EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Communicated on 10 June 2016

FIRST SECTION

Application no. 39714/15
Alyson AUSTIN
against the United Kingdom
lodged on 4 August 2015

STATEMENT OF FACTS

The applicant, Ms Alyson Austin, is a British national, who was born in 1964 and lives in Merthyr Tydfil. She is represented before the Court by Richard Buxton Environmental & Public Law, a firm of solicitors based in Cambridge.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

In 2007 a land reclamation and open-cast coal extraction operation, run by M. Ltd, began operating 450 metres from the applicant's home. Conditions attached to the grant of planning permission for the site required effective noise and dust suppression measures to be taken. The applicant has, however, experienced significant noise and dust pollution as a result of the mining operations.

1. The 2010 application for a group litigation order

In June 2010 the applicant, together with around five hundred other individuals living near the site, applied for a group litigation order ("GLO") against M. Ltd, with a view to pursuing a claim in private nuisance. A GLO provides for the case-management of claims which give rise to common or related issues of fact or law. M. Ltd contested the application on the basis that a GLO would be premature. It referred to the viability of the potential claims and their funding. The claimants indicated that after-the-event insurance policies (that is to say, insurance policies taken out after a dispute has arisen to protect against the risk of having to pay the other side's legal costs) were expected to be put in place shortly.

On 11 November 2010 the County Court refused the GLO application. The uncertainties as to funding coupled with the sparse information

available as to the effect on each of the potential claimants of the alleged nuisance was such that, "with reluctance and some hesitation and only after anxious consideration", the court concluded that the application was premature. It clarified that this did not rule out another GLO application if and when funding was in place. The claimants were ordered to pay the defendant's costs.

The claimants appealed to the Court of Appeal and sought a protective costs order ("PCO") in relation to the appeal. A PCO limits the costs liability of the party to whom it is awarded, while allowing that party to recover some or all of their costs if successful. It subsequently became apparent that no after-the-event insurance could be obtained for the proposed litigation.

Meanwhile, the defendant lodged its bill of costs for opposing the GLO application, amounting to 257,150 pounds sterling ("GBP"). It explained that the costs liability would only be enforced against those who took any other action to commence a new claim against it in respect of the same or similar subject matters.

On 29 July 2011 the Court of Appeal dismissed the appeal and refused a PCO. It found that the decision whether to make a GLO had been within the discretion of the court and that there was no basis upon which to interfere with the exercise of that discretion in this case. Further, the claimants were not entitled to a PCO in respect of the appeal, since an adverse costs order would not involve them incurring prohibitive expense: once the defendants' costs claim had been appropriately adjusted, it amounted to approximately GBP 361.52 per claimant. The court also noted the terms of the defendant's undertaking not to enforce costs against those who took no further action. In its order, the Court of Appeal directed that the costs liability of each claimant in respect of the appeal was not to exceed GBP 194.04.

2. The 2012 application for a protective costs order

The applicant subsequently attempted to reach a negotiated resolution of the dispute with M. Ltd but was unsuccessful.

In October 2012 she applied to the High Court for an order that her liability for the defendant's costs in proposed private nuisance proceedings against M. Ltd be limited to nil. She alleged that she was affected by dust and noise which unreasonably interfered with the enjoyment of her home and claimed that this would not happen if M. Ltd complied with the conditions imposed on its planning permission to mitigate the adverse environmental effects of its activities. In her application, she argued that unless such an order was made, any proceedings that she subsequently issued would be prohibitively expensive and contrary to Article 9 of the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 ("the Aarhus Convention") and Article 11 of Directive 2011/92/EU of the European Union on the assessment of the effects of certain public and private projects on the environment. In support of her application, she lodged summary noise assessments of June 2008 and January 2009 prepared by the local authority, noise and dust reports of June 2009 and July 2012 prepared by independent consultants, a summary

of complaints made to the local authority, a diary recording noise and dust problems since 2008 and draft particulars of the proposed nuisance claim.

On 20 August 2013 the High Court declined to grant a PCO. The judge accepted on the evidence before him that the applicant was of modest means, that public funding to bring proceedings was not available and that it had not been possible to secure after-the-event insurance. However, he considered that private nuisance proceedings did not fall within Article 11 of Directive 2011/92/EU and that, even if they did fall within Article 9 of the Aarhus Convention, that Article was merely a matter to be taken into account when exercising his discretion. In so far as he had the discretion to make the order sought, the judge declined to make it. He accepted that there was some degree of public interest in the proposed proceedings, that they had a reasonable prospect of success and that any injunction was likely to benefit other homes in the immediate vicinity of the applicant's home. However, he considered it uncertain whether any injunction would benefit homes in other vicinities close to the development. Any remedy was likely to be directed to the precise conditions prevailing at the applicant's home and might well be implemented in practice without any significant change in the development process as a whole.

