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

FIRST SECTION

DECISION

Application no. 39714/15
Alyson AUSTIN
against the United Kingdom

The European Court of Human Rights (First Section), sitting on 12 September 2017 as a Committee composed of:

Kristina Pardalos, *President,*
Pauliine Koskelo,
Tim Eicke, *judges,*
and Renata Degener, *Deputy Section Registrar,*

Having regard to the above application lodged on 4 August 2015,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

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

2. The British Government ("the Government") were represented by their Agent, Ms A. Hennedy Goble of the Foreign and Commonwealth Office.

A. The circumstances of the case

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

4. In 2007 a land reclamation and open-cast coal extraction operation, run by M. Ltd, began operating 450 metres from the applicant's home. The

applicant claims to have experienced significant noise and dust pollution as a result of the mining operations.

1. The 2010 application for a group litigation order

5. In June 2010 the applicant, together with around 500 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.

6. 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. The claimants were ordered to pay the defendant's costs.

7. 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.

8. 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 further action to commence a new claim against it in respect of the same or similar subject matters.

9. On 29 July 2011 the Court of Appeal dismissed the appeal and declined to make 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

10. Following an unsuccessful attempt to reach a negotiated resolution of the dispute with M. Ltd, the applicant sought to bring private nuisance proceedings to obtain both an injunction to restrain the ongoing nuisance and damages for past nuisance. Since public funding was not available, in

October 2012 she applied to the High Court for a PCO which would allow her to pay no costs to M. Ltd if she lost the contemplated proceedings, but receive all her costs if she won. She argued that unless such a PCO was made, any proceedings that she subsequently issued would be prohibitively expensive and contrary to either 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" – see paragraphs 26-29 below) or to Article 11 of the EU Directive which in part implemented the Aarhus Convention, that is, Directive 2011/92/EU of the European Union on the assessment of the effects of certain public and private projects on the environment ("the EU Directive" – see paragraph 30 below).

11. The High Court gave judgment on 20 August 2013. The judge accepted on the evidence before him that the applicant was of modest means and that public funding was not available to bring proceedings. However, he considered that private nuisance proceedings did not fall within Article 11 of the EU Directive and, 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 PCO 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.

12. He made no order for costs in the application and granted permission to appeal.

13. 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.

14. On 21 July 2014 her appeal was dismissed. The court found that Article 11 of the EU Directive was not applicable to private nuisance claims, but Article 9(3) of the Aarhus Convention could potentially be engaged if the claim had a close link to the particular environmental matters regulated by the Convention and would, if successful, confer significant public environmental benefits. However, the court was not satisfied that the applicant's case fell within the scope of Article 9(3) in view of the limited public benefit which it would achieve. Even if it did, it indicated that it would not interfere with the High Court Judge's conclusion that no PCO should be granted, both for the reasons identified by the judge, and the

following additional factors: the strong element of private interest in the claim; the absence of any satisfactory evidence demonstrating that the applicant had properly and adequately explored the "potentially cheaper statutory route" of contacting the planning authority about alleged breaches of planning permission by M. Ltd and judicially reviewing any failure by that authority to act; and the fact that the respondent was a private body using its own private resources, which had already had to pay out considerable sums in costs in relation to the unsuccessful GLO claim. It did not, therefore, consider it just to impose a PCO in this case.

15. On 23 July 2014 the Supreme Court gave judgment in *Coventry and others v. Lawrence and another (No 2)* [2014] UKSC 46, a private nuisance case in which the unsuccessful respondents argued that the costs order made against them breached their rights under Article 6 and Article 1 of Protocol No. 1. Although the Supreme Court adjourned consideration of the costs issue, in his leading judgment, Lord Neuberger of Abbotsbury, the President of the Supreme Court, observed that the level of costs in the case were "very disturbing".

16. The applicant subsequently applied for leave to appeal to the Supreme Court. Her grounds of appeal principally focused the lower courts' treatment of her arguments under the Aarhus Convention and EU Directive. The final paragraph of her grounds cited *Coventry v. Lawrence (No. 2)* and invoked for the first time her rights under Articles 6, 8 and Article 1 of Protocol No. 1 to 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

17. On 28 February 2013 the applicant had lodged a complaint with the Aarhus Convention Compliance Committee ("the Aarhus Committee"). She alleged, *inter alia*, that the United Kingdom had failed to comply with Article 9(3) and (4) of 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". Her complaint (Communication ACCC/C/2013/86) was joined to an earlier complaint

brought by the Environmental Law Foundation alleging that the United Kingdom had failed to comply with its obligations under the Aarhus Convention since section 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 would result in prohibitively expensive costs in private nuisance proceedings in breach of Article 9(3), (4) and (5) of the Aarhus Convention (Communication ACCC/C/2013/85).

