Neutral Citation Number: [2022] EWHC 450 (Admin)

Case No: CO/2131/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN WALES

Cardiff Civil Justice Centre
2 Park Street
Cardiff CF10 1ET

Date: 04/03/2022

Before :

MR JUSTICE EYRE

- -

Between :

R (on the application of CATHERINE LEWIS)	**Claimant**
- and -	
THE WELSH MINISTERS	**Defendant**
-and-	
VELINDRE UNIVERSITY NHS TRUST	
	Interested Party

- -
- -

Christian J Howells and Nia Gowman (instructed by **Deighton Pierce Glynn**) for the **Claimant**
Rhodri Williams QC (instructed by **Geldards LLP**) for the **Defendant**
Emyr Jones (instructed by **Mills and Reeve Solicitors**) for the **Interested Party**

Hearing date: 17th November 2021 followed by written submissions on the issue of costs capping

- -

Approved Judgment

THE HON. MR JUSTICE EYRE

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time of hand-down was 10.00am on 4 March 2022

Mr Justice Eyre:

1. On 19th March 2021 the Defendant approved the Interested Party's Outline Business Case to build the new Velindre Cancer Centre on a site at the Northern Meadows in Whitchurch, Cardiff.

2. The Claimant sought judicial review of that decision on three grounds. The first was an alleged failure to take into account all material considerations and/or to make sufficient enquiries. In particular it was said that there had been a breach of the Defendant's *Tameside* duty with failure to make reasonable enquiries as to when the new University Hospital of Wales would be operational and the feasibility of co-locating the new Velindre Cancer Centre in that development. Further there was said to have been a failure to obtain a clinical review of the proposed stand-alone unit and a failure to ascertain whether the relevant health board would establish an oncology footprint at the University Hospital of Wales. The second ground was an alleged breach of the duty to carry out sustainable development imposed on the Defendant by section 3 of the Well-being of Future Generations (Wales) Act 2015. It was said that the decision was based on short term need and would have a detrimental long term effect because it would have the consequence of a less advantageous clinical model for cancer care being adopted for the future. The third ground alleged a breach of the duty to seek to maintain and enhance bio-diversity and related matters in breach of sections 6 and 7 of the Environment (Wales) Act 2016. In that regard the Claimant contended that the Defendant was wrong in saying that those matters were the responsibility of the relevant local planning authority and that the Defendant itself had a duty which it had failed to follow. The Claimant contended that the claim was an Aarhus Convention ('the Convention') claim and sought a limit on costs on that basis and/or a judicial review costs capping order pursuant to CPR Pt 45.16 and following.

3. Sir Ross Cranston refused permission by an order of 21st September 2021 directing at the same time that a compliant application for costs capping and/or an Aarhus Convention order be filed within 14 days failing which the Defendant and the Interested Party were to have their costs in the sums summarily assessed.

4. The Claimant renewed her application for permission and the matter came before me on 17th November 2021. For the reasons which I explained in my *ex tempore* judgment on that day I concluded that none of the three grounds disclosed a judicial review claim with any real prospect of success and I refused permission.

5. I ordered that the Claimant pay the Defendant's costs summarily assessed in the sum of £10,328.50 and the costs of the Interested Party summarily assessed in the sum of £20,000. However, that part of my order was subject to determination of the question of the Claimant's application for a costs limit pursuant to the Aarhus Convention and CPR Pt 45.41 and following. I then gave directions for the sequential filing of written submissions on that issue. The order to be made follows consideration of those submissions and this judgment contains the reasons for that order. Permission having been refused the application for costs capping pursuant to Pt 46.16 has fallen away.

The Relevant Provisions of the Rules and the Convention.

6. Article 1 of the Convention identifies the objective of the Convention as being:

> "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."

7. Article 4 of the Convention makes provision for access to environmental information and article 6 addresses public participation in decisions on specified activities.

8. Article 9(1) provides that the parties to the Convention are to ensure that those who consider their requests for information under article 4 have not been adequately met have access to a review procedure. Similarly article 9(2) provides that the parties are to ensure that members of the public have access to a review procedure to challenge the legality of decisions which are subject to the provisions of article 6. Then article 9(3) provides that:

> "in addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, 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."

