OUTER HOUSE, COURT OF SESSION

[2010] CSOH 5

P1225/09

OPINION OF LADY DORRIAN

in the Petition

of

MARCO McGINTY AND ANOTHER

Petitioners;

for

Judicial Review

Petitioner: Smith, Q.C., Burnett; Drummond Miller
Respondent: Johnston, Q.C., Poole; Scottish Government Legal Directorate

20 January 2010

[1] In this case, the petitioner seeks judicial review of the designation by the Scottish ministers of a new power station and transhipment hub at Hunterston, as a national development in a National Planning Framework. The case called before me for a first hearing. At that hearing, there was a motion on behalf of the second petitioner to abandon the petition so far as relating to his interest and I granted that motion unopposed. There was also a motion to amend the instance by deleting the words "assisted person" where they appear in the instance. The remaining issue for consideration was an application by Minute for the first petitioner in which the petitioner seeks a protective and restricted expenses order. That Minute has been answered by the respondent and there was, on the morning, a considerable degree of agreement between the parties. No challenge was made to the competency of such an order, it being accepted by the respondent that a protective and restricted expenses order was competent in Scotland. (*McArthur* v *Lord Advocate* 2006 SLT 170). It was also a

matter of agreement between the parties that the principles which fell to be applied, are effectively those reflected in the case of *McArthur* and set out in the case of *Regina (Corner House Research)* v *Secretary of State for Trade & Industry* 2005 1 WLR 2600 at paragraph 74. Those criteria are:

(i) The issues raised are of general public importance;

(ii) the public interest requires that those issues should be resolved;

(iii) the applicant has no private interest in the outcome of the case;

(iv) having regard to the financial resources of the applicant and the respondent and to the amount of costs that are likely to be involved, it is fair and just to make the order;

(v) if the order is not made, the applicant will probably discontinue the proceedings and will be acting reasonably in doing so.

[2] In answers lodged for the Scottish ministers, it is accepted that for present purposes:

(i) the court has jurisdiction to make a restricted expenses order in appropriate cases as set out in *McArthur*;

(ii) the present case is of sufficient importance to justify the court making a restricted expenses order even at this early stage, if satisfied that the criteria for such an order are met;

(iii) the issues raised in the petition are of genuine public importance; and

(iv) the public interest requires that those issues be resolved.

Accordingly, the essential questions before me were (a) whether the petitioner could satisfy the court that the criteria (iii)-(v) above have been met and (b) if such an order were to be made, whether a cost-capping order for the petitioner's expenses should be made.

[3] On the question of whether the applicant had a private interest in the outcome of the case, counsel drew my attention to a number of cases in which the appropriateness of that criterion has been questioned. Reference was made to *Morgan & Baker* v *Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107, *R (England)* v *LB Tower Hamlets* [2006] EWCA Civ 1742 and *R (Compton)* v *Wiltshire PCT* 2009 1 WLR 1436. As it happened, however, the respondents did not seek to suggest that the petitioner did have any private interest in the matter and accepted that, as indicated in *Morgan*, a degree of flexibility to this aspect of the test was required. The petitioner has no financial interest in the outcome of the proceedings, no financial connection of any type with any other proposal for, or uses of, the Hunterston site. He has no financial connection with the current use of

the site which he uses recreationally for bird watching. Proceeding for the moment on the assumption that this remains a relevant criterion, I am quite satisfied that the petitioner does not have a private interest such as would rule out the making of the order sought.

[4] As to the financial situation of the respective parties, the respondents are, of course the Scottish ministers. The petitioner is unemployed and in receipt of jobseekers allowance of £128.60 per fortnight. He has savings in the region of around £1,000 and the prospects of a short term work placement in January and February which might earn him £1,250 per month. The petitioner has been refused Legal Aid and an application for review has also been refused. The litigation so far has been funded by donated funds. The total sum raised so far is a little short of £15,000 of which only a small balance is likely to be remaining following the present hearing. As to the costs which are likely to be incurred, an assessment by a legal accountant was placed before me, indicating that the petitioner's potential liability should the Scottish ministers be successful, might be in the region of £90,000 and the petitioner's own expenses might be in the region of £80,000. Counsel submitted that if the order is not made the applicant will probably discontinue the proceedings and would be acting reasonably in so doing.