18. 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 Article 9(3) of the Aarhus Convention could apply to private nuisance claims where the nuisance complained of affected the "environment", in the broad meaning of this term; that the United Kingdom had failed to ensure that private nuisance proceedings which fell within the scope of Article 9(3) were not prohibitively expensive; and that the alternative administrative and judicial procedures relied on by the United Kingdom Government did not, either individually or collectively, provide for a fully adequate alternative to private nuisance proceedings. It therefore found that the United Kingdom had failed to comply with Article 9(4).

19. The applicant had also complained about her private nuisance claim for noise and dust from the opencast coal mining operation; however, the Aarhus Committee decided not to examine this complaint since at the time of its deliberations it was still ongoing at domestic level.

20. 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 generally or in respect of the *Coventry v. Lawrence* litigation 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

21. 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.

22. 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

23. 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.

24. 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.

3. The Human Rights Act 1998

25. Section 7(1) of the Human Rights Act 1998 provides that:

> "A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act."

C. Relevant international and European Union legal materials

1. The Aarhus Convention

26. 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.

27. 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."

28. 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.

29. The Aarhus Convention Compliance Committee ("the Aarhus Committee"), established by Decision 1/7 of the meeting of the Parties to the Aarhus Convention, is responsible for reviewing compliance with the provisions of the Aarhus Convention. It may consider communications from persons alleging non-compliance by one or more State parties, and if it finds that a State has failed to comply it may make recommendations to the Meeting of the Parties, which has power to adopt response measures.

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

30. 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

31. Under Article 8 and Article 1 of Protocol No. 1 to the Convention, the applicant alleged that the respondent State had failed to provide an appropriate mechanism for her to secure the proper regulation of private sector activities and had failed to protect her from dust and noise pollution from the open-cast coal mining, since pursuing private nuisance proceedings carried a significant costs risk which in practice precluded her from bringing proceedings. Under Article 13, she alleged that she did not enjoy an effective remedy in respect of her complaints under Article 8 and Article 1 of Protocol No. 1.

THE LAW

A. The parties' submissions

1. The Government

32. The Government submitted that insofar as the present application raised allegations of a systemic failure by the United Kingdom to have in place an effective mechanism through which individuals could seek the cessation of activities alleged to cause them an environmental nuisance, it

was "substantially the same", within the meaning of Article 35 § 2 (b) of the Convention, as that which had been considered by the Aarhus Committee in March 2014, and which would be further considered at the next Meeting of the Parties in or around September 2017.

33. The Government further submitted that the remainder of the applicant's complaints concerned her particular dispute with M. Ltd. As this was a horizontal dispute between two private parties, neither Article 8 nor Article 1 of Protocol No. 1 could apply. The Government observed that it would have been open to the applicant to have pressed her local authority to take action against M. Ltd and if it declined to do so she could have sought permission to apply for judicial review. She did not pursue this course of action and there could be no arguable claim that Article 8 and/or Article 1 of Protocol No. 1 were engaged as against the respondent State.

34. In the absence of any arguable complaint under Article 8 or Article 1 of Protocol No. 1, Article 13 did not apply.

35. In any case, the Government observed that the applicant had only raised the Convention arguments upon which she now sought to rely in her applications for permission to appeal to the Supreme Court. However, by this stage it was far too late for her to introduce new grounds not pleaded in the two courts below.

2. The applicant

36. Although the applicant did not accept that the Aarhus Committee could be regarded as "another procedure of international investigation or settlement" within the meaning of Article 35 § 2 (b) of the Convention, she confirmed that a complaint concerning a systemic failure by the United Kingdom to have in place an effective mechanism through which individuals could seek the cessation of activities alleged to cause them an environmental nuisance was not part of her application to this Court.

37. With regard to the remainder of her complaints, she submitted that the failure to regulate private sector activities was precisely the type of environmental case that was within the scope of Article 8 and Article 1 of Protocol No. 1.

38. Finally, the applicant contended that it was irrelevant that she had only invoked her Convention complaints in her applications to the Supreme Court. It was the approach of the Court of Appeal that had raised concerns that her human rights had been breached, and it had therefore been appropriate to raise before the Supreme Court, as a court of last resort, the complaints upon which she now sought to rely.