9. The costs limits and procedure applicable to claims falling within the scope of the Convention are laid down in section VII of Pt 45 which provides at 45.41(2) as follows:

> "(a) `Aarhus Convention Claim' means a claim brought by one or more members of the public by judicial review or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions, and which is within the scope of article 9(1) or 9(2) or 9(3) of [the Aarhus Convention]
>
> "(b) references to a member or members of the public are to be construed in accordance with the Aarhus Convention."

10. Pt 45.43 (2) then sets out the limits on the costs which a claimant may be ordered to pay in an Aarhus Convention Claim providing a limit of £5,000 where "the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal persons" and of £10,000 "in all other cases".

The Relevant Limit on the Claimant's Costs Liability.

11. The initial pre-action protocol letter sent by the solicitors now acting for the Claimant was said to have been written "on behalf of Save the Northern Meadows, a group formed of concerned citizens who wish to protect the Northern Meadows in the Whitchurch area of Cardiff from development". The members of that group set up a crowdfunding website. In its response to that correspondence the Defendant took the point that Save the Northern Meadows did "not have legal personality for the purposes of issuing legal proceedings for judicial review" and sought details of the "correct legal identity (or identities) of the Claimant". The point was repeated in subsequent correspondence by the Defendant and as a result correspondence thereafter was sent in the name of the Claimant; she set up her own crowdfunding website; and ultimately commenced proceedings in her own name.

12. The Claimant's witness statement sets out her personal reasons for concern about the arrangements for cancer care at Velindre and more generally; her concern for the environment; and her particular interest in the Northern Meadows site.

13. The first question is whether in those circumstances the relevant limit if the claim is an Aarhus Convention Claim attracting costs protection is one of £5,000 or £10,000. In his written submissions on behalf of the Defendant Mr. Williams QC says that in those circumstances the Claimant is "manifestly not claiming only as an individual". In response Mr. Howells contends that the Claimant is "plainly an individual claimant".

14. The position is, in my judgement, not as plain nor as manifest as the competing submissions contend. However, I am satisfied that the Claimant falls within the scope of Pt 45.43(2)(a) and that the £5,000 limit applies. The Claimant is not bringing the claim as or on behalf of a business and so the question becomes one of whether she is bringing the claim on behalf of another legal person or persons. She is not. As the Defendant has pointed out Save the Northern Meadows is not a legal person. It is a group of individuals with a common concern but it has no legal personality. It is also of note that the Claimant explains that it is not a group with any defined membership, constitution, or subscription. The individuals who support the campaign doubtless wished the Claimant well in her challenge to the Defendant's decision but the claim was not brought on behalf of them. In that regard it is also of note in the absence of any membership structure it would not be possible to identify the other legal persons on whose behalf the Claimant is said to have brought the claim. It is relevant that the Claimant set out her own personal reasons for having particular concerns about the course set out in the Outline Business Case. It does appear that the crowdfunding page controlled by the Claimant makes use of the group's logo and email domain but that is not sufficient to take the Claimant outside the scope of Pt 45.43(2)(a).

Compliance with Pt 45.42(1)(b).

15. Pt 45.42(1)(b) requires a claimant who contends that his or her claim is an Aarhus Convention Claim to file and serve a schedule setting out his or her significant assets, liabilities, income, and expenditure together with the aggregate amount of the financial support which has been and which is likely to be provided by others.

16. The Defendant says that the information provided by the Claimant was deficient. The Claimant provided details of the amounts received on the crowdfunding site controlled by her and said that her target was to raise a total of £35,000 that being "the amount I reasonably expect to receive from the public including STNM supporters". The Defendant says that at the time of its written submissions there were further sums on the crowdfunding site of the Save the Northern Meadows campaign and that the media coverage resulting from the court proceedings would be likely to lead to a greater sum being provided by members of the public.

