COMMUNICATION TO AARHUS COMPLIANCE COMMITTEE

IN THE MATTER OF ICOS No 18/23791/01
IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY RURAL INTEGRITY (LISBURN 01) LTD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY LISBURN AND CASTLEREAGH CITY COUNCIL TO ISSUE PLANNING PERMISSION REF LA05/2017/0556/O
DATED 6TH DECEMBER 2017

CORRESPONDENT
Gordon Duff

PARTY CONCERNED
The Government of the United Kingdom/Northern Ireland.

FACTS OF THE COMUNICATION

The issue

1. The Court has dismissed the above application and determined that a company director (not being employed) cannot represent his own company in judicial review proceedings and must engage a solicitor to do so. I believe this determination is unjust, is an incorrect interpretation of national legislation and it also installs a financial barrier in an Aarhus Convention Case contrary to Article 9 of the Convention.

The Applicant

2. I am the director of Rural Integrity (Lisburn 01) Ltd (hereinafter referred to as the Applicant.) The Applicant was involved in the above application for judicial review in the High Court in Northern Ireland. The case has been dismissed. The Applicant cannot afford to appeal the decision.
3. The Applicant Company was incorporated on 26th January 2017. I am the sole shareholder and director of this company. The share capital of the company is £100.
4. The objects of the company are *"to challenge excess development within the Lisburn and Castlereagh City Council rural area which undermines the sustainable development of Lisburn. To challenge urban sprawl, ribbon development and all rural development contrary to planning policy".*
5. I am self-employed. I am not rich. I am not legally trained. I am passionate about the environment and sustainable development.
6. The Applicant Company was one of three companies I set in January 2017 for purposes of litigation. I was concerned at the quality of several planning decisions

made by Lisburn and Castlereagh City Council and was determined to challenge one or more of these decisions.

7. I chose to use incorporation for several reasons; for separation of litigation costs from personal finances; so that litigation could continue if I were to die or become unwell; so that I may possibly attract shareholders or fellow directors and so that I had could feel less anxious and stressed and focus on the case/s.

History

8. I direct and have represented the Applicant in many cases in my spare time for well over 2 years without challenge by the Court or respondents.
9. On the 7th June 2017 the Applicant brought its first application which challenged a planning decision that allowed a planning permission for 54 holiday apartments associated with a proposed golf resort be amended to 54 residential apartments by removal of a condition that restricted the apartments to holiday use only. The resulting 54 apartments in the countryside was an obvious breach of planning policy. This application was conceded by the planning authority on procedural grounds and the decision quashed by the Court on 23rd November 2017.
10. I represented the Applicant in this judicial review application with full approval of the Courts and all the parties to the case.
11. At this time I had no plans to conduct very extensive litigation but as time went on I became aware of regular abuses of planning policy allowing single “commuter” focused dwellings in the countryside. I estimate that over time many thousands of such houses are being built and represent 100’s of £millions investment in building houses in the wrong place with multiple harmful environmental effects and which also undermined very necessary, more sustainable, more worthy development in settlements.
12. It is the cumulative impact of one off houses that is the significant planning and environmental issue. These harmful effects include destruction of fertile agricultural land, destruction of protected hedgerow habitats, escalation of traffic and car dependency, damage to the rural character and run off pollution from sceptic tanks to name a few. The problems are recognised in planning policy which is not being correctly applied.
13. The Applicant Company has since submitted 18 applications for leave to apply for judicial review.
14. I am also director and shareholder of 10 other companies which combined have submitted a further 20 judicial reviews. Of these companies 4 have other shareholders and directors. Legal representation has been engaged in two of the cases which have successfully raised sufficient funds.
15. The other applicants cannot afford legal representation in any of the other cases.
16. I submitted all the applications on behalf of the applicants. The Court accepted the fees. The applications were accepted by the Court and logged into the system. A total of 37 judicial review applications were submitted without the applicant’s representation being challenged by either the Court or respondents.

