In the High Court of Justice
Queen's Bench Division
Administrative Court

CO Ref: CO/7581/2009

In the matter of an application for Judicial Review

The Queen on the application of

(1) *Merthyr Tydfil County Borough Council*

(2) *Caerphilly Borough Council*

Claimants

versus

Legal Services Commission

Defendants

- and -

Elizabeth Condron

Interested Party

Application for permission to apply for Judicial Review
NOTIFICATION of the Judge's decision (CPR Part 54.11, 54.12)

Following consideration of the documents lodged by the Claimant and the Acknowledgements of service filed by the Defendant and Interested Party,

Order by His Hon. Judge Curran QC,
sitting as
a deputy Judge of the High Court

Permission is hereby refused.

Observations:

1. This case arises out of a claim that the LSC irrationally granted public funding to the Interested Party, Mrs Condron, for a case which resulted in a lengthy permission hearing before Beatson J in May this year.

2. I am refusing permission in this case on the ground that the current Claim is unarguable, largely for the reasons given in the Legal Services Commission's AOS.

3. The decision complained of was the decision of a Review Committee on 16 April 2009. Precisely what material was before the Committee, what arguments it considered, and the precise reasons for reversing the decision *not* to grant public funding for the original claim are not known to the Claimants, because, inevitably, some of the material is exempt from disclosure under section 20 of the Access to

Justice Act 1999: the Claimants (whose right to make representations against the grant was exercised at an earlier stage) are entitled to know only that funding has been granted or withdrawn. The Claimants are thus unable to demonstrate from the Committee's own reasoning that the decision was one which no reasonable tribunal could have made.

4. Their attempt to do so by reference to the decision of Collins J on 9 March 2009 (to refuse permission on the papers because he considered the original claim without merit, but who may or may not have had all the material before the Committee) and by reference to the decision of Beatson J (who considered the matter on the basis of the papers and of oral argument from advocates for these Claimants, for Mrs Condron, and also from leading counsel for an Interested Party) is in my view misconceived. Each of those judges was performing a different task -- one looking only at the papers, the other, having read the papers, hearing oral argument over two days as well. The considerations each had in mind, therefore, whilst similar in many respects, were not identical to those before the other, and only some of those would necessarily have been the same as the considerations arising from the material before the Committee. The Committee were addressed for an hour by a solicitor-advocate for the Interested Party, and took a further hour to consider their decision. In those circumstances it simply does not follow that because each of the judges, on the basis of the material before each of them respectively, concluded that the case was not arguable, the Committee's decision, made at a hearing for which there seems to have been limited time available, must have been irrational.

5. The judgment of Beatson J runs to some 65 paragraphs of closely-reasoned consideration of matters which are far from straightforward and which involve EU law.

6. Both Beatson J and Collins J regarded delay and breaches of the CPR and the relevant protocol by Mrs Condron as material considerations. Whilst of obvious significance, such matters would not necessarily have been afforded the same weight by the Committee, and it would be idle to attempt to characterise their decision as irrational on that ground, even if these Claimants were capable of doing so (which they are not: see paragraph 7.1 of the Statement of Facts and Grounds.)

7. Moreover, Richards LJ has now directed (order dated 6 August 2009) an oral hearing by the Court of Appeal of the application for permission to appeal Beatson J's decision, with a time estimate of half a day, which might be said further to demonstrate the fallacy in the Claimants' approach.

8. I agree that there is force in the application in the present case of observations of Scott Baker J (as he then was) in the case of *R v Legal Aid Board ex p. Owners Abroad* which the Defendants refer to as an unreported decision. That case is in fact reported at [1998] PIQR P116 (the observations are at p. P128.) The judge held that similar legislation in relation to the previous Legal Aid system under consideration by him placed an almost insurmountable hurdle in the way of concluding that an apparently surprising decision to grant public funding for litigation was irrational. I see it is said in the Defendants' Acknowledgement of

Service that that case and other authorities in similar vein have previously been drawn to the Claimants' attention by the Defendants, but the Claimants have not even sought to deal with the points upon which the Defendants rely from those cases. Whether that is correct or not, nothing in the Statement of Facts and Grounds deals with the case-law which is plainly relevant.