17. I am satisfied that the information provided by the Claimant met the requirements of Pt 45.42(1)(b). That rule requires an assessment to be made of the sums likely to be received but provided it was a genuine assessment the fact that more financial support than was anticipated is obtained does not mean that there can be said to have been a failure to provide the requisite information. As I have explained above the Claimant is bringing the claim as an individual and not on behalf of other legal persons and so the funds paid to Save the Northern Meadows by way of that group's crowdfunding

exercise are not material. The position is not altered by the fact that there is said to have been "significant coverage in the media" of the campaign. The Defendant contends that the coverage will have led to extra funding being provided for the campaign and by implication being available for the Claimant. That can be little more than speculation. Such coverage is likely to have increased awareness of the Claimant's claim and of the campaign in respect of the Northern Meadows site but it is also likely to have alerted members of the public to the reasons why the Defendant and the Interested Party propose the project and to the repeated judicial refusal of permission for the claim. There is no evidence as to these matters let alone as to their financial effect and I am not able to conclude that the funding will have been increased nor that increased funding for the campaign will have altered the Claimant's financial position.

18. In the light of those conclusions I turn to the question of whether the claim is an Aarhus Convention Claim within the meaning of Pt 45.41.

The Parties' Contentions in respect of the Nature of the Claim.

19. The Defendant adopted the submissions of the Interested Party which are noted below but as an alternative contention Mr Williams accepted that of the three grounds on which the claim had been based Ground 3 could be regarded as being potentially within the scope of the Aarhus Convention as being a challenge by reference to an alleged breach of the law relating to the environment. However, he said that neither Ground 1 nor Ground 2 could be so characterised. In addition he said that Ground 3 should be seen as having been a "makeweight ground of claim" added for the purpose of enabling a claim for costs capping to be made. That, Mr Williams submitted, was an abuse of process. In those circumstances the application for an order under the Convention should be refused. Alternatively, it was submitted that any such order should be made only in respect of Ground 3 and the matter approached on the footing that the bulk of the costs had been incurred in respect of Grounds 1 and 2.

20. For the Interested Party Mr Jones adopted the Defendant's submissions as a fallback position. However, his main contention was that the claim in its entirety fell outside the scope of the Convention. Mr Jones said that in deciding whether the costs capping provisions applied regard was to be had to the nature of the decision being challenged rather than the ground of review on which the challenge was based. Here the relevant decision was the Defendant's approval of the Outline Business Case. That was a decision about funding and not about environmental matters. As a consequence the challenge to that decision even though it made reference to environmental questions was outside the scope of the Convention. The environmental acceptability or otherwise of the steps needed to implement the decision to build the new centre on the North Meadows site was a matter for the planning system and the decisions made and to be made under the planning process gave effect to the Claimant's rights under the Aarhus Convention. Mr Jones said that for the court to take a different view and to conclude that the challenge to the approval of the Outline Business Case (characterised by him as a funding decision) was within the scope of the Convention would mean "that a challenge by a public body to build anything would be subject to the Convention and the costs protection". Mr Jones said that was an unattractive consequence to which regard should be had in considering whether the current claim was within the scope of the Convention. In addition Mr Jones invoked the decision of Ouseley J in *R (ex p Islington and Camden LBC) v Mayor of London & Royal Mail Group* [2015] EWHC 3035 at [148] as authority for the proposition that "it is the nature of the decision in

question and not the ground of review which determines whether the claim is subject to the Aarhus cap".

21. For the Claimant Mr Howells submitted that Ground 3 was squarely within the scope of article 9(3) of the Convention. That was because regard was to be had to the claim as a whole. When that was done the claim was to be seen as involving a challenge which was advanced expressly on the footing that the decision of the Defendant had contravened the relevant provisions of a national law which related to the environment. Mr Howells submitted that the Claimant's primary motivation was to protect her local environment. Further, he said that there was no adequate basis for the contention that Ground 3 had been advanced only as a makeweight or that there had been an abuse of process in its inclusion.

Discussion.

22. I am satisfied that Ground 3 was included in the claim in good faith and not for any illegitimate purpose. The ground was properly articulated in the Statement of Facts and Grounds and was advanced with force although it was not at the forefront of the Claimant's case. I found that neither it nor the other grounds had sufficient prospects of success for permission to be granted but that does not mean that the Claimant was not advancing it genuinely. There is no basis on which I could conclude that Ground 3 was included in the claim other than with a view to obtaining relief on the basis of that ground in addition to or as an alternative to Grounds 1 and 2.

23. It follows that I must consider whether the challenge to the approval of the Outline Business Case which included the contention that the decision was a breach of the Defendant's duty under sections 6 and 7 of the Environment (Wales) Act 2016 was an Aarhus Convention Claim.

