Michaelmas Term
[2013] UKSC 78

JUDGMENT

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

before

Lord Neuberger, President
Lord Hope
Lord Mance
Lord Clarke
Lord Carnwath

JUDGMENT GIVEN ON

11 December 2013

Heard on 22 July 2013

Appellant
David Wolfe QC

(Instructed by Richard Buxton Environmental and Public Law)

Respondents
James Eadie QC
James Maurici QC
(Instructed by Treasury Solicitor)

LORD CARNWATH (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") requires that the procedures to which it refers should be "fair, equitable, timely and not prohibitively expensive" (article 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 Directive 85/337/EEC) and integrated pollution prevention and control (IPPC Directive 96/61/EC); compliance was required by 25 June 2005 (Council Directive 2003/35/EC article 6) (The EIA Directive is now consolidated at 2011/92/EC). 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 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 (*Edwards v Environment Agency* [2008] 1 WLR 1587; [2008] UKHL 22). 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 (*Commission of the European Union v United Kingdom* (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 UK 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)), paras 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 L R 56. He observed 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." (para 5)

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:

> "… 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..." (para 31).

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…" ([2008] 1 WLR 1587, para 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:

> "… 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 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." (para 126)

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 (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [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 paragraph 10 of Annex I to the Directive, rather than a "change or extension" of an Annex I project, within paragraph 13 of Annex II. The main practical difference was that paragraph 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 that the proposal was not within paragraph 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 (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 (para 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" (para 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 WLR 79, 92 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 WLR 79 para 35, per Lord Hope). As to the application of the Aarhus test, the court referred to the judgment of Sullivan LJ in *R (Garner) v Elmbridge Borough Council* [2011] 3 All ER 418; [2010] EWCA Civ 1006, in which he had identified an "important point of principle", as to whether the question should be approached objectively or subjectively:

> "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?" (para 42)

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 the *Garner* 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 (para 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 (para 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 (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 including *R (Garner) v Elmbridge Borough Council* [2011] 1 Costs LR 48 (8 September 2010), have set out the basic principles underpinning the use of PCOs 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 Civil Procedure Rules. 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 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 No 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 *Commission of the European Communities v Ireland* (Case C-427/07) [2010] Env LR 123; [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" (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".

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, "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." (para 42)

iv) That the claimant has not in fact been deterred for carrying on the proceedings is not "in itself" determinative.

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

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 *Commission of the European Union v United Kingdom* (Case C-530/11), the Advocate General said of the court's reasoning on this point:

> "… 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." (para 23)

25. However, as she had recognised in her earlier opinion (2012 opinion in *Edwards v Environment Agency (No 2)* (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."

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."

Conversely -

> "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." (para 45)

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 (No 2)* (Case C-260/11) [2013] 1 WLR 2914, supported as he says by the Advocate General's 2013 opinion in *Commission of the European Union v United Kingdom* (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.

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[2010] UKSC 57

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

Appellant	*Respondents*
David Wolfe	James Eadie QC James Maurici Charles Banner
(Instructed by Richard Buxton Environmental and Public Law)	(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.

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) 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;
(ii) if so, whether in the particular circumstances of this case the costs officers should seek to do so; and
(iii) 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

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."

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 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."

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:

"(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)

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.

> 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;

> 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 Commercial 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 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 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:

> "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

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.

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.

ANNEX

IN THE SUPREME COURT OF THE UNITED KINGDOM

Parliament Square
London,

Date: 15 January 2010

Before :

MRS REGISTRAR DI MAMBRO AND MASTER O'HARE

- -

Between :

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

- -
- -

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

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Approved Judgment

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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 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:
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> i) That the "not prohibitively expensive" obligation arising under the Convention 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, 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 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 …
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> 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 …
>
> 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 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."

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 –
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> (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*.

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.
>
> 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.
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> 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:
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> - Limiting them to the costs of one Respondent …
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> - 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 …
>
> - 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 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.