

JUDGMENT OF THE COURT (Fourth Chamber)

11 April 2013 (*)

(Environment – Aarhus Convention – Directive 85/337/EEC – Directive 2003/35/EC – Article 10a – Directive 96/61/EC – Article 15a – Access to justice in environmental matters – Meaning of ‘not prohibitively expensive’ judicial proceedings)

In Case C-260/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court of the United Kingdom (United Kingdom), made by decision of 17 May 2011, received at the Court on 25 May 2011, in the proceedings

The Queen, on the application of:

David Edwards,

Lilian Pallikaropoulos

v

Environment Agency,

First Secretary of State,

Secretary of State for Environment, Food and Rural Affairs,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, acting as President of the Fourth Chamber, J.-C. Bonichot (Rapporteur), C. Toader, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: J. Kokott,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 13 September 2012,

after considering the observations submitted on behalf of:

- Ms Pallikaropoulos, by R. Buxton, Solicitor, and D. Wolfe QC,
- the United Kingdom Government, by C. Murrell and J. Maurici, acting as Agents, and by R. Palmer, Barrister,
- the Danish Government, by S. Juul Jørgensen and V. Pasternak Jørgensen, acting as Agents,
- Ireland, by E. Creedon and D. O’Hagan, acting as Agents, and by N. Hyland, Barrister-at-Law,
- the Greek Government, by G. Karipsiades, acting as Agent,

– the European Commission, by P. Oliver and L. Armati, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 18 October 2012,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of the fifth paragraph 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 (OJ 1985 L 175, p. 40) and the fifth paragraph of Article 15a of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17) ('Directive 85/337' and 'Directive 96/61', respectively).
- 2 The request has been made in proceedings between, on the one hand, Mr Edwards and Ms Pallikaropoulos and, on the other, the Environment Agency, the First Secretary of State and the Secretary of State for Environment, Food and Rural Affairs concerning a permit issued by the Environment Agency for the operation of a cement works. The request concerns the conformity with European Union law of the decision of the House of Lords ordering Ms Pallikaropoulos, whose appeal had been dismissed as unfounded, to pay the costs of the opposing parties.

Legal context

International law

- 3 The preamble to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1), ('the Aarhus Convention') states:

' ...

Recognising also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,

Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,

...

Concerned that effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced,

...'

- 4 Article 1 of the Aarhus Convention, under the heading 'Objective', provides as follows:

‘In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.’

5 Article 3 of the Aarhus Convention, headed ‘General provisions’, states in paragraph 8:

‘Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalised, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.’

6 Under the heading ‘Access to justice’, Article 9 of the Aarhus Convention states:

‘ ...

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned:

(a) Having a sufficient interest

or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

...

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.

...

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.’

European Union law

7 According to Article 10a of Directive 85/337 and Article 15a of Directive 96/61:

‘Member States shall ensure that, in accordance with the relevant national legal system,

members of the public concerned:

- (a) having a sufficient interest, or alternatively,
- (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

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 this Directive.

Member States shall determine at what stage the decisions, acts or omissions may be challenged.

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. ...

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

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

...’

- 8 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1) codified Directive 85/337. The second subparagraph of Article 11(4) of Directive 2011/92 contains provisions identical to those of the fifth paragraph of Article 10a of Directive 85/337.
- 9 Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (OJ 2008 L 24, p. 8) codified Directive 96/61. The second subparagraph of Article 16(4) of Directive 2008/1 contains provisions identical to those of the fifth paragraph of Article 15a of Directive 96/61.

United Kingdom law

- 10 Rule 49(1) of the Supreme Court Rules 2009 (SI 2009/1603) provides:

‘Every detailed assessment of costs shall be carried out by two costs officers appointed by the President and –

- (a) one costs officer must be a Costs Judge (a Taxing Master of the Senior Courts), and
- (b) the second may be the Registrar.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 11 Mr Edwards challenged the decision of the Environment Agency to approve the operation of a cement works, including waste incineration, in Rugby (United Kingdom), in the light of environmental law, relying, in particular, on the fact that the project had not been the subject

of an environmental impact assessment. In that connection, Mr Edwards was granted legal aid.