9. The substance of the matters now complained of was not, it seems, raised at the conclusion of the hearing before Beatson J. The current claimants -- the defendants in the earlier proceedings -- presumably could not have invited the judge to consider making any award of costs against the Legal Services Commission, who are the current defendants, under the provisions of section 11 of the Access to Justice Act 1999[1] as these matters are expressly reserved to the Costs Judge, although the trial judge may be invited to record findings of fact as to the parties' conduct relevant to an award under that section. It is also obvious that a public authority is highly unlikely to satisfy the test under Costs Protection Regulation 5 (3) (c) for financial hardship required of any other successful litigant seeking costs against the LSC, so that awards against the LSC in favour of public bodies are at least rare, if not unknown, except in the case of appeals. The Claimants say in para 4.4 of their Grounds that their concern is that unmeritorious claims should not be funded at public expense "so that there is no costs sanction against the Claimant" but a costs sanction *was* granted in this case against the Claimant – to a limited extent at least. Why it was limited to pre-hearing costs is not entirely clear, as I have not seen the written submissions on costs which resulted in the Order made by the judge on 26 June 2009. In any event, the reality of a costs sanction against a Claimant always exists if the Court is persuaded that there are reasons for enforcing the order. If *solicitors* have so conducted a case as to cause costs to be wasted then the trial judge may consider an application against *them* but no such application was made to Beatson J either. There may be force in the Defendants' contention in their Acknowledgement of Service that essentially the Claimants' dissatisfaction is with the way in which the public funding scheme itself operates in such circumstances,

10. It is not clear, in all the circumstances, what discernible public good would be served by permission being given to apply for judicial review. If it were given, more good public money would be likely to be thrown after bad. But neither of those points is a reason for my refusal of permission.

11. The Claimants shall pay the costs of the Defendants incurred in the preparation of their Acknowledgement of Service, to be taxed if not agreed. No order as to costs of the Interested Party as it was unnecessary for costs to be incurred in preparation of so detailed an Acknowledgement of Service by her, when the Defendants' Acknowledgement of Service raised a sufficient answer to the application.

---

[1] Guidance Notes on the application of which were issued by the Senior Costs Judge and are to be found in the White Book at 48. 14. 9:

IN THE ADMINISTRATIVE COURT **CO/10241/2008**

BETWEEN:

R (oao ELIZABETH CONDRON)

Claimant

and

(1) MERTHYR TYDFIL COUNTY BOROUGH COUNCIL
(2) CAERPHILLY COUNTY BOROUGH COUNCIL

Defendants

MILLER ARGENT (SOUTH WALES) LTD

Interested Party

CLAIMANT'S SKELETON ARGUMENT
Permission hearing, 30 April 2009

Documents referred to are paginated and contained in the updated Claim Bundle e.g. [CB 71], Supplementary Bundle e.g. [SB3], or authorities e.g. [AB Tab 12]. Abbreviations: Claimant (C), Defendants (D1 and D2), Interested Party (IP).

1. This is a renewed permission hearing. C pursues Grounds (1) non-compliance with EIA legislation and (2) failure to consider cumulative effectives. C does not pursue the application for a protective costs order; public funding was granted on 16 April 2009. There is an argument about delay and, should permission be granted, choice of venue.

2. CB includes C's statement of facts & grounds and reply note. SB contains recent orders, the Acknowledgements of Service, statements & other relevant documents. There is an authorities bundle (AB) and skeleton arguments.

3. Suggested pre-reading (45 mins):

   (1) skeletons;
   (2) C's grounds [CB 8-21] and reply note [22-32];
   (3) either D1's grounds or IP's grounds [SB Tabs 2 or 3];
   (4) Order of Collins J [SB p. 2], and
   (5) extracts of decision notices [CB 90, 103].

