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Your ref. CO/3955/2014
Our ref. PS/HH/Keogh-4

11 September 2014

Dear Sirs

Irene Keogh v Secretary of State for Communities & Local Govt CO/3955/14

We act for the claimant in the above matter and write further to the letter from the Treasury Solicitor of 9.9.14 on behalf of the Secretary of State.

We are surprised that the Secretary of State is now objecting to the grant of a Protective Costs Order (PCO). We asked for clarification of his position on 20.8.14 (some 4 weeks ago) and followed this up in correspondence on 21.8.14 and 3.9.14. It is only now that the Secretary of State suggests he is likely to seek further information.

We are also concerned that the Secretary of State's primary position is that he does not consider that the claimant is entitled to a PCO in these proceedings because they derive from s. 288 of the TCPA 1990 and, as a consequence, do not fall within the scope of 'judicial review' within the meaning of CPR 45.41-44.

There is no rational basis for the distinction made by the Secretary of State. Indeed, judicial review and statutory review are so closely associated on a factual, legal and procedural basis that any suggested distinction by the Secretary of State amounts, in our view, to unfair and inequitable treatment by the Secretary of State in breach of the Aarhus Convention. The distinction and exclusion of s. 288 is, in our view, an attempt to exclude the application of express rights conferred under the Convention.

Our client's case is a very good example of the close factual, legal and procedural associations between judicial review and s. 288.

No factual distinction between judicial review and s. 288

In 2011 Mrs Keogh issued judicial review proceedings challenging the Council's decision to grant planning permission (no. SE100966/F). This was quashed by consent on 3.9.12; see e.g. *R (Keogh) v Herefordshire Council,* CO/7687/11. In April 2013 the Council refused permission for that development and the developer appealed. The Inspector then granted permission in part on 11.8.14 for the same application (no. SE100966/F). The only factual difference between the 2011 judicial proceedings and the present proceedings is that the Secretary of State has become a party to the claim. It is the same claimant, the same respondent parties (plus the Secretary of State), the same development proposal. There is no logical factual basis for excluding the costs provisions of CPR 45.41-44.

Procedural basis for judicial review and s. 288

The procedural basis for judicial review and s. 288 claims is Part 8 of the CPR. CPR 54 covers judicial review and statutory review and states that it amends the Part 8 process. A claim for judicial review is to review, among other things, the lawfulness of a decision, action or failure to act in relation to the exercise of a public function (CPR 54(2)(a)).

A claim under s. 288 challenges the validity of any action by the Secretary of State (i.e. the decision letter of the Inspector on behalf of the Secretary State) on the ground that the action is not within the powers of the TCPA 1990, or that any of the relevant requirements have not been complied with in relation to that action. The provisions of CPR Practice Direction 54E relating to Planning Court claims apply as much to s. 288 claims as they do planning judicial review.

Legal effect of a quashing order under s. 288

The effect of a finding of unlawfulness under s. 288 may result in the quashing of any action taken by the Secretary of State. This is identical in terms to the powers of the court under CPR 54.2(c).

In brief reply to the other points raised on behalf of the Secretary of State:

a) We are obtaining a short statement from our client confirming that her financial circumstances are such that she cannot afford to pursue these proceedings without a PCO on the terms proposed. However, our position remains that given the provisions of CPR 45.41-44 and CPR PD 45 5.1 which set what may be regarded as an objectively based maximum liability for any PCO that is granted, it is reasonable to apply to the court for a PCO without the need to provide any financial information that the Claimant cannot afford a PCO with costs liability of £5,000 plus her own costs.

b) The Treasury Solicitor refers to an application for fee remission. Our understanding was that the financial limits for fee remission are comparable to legal aid. We have reviewed the eligibility criteria and there is a slight distinction between fee remission and legal aid whereby capital in an applicant's main home is not taken into account for fee remission. Thus, it may be that our client is eligible for a refund of the court fee and we are content to advise our client to apply for a retrospective application for fee remission. If it transpires that our client is eligible for fee remission, we will notify the court and undertake to amend the terms of the PCO order to reflect this, such that the burden of the court fee does not fall on the Secretary of State.

c) The costs of travel and specific copying, such as for court bundles, are a reasonable and claimable expense in legal proceedings and, even if they were not, they are still

an expense that the Claimant has to occur and so should be taken into account in considering the costs of proceedings as a whole.

d) While noting the comments of the Court of Appeal in *Austin v Miller Argent,* the Secretary of State has failed to respond to the submissions relating to *Commission v UK* [2014]. The appellant in *Austin* has applied to the Supreme Court for permission to appeal.

There is an air of unreality about the Secretary of State's position in relation to the PCO application and it is extremely disappointing to have to respond to these collateral points when this only seeks to delay matters and place further financial burden on an individual that simply cannot afford this. This is of particular concern when set against a backdrop of the recent planning reforms and the emphasis placed on seeking to progress matters in a prompt manner. We are conscious, for instance, that there is a need to progress this particular claim in terms of filing a comprehensive claim bundle with evidence; the costs of which are not reasonable to incur without the certainty of costs protection in taking the claim forward. It is unfair to place an unnecessary costs hurdle in the place of individuals in circumstances where this simply would not be an issue for any of the other parties.

For completeness, and quite independently of our client's application for a PCO, we are referring this correspondence to the United Nations Aarhus Convention Compliance Committee in relation to Communications ACCC/85 & 86 which are currently being considered by the Compliance Committee. The Compliance Committee has recently expressly asked about the application of CPR 45.41-44 in relation to private nuisance proceedings. We consider that the Secretary of State's approach in this case is a further example of the UK Government's unduly restrictive approach to the Convention.

In all the circumstances, we ask that the claimant's interim application for a PCO is determined on the papers and at the earliest opportunity.

Yours faithfully

Richard Buxton Environmental & Public Law

cc (by e-mail) Treasury Solicitor (Louise Marriott) for the Secretary of State
Herefordshire Council (Kate Stevenson)
Burges Salmon (Stephen Humphreys) for the 3rd Defendant
UNECE, Secretary to the Compliance Committee.
Defra (Ahmed Azam)