He indicated that, had he made an order, he would have limited her costs liability to GBP 7,500 and the maximum costs that she could recover if successful to GBP 40,000. He made no order for costs in the application and granted permission to appeal.

In her grounds of appeal, the applicant again relied on the Aarhus Convention and the EU Directive. She applied for costs protection in respect of the appeal. On 18 November 2013 the Court of Appeal capped the applicant's costs liability for the appeal at GBP 2,500.

On 21 July 2014 her appeal was dismissed. The court first considered whether the Aarhus Convention could apply to private nuisance claims. It noted the respondent's argument that there was a range of other remedies available to someone in the applicant's position which she could utilise at very little expense, including the possibility of inviting the planning authority to take enforcement action or statutory nuisance proceedings, both of which could lead to judicial review of an unreasonable failure by the authorities to act. The court saw the force of these submissions but considered that it would be wrong to exclude all claims of private nuisance from the scope of Article 9(3) for this reason. The powers conferred on public authorities were not sufficient to achieve the objectives of the Aarhus Convention, since such authorities were often understaffed, under-resourced and did not have the same direct concerns to uphold environmental standards as did members of the public. The court therefore found that private nuisance actions were in principle capable of constituting procedures which fell within the scope of Article 9(3) of the Aarhus Convention, subject to two requirements. The first was that the nature of the claim had to have a close link to the particular environmental matters regulated by the Convention. The second condition was that the claim, if successful, had to confer significant public environmental benefits.

The court accepted that the existence of an alternative and potentially cheaper procedure that afforded a realistic, practical and effective remedy was a relevant factor for the exercise of the court's discretion. However, it

considered it unrealistic to say that the authorities' lack of action could itself be challenged by way of judicial review, noting "That is hardly an effective way of securing the environmental standards which the [Aarhus] Convention is designed to achieve". The court further found that Article 11 of Directive 2011/92/EU was not applicable to private nuisance claims. The Article 9(4) obligation in the Aarhus Convention that effective remedies be "fair, equitable, timely and not prohibitively expensive" was therefore merely a factor to be taken into account in the exercise of discretion. The court accepted that the mere fact that a claimant had a personal interest in the litigation did not, of itself, bar her from obtaining a PCO.

Turning to the facts of the applicant's case, the court concluded:

> "46.We agree with the [High Court] judge that the public benefit is both relatively limited and uncertain in this case. We accept that her claim in private nuisance is sufficiently linked to the development because it is likely, at least indirectly, to raise issues concerning compliance with the planning conditions imposed to mitigate environmental harm. But having regard to the limited public benefit which this action would achieve, we are not satisfied that it falls within the scope of Article 9.3.
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> 47. But even if it does, the question is whether we should interfere with the judge's conclusion that no PCO should be granted. We do not think that we should. In addition to the matters identified by the judge, there are a number of other factors here which in our view point against making the order. The first is the strong element of private interest in the claim. The second is that although [counsel for the applicant] told us that Mrs Austin had contacted the Council with her complaints, we had no satisfactory evidence demonstrating that this potentially cheaper statutory route had been properly and adequately explored. A third is the fact that this respondent is a private body using its own private resources, and we think it of some relevance to this application that it has already had to pay out considerable sums in costs in relation to the GLO claim unsuccessfully brought by the appellant. Even having regard to Article 9.4 as a factor necessarily to be considered in the exercise of the court's discretion, and recognising that the appellant is of modest means, we are not satisfied that the judge erred or that it would otherwise be just to impose a PCO in this case."

It awarded M. Ltd GBP 2,500 in costs.

The applicant applied for leave to appeal to the Supreme Court. In her application, she invoked for the first time her rights under the Convention. She contended that if she was faced with the risk of prohibitive costs of an unsuccessful action in private nuisance, that would mean that her Article 6 right to a fair and public hearing would be negated, and that she would lack effective means to protect her rights under Article 8 and Article 1 of Protocol No. 1. She accepted that she had not raised these arguments in the courts below. On 24 February 2015 leave to appeal was refused on the ground that there was no arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the case had already been the subject of judicial decision and reviewed on appeal. The Supreme Court found the Court of Appeal's reasoning and conclusion convincing and said that there was no basis for interfering with the judge's exercise of discretion. It did not comment on the applicant's Convention arguments.

3. The complaint to the Aarhus Convention Compliance Committee

Meanwhile, on 28 February 2013, the applicant lodged a complaint with the Aarhus Convention Compliance Committee ("the Aarhus Committee"). She alleged that the United Kingdom had failed to comply with the Aarhus

Convention because it had not ensured that the costs of access to justice in private nuisance cases were "fair, equitable, timely and not prohibitively expensive".

