Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 18 October 2012[1]

Case C-260/11

**The Queen, on the application of
David Edwards and Another
v
Environment Agency and Others**

(Reference for a preliminary ruling from the Supreme Court (United Kingdom))

(Aarhus Convention — Directive 2003/35/EC — Directive 85/337/EEC — Assessment of the effects of projects on the environment — Directive 96/61/EC — Integrated pollution prevention and control — Access to justice — Concept of 'prohibitively expensive' judicial proceedings)

I – Introduction

1. How much may judicial proceedings in an environmental matter cost? This question is the subject of the present reference for a preliminary ruling. Under the Aarhus Convention[2] and the provisions implementing it in the Environmental Impact Assessment (EIA) Directive[3] and the IPPC Directive,[4] judicial proceedings in environmental disputes may not be prohibitively expensive.

2. However, in England and Wales there are considerable risks before courts in terms of costs, in particular because of the fees which are normally payable for lawyers there. The Supreme Court is therefore asking, following the conclusion of environmental proceedings, how it should apply the Convention and the corresponding provisions of the directives in connection with a dispute concerning the order for costs.

1 — Original language: German.

2 — Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L 124, p. 4).

3 — Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156, p. 17); codified by Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1).

4 — Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26), as amended by Directive 2003/35; codified by Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (OJ 2008 L 24, p. 8) and replaced by Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L 334, p. 17).

II – Legal framework

A – *International law*

3. The relevant rules on the legal costs of environmental proceedings are contained in the Aarhus Convention, which was signed by the then European Community on 25 June 1998 in Aarhus (Denmark). [5]

4. Access to justice is addressed in the seventh, eighth and 18th recitals in the preamble to the Convention:

'Recognising also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,

Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,

…

Concerned that effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced'.

5. The fundamental objective of the Convention is laid down in Article 1:

'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.'

6. Article 3(8) of the Convention mentions costs in judicial proceedings:

'Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalised, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings.'

7. Article 9 of the Convention regulates access to justice in environmental matters. Article 9(4) and (5) includes mention of costs:

'4. 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. …

5. … each Party … shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.'

5 — Approved by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

8. Lastly, reference should be made to the decision-making practice of the Aarhus Convention Compliance Committee ('the Compliance Committee'). The Compliance Committee, which is composed of experts, was established by the parties in order to contribute to the review, provided for in Article 15 of the Convention, of compliance with its provisions. It examines primarily complaints by individuals.[6] It concludes its investigations with 'findings and recommendations'.

B – *European Union ('EU') law*

9. In order to implement the Aarhus Convention, Directive 2003/35/EC[7] inserted Article 10a into the EIA Directive and Article 15a into the IPPC Directive. Both provisions govern access to justice in certain environmental disputes and each provide, in the fifth paragraph:[8]

'Any such procedure shall be fair, equitable, timely and not prohibitively expensive.'

III – Facts and reference for a preliminary ruling

10. The present proceedings have their origin in an application by David Edwards for judicial review of a decision by the Environment Agency to issue a permit for the operation of a cement works. As far as can be seen, the undertaking concerned did not participate in those proceedings.

11. The application was dismissed at first instance in 2005. Mr Edwards then appealed against that decision to the Court of Appeal. Before the Court of Appeal, Mrs Pallikaropoulos was added as an appellant for the remainder of the proceedings after Mr Edwards withdrew. Her liability for costs in the Court of Appeal was capped in advance at GBP 2 000. The Court of Appeal dismissed the appeal and in 2006 made an order for costs by which the respondents' costs, capped at the abovementioned amount, were awarded against Mrs Pallikaropoulos.

12. Mrs Pallikaropoulos then appealed to the House of Lords. At the outset of the proceedings she applied for a protective costs order, by which she sought a cap on her liability for costs in that appeal. However, the House of Lords refused her application, inter alia because she had not provided information about her means or about the identity and means of those persons whom she represented.

13. On 16 April 2008, the House of Lords affirmed the decision of the Court of Appeal dismissing Mrs Pallikaropoulos' appeal. On 18 July 2008, the House of Lords pronounced an order for costs, in which Mrs Pallikaropoulos was ordered to pay the entire costs of the appeal to the House of Lords.

