

2011-07-25

## ***Case Summary posted by the Task Force on Access to Justice***

### **Opinion of Lady Dorrian in the Petition of Marco McGinty and Another for Judicial Review**

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| <b>1. Key issue</b>                         | Costs - The Outer Court of Session (Scotland) stated that the criteria for making a Protective Cost Order (PCO) were satisfied in an environmental case and ordered that if the petitioner – an unemployed person with low income – would lose the case, he would be liable for the costs of the Scottish Ministers up to a level of £30,000. A reciprocal costs cap was also imposed so 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.  |
| <b>2. Country/Region</b>                    | UK (Scotland)  |
| <b>3. Court/body</b>                        | Outer House, Court of Session  |
| <b>4. Date of judgment /decision</b>        | 20 <sup>th</sup> January 2010  |
| <b>5. Internal reference</b>                |  |
| <b>6. Articles of the Aarhus Convention</b> | Article 9(4)   |
| <b>7. Key words</b>                         | Prohibitive costs, PCO   |
| <b>8. Case summary</b>                      | <p>In this case, Mr McGinty (as petitioner) sought to judicially review the designation by the Scottish Ministers of a new power station and transshipment hub at Hunterston as a national development in a National Planning Framework. The petitioner also applied for a protective and restricted expenses order (an order similar to a PCO in England and Wales) and a hearing was held. At the conclusion of the hearing, Lady Dorrian delivered her Opinion.</p> <p>The Outer Court of Session accepted that it had the jurisdiction to make such an order in appropriate cases, as set out in <i>McArthur v Lord Advocate</i> (2006 SLT 170) and on the principles set out in <i>R (Corner House Research) v Secretary of State for Trade &amp; Industry</i> (2005 1 WLR 2600 at para 74). Lady Dorrian considered that this case was sufficiently important to justify the court making such an order at an early stage, providing that: (1) the issues raised are of genuine public importance; and (2) the public interest requires those issues to be resolved.</p> <p>The Defendants were the Scottish Ministers. The petitioner, Mr McGinty, was unemployed and in receipt of jobseekers allowance of £128.60 per fortnight. He had savings in the region of £1,000 and the prospects of a short-term (2 months) work placement which might earn him £1,250 per</p> |

month. He was refused Legal Aid and an appeal had also been refused. The litigation thus far had been funded by donated funds, raising little short of £15,000 of which only a small balance would remain following the conclusion of the PCO hearing.

As to the likely costs to be incurred, the petitioner's potential liability, should he lose, were estimated to be in the region of £90,000 and his own expenses in the region of £80,000.

At the request of the Scottish Ministers, the Court discussed the imposition of a reciprocal costs cap – this capping the costs recoverable by the petitioner in the event that he won the case. Reference was made to *Corner House* (para 76) and *R (on the application of Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* (2008 EWCA Civ 1209).

In her Opinion, Lady Dorrian stated that she was satisfied that the criteria for making an order were satisfied. She ordered that if the petitioner were to lose the case, that he would be liable for the costs of the Scottish Ministers up to a level of £30,000. A reciprocal costs cap was also imposed so 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.

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| 9. Link address | <a href="http://www.scotcourts.gov.uk/opinions/2010CSOH5.html">http://www.scotcourts.gov.uk/opinions/2010CSOH5.html</a><br><a href="http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/UNITED_KINGDOM/McGinty/UK_Opinion_LadyDorrian_McGinty_another.pdf">http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/UNITED_KINGDOM/McGinty/UK_Opinion_LadyDorrian_McGinty_another.pdf</a> |
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