[5] Effectively, senior counsel for the respondent did not make submissions on any of these matters being content to leave it as a matter for the court to determine whether the criteria had been satisfied. Instead, counsel made submissions on two points in respect of the form of any order which might be made. The first question addressed by senior counsel for the respondent was, whether there should be a cap and the second was, whether there should be a limit set on what the petitioner could recover by way of expenses if he were to succeed. Counsel referred to paragraph 76 in *Corner House* which suggested that, in all cases other than those where legal advisers are acting *pro bono* that a capping order for the claimant's costs will be required. The court rephrased guidance previously given about this matter, stating as follows:

> "i. When making any PCO where the applicant is seeking an order for costs in its favour if it wins the court should prescribe by way of a capping order a total amount of the recoverable costs which will be inclusive, (in a case where there is an uplift because of a contingent fee agreement) of any additional liability.
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> ii. The purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses, and as a balancing factor the liability of the defendant for the applicant's costs if

the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate or junior counsel status that are no more than modest.

ii. The overriding purpose of exercising this jurisdiction is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the court considers that it is in the public interest that an order should be made. The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation and must arrange its legal representation (when its lawyers are not willing to act *pro bono*) accordingly."

[6] Reference was also made to the case of *R (On The Application Of Bug Life: The Invertebrate Conservation Trust)* v *Thurrock Thames Gateway Development Corp* 2008 EWCA Civ 1209. In that case, an application for judicial review was dismissed in circumstances where a protective costs order had been made limiting the costs recoverable by the claimant, if successful, or from the claimant if unsuccessful to £10,000. The nub of the decision in that case was, that the costs should in general be modest and the claimant should expect the costs to be capped. There should be no assumption that it is appropriate, where the claimant's liability for costs is capped, that the defendant's liability for costs should be capped in the same amount: the amount of any cap on the defendant's liability for the claimants costs will depend upon the circumstances of the case. The Master of the Rolls Sir Anthony Clarke observed,

"The cases have also focused on the question whether, where a PCO is made in favour of the claimant, it may also be appropriate to make an order capping the liability of the defendant to pay the claimant's costs if the claimant wins. In both *Corner House* and *Compton* the court recognised that, in a case where it was making a PCO in favour of the claimant, the answer might well be yes."

He then went on to quote from the case of *Compton* in which Lord Justice Smith said,

"At one end of the scale, the judge may make a PCO which imposes on a defendant the burden of bearing its own costs even though it wins on the merits and does not relieve it of the perspective burden of paying the applicant's costs in the event that the applicant succeeds.

> However, *Corner House* makes it plain that it will be usual to limit the successful claimant to recovery of modest costs, comprising the fees of the solicitor and one junior counsel. That is the 'strongest' form of order which will usually be made. It puts the defendant at a major disadvantage; on costs it is in a "heads you win tails I lose" position. At the other end of the scale, the court can make a much more modest order, whereby the claimant's liability to pay the defendant's costs is capped not at nil but at a specified level and where the defendant is given a guarantee that it will not be required to pay any of the claimant's costs ... Between the two extremes of the forms of order I have mentioned, it is possible for the judge to tailor the terms of the order to meet what he sees as the justice and fairness of the case."

He concluded that:

> "It follows that, as the court put it in *Corner House*, the costs should in general be reasonably modest and the claimant should expect the costs to be capped as set out in paragraph 76 of the judgment in that case."

[7] I am satisfied that the criteria for making the order have been established. I am satisfied that it is fair and just to do so and that in the absence of such an order the petitioner will probably discontinue the proceedings and would be acting reasonably in so doing.

[8] However, I am also satisfied that it would not be equitable to make such an order specifying that the petitioner, if unsuccessful, should have to bear no part of the respondents expenses. I accordingly propose to make an order that if the Respondents were to succeed, the petitioner should be responsible for their expenses to a level of £30,000.

[9] I am equally satisfied that it would be equitable to specify some limit on the expenses within the petitioner would recover, if successful. Having regard to the concessions made by the respondents as noted at paragraph 2 (iii) and (iv) above, I propose to specify that in the event of success the petitioner's recovery should be limited to that of a solicitor and one senior counsel acting without a junior.

[10] I will otherwise continue this case for a second hearing at a date afterwards to be fixed. In case issues arise regarding the precise form of the order, I will put the case out by order for further discussion.