11 December 2013

PRESS SUMMARY

R (on the application of Edwards and another) (Appellant) v Environment Agency and others (Respondents) [2013] UKSC 78

JUSTICES: Lord Neuberger (President), Lord Hope, Lord Mance, Lord Clarke, Lord Carnwath.

BACKGROUND TO THE APPEAL

This appeal concerns the meaning of "prohibitively expensive" under the Aarhus Convention.

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. The public campaign was being led by Mrs Pallikaropolous who had committed substantial funds of her own to the campaign.

Following the decision of the Rugby Borough Council not to pursue its own claim for judicial review, Mrs Pallikaropolous was reported as "pledging to carry on the battle using legal aid" and, because she was too rich to get legal aid, asked for someone to come forward to take the case under legal aid. A local resident, Mr David Edwards, began judicial review proceedings on 28 October 2003 challenging the Agency's decision. The judge inferred that Mr David Edwards had been put up as a claimant in order to secure public funding of the claim.

The substantive application for judicial review was dismissed on 8 February 2006. Mr Edwards appealed to the Court of Appeal. On the final day of the Court of Appeal hearing, Mr Edwards withdrew his instructions from both solicitors and counsel. Mrs Pallikaropolous applied without objection to be joined as an additional appellant in the public interest to enable the appeal to be concluded. Her potential liability to costs in the Court of Appeal was capped at £2,000. Following dismissal of the appeal, the respondents' costs capped at this level were awarded against her.

Mrs Pallikaropolous was given leave to appeal by the House of Lords. She provided security for costs in the sum of £25,000 and the appeal proceeded. Her appeal was dismissed by the House of Lords. The present dispute arises out of the order for costs of the appeal in the House of Lords made in favour of the respondents. The Environment Agency and the Secretary of State submitted bills totally respectively £55,810 and £32,290.

The Supreme Court made a reference to the Court of Justice of the European Union (CJEU) for guidance relating to the expression "not prohibitively expensive". 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. The proposals were given effect to by amendment to the Civil Procedure Rules.

JUDGMENT

The Supreme Court makes an order for costs in the amount of £25,000 in favour of the respondents jointly. Lord Carnwath gives the lead judgment with which Lord Neuberger, Lord Hope, Lord Mance and Lord Clarke agree.

REASONS FOR THE JUDGMENT

The following points could be extracted from the CJEU's *Edwards* judgment: (i) 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. (ii) The court did not give definitive guidance as to how to assess what is objectively unreasonable. (iii) The court could take into account 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." (4)That the claimant has not in fact been deterred for carrying on the proceedings is not itself determinative. (5) The same criteria are to be applied on appeal as at first instance **[28]**.

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 security already paid by the appellant as the condition for bringing the appeal. It is impossible on the material available to hold that the order was subjectively unreasonable. 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 **[30-31]**.

Of the five factors mentioned by the court, the second and fifth can be discounted 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, they could not be said to be frivolous **[34]**. The relative complexity of the case is evidenced by the fact that it took three days before the House **[35]**. 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 **[36]**.

Taking factors mentioned by the court into account, it is 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 **[37]**.

References in square brackets are to paragraphs in the judgment

PRESS SUMMARY

15 December 2010

R (on the application of Edwards and another) (Appellant) v Environment Agency & others (Respondents) [2010] UKSC 57

JUSTICES: Lord Hope (Deputy President), Lord Walker, Lord Brown, Lord Mance, Sir John Dyson

BACKGROUND TO THE APPEAL

This is an appeal against a decision of two costs officers appointed to assess costs incurred in proceedings before the Appellate Committee of the House of Lords ('the House of Lords'). It considers the approach which should be taken by courts when awarding costs, and costs officers when assessing costs, in cases raising issues about the environment where European law and the Aarhus Convention provide that, because of the nature of such legal proceedings, they should not be 'prohibitively expensive'.

The Appellant, Mrs Pallikaropoulos, had been involved in an application for judicial review of the Environment Agency's decision to issue a permit for the operation of a cement works. Permission had been granted to use shredded tyres as fuel for the works and there had been a public campaign against this on environmental grounds. She lost in the Court of Appeal but was given leave to appeal to the House of Lords. She applied for an order varying or dispensing with the requirement which then existed in House of Lords proceedings that she had to give security for costs. She also applied for a protective costs order, which would have capped her liability for the costs of the appeal.