4. C seeks to quash permissions relating to a 23.44 ha industrial site (the project) adjacent to the Ffos-y-fran opencast coal mine in Merthyr Tydfil described as:

> Continuation of use of Cwmbargoed Disposal Point for the duration of related operations at the Ffos-y-fran land reclamation scheme and the provision of additional facilities (mineral processing and preparation plant, coal washing plant, coal haulage vehicle workshop, water storage tank, information and advertisement hoardings, coal stacking and preparation facilities and other ancillary works).
>
> [CB 77]

5. C's skeleton considers four matters:

> (1) merits of the application;
>
> (2) consequences of error of law;
>
> (3) promptness; and
>
> (4) venue for hearing.

1 Merits

6. The claim alleges a failure to comply with the EIA Directive 85/337/EEC and/or the EIA Regulations 1999. The Claimant's case is that D1 and D2 have erred in law by failing to carry out a comprehensive screening assessment for EIA. The failure is stark and affirmed in express terms by D2 [CB 90, 103, 117].

7. Later statements on behalf of D1 and D2 [SB 47, 50] that they did consider whether EIA was required contradict: (a) the earlier written statements, and (b) the explanation given to C on 10 September 2009 [CB 34]. In any event, those statements fail to demonstrate that any assessment met the appropriate screening standard in *Commission v Italy* [2004] C-87/2 that:

> 44. … no project likely to have significant effects on the environment, should be exempt from assessment, unless the specific project excluded could, on the basis of a comprehensive **screening**, be regarded as not being likely to have such effect.
>
> [AB Tab 6]

8. Further, D1 and D2 have since failed to publish that screening opinion as required by Article 4(4) of the Directive [AB Tab 1, p 5] and to the detriment of C and others.

(a) Project lists

9. Ds say that the project does not fall within the lists under paragraphs 2(e), 10(b) or 13 of Annex 2 of the Directive (Sch 2 in the EIA Regulations 1999) and therefore the EIA regime does not apply.

10. C submits [CB10] that when adopting the approach to EIA matters required by the European Courts of 'wide scope and broad purpose', the conclusion has to be that this project must fall within Annex/Sch 2. For instance, para 28 of *Ecologistas en Accion v Madrid* [2008] C-142/07 states that:

> … The Court has stated on numerous occasions that the scope of Directive 85/337 and the amended directive is very wide. … It would, therefore, be contrary to the very purpose of the amended directive to allow any urban road project to fall outside its scope solely on the ground that that directive does not expressly mention among the projects list in Annexes I and II those concerning that kind of road. [AB Tab 9]

11. Moreover, Government guidance is cautious of any restriction to the EIA regime stating that:

> The messages are clear
>
> First, the Directive is **not** open to narrow interpretation. The UK Courts will interpret the Directive in the European sense - i.e. as having wide scope and broad purpose.
>
> Second, **do not** assume a project is excluded simply because it is not expressly mentioned in either the Directive or the Regulations.
>
> [AB Tab 5, p 3]

12. C maintains the projects fall within either paragraphs 2(e), 10(b) or 13 of Annex 2 of the Directive (Sch 2 of the Regulations).

(a) Paragraph 2(e) relating to 'surface industrial installations for the extraction of coal …' [AB Tab 2, p 58] describes this project precisely. Paragraph 2(e) is without qualification, save for the 0.5 hectare threshold in Sch 2. Applying the wide scope and broad purpose required by the ECJ in *Ecologistas* it would be astonishing to exclude the Cwmbargoed project. Moreover, the narrow interpretation of para 2(e) alleged by the opposing parties would be unduly restrictive for a number of other projects. It would, for instance, exclude all underground aspects of deepshaft coal mining for which environmental impacts are likely to be significant.

(b) The projects could also fall within paragraph 10(b) of Sch 2 relating to 'urban development projects' [AB Tab 2, p 61. Again, a wide scope is applied to this list. In *Goodman v LB Lewisham* [2008] EWCA Civ 140, Buxton LJ explained that:

> 13 … "Infrastructure project" and "urban development project" are terms of wide ambit, … "infrastructure" goes wider, indeed far wider, than the normal understanding, …
>
> 24. The words "including the construction of shopping centres and car parks, sports stadiums, leisure centres and multiplex cinemas" are not words of limitation but of description which emphasises the wide ambit encompassed by "urban development projects" …
>
> [AB Tab 11]

This approach is affirmed in Government guidance, highlighting that a common project that frequently requires EIA is housing, but that this is not listed *at all* in the Directive or Regulations [AB Tab 5, page 3].