14. The order for costs is now the matter of dispute before the Supreme Court, which has taken the place of the House of Lords. In those proceedings, the Supreme Court has referred the following questions to the Court of Justice:

1. How should a national court approach the question of awards of costs against a member of the public who is an unsuccessful claimant in an environmental claim, having regard to the requirements of Article 9(4) of the Aarhus Convention, as implemented by Article 10a of the EIA Directive and Article 15a of the IPPC Directive?

6 — See http://www.unece.org/env/pp/pubcom.htm.

7 — Cited in footnote 3.

8 — Respectively (i) now the second subparagraph of Article 11(4) of Directive 2011/92 and (ii) for an intermediate period, the second subparagraph of Article 16(4) of Directive 2008/1 and now the second subparagraph of Article 25(4) of Directive 2010/75.

2. Should the question whether the cost of the litigation is or is not 'prohibitively expensive' within the meaning of Article 9(4) of the Aarhus Convention as implemented by the directives be decided on an objective basis (by reference, for example, to the ability of an 'ordinary' member of the public to meet the potential liability for costs), or should it be decided on a subjective basis (by reference to the means of the particular claimant) or upon some combination of these two bases?

3. Is this entirely a matter for the national law of the Member State subject only to achieving the result laid down by the directives, namely that the proceedings in question are not 'prohibitively expensive'?

4. In considering whether proceedings are, or are not, 'prohibitively expensive', is it relevant that the claimant has not in fact been deterred from bringing or continuing with the proceedings?

5. Is a different approach to these issues permissible at the stage of (i) an appeal or (ii) a second appeal from that which requires to be taken at first instance?

15. Mrs Pallikaropoulos, the United Kingdom of Great Britain and Northern Ireland, the Kingdom of Denmark, Ireland, the Hellenic Republic and the European Commission submitted written observations and presented oral argument at the hearing on 13 September 2012.

IV – Legal assessment

16. The first and third questions asked by Supreme Court should be answered together, since they abstractly address the discretion enjoyed by the Member States in implementing the provisions in question (see under A). On the basis of the answer to these two questions the other questions concerning specific aspects can then be answered in turn (see under B, C and D).

A – *The first and third questions: discretion for domestic measures*

17. The first and third questions essentially ask whether the Court may decide how a national court should approach the question of the award of costs against a member of the public who is an unsuccessful claimant in an environmental claim with regard to the requirement of preventing prohibitively expensive judicial proceedings, or whether this is entirely a matter for the national law of the Member State, provided only that the proceedings in question do not become 'prohibitively expensive'.

18. Article 9(4) of the Aarhus Convention, the fifth paragraph of Article 10a of the EIA Directive and the fifth paragraph of Article 15a of the IPPC Directive each provide that environmental proceedings must be fair, equitable, timely and not prohibitively expensive.

19. As Ireland points out, under the third paragraph of Article 288 TFEU a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but is to leave to the national authorities the choice of form and methods. This fundamental freedom of choice enjoyed by the Member States is not called into question because the directives also implement an essentially identical provision of an international convention entered into by the European Union.

20. In the present case, the discretion thus granted is particularly broad because the abovementioned provisions do not contain any further rules on how prohibitive costs are specifically to be prevented.

21. The great diversity of cost regimes in the Member States underlines the need for that discretion. Neither Article 9(4) of the Convention nor the provisions of the directives are intended to effect a comprehensive harmonisation of those cost regimes. They require only the necessary selective adaptations.

22. It can therefore be stated by way of an interim conclusion that it is in principle for the Member States to determine how the result provided for in Article 9(4) of the Aarhus Convention, Article 10a of the EIA Directive and Article 15a of the IPPC Directive, namely that the judicial proceedings covered are not prohibitively expensive, is achieved.

23. Nevertheless, the discretion enjoyed by the Member States is not unlimited. The Court has already pointed out in connection with the Convention that in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. The Member States are, however, responsible for ensuring that those rights are effectively protected in each case. [9]

24. Consequently, the Member States' rules must actually prevent in each individual case the judicial proceedings covered from being prohibitively expensive.