In support of these applications, she relied on Article 10a Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, Article 15a of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (together, 'the Directives') and also Article 9 of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 1998. The Directives implement Article 9 in EU law. It requires that the proceedings to which it applies should not be 'prohibitively expensive'. The Appellant submitted that the House of Lords should make no order about costs, relying upon the provisions of the Directives and the Aarhus Convention. She gave some information about her means, but it was in general terms and not supported by detailed evidence. In July 2008, the House of Lords ordered that the Appellant must pay to the Respondents the costs of the appeal to the House of Lords.

After the Supreme Court was established, it became the court with jurisdiction in respect of this matter. In accordance with the Supreme Court rules, two costs officers were appointed to carry out a detailed assessment of costs. The question was whether, when assessing the Respondents' costs, the costs officers had any jurisdiction to implement the Directives and, if they did, whether in the particular circumstances of this case they should seek to do so. The costs officers decided that compliance with the Directives was a relevant factor for them to take into account unless the court awarding costs had already done so. They would therefore disallow any costs which they considered to be prohibitively expensive. They took the view that the House of Lords had not already decided the point and that they should therefore apply the Aarhus principles in the course of their assessment.

JUDGMENT

The Supreme Court unanimously sets aside the costs officers' ruling that they have jurisdiction to implement the Directives, but refers the case to the Court of Justice of the European Union for a preliminary ruling to ascertain what those Directives require. The order for costs of 18 July 2008 is stayed pending the resolution of the reference. Lord Hope gives the Court's judgment.

REASONS FOR THE JUDGMENT

A decision about what the Directives require is a matter for the Court and not the costs officers. There is a distinction in principle between deciding as part of the assessment of costs to reduce the bill of costs by a percentage and deciding in advance that a party will receive only a percentage of assessed costs. This is recognised by the Supreme Court's rules (Rules 49 & 50), which mirror in this regard the Civil Procedure Rules. The cost officers' function is to carry out the detailed assessment and 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: **[19]**. Because of this division of responsibility, the cost officers were not obliged to give effect to the Directive: **[23]** & **[24]**. The question whether the review procedure is prohibitively expensive can, and should, be addressed by the Court itself. Preferably this should be at the outset of proceedings. In an appeal, a party seeking a protective costs order on the basis that otherwise the proceedings will be prohibitively expensive should make that application when permission to appeal is being sought, or as soon as possible thereafter: **[23]**. If a protective costs order is refused, that does not prevent the Court from considering the matter at the end of proceedings: **[24]**. The Court can then set a limit on the paying party's liability which meets the objectives of the Directives: **[25]**.

The Court then considers its own obligation under the Directives in this case. It considers whether, when the House of Lords rejected the Appellant's application in March 2007 and also when it found her liable for the Respondents' costs in July 2008, it fulfilled its obligation to take measures necessary to achieve the objects of the Directives: **[27]**. Developments since these decisions show that there are unresolved issues with the requirement that proceedings must not be 'prohibitively expensive'. In particular, it is unclear whether the test is a 'subjective' one, which looks to the means of the particular claimant, or an 'objective' one, which looks to the ability of an 'ordinary' member of the public to meet the potential liability for costs: **[29]**. In *R (Garner) v Elmbridge Borough Council* [2010] EWCA Civ 1006, Sullivan LJ held that a purely subjective test was incompatible with the Directives. In making its earlier decisions, the House of Lords took a purely subjective approach. Various other difficult issues which have since come to light in this area of law (set out at **[31] – [32]**) were not addressed by the House of Lords when it made its previous orders. In light of these, it is questionable whether, when it made those orders, the House of Lords fulfilled its obligations under the EU Directives: **[33]**.

The Supreme Court has inherited all of the powers which were vested in the House of Lords as the ultimate court of appeal. It therefore has the power to correct any injustice caused by an earlier order of the House of Lords or of the Supreme Court: **[35]**. In this case, an injustice may have been caused by the failure of the House of Lords to address itself to the correct test in order to comply with the requirements of the Directives. It is not clear what the appropriate test under the Directives is. The Court therefore refers the matter to the Court of Justice of the European Union for a preliminary ruling and stays the order for costs pending resolution of that reference: **[36]**.