On 23 February 2015 the Aarhus Committee issued draft findings and invited comments from the parties. Comments were duly received and, on 14 April 2015, the Aarhus Committee issued revised draft findings, again inviting comments. In its revised draft findings, it said that "in general" private nuisance proceedings should be considered judicial procedures aimed to challenge acts or omissions by private persons and public authorities which contravened "national law relating to the environment", in the sense of Article 9(3) of the Aarhus Convention. While this did not mean that the Aarhus Convention necessarily applied to all private nuisance proceedings, it would apply where the nuisance complained of affected the "environment", in the broad meaning of this term. The number of people affected and the motivation of the claimant to bring private nuisance proceedings or the proceedings' possible significance for the public interest were not decisive to the assessment of whether the procedure fell within the scope of "national law relating to the environment".

The revised draft findings concluded that only statutory nuisance proceedings could be considered a viable alternative to a private nuisance claim, but that in a number of respects, statutory nuisance did not provide an adequate alternative either. The Committee therefore found that the alternative administrative and judicial procedures relied on by the Government did not, either individually or collectively, provide for a fully adequate alternative to private nuisance proceedings. As to the costs of private nuisance proceedings, the revised draft findings noted that they typically exceeded GBP 100,000. The Committee accordingly concluded that the United Kingdom had failed to ensure that private nuisance proceedings which fell within the scope of Article 9(3) and for which there was no full adequate alternative procedure were not prohibitively expensive. It had therefore failed to comply with Article 9(4). It appears that the revised draft findings have yet to be formally adopted.

Following receipt of the revised draft findings of the Aarhus Committee, the applicant applied again to the Supreme Court for permission to appeal the refusal to make a PCO. On 24 November 2015 the Supreme Court refused permission. It noted that it would only grant an application for permission to appeal which it had already refused in exceptional circumstances. No such exceptional circumstances existed here. The High Court and the Court of Appeal had found that there was insufficient public interest and that Article 9(3) of the Aarhus Convention did not apply. But even if it did apply, the courts had concluded that no PCO should, as a matter of discretion, be granted. Nothing in the applicant's grounds could disturb that assessment, which in any event did not raise a question of general public importance.

B. Relevant domestic law and practice

1. Nuisance

Private nuisance is a common law tort. It involves an act or omission which is an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of his ownership or occupation of land or other right enjoyed in connection with land.

Section 79 of the Environmental Protection Act 1990 explains what constitutes a statutory nuisance for the purpose of the Act and sets out the resulting duty on the local authority, where a complaint of a statutory nuisance is made to it by a person living within its area, to take such steps as are reasonably practicable to investigate the complaint. Section 80 enables the local authority to serve an abatement notice where it is satisfied that a statutory nuisance exists, or is likely to occur or recur.

2. Litigation costs

The general rule on litigation costs in England and Wales is that costs follow the event, so the successful party can recover his costs from the losing party. However, the courts have discretion to take a different approach in a particular case.

A protective costs order limits the costs which the party to whom it is awarded is liable to pay in the event that he is unsuccessful. It can also limit the costs which he may recover from the other side in the event that he is successful. It can only be granted where the proceedings concern matters of public interest.

C. Relevant international and European Union legal materials

1. The Aarhus Convention

The Aarhus Convention was adopted on 25 June 1998 by the United Nations Economic Commission for Europe and came into force on 30 October 2001. The United Kingdom ratified the Convention in 2005.

The Aarhus Convention promotes public participation in decision-making concerning issues with an environmental impact. Article 9 deals with access to justice. Article 9(3) provides:

> "... each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."

Pursuant to Article 9(4), such procedures must provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.

2. Directive 2011/92/EU of the European Union on the assessment of the effects of certain public and private projects on the environment

Article 11 of Directive 2011/92/EU transposes some of the provisions of the Aarhus Convention. It does not contain a provision equivalent to Article 9(3) of that Convention.

COMPLAINTS

The applicant alleges that the respondent State has failed to provide an appropriate mechanism to secure the proper regulation of private sector activities and has failed to protect her from dust and noise pollution from the open-cast coal mining, since pursuing private nuisance proceedings carries a significant costs risk, in breach of her rights under Article 8 and Article 1 of Protocol No. 1. Under Article 13, she alleges that she did not enjoy an effective remedy in respect of her complaints under Article 8 and Article 1 of Protocol No. 1.

QUESTIONS TO THE PARTIES

1. Do the applicant's complaints under Article 13 combined with Article 8 and Article 1 of Protocol No. 1 concern a matter which is essentially the same as that which the applicant submitted to the Aarhus Convention Compliance Committee? If so, can the proceedings before that institution be considered as another procedure of international investigation or settlement, within the meaning of Article 35 § 2 of the Convention?

2. If not, did the applicant have an "arguable claim" that there had been a violation of her rights under Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention so as to bring Article 13 into play?

3. If so, did the applicant have at her disposal an effective domestic remedy for her complaints under Article 8 and Article 1 of Protocol No. 1, as required by Article 13 of the Convention?