24. I have already noted the objective of the Convention and in *Venn v Communities and Local Government Secretary* [2014] EWCA Civ 1539, [2015] 1 WLR 2328 Sullivan LJ (with whom Gloster and Vos LJJ agreed) confirmed, at [11], that environmental matters are given a "broad meaning" in the Convention.

25. In *R (McMorn) v Natural England* [2015] EWHC 3297 (Admin), [2016] PTSR 750 Ouseley J explained, at [239] that in article 9(3):

> "The word `contravene' does not mean that the article 9(3) obligation applies only where the claim succeeds in establishing a contravention; it includes a challenge founded on the contention that there has been such a contravention."

26. In his submissions Mr Jones placed considerable weight on Ouseley J's judgement in *R (ex p Islington and Camden LBC) v Mayor of London & Royal Mail Group*, a judgment delivered just over a month after that in *McMorn*. He relied in particular on [148] where Ouseley J said:

> "it is to be noted that the question of whether a claim is an Aarhus Convention claim is to be determined not by the grounds upon on which a claim is brought, but by the decision which is challenged. … It does not seem to me therefore that there is any value in analysing the precise nature of the claim which is brought. That is not what CPR 45.41 focuses on."

27. However, it is important to note that at the time of Ouseley J's judgment the definition in the Rules of an Aarhus Convention Claim was different from that which is now applicable. In 2015 Pt 45.41(2) defined such a claim as:

> "A claim for judicial review of a decision, act or omission all or part of which is subject to the [Aarhus Convention] including a claim which proceeds on the basis that the decision, act or omission, or part of it, is so subject."

28. It was in respect of that definition that Ouseley J gave the explanation relied on by Mr Jones. Indeed at [149] Ouseley J made it clear that it was the wording of the rule which had led to that conclusion saying:

> "if the Rule Committee meant instead of the decision that one should focus on the nature of the claim rather than the decision struck at, it would lead to some very odd results, where a decision which was undoubtedly covered by Aarhus would not receive costs protection because some peculiar financial point was being made about it. That is not the intention. The intention is to protect the decision not the nature of the claim."

29. I have rehearsed at [9] above the current wording of Pt 45.41(2)(a). As a matter of grammatical construction the definition now in force does require attention to be focused on the nature of the claim rather than on the nature of the decision being challenged. The current definition lays down four requirements which must be satisfied for a claim to be an Aarhus Convention Claim.

i) First, it has to be a "claim brought by one or more members of the public".

ii) Next, the claim has to be made by way of "judicial review or review under statute".

iii) Then it has to challenge "the legality of any decision, act or omission of a body exercising public functions".

iv) Finally, it must be a claim "which is within the scope of Article 9(1) or 9(2) or 9(3) of [the Aarhus Convention]".

30. That last requirement is a requirement as to the claim being made and not a description of the decision being challenged. This follows from the language and structure of Pt 45.41(2)(a) and in particular the use of the words "and which" before the words "is within the scope of Article 9(1) or 9(2) or 9(3) of [the Aarhus Convention]". A comma separates the words "and which" from the preceding words "any decision, act or omission of a body exercising public functions" and consequently the words following "and which" are to be read as referring back to the words "a claim" and not as being a reference to the decision under challenge.

31. What then is a claim within the scope of article 9(3)? Mr Jones sought to argue that there should even there be regard to the nature of the decision being challenged. In my judgement such an approach would be consistent with neither the purpose of the Convention nor the terms of article 9(3). The focus of the latter is on the nature of the provision which is said to have been contravened and not on the nature of the act or omission which is said to have constituted the contravention. The article is concerned with acts or omissions which contravene the provisions of a "national law relating to the environment". Accordingly, a claim is within the scope of article 9(3) if it alleges a breach of such a national law. This construction is supported by Ouseley J's explanation

in *McMorn* of the meaning of "contravene" in article 9(3). As was said there "contravene" includes "a challenge founded on the contention that there has been such a contravention" even if that contention ultimately fails.

32. The nature and subject matter of the act or omission being challenged will make it more or less likely that there has in fact been a contravention of such a law (and potentially whether the ground of challenge is being advanced in good faith) but to determine whether a claim is within the scope of article 9(3) the court is to look to the nature of the provision which is said to have been contravened.