- 12 That action was dismissed and Mr Edwards brought an appeal before the Court of Appeal, before eventually deciding, on the final day of the hearing, to withdraw the case.
- 13 Ms Pallikaropoulos was granted leave, at her request, to take part as appellant in the remainder of the proceedings. While she did not satisfy the necessary requirements for entitlement to legal aid, the Court of Appeal agreed to cap her liability for costs at GBP 2 000.
- 14 The Court of Appeal dismissed the appeal brought by Ms Pallikaropoulos and ordered her to bear her own costs and to pay the opposing parties' costs as thus capped.
- 15 Ms Pallikaropoulos appealed to the House of Lords and requested that she should not be required to give a guarantee in respect of foreseeable costs in the sum of GBP 25 000 as required by that court. That request was refused.
- 16 Ms Pallikaropoulos also applied for a 'protective costs order' whereby her liability for costs would be capped should her appeal not be allowed. That application was refused.
- 17 By decision of 16 April 2008 the House of Lords affirmed the Court of Appeal's decision to dismiss the appeal and, on 18 July 2008, ordered Ms Pallikaropoulos to pay the respondents' costs of the appeal, the amount of which, in the event of disagreement between the parties, was to be fixed by the Clerk of the Parliaments. The respondents submitted two bills for recoverable costs in the amounts of GBP 55 810 and GBP 32 290.
- 18 The jurisdiction of the House of Lords was transferred to the newly-established Supreme Court of the United Kingdom on 1 October 2009. In accordance with the Supreme Court Rules 2009, the detailed assessment of the costs was carried out by two costs officers appointed by the President of the Supreme Court. In that context, Ms Pallikaropoulos relied on Directives 85/337 and 96/61 to challenge the costs order that had been made against her.
- 19 By decision of 4 December 2009, the costs officers took the view that they were, in principle, competent to assess the merits of that argument.
- 20 The respondents in the main proceedings appealed, in the costs proceedings, against that decision to a single judge of the Supreme Court of the United Kingdom, requesting that the case be referred to a panel of five judges. It was ultimately decided that the case should be so referred.
- 21 That panel delivered its decision on 15 December 2010. It found that the costs officers ought to have confined themselves to the jurisdiction which the Supreme Court Rules 2009 conferred on them and thus to have limited themselves to quantifying the costs. The panel took the view that the question whether the procedure was prohibitively expensive, within the meaning of Directives 85/337 and 96/61, was within the sole jurisdiction of the court adjudicating on the substance of the case, which may adjudicate either at the outset of the proceedings, when determining the request for a protective costs order, or in its decision on the substance.
- 22 The panel also took the view that the question whether the order that Ms Pallikaropoulos pay the respondents' costs was contrary to those directives had not been examined by the House of Lords when it considered her application for a protective costs order.
- 23 It is in those circumstances that the Supreme Court of the United Kingdom decided to stay

the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- (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 Article 9(4) of the Aarhus Convention, as implemented by Article 10a [of Directive 85/337] and Article 15a of [Directive 96/61]?
- (2) Should the question whether the cost of the litigation is or is not “prohibitively expensive” within the meaning of Article 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?

Consideration of the questions referred

24 By its various questions, which it is appropriate to consider together, the referring court asks the Court of Justice to clarify, first, the meaning of the requirement laid down in the fifth paragraph of Article 10a of Directive 85/337 and in the fifth paragraph of Article 15a of Directive 96/61 that judicial proceedings covered by those provisions should not be prohibitively expensive, and, second, the criteria for assessing that requirement which a national court may apply when deciding on costs, and the latitude available to Member States in defining those criteria in national law. In the context of the assessment by a national court as to whether proceedings may be prohibitively expensive, the referring court also asks the Court of Justice to clarify whether courts must take account of the fact that the party liable to be ordered to pay the costs has not actually been deterred from bringing or pursuing its claim and whether, moreover, their analysis may differ, according to whether they are adjudicating at the conclusion of first-instance proceedings, an appeal or a second appeal.

The notion of ‘not prohibitively expensive’ within the meaning of Directives 85/337 and 96/61

25 As the Court has already held, it should be recalled, first of all, that the requirement, under the fifth paragraph of Article 10a of Directive 85/337 and the fifth paragraph of Article 15a of Directive 96/61, that judicial proceedings should not be prohibitively expensive does not prevent the national courts from making an order for costs (see, to that effect, Case C-427/07 *Commission v Ireland* [2009] ECR I-6277, paragraph 92).

26 That follows expressly from the Aarhus Convention, with which European Union law must be ‘properly aligned’, as is evident from recital 5 in the preamble to Directive 2003/35, which amended Directives 85/337 and 96/61, since Article 3(8) of that Convention states that the powers of national courts to award reasonable costs in judicial proceedings are not to be affected.

