Neutral Citation No: [2012] NIQB 97

Ref: HOR8665

Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 03/12/12

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH (JUDICIAL REVIEW)

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The Alternative A5 Alliance's Application [2012] NIQB 97

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HORNER J

[1] The Alternative A5 Alliance has brought what is in effect a statutory judicial review of the proposed 85 kilometre A5 western transport corridor being built because, inter alia, they claim the Department has breached their EU rights in general and the EIA Directive in particular. The Alliance claims that the requirements of Article 9 of the Aarhus Convention which had been incorporated originally in Article 10A now Article 11 of the EIA Directive 2011/92/EU are directly engaged.

[2] The Alliance seeks a Protective Costs Order ("PCO") of £5,000. The Department of Regional Development ("DRD") object not to the order but to the amount and suggest £50,000. They also seek a cap on the costs which would be recoverable by them should the Alliance succeed in the sum of £30,000. The Alliance resists this and point out that the costs which they can recover are limited in any event because their legal team is working at discounted commercial rates.

[3] First of all, I want to commend the industry of counsel. I have had the benefit of two very detailed skeleton arguments and of being referred to all the relevant case law, both in UK and Europe and also to the relevant legislation. I want to make it clear that although I do not deal specifically with every authority to which I have been referred, I have taken them all into account. In particular I found considerable assistance from two sources. The first was the decision of the Lord Chief Justice in the decision of re Ciara Thompson 2010 NIQB 38 and the second the opinion of the Advocate General Kokott in the referral by the Supreme Court in Edwards v Environment Agency 2011 (1WLR 79). It was common case that the date for the decision of the ECJ was unknown. It might be a matter of weeks or a matter of months. The opinion of the Advocate General given on 18 October 2012 is only advisory and does not bind the court. However, I do consider her reasoning to be persuasive. She said at paragraph 49:

> "… account must be taken of the objective and subjective circumstances of the case, with the aim of enabling wide access to justice. The insufficient financial capacity of the claimant may not constitute an obstacle to proceedings. It is necessary always, hence including when determining the costs which can be expected of claimants having capacity to pay (sic), to take due account of the public interest in environmental protection in the case at issue."

[4] Looking at the arguments presented on behalf of the Alliance and on behalf of the Department respectively, it does rather seem as if I have been asked to choose for the PCO an arbitrary figure of £5,000, a sum which it is not suggested bears any relation to the means or circumstances of the Alliance. The Alliance's Senior Counsel assured me that this was a standard sum awarded in respect of PCOs in England and I have no reason to doubt this. On the other hand, Senior Counsel for the Department said that in hearing such an application, I should carry out a balancing exercise and take into consideration the circumstances of this particular case in determining what is the appropriate amount to award. Having had time to consider the matter and read all the authorities, I am of the view that the proper approach is for me to carry out the more nuanced exercise suggested by Mr Elvin QC on behalf of the DRD. This will ensure that the procedure is "fair, equitable, timely and most importantly not prohibitively expensive". It is my view that "prohibitively expensive" can only be construed in relevant terms. What may be prohibitively expensive to one person who is in receipt of the minimum wage will not be so to another person who earns a six figure salary. I also consider that account should be taken of the difference between someone who brings an application such as Mr Garner in R (Garner) v Elmbridge BC (2011) Env LR 10 for entirely altruistic reasons and in the public interest and someone who is motivated primarily by private interest, although the application may have the necessary public interest dimension. Also the approach to Government departments funded by the taxpayer will be necessarily different to commercial organisations dependant on private finance and individuals who have to rely on their own resources.

[5] Accordingly in this count I have taken into account the following matters in particular:-

(i) The public interest of this challenge, namely to protect the environment.

(ii) The private interests of those members involved on behalf of the Alliance.

(iii) The means of those members of the Alliance which are set out in the letter of 27 November 2012 and the means of their supporters which have also been provided to the court in a separate document.

(iv) The importance of ensuring that the Alliance has access to justice.

(v) The fact that the Department is funded by the taxpayer.

[6] I have not taken into account the merits as it is not possible for me to form a view other than to say that the Alliance's case is not obviously going to fail. In those circumstances, I propose to make a PCO and cap the costs liability of the Alliance at £20,000. Given that there are approximately 135 persons involved with the Alliance, this works out at just over £150 per person. I do not consider that this is "prohibitively expensive" even when taking into account the contribution that each of the members of the Alliance must make to the Alliance's own costs. I am of the view that this meets the requirements of the Aarhus Convention. I do not propose to make any cap on the costs which may be recoverable from the Department should the Alliance succeed. As I have said, those costs are already, to some extent, capped and I consider it is the fair way to deal with the matter as it takes into account the merits of the claim. In other words, should the Alliance succeed, those involved will not be out of pocket. It seems to me that this achieves a fair and equitable balance. If the Alliance loses, the costs it will pay are capped at £20,000. If it succeeds, its costs will almost certainly be paid in full because in these types of cases costs almost always follow the event.