The Application

17. The application for leave was submitted on 5th March 2018 and dismissed on the 6th March 2020. The application challenged a single dwelling in the countryside.
18. The Order 53 Statement submitted with the application included the following –
    The relief sought is…….

(d) This being an application for judicial review of a decision, acts and omissions all or part of which are subject to the provisions of the Aarhus Convention, and therefore an Aarhus Convention case within the meaning of the Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 and/or as amended 2017, order that any costs recoverable from the applicant shall not exceed £10,000 plus any VAT.

19. This is an Aarhus Convention case. It has not been disputed and the Court has not determined otherwise. Similar cases have been regarded as Aarhus cases by the Court.
20. The Court costs and other costs associated with the application were approximately £270 in total. These costs were met by a director's loan to the Applicant Company.
21. The Court dismissed a similar case brought by the Applicant in June 2019 on the grounds that the Applicant failed to lodge £10,000 costs. This was appealed. On the 22nd January 2020 the Court of Appeal dismissed the Appeal without hearing the substance of the appeal and in doing so stated "we are obliged to dismiss the appeal because it has not been pursued by anyone entitled to do so, on behalf of the company". I exhibit the appeal decision in **Appendix 1.**
22. I recognise significant problems in the Appeal decision as follows
    (i) This was conceded by the respondent as an Aarhus case. The decision conflicts with the need for access to justice.
    (ii) The Court granted Leave and in doing so acknowledged issues of public importance which needed to be examined. I exhibit the leave transcript at **Appendix 2**
    (iii) The Court granted leave and engaged with the Applicant for over a year issuing directions, orders and judgements and finally dismissed the case. All contrary to its own position on Order 5 Rule 6
    (iv) The Court of Appeal has acted unjustly by removing the Applicant's right of appeal and a costs award of £10,000 plus VAT has been made against the Applicant
    (v) The Court of Appeal made an offer to allow me to take over the case from the company to rectify any inflexibility in the Court Rules. In doing making the Courts problem my problem the Court consigned all other similar associated cases to be non-compliant and unaffordable. The offer did not fix the injustice.
    (vi) This offer would not have been appropriate in the four cases where I have fellow directors and shareholders so it is not an equitable solution.
    (vii) The Court has not shown flexibility or judicial discretion nor considered that the Rules could simply need updating to accommodate environmental judicial reviews
23. That decision may still be appealed to the Supreme Court of the United Kingdom so the domestic remedy in that case has not been exhausted.
24. The application which is being referred to the Commission was dismissed along with 28 other judicial review applications. None of the cases were examined or the merits investigated. I exhibit the judgement of the Court in **Appendix 3**.
25. In particular it is clear that the cases have not been considered at all. Competing issues are purported to being weighed by the Court in a notional balance; however

the issues being weighed are procedural issues arising in the previous appeal case - not each of the cases which are dismissed (page 22 of the judgement).

26. There are many things about the judgement that I believe are inaccurate. The Court claims to exercise judicial discretion but has shown judicial prejudice. The Court claims to weigh competing interests but has made victims out of developers and weighed this heavily and simply wrongly guessed the environmental issues and issues of public importance rather than examine them with diligence.
27. I believe there is bias in the judgement. However the issue being brought to the Committee is of a procedural nature and I am not going to rehearse other aspects of my dissatisfaction with the Court's judgement.
28. The Applicant does not have the resources to appeal all the dismissed cases.