25. The way in which the concept of 'prohibitively expensive' is to be interpreted, that is to say the way in which the result provided for in Article 9(4) of the Convention and in the directives is to be determined, cannot be left to the Member States. The need for the uniform application of EU law requires that the terms of a provision of EU law that makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose of the legislation in question; the Court relies additionally upon the principle of equality in this regard. [10] And in contrast, for example, to the case of the concepts of 'sufficient interest' and 'impairment of a right', for the concept of 'prohibitively expensive' the directives do not refer to national law.

26. Indications as to what is meant by the prevention of prohibitively expensive judicial proceedings can be derived from the wording of the provision, but also from its context, [11] that is to say, in the absence of further indications in Directive 2003/35, above all from the Aarhus Convention. Furthermore, the general requirements governing the transposition and implementation of EU law are important, in particular the need for sufficiently clear transposition, [12] the principles of effectiveness and equivalence, [13] and respect for fundamental rights under EU law. [14]

9 — Case C-240/09 *Lesoochranárske zoskupenie* [2011] ECR I-1255, paragraph 47; see also Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 44 et seq.

10 — Case 327/82 *Ekro* [1984] ECR ECR 107, paragraph 11; Case C-204/09 *Flachglas Torgau* [2012] ECR, paragraph 37; and Case C-376/11 *Pie Optiek* [2012] ECR, paragraph 33.

11 — See Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening* [2009] ECR I-9967, paragraph 45, on the recognition of non-governmental organisations.

12 — Case 29/84 *Commission* v *Germany* [1985] ECR 1661, paragraph 23, and Case C-427/07 *Commission* v *Ireland* [2009] ECR I-6277, paragraph 55 and the case-law cited.

13 — *Lesoochranárske zoskupenie* (cited in footnote 9), paragraphs 47 and 48; Case C-115/09 *Trianel Kohlekraftwerk Lünen* [2011] ECR I-3673, paragraph 43; and Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus and Roua* [2011] ECR I-9711, paragraph 52.

14 — Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 105; Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 68; and Case C-35/09 *Speranza* [2010] ECR I-6581, paragraph 28.

27. The concept of 'excessive' highlighted by the Commission, which describes the costs to be prevented in some language versions of the directives and in the corresponding translations of the Convention,[15] could refer to the principle of proportionality. That principle must be observed in any event when interpreting and implementing directives[16] and naturally precludes excessive costs for the access to justice provided for in the Aarhus Convention and the directives.

28. However, reducing costs protection to the principle of proportionality would fall short. In the three binding language versions of the Convention the concept of 'excessive' is not used. According to the French version, costs of procedures may not be prohibitive[17] and according to the English version the procedures are not to be prohibitively expensive.[18] The Russian version does not use the concept of 'prohibitive', but also seeks to ensure that procedures are not inaccessible on account of high costs.[19]

29. Consequently, it is not only a question of preventing costs which are excessive, that is to say disproportionate to the proceedings, but above all the proceedings may not be so expensive that the costs threaten to prevent them from being conducted. Reasonable but prohibitive costs are a possibility in particular in environmental proceedings relating to large-scale projects, since these may be very burdensome in every respect, for example with regard to the legal, scientific and technical questions raised and the number of parties.

30. It is therefore now possible to give a helpful answer to the first and third questions: Under Article 9(4) of the Aarhus Convention, Article 10a of the EIA Directive and Article 15a of the IPPC Directive, it is in principle for the Member States to determine how to avoid the judicial proceedings covered not being conducted on account of their costs. However, those measures must ensure in a sufficiently clear and binding manner that the objectives of the Aarhus Convention are satisfied in each individual case and, at the same time, observe the principles of effectiveness and equivalence and the fundamental rights under EU law.

B – *The second question: the relevant criteria*

31. Secondly, the Supreme Court wishes to know if the question whether the cost of the litigation is or is not 'prohibitively expensive' should be decided on an objective or a subjective basis or using a combination of both. It mentions, by way of example, the ability to pay of an 'ordinary' member of the public and the means of the particular claimant.

32. Ultimately, this question asks, in essence, how a national court should decide whether the costs of a case are still or are no longer compatible with Article 9(4) of the Aarhus Convention and the implementing provisions contained in the directives.

33. The Court is not able to give a comprehensive and definitive answer to this question if only because of the discretion enjoyed by the Member States, but also on account of the many possible scenarios. However, the context of Article 9(4) of the Aarhus Convention makes it possible to identify aspects which may be useful in determining permissible costs.

