[2013] IEHC 630

THE HIGH COURT

JUDICIAL REVIEW

Record Number: 2011 1068 JR

BETWEEN:

PHILIP D. BROWNE

APPLICANT

AND

FINGAL COUNTY COUNCIL

RESPONDENT

DECISION BY MR JUSTICE MICHAEL PEART ON PRELIMINARY COSTS ISSUE, GIVEN ON THE 11TH DAY OF DECEMBER 2013:

1. The applicant is not legally represented, and has filed an application for leave to seek remedies by way of judicial review against Fingal County Council in a matter which I will loosely refer to as an environmental matter.

2. As a preliminary matter, and before moving his application for leave, the applicant has asked this Court for what has been referred to as a 'protective costs order'. However it is important to understand exactly what the applicant means by that.

3. He does not mean simply that in the event that he loses the action in due course no order for costs will be made against him; or that i8n the event that he wins he will be granted an order for his costs against Fingal County Council.

4. If these matters were what concerned him he would be easily reassured by the provisions of Section 50B of the Planning & Development Act, 2000, as amended whereby in cases coming within the class of case to which the section applies (including the applicant's case), the Court shall make no order as to costs, subject to the provisions of Section 50B(2A) as inserted, whereby the Court retains a discretion to award costs, or a portion of those costs in favour of a successful applicant to the extent that he has succeeded.

5. But the applicant seeks more than that, and does so by reference to the what he believes are this State's obligations under the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark on 25 June 1998 ("the Aarhus Convention"), and certain Council Directives made in that regard.

6. The applicant seeks an order from this Court in advance of moving his application for leave that his legal costs will be paid, regardless of the outcome. He needs this assurance before he engages a legal team to act on his behalf. In effect, he is seeking an order that regardless of what his costs may turn out to be, these will be met by Fingal County Council. He believes that if the Aarhus Convention, and the Council Directives in question are to be given proper effect, he is entitled to such an order now. What he is seeking amounts to legal aid, or an indemnity in respect of his own costs regardless of the outcome of the case.

7. Under Article 9 of the Aarhus Convention judicial proceedings in environmental disputes must not be "prohibitively expensive" – a term which is not defined in the Convention. Nor is any explanation given, or even guidance as to whether the test is a subjective or an objective one.

8. The present application was put back from time to time so that the applicant could await the delivery of judgment by the European Court of Justice in David Edwards v. Environment Agency and others – Case C-260/11, upon a reference had been made to that Court which might give some clarification as to what is meant by the term "not prohibitively expensive".

9. In its judgment the Court makes clear at paragraph 25 that the phrase does not mean that the national court is precluded from making an order for costs. It has stated also at paragraph 33 that the requirement "*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 the principle of effectiveness, whereby procedural rules must not make it in practice impossible, or excessively difficult to exercise rights conferred by European law*", and that the cost of bringing a challenge "*must not be so expensive as to prevent the public from seeking review in appropriate cases*".

10. The Court goes on to state in paragraph 35 that "*when a national court is called upon to make an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute, or where, as in the United Kingdom, it is required to state its views at an earlier stage of the proceedings on a possible capping of the costs for which the unsuccessful party may be liable, it must satisfy itself that the requirement has been complied with.*"

11. In this country, it appears that what is provided for in relation to costs in cases of this kind gives even greater protection to an unsuccessful applicant than is required under the Aarhus Convention. That protection is what appears in Section 50B of the Planning & Development Act, 2000 as amended. Under these provisions no order as to costs may be awarded against an unsuccessful applicant. The Court is required to make no order as to costs in such a case. The Court may of course under Section 50B (2A) of the Act of 2000, as inserted, make an order for costs in favour of a successful applicant.

12. Neither the Aarhus Convention, nor the Edwards case, mandate that legal aid be available to impecunious applicants as part of the requirement that access to justice should not be prohibitively expensive. Paragraph 38 of Edwards makes a brief reference to legal aid schemes in member states as being something, inter alia, to be taken into account. Clearly, if legal aid had to be available, or some sort of pre-emptive order for costs in advance of an application, this would have been clearly stated, and it is not.

13. In so far as the applicant might have sought, as part of his reliefs, a declaration that he is entitled under Aarhus or otherwise to an advance indemnity in relation to his costs, no matter what the result of his proceedings, this is something which would require that the Attorney General be joined to meet the arguments that the State has failed in its obligations under Aarhus. Certainly the applicant could not expect that Fingal County Council would in every case brought against it, have to meet the applicant's costs, no matter what the result of the case brought against it.

14. The applicant was offered an opportunity to consider whether he wanted to join the Attorney General but he has decided that he will not do so.

15. I am satisfied that while Aarhus applies, and the State must meet its obligations under it, Section 50B as amended more than meets those obligations as properly understood in relation to costs orders.

16. I am not satisfied that under Aarhus the applicant is entitled to the sort of blanket costs indemnity order he now seeks in advance of bringing his application for leave to seek judicial review. Neither am I satisfied that this Court has jurisdiction under Statute or otherwise to make the order which he is seeking. The jurisdiction to in certain circumstances make a protective costs order, which is identified by Laffoy J. in *Village Residents Association Ltd v. An Bord Pleanala* [2000] 4 IR. 321, and referred to by Kelly J. in *Friends of the Curragh Environment Ltd v. An Bord Pleanala* [2006] IEHC 243 is not so wide as to encompass what the applicant seeks herein.

17. I refuse this application.

18. The applicant must now decide if he wishes to continue with his leave application, and I will put the matter back so that he can consider his position in the light of my decision.

19. I should add that in so far as the applicant asserts that his application is a proceedings which he seeks to bring in the general public interest, and relies upon that fact to assist his present application, I have to say that this may not be the case as it certainly appears from the papers which have been filed that he has a private commercial interest in the outcome of the proceedings should he succeed in obtaining leave to seek his reliefs. I mention this aspect in case by failing to do so, I may be taken by the applicant as conceding that the intended proceedings are in the general public interest.

20. Finally I refer to the fact that the applicant has stated that part of his application was that a cap should be set upon the amount of any costs, in a way similar to what can occur in the United Kingdom under the Civil Procedure Rules. A cap on costs is not relevant in the present case where Section 50B of the Act of 2000 mandates that no order as to costs be made, subject to the Court having a discretion to award costs to a successful applicant. However, if the applicant loses the proceedings at the end of the day, this Court is precluded from awarding any costs against him. Setting a limit on such costs therefore does not arise.