PROVISIONS OF THE CONVENTION ALLEGED TO BE IN NON-COMPLIANCE

29. **Article 9(2)** of the convention, allows members of the public concerned (having sufficient interest) to "*have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention*."
    Article 9(4) includes- "*In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2, and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.*
    Article 9(5) states "*In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice*."
30. The domestic procedures established by Parties to the Convention, must be fair, equitable, timely and not prohibitively expensive. Financial and other barriers to access to justice ideally should be ideally removed or reduced.
31. These principle have already been transcribed into the following Northern Ireland legislation – *The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013* and *The Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland)2017.*
    I exhibit these regulations in **Appendix 4**

NATURE OF ALLEGED NON-COMPLIANCE

32. The issue that has arisen is (a) an incorporated applicant can legitimately bring a judicial review but (b) it must according to Order 5 Rule 6 of the Rules of the Court of Judicature (NI) 1980, either engage a solicitor to bring the proceedings or be granted permission by the Court for an employee to do so. This has been interpreted to mean that a director who is not an employee cannot represent a company in proceedings.
33. This is unjust and makes such cases unaffordable. I believe the Court Rules which were written in 1980 were considering private civil cases not judicial review cases. I

also believe they need updated to be flexible enough to become compliant with the Aarhus Convention and the Northern Ireland Aarhus legislation.

34. Nevertheless I believe the Rules as they exist have been wrongly interpreted. The Court should have acted justly and should have applied the rules flexibly particularly so as it is an environmental judicial review; and should have considered the Aarhus Convention and the Northern Ireland Aarhus regulations.

Order 5 Rule6

35. Order 5 is titled MODE OF BEGINNING CIVIL PROCEEDINGS IN THE HIGH COURT Rule 6 states-
Right to sue in person
6.- (1) Subject to paragraph (2) and to Order 80 rule 2, any person (whether or not he sues as a trustee or personal representative or in any other representative capacity) may begin and carry on proceedings in the High Court by a solicitor or in person.
(2) Except as provided by paragraph (3), ***or under any other statutory provision****, a body corporate may not begin or carry on such proceedings otherwise than by a solicitor.*
(3) A body corporate may begin and carry on any such proceedings by an employee if – (a) the employee has been authorised by the body corporate to begin and carry on proceedings on its behalf; and
(b)the Court grants leave for the employee to do so.
36. I am an unpaid director with no employment contract. The Court has determined that I cannot represent the Applicant to bring the judicial review.
37. I have argued that the terms “or under any other statutory provision” trigger the Aarhus Regulations.

38. Order 1 Rule1A reads as follows-
The overriding objective
1A. - (1) The overriding objective of these Rules is to enable the Court to deal with cases justly.
(2) Dealing with a case justly includes, so far as is practicable -
(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate to - (i) the amount of money involved; (ii) the importance of the case; (iii) the complexity of the issues; and (iv) the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.
(3) ***The Court must seek to give effect to the overriding objective when it -***
(a) exercises any power given to it by the Rules; or
(b) interprets any rule.

39. The Court Rules are flexible. Each must be interpreted according to the overriding objective in ways that are just.
40. There is no reason why an employee is more eligible to represent a company in a judicial review than a director of the company. This is not common sense or just.

41. If an incorporated applicant is the only applicant bringing an environmental case of recognised public importance forward it is just that it must be heard regardless of it being only represented by its director.
42. Rule 6 only makes sense in private law in a normal civil case between 2 parties so that one party doesn't have an unfair advantage over another party. It doesn't make sense in judicial review if there is an obvious abuse of power or mistake by a public authority.

Rules in an Aarhus Convention Case

43. In an Aarhus Convention Case there is no level playing field between the Parties. The environment is paramount. There is no need for Order 5 Rule 6 in such a case. As the Court Rules are 40 years old, the Aarhus Convention and the Northern Ireland Aarhus Regulations cannot have been taken into account when the Rules were written. The Rules now need qualified and brought up to date.

The Northern Ireland Aarhus Regulations

44. Order 5 Rule 6 (2) engages other statutory provisions which include the Northern Ireland Aarhus Regulations
45. Regulation 3 of the 2017 Amended Regulations states-

    "(2) Subject to paragraphs (3) and (7), in an Aarhus Convention Case, the court shall order that any costs recoverable from an applicant shall not exceed £5,000 where the applicant is an individual and £10,000 where the applicant is a legal person or an individual applying in the name of a legal entity or unincorporated association.