- 27 Next, it must be pointed out that the requirement that litigation should not be prohibitively expensive concerns all the costs arising from participation in the judicial proceedings (see, to that effect, *Commission v Ireland*, paragraph 92).
- 28 The prohibitive nature of costs must therefore be assessed as a whole, taking into account all the costs borne by the party concerned.
- 29 Furthermore, the need for the uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose pursued (see, inter alia, Case C-204/09 *Flachglas Torgau* [2012] ECR I-0000, paragraph 37).
- 30 It follows from this that even if neither the Aarhus Convention – Article 9(4) of which provides that the procedures referred to in paragraphs (1) to (3) of that article are not to be prohibitively expensive – nor Directives 85/337 and 96/61 specify how the cost of judicial proceedings should be assessed in order to establish whether it must be regarded as prohibitively expensive, that assessment cannot be a matter for national law alone.
- 31 As is expressly stated in the third paragraph of Article 10a of Directive 85/337 and the third paragraph of Article 15a of Directive 96/61, the objective of the European Union legislature is to give the public concerned ‘wide access to justice’.
- 32 That objective pertains, more broadly, to the desire of the European Union legislature to preserve, protect and improve the quality of the environment and to ensure that, to that end, the public plays an active role.
- 33 Moreover, the requirement that the cost should be ‘not prohibitively expensive’ pertains, in environmental matters, to the observance of the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, and to the principle of effectiveness, in accordance with which detailed procedural rules governing actions for safeguarding an individual’s rights under European Union law must not make it in practice impossible or excessively difficult to exercise rights conferred by European Union law (see, inter alia, Case C-240/09 *Lesoochránárske zoskupenie VLK* [2011] ECR I-1255, paragraph 48).
- 34 Lastly, although the document published in 2000 by the United Nations Economic Commission for Europe, entitled ‘The Aarhus Convention, an implementation guide’, cannot offer a binding interpretation of that Convention, it may be noted that, according to that document, the cost of bringing a challenge under the Convention or to enforce national environmental law must not be so expensive as to prevent the public from seeking review in appropriate cases.
- 35 It follows from the foregoing that the requirement, under the fifth paragraph of Article 10a of Directive 85/337 and the fifth paragraph of Article 15a of Directive 96/61, that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result. Where a national court is called upon to make an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute or, more generally, where it is required – as courts in the United Kingdom may be – to state its views, at an earlier stage of the proceedings, on a possible capping of the costs for which the

unsuccessful party may be liable, it 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.

The relevant criteria for assessing the requirement that the cost be 'not prohibitively expensive'

- 36 As stated in paragraph 24 of the present judgment, the Supreme Court of the United Kingdom wishes to establish the assessment criteria that the national court must apply in order to ensure compliance, when deciding on costs, with the requirement that the costs of the proceedings should not be prohibitively expensive. It asks, in particular, whether that assessment is objective in nature or, on the contrary, subjective, and to what extent national law must be taken into account.
- 37 It must be recalled that, according to settled case-law, where European Union law lacks precision, it is effectively for the Member States, when they transpose a directive, to ensure that it is fully effective, whilst retaining a broad discretion as to the choice of methods (see, inter alia, Case C-216/05 *Commission v Ireland* [2006] ECR I-10787, paragraph 26).
- 38 It follows that, as regards the methods likely to secure the objective of ensuring effective judicial protection without excessive cost in the field of environmental law, account must be taken of all the relevant provisions of national law and, in particular, of any national legal aid scheme as well as of any costs protection regime, such as that referred to in paragraph 16 of the present judgment. Significant differences between national laws in that area do have to be taken into account.
- 39 Furthermore, as previously stated, the national court called upon to give a ruling on 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.
- 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 paragraph 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, Case C-279/09 *DEB* [2010] ECR I-13849, paragraph 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.
- 46 It must therefore be held that, where the national court is required to determine, in the context referred to in paragraph 41 of the present judgment, whether judicial proceedings on environmental matters are prohibitively expensive for a claimant, it cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It 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, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime.
- 47 By contrast, the fact that a claimant has not been deterred, in practice, from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him.
- 48 Lastly, that assessment cannot be conducted according to different criteria depending on whether it is carried out at the conclusion of first-instance proceedings, an appeal or a second appeal.

Costs

- 49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

The requirement, under the fifth paragraph 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 and the fifth paragraph of Article 15a of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result. Where a national court is called upon to make an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute or, more generally, where it is required – as courts in the United Kingdom may be – to state its views, at an earlier

stage of the proceedings, on a possible capping of the costs for which the unsuccessful party may be liable, it 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.

In the context of that assessment, the national court cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It 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, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime.

By contrast, the fact that a claimant has not been deterred, in practice, from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him.

Lastly, that assessment cannot be conducted according to different criteria depending on whether it is carried out at the conclusion of first-instance proceedings, an appeal or a second appeal.

[Signatures]

* Language of the case: English.

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