(c) Finally, the project may be regarded as an extension to the main opencast operations under paragraph 13 of Sch. 2. The Regulations suggest how to carry out screening for extensions to Sch 1 projects. For para 19 (opencast) you look to para 2(a), and the extension should include:

> *All development* except the construction of building or other ancillary structures where the new floorspace does not exceed 1,000 square metres. [emphasis added]
>
> [AB Tab 1, p 63]

The present project considerably exceeds the para 13 threshold.

13. The wide approach to the EIA project lists is illustrated by, for instance: *R (oao Kathro) v Rhondda Cynon Taff CBC* [2001] EWHC Admin 527, school complex in a rural village (para 10(b)), *R (Mellor) v Secretary of State* ECJ [2009] ECJ, a secure hospital in a rural area at the edge of the Nidderdale AONB (para 10(b)); [AB Tab. 17] and *Berkeley v Secretary of State* [2001] AC 603listed building demolition, residential and associated development (para 10(b)) [AB Tab. 11].

(b) The correct approach to comprehensive screening

14. EU Guidance on Screening (2001) sets out how to approach screening [AB Tab 3, fig. 2 and para B4]. In outline, a screening opinion for this type of project must include a case-by-case assessment which must then apply the criteria in Annex III of the Directive [AB Tab 1, p 15] (Sch 3 of the Regs).

15. The approach by D1 and D2 was that screening did not need to be carried on. In doing so, they have failed to even engage the EIA legislation and that this is a simple but substantial error of law.

16. C submits that the error is serious because the project will have significant environmental effects see, for instance, the conditions to the permission [CB 109]. The direct concern of C being the ability of IP to increase annual coal extraction from between 0.75 and 1 million tonnes to up to 1.5 million tonnes [CB 18-20] and the consequent noise and air pollution.

17. Even if the project did not fall within a specific list, which is denied, EIA screening *requires* D to assess whether the proposals will have a significant effect on the environment. C's case is, however, that it is

unnecessary to look that far along the EIA process to establish error of law.

(c) Cumulative effects

18. C submits that D1 and D2 have also failed to consider the cumulative effect of the project and the proposed variation of Condition 37 of the opencast permission to transport up to 100,000 tonnes of coal by road instead of rail. C contends that it was artificial to determine the Cwmbargoed project in isolation; see e.g. para 44 of *Ecologistas* [AB Tab 9] and para 45, *Paul Abraham v Region Wallone* [2008] C-2/07 [AB Tab 8].

19. Ds claim that the project site has been operating for a number of years as a coal site and that it is nothing to do with the opencast. Yet this contradicts the planning application title [CB 77].

2 Consequences of legal error

20. The consequence of failing to carry out a screening opinion is serious. D1 and D2 have not tested whether or not this project is 'EIA development' and therefore subject to EIA. They have excluded the broad purpose of the Directive explained by Lord Hoffman in *Berkeley v Secretary of State* [2001] AC 603 at 615:

> I said in *R v North Yorkshire CC ex p Brown* [2000] 1 AC 387, 404 that the purpose of the Directive was "to ensure that planning decisions are made on the basis of full information". This was a concise statement, adequate in its context, but which needs for present purposes to be filled out. The Directive requires not merely that the planning authority should have the necessary information, but that is should have been obtained by means of a particular procedure, namely that of an EIA. And an essential element in this procedure is that what the Regulations call the "environmental statement" by the developer should have been "made available to the public" and that the public should have been "given the opportunity to express an opinion" in accordance with article 6(2) of the Directive."
>
> [AB Tab 10]

21. The problems directly concerning C are an increase in dust and noise problems arising from main opencast operations. The problems are highlighted in the summary complaints received by D [SB 67-73]. The IP has yet to disclose details of the dust, noise and other problems [SB 91-2]. That there will be an increase is identified in the IP's planning application and the increase in annual coal extraction from between 750,00-1,000,000 tonnes to up to 1,500,000 tonnes from the opencast operations [CB 184]. Importantly, an EIA would consider the impacts, including any indirect and secondary impacts, and should propose preventive measures, mitigation or at the very least remedial measures to those impacts.