    (3) The court may decrease the amount specified in paragraph (2) if it is satisfied that not doing so would make the costs of the proceedings prohibitively expensive for the applicant."
46. Incorporation is legitimate and in the case of a company there is a mechanism in place to deal with costs. This is entirely sufficient to establish the proper and fair conduct of a case.
47. The further need to engage a solicitor is unfair and can only be interpreted as a prohibitively expensive financial barrier.
48. Regulation 6 of the 2017 Regulations state-

    "**Determination of prohibitive expense**

    6. Proceedings are to be considered prohibitively expensive for the purpose of these Regulations if, having regard to any court fee an applicant is liable to pay, their likely costs either—

    (a)exceed the financial means of the applicant; or

    (b)are objectively unreasonable having regard to—

    (i)the situation of the parties;

    (ii)whether the applicant has a reasonable prospect of success;

    (iii)the importance of what is at stake for the applicant;

    (iv)the importance of what is at stake for the environment;

    (v)the complexity of the relevant law and procedure; and

    (vi)whether the case is frivolous.".

49. It would be unclear from looking at the wording in the Regulations if prohibitively expensive could extend to a company's own legal costs.
50. The matter was addressed in RSPB, Friends of the Earth and Client Earth v SOS for Justice, The Lord Chancellor and the Civil Procedure Rules committee [2017] EWHC 2309 (admin).
    In par 58 Mr Justice Dove indicated that "*all of the costs potentially involved in bringing a case, including a claimants own costs, are matters which can properly be taken into account by the court in assessing whether the default costs caps are appropriate or not*"
51. I cite this case simply to suggest the Northern Ireland Regulations could be clearer on a company's own costs. The implication in the quoted case is that a company's own costs cannot be prohibitively expensive. Both the Court Rules and the Northern Ireland Aarhus Regulations must be interpreted consistently with Article 9 and need amended accordingly.

Conclusion

52. The UK Government is not in compliance with Article 9 of the Convention. It is important that the Convention is reflected in UK judicial practice, rules and legislation; both for unresolved cases that I have brought and as a general rectification of an unjust stance by a Party to the Convention.
53. I respectfully request the Commission to consider this communication and allow it to progress to the next stage.

USE OF DOMESTIC REMEDIES

54. The Court has dismissed 29 cases and previously dismissed 4 others. The Applicants cannot afford to appeal all these cases despite strongly held concerns. The case being referred to the Commission will not be appealed. In this case the domestic remedies cannot be pursued any further.
55. The case is simply a sample and the Applicant needs clarification from the Aarhus Compliance Committee in regard to the UK Government's compliance with the Convention.
56. The Applicant is still considering a late appeal to the Supreme Court on this issue in the appeal case mentioned above. If the Applicant proceeds and asks for leave to appeal to the Supreme Court it is not guaranteed that leave will be granted. However I hope such an appeal if it did proceed would do so with prior clarification from the Compliance Committee as a result of this communication.
57. The Court refused a reasonable request for adjournment to clarify the key issues raised in this communication. The Court has been reckless in proceeding to dismiss 29 cases whilst the Court of Appeal decision was untested. I exhibit the letter I sent to the Court in **Appendix 5.** The Court dismissed this in its Court Notice no 5 which is Appendix 3 to its judgement. This was exhibit in my Appendix 3.

USE OF OTHER INTERNATIONAL PROCEEDURES

58. There has been no such use.

CONFIDENTIALITY

59. I don't request any special confidentiality.

SUPPORTING DOCUMENTATION

60. Please find attached –

    Appendix

    (1) Appeal Court decision dated 20th January 2020
    (2) Leave transcript in appeal case.
    (3) Judgement of the Court dated 6th March 2020
    (4) Costs Protection (Aarhus Convention) Regulations NI
    (5) Letter to the Court dated 20th February 2020 requesting an adjournment

Gordon Duff
25th May 2020