the court will be in a much better position to take a view on both the 'merits' of the case (in the sense discussed above) and on the costs incurred and their consequences for the parties. The test in principle remains the same but the court is considering it in a different context.

[**34**] Of the five 'merits' factors mentioned by the court, I would discount the second and fifth immediately. There is no evidence that the appellant had any economic interest of her own in the proceedings, and, given the grant of permission at each stage, including the appeal to the House of Lords, they could not be said to be frivolous.

[**35**] The relative complexity of the case (factor (iv)) is evidenced by the fact that it took three days before the House. It has not been suggested that the costs incurred by the respondents were excessive in respect of the issues involved in the case. They are not out of line with those incurred by the appellant. The £25,000 now claimed represents a very significant reduction from that figure.

[**36**] The other two factors—(i) the prospects of success and (iii) the importance of the case for the protection of the environment—are at best neutral from the applicant's point of view. The issue of construction of the EIA Directive was one of some difficulty, as is clear from the division of views within the House. However, by the time it reached the House it seems to have become a point of limited practical significance for the protection of the environment in the area, given the judge's unchallenged finding on that aspect. Nor was there any clear evidence of more general public support for her appeal at this level. Furthermore the prospects of a final order in her favour in the appeal were highly questionable. Whatever the answer to the bare legal issue, there was a serious risk of the court's discretion being exercised against her, in the same way as had happened in the lower courts. Accordingly, the potential significance of the legal issue in my view carries relatively little weight in the overall balance. The alternative disclosure issue had been overtaken by events, as the Court of Appeal had held, and the House confirmed.

[**37**] Taking all these factors into account, I find it impossible to say that the figure of £25,000, viewed objectively, is unreasonably high, either on its own or in conjunction with the £2,000 awarded in the Court of Appeal.

[**38**] Mr Wolfe submits that if this court has any doubt as to his interpretation of the European court's decision and the Advocate General's opinions, we should delay matters until the final judgment in the infraction proceedings. I do not think that is necessary or desirable. Resolution of this case has already been long delayed. The European court has given such specific answers as it thought appropriate to the questions referred in the present case. Although they leave some scope for judgment in their application, there is nothing in the Advocate General's later opinion, in my view, which suggests that more definitive guidance for the purposes of the present case is to be expected from the forthcoming judgment.

[**39**] In conclusion, I am satisfied that in the special circumstances of this case the figure of £25,000 now claimed by the respondents is neither subjectively nor objectively excessive. Accordingly, I would make an order for costs in that amount in favour of the respondents jointly.

Order accordingly.

Karen Widdicombe Solicitor (non-practising).