B. The Court's assessment

39. It is clear from the applicant's submissions that she does not now seek to reiterate the "systemic" complaint considered by the Aarhus

Committee, namely that the respondent State failed to ensure that private nuisance proceedings were "fair, equitable, timely and not prohibitively expensive" (see paragraph 17 above). Consequently, the applicant's complaints before this Court concern only the alleged failure by the State to protect her from the actions of M. Ltd by enabling her to bring a private nuisance claim without incurring a significant costs' risk. As the Aarhus Committee declined to consider this complaint (see paragraph 19 above), it is not necessary for the Court to decide whether that Committee could be regarded as "another procedure of international investigation or settlement" within the meaning of Article 35 § 2 (b) of the Convention.

40. In view of the fact that M. Ltd was a private company, the Government have submitted that neither Article 8 nor Article 1 of Protocol No. 1 could apply to the applicant's complaint before this Court. It is true that had the applicant brought private nuisance proceedings, she could not have argued that M. Ltd was breaching her rights under either of these Articles since its actions did not engage the liability of the State. However, the applicant does not suggest that the nuisance caused by M. Ltd breached her rights under Article 8 or Article 1 of Protocol No. 1; rather, she is complaining that in refusing to grant a PCO the domestic courts failed to protect her from the actions of M. Ltd because she would have been unable to bring a private nuisance claim without incurring a significant costs' risk. Nevertheless, while the Court would not exclude the possibility that the State's responsibility under the Convention could potentially be engaged in such a case, in view of its findings at paragraphs 41-44 below it is not necessary for it to reach any firm conclusion as to whether Article 8 or Article 1 of Protocol No. 1 were applicable in the present case.

41. It is now well-established in the Court's case-law that those who wish to invoke its supervisory jurisdiction as concerns complaints against a State are obliged to first have normal recourse to remedies which are available and sufficient to afford redress in respect of the breaches alleged (see, amongst many authorities, *Akdivar and Others v. Turkey*, 16 September 1996, §§ 65-67, Reports of Judgments and Decisions 1996−IV and *Vučković and Others v. Serbia (preliminary objection)* [GC], no. 17153/11 and 29 other cases, §§ 69-71, 25 March 2014). In the United Kingdom, the human rights and fundamental freedoms defined in the Convention and its Protocol No. 1 are now part of domestic law. Therefore, pursuant to section 7 of the Human Rights Act 1998 (see paragraph 25 above), where a public authority, including the domestic courts, has acted or proposes to act in a manner incompatible with Convention rights, the person concerned may either bring proceedings against the authority or rely on her Convention rights in any legal proceedings. Consequently, although the applicant could not have invoked her Convention rights against a private party in any private nuisance claim, there is no reason to believe – and, indeed, the applicant does not appear to suggest – that she could not have

argued before either the High Court or the Court of Appeal that the refusal to make a PCO would be in breach of the courts' obligation under the Convention to protect her from an interference with her home by a private company. Nevertheless, she did not directly invoke her Convention rights at either level of jurisdiction, but instead relied solely on Article 9 of the Aarhus Convention and Article 11 of the EU Directive (see paragraphs 10 and 13 above).

42. In fact, the applicant's Convention rights were invoked for the first time in her application for leave to appeal to the Supreme Court, and only then in a brief paragraph at the end of the grounds, which principally focused the lower courts' treatment of her arguments under the Aarhus Convention and EU Directive (see paragraph 16 above). While in certain cases applicants might be able to demonstrate good reasons for only raising their Convention complaints at such a late stage of proceedings, in the present case the applicant has not provided any satisfactory explanation for her failure to raise them before the lower courts, except to state – in somewhat vague terms – that it was the approach of the Court of Appeal that raised concerns that her human rights had been breached (see paragraph 38 above). In fact, upon reading her grounds of appeal, it would appear that it was the judgment of the Supreme Court in the case of *Coventry v. Lawrence (No 2)* which alerted her legal team to the possibility that costs' issues in private nuisance claims could give rise to issues under the Convention (see paragraph 16 above).

43. Given that permission to appeal to the Supreme Court is only granted for applications that raise an arguable point of law of general public importance (see paragraph 16 above), and only a small percentage of applications meet this strict test, the applicant cannot be said to have provided the domestic courts with the opportunity which is in principle intended to be afforded to a Contracting State by Article 35 § 1 of the Convention, namely the opportunity of addressing, and thereby preventing or putting right, the particular Convention violation alleged against it (see, for example, *Azinas*, cited above, § 41).

44. In light of the foregoing, the application must be rejected as inadmissible in accordance with Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 5 October 2017.

Renata Degener
Deputy Registrar

Kristina Pardalos
President