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Case Summary posted by the Task Force on Access to Justice

Case C-260/11 (Reference from the UK Supreme Court in *Edwards/Pallikaropoulos v Environment Agency [2011] UKSC 57)*

1. Key issue	Access to justice and costs in environmental cases
2. Country/Region	European Union, United Kingdom
3. Court/body	Court of Justice of the European Union
4. Date of judgment /decision	2013-04-11
5. Internal reference	C-260/11 (CELEX: 62011CJ0260)
6. Articles of the Aarhus Convention	Art. 9, para. 4
7. Key words	Access to justice, costs and meaning of prohibitive expense

8. Case summary

Ms Pallikaropoulos brought an action for judicial review of a permit for a large cement work. She lost the case and was ordered to pay the respondent's litigation cost at the appeal stage, in total GBP 90,000. When the cost order was appealed, the Supreme Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) How should a national court approach the question of awards of costs against a member of the public who is an unsuccessful claimant in an environmental claim, having regard to the requirements of Article 9(4) of the Aarhus Convention, as implemented by Article 10a [of Directive 85/337] and Article 15a of [Directive 96/61]?
(2) Should the question whether the cost of the litigation is or is not "prohibitively expensive" within the meaning of Article 9(4) of the Aarhus Convention as implemented by [those] directives be decided on an objective basis (by reference, for example, to the ability of an "ordinary" member of the public to meet the potential liability for costs), or should it be decided on a subjective basis (by reference to the means of the particular claimant) or upon some combination of these two bases?
(3) Or is this entirely a matter for the national law of the Member State subject only to achieving the result laid down by [those] directives, namely that the proceedings in question are not "prohibitively expensive"?
(4) In considering whether proceedings are, or are not, "prohibitively expensive", is it relevant that the claimant has not in fact been deterred from bringing or continuing with the proceedings?
(5) Is a different approach to these issues permissible at the stage of (i) an appeal or (ii) a second appeal from that which requires to be taken at first instance?'

The following key points arise from the judgment of the CJEU:

The requirement that litigation should not be prohibitively expensive concerns all the costs arising from participation in the judicial proceedings. The prohibitive nature of costs must therefore be assessed as a whole, taking into account all the costs borne by the party concerned (paras 27 and 28).
The assessment of what must be regarded as prohibitively expensive is not a matter for national law alone (paras 29 and 30).

The objective of the EU legislature is to give the public concerned 'wide access to justice' in order that they may play an active part in protecting and improving the quality of the environment. The requirement that costs should be 'not prohibitively expensive' pertains to the observance of the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, and to the principle of effectiveness, in accordance with which detailed procedural rules governing actions for safeguarding an individual's rights under European Union law must not make it in practice impossible or excessively difficult to exercise rights conferred by European Union law (paras 31-33).

Although the Aarhus Implementation Guide (2000) is not a binding interpretation of that Convention, it is persuasive (in noting that the cost of bringing a challenge under the Convention or to enforce national environmental law must not be so expensive as to prevent the public from seeking review in appropriate cases) (para 34).

In accordance with Article 10a of Directive 85/337 and Article 15a of Directive 96/61, the requirement that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result (para 35).

The assessment as to what is prohibitively expensive cannot 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 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 (paras 40-41).

In deciding the figure, other factors are relevant, including: (i) the situation of the parties concerned; (ii) whether the claimant has a reasonable prospect of success; (iii) the importance of what is at stake for the claimant and the protection of the environment; (iv) the complexity of the relevant law and procedure; (iv) the potentially frivolous nature of the claim at its various stages; and (v) the existence of a national legal aid scheme or a costs protection regime (paras 42 and 46).

The fact 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 (para 43).

The requirement that judicial proceedings should not be prohibitively expensive cannot 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 (para 44 and 45).

9. Link to judgement/ decision	http://curia.europa.eu/juris/document/document.jsf?text=&docid=136149&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1211866 http://curia.europa.eu/juris/celex.jsf?celex=62011CJ0260&lang1=en&type=NOT&ancre= http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/EUROPEAN_UNION/CJEU_C260_11_Edwards/CJEU_260_11_Edwards_Judgement.pdf