33. Here ground 3 was in clear terms alleging a breach of the provisions of the Environment (Wales) Act 2016. Sections 6 and 7 of that Act were manifestly provisions of national law relating to the environment. I found that that ground did not have sufficient prospects of success to warrant the grant of permission but it was an allegation which was made in good faith and which was of a breach of a law relating to the environment. In those circumstances Ground 3 was within the scope of article 9(3).

34. I am satisfied that if the limit imposed by Pt 45.43 applies to a claim then it applies to the entirety of the claim and that it is not open to the court to find that the limit applies to some elements of a claim and not others. Accordingly, I reject the Defendant's contention (adopted as a fall-back position by the Interested Party) that Grounds 1 and 2 should be treated differently from Ground 3 and that the costs attributable to those grounds were outside the costs limit. I do so because such an approach would not be compatible with the references in Pt 45 section VII to "a claim" and "the claim". It would also not be compatible with the fact that there is a single claim for judicial review albeit one in which more than one ground is advanced for the granting of that relief. Moreover, the approach urged on me by the Defendant would have the potential for generating additional expense and satellite litigation. It would open the door to argument as to which parts of a claim were and which were not within the scope of Pt 45 section VII and as to which part of the costs were attributable to which ground. That would be an undesirable consequence and one which would be inconsistent with the Overriding Objective and that is a matter to which I am required by Pt 1.2 to have regard when interpreting the Rules.

35. Accordingly, at least where a ground which brings the Aarhus Convention costs limit into operation is included in a claim in good faith it is not appropriate to distinguish between the costs attributable to that ground and those attributable to other grounds. The situation might be different where the court is satisfied that the ground is not advanced in good faith and that its inclusion is an illegitimate attempt to obtain costs protection for a claim which is not in truth within the scope of the Convention. In considering those questions the nature of the decision being challenged may become relevant. It is conceivable that there would be circumstances in which it could not credibly be said that the decision under challenge had anything to do with environmental matters or could in good faith be said to have been a breach of the law relating to such matters. That might be a factor which would cause the court to conclude that a ground making reference to such matters was not included in the claim in good faith. However, I am satisfied that it is not the position here and I will not speculate on what the correct approach would be in such circumstances.

36. It follows that the claim here included a ground of challenge which was within the scope of article 9(3). The claim was, therefore, an Aarhus Convention Claim for the purposes of Pt 45 section VII and the costs limit imposed by Pt 45.43 applied.

Conclusions.

37. In summary, therefore, I have found that the Claimant is claiming as an individual; that she has complied with the requirements of Pt 45.42(1)(b); and that her claim is an Aarhus Convention Claim within the meaning of Pt 45.41(2). The consequence of those conclusions is that the costs payable by the Claimant are limited to £5,000 apportioned between the Defendant and the Interested Party by reference to their respective proportions of the total costs bill. In addition the effect of Pt 45.45(3)(b) is that the normal approach is that a defendant who unsuccessfully contends that a claim is not an Aarhus Convention Claim shall pay the costs of that issue. My order has made provision for that and for the costs so payable to be set off against the costs payable by the Claimant.

ORDER

UPON READING the written submissions lodged pursuant to the order of 24th November 2021

And FOR THE REASONS set out in the judgment handed down on ...

AND UPON the court finding that the claim is an Aarhus Convention Claim within the meaning of CPR Pt 45.41 (2)(a).

IT IS ORDERED that:

1) The Defendant and the Interested Party shall pay the Claimant's costs of determining whether the claim is an Aarhus Convention Claim. Such costs are to be assessed on the standard basis in default of agreement and are to be payable notwithstanding the limit imposed by Pt 45.43(3).

2) The costs payable by the Claimant pursuant to paragraph 2 of the order of 24th November 2021 are limited to the sum of £5,000 and are to be payable as to £1,702.50 to the Defendant and as to £3,297.50 to the Interested Party.

3) The sum payable pursuant to paragraph 1 hereof is to be set off against the sums payable pursuant to paragraph 2 hereof such that the Claimant shall pay the Defendant and the Interested Party only such sum by way of costs as represents that part of the sum of £5,000, if any, as remains after deduction from that sum of the Claimant's costs of determining whether the claim is an Aarhus Convention Claim. The said remaining sum shall be apportioned between the Defendant and the Interested Party in the proportions 34.05: 65.95.

Dated 4 March 2022