3 Promptness

22. C resists the allegation of delay. The earliest C knew of *any* of the decisions for the project was 10 September 2009. From then on C acted promptly, with the pre-action protocol being complied with, the claim being issued less than seven weeks later, and the detailed claim and documents being served soon after.

23. During the pre-action stage, C was content not to bring proceedings in her name but to allow others residents to proceed. But for the pressure from the opposing parties this would have been the case [CB 338-340]. When others feared taking proceedings, C agreed to do so. If permission were refused on the basis of delay then this would be contrary to Article 10a of the EIA Directive and that proceedings should be fair and equitable. It is also likely to breach Article 3(8) of the Aarhus Convention 1998 and that 'each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement.'

24. The opposing parties rely upon *Finn-Kelcey v Milton Keynes Council* [2008] EWCA Civ 1067 [AB Tab 17]. C's case is not inconsistent with that. In particular, the statements of Keene LJ at para 25 that 'what satisfies the requirement of promptness will vary from case to case' and

whether the claim was filed promptly 'depends on all the relevant circumstances'.

25. The relevant circumstances in this case are that:

(a) at the date the claim was issued the IP had not complied with the conditions precedent for the July 2007 permissions [CB 43-44];

(b) in any event, the plans to be submitted under the conditions precedent may be subject to EIA screening: (see the comments of Mr Justice Crane *R (Anderson) v Bradford MDC* [2006] EWHC 3344 (Admin), paras 65 & 67 [AB, Tab 14] and the subsequent comments by the Government in amending the EIA Regulations 1999 [CB 448];

(c) in failing to carry out screening opinions for the earlier decisions D1 and D2 are under an obligation to remedy that failure in EU law, paras 64-66, *Wells v Secretary of State* [2004] C-201/02 [AB Tab 12];

(d) the opposing parties had collectively failed to inform C and many other residents, including those attending the IP's Liaison Committee about the planning proposals or decisions;

(e) C has had difficulty in seeking disclosure of certain documents from the opposing parties and that this has not helped progress the case [CB 383]; and

(f) none of the opposing parties have been prejudiced by any purported delay.

26. If the Court concludes that C has issued out of time, then relying upon the circumstances set out above she will seek permission to challenge those permissions out of time.

27. The overall position is that the requirement of promptness should not be interpreted or applied in a way that places those of limited means who are

affected by proposed development in an unrealistically onerous position as regards bringing a challenge to the grant of planning permission.

28. If the court has residual concerns about prejudice or delay; C seeks permission for an expedited hearing. However, it is noted that no party has, to date, requested that the matter be expedited.

29. In all the circumstances there is no sufficient reason to refuse permission on timing grounds if the court finds Ground (1) and/or (2) arguable on the merits.

4 Venue

30. C resists the opposing parties request to hear the matter in Cardiff. The reasons are set out in the summary reply [CB 28-9] and that (a) C does not consider that she will have a fair trial and (b) that a trial in the locality will increase the stress, anxiety and tension for C and other members of the public concerned. Transfer to Cardiff has been considered in earlier proceedings with the Court concluding that the matter remain in London [CB 330/1-4]].

31. Cs concerns are justified. Two days after C informed the Court and the parties that she was renewing her permission application, IP issued a press release [SB 82-83] and that was then mis-reported [CB86]. Again, this may be regarded as being contrary to Article 3(8) of the Aarhus Convention.

32. In the circumstances, C seeks an order that the matter be heard in London.

Dr Paul Stookes
Richard Buxton Environmental & Public Law
29 April 2009
pstookes@richardbuxton.co.uk