15 — In addition to the German version, this seems to be true of the Czech, Spanish, Hungarian, Italian, Lithuanian, Latvian, Dutch, Polish and Portuguese versions of the relevant provisions.

16 — *Speranza* (cited in footnote 14), paragraphs 28 and 29.

17 — The French version states: '(L)es procédures … doivent être objectives, équitables et rapides sans que leur coût soit prohibitif.'

18 — The English version states: '(T)he procedures … shall … be fair, equitable, timely and not prohibitively expensive.'

19 — The Russian version of Article 9(4) states: 'Помимо и без ущерба для пункта 1 выше процедуры, упомянутые выше в пунктах 1, 2 и 3, должны обеспечивать адекватные и эффективные средства правовой защиты, включая при необходимости средства правовой защиты в виде судебного запрещения, и быть справедливыми, беспристрастными, своевременными и не связанными с недоступно высокими затратами.'

34. It should be stated, first, that Article 3(8) of the Aarhus Convention expressly permits reasonable costs. Article 9(4) and the provisions of the directives accordingly do not preclude an order for costs unless the amount is prohibitive. [20]

35. There are no simple criteria governing when a cost claim is prohibitive. When the Court ruled that fees amounting to EUR 20 and EUR 45 did not constitute an obstacle to the exercise of the rights of participation in an environmental impact assessment, it did not indicate any ground on which that finding was based. [21] Nor did it state grounds why the direct costs for supplying information on the environment, up to an amount of around EUR 5 000, should not dissuade persons from exercising the right to such information, whilst indirect costs, such as a contribution to the authority's fixed costs, should. [22]

36. The Compliance Committee [23] has already given its view on the issue of prohibitive costs on several occasions, indeed mainly in relation to the United Kingdom. [24] In each case it conducts a comprehensive assessment of the circumstances of the individual case and of the national system. This approach is necessary because Article 9(4) of the Convention – just like the provisions of the directives – does not contain any specific criteria.

37. The Commission also refers to the *Kreuz* [25] case before the European Court of Human Rights. However, that case did not concern the total costs of the judicial proceedings, but only a large advance of court fees which was payable by the applicant. In this context, the European Court of Human Rights mentioned that the amount was equal to the *average* annual salary in the State in question. In the view of the Commission, this is an indication supporting an objective standard. However, this idea cannot be discerned in the remainder of the grounds of the judgment. As the United Kingdom has noted, the primary issue was rather the individual capacity to pay of the person concerned, which is a subjective standard. [26]

38. Individual capacity to pay is also relevant with respect to the principle of effective legal protection for the purposes of Article 47 of the Charter of Fundamental Rights. Under the third paragraph of Article 47, legal aid must be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. Admittedly, the Convention does not absolutely require, under Article 9(5), the introduction of assistance mechanisms such as legal aid, [27] but only consideration of the 'establishment of appropriate assistance mechanisms'. However, legal aid makes it possible to prevent risks in terms of prohibitive costs in certain cases. [28] In so far as the enforcement of provisions of EU law is concerned, legal aid may even be absolutely necessary if the risks in terms of costs, which are acceptable in principle, constitute an insurmountable obstacle to access to justice on account of the limited capacity to pay of the person concerned. [29]

20 — *Commission* v *Ireland* (cited in footnote 12), paragraph 92.

21 — Case C-216/05 *Commission* v *Ireland* [2006] ECR I-10787, paragraph 45.

22 — Case C-217/97 *Commission* v *Germany* [1999] ECR I-5087, paragraph 47 et seq.

23 — With regard to the Aarhus Convention Compliance Committee, see above, point 8.

24 — Findings and recommendations of 24 September 2010, Morgan and Baker/United Kingdom (ACCC/C/2008/23, ECE/MP.PP/C.1/2010/6/Add.1, paragraph 49), Cultra Residents' Association/United Kingdom (ACCC/C/2008/27, paragraphs 44 and 45) and ClientEarth and Others/United Kingdom (ACCC/C/2008/33, ECE/MP.PP/C.1/2010/6/Add.3, paragraph 128 et seq.), and of 30 March 2012, DOF/Denmark (ACCC/C/2011/57, ECE/MP.PP/C.1/2012/7, paragraph 45 et seq.).

25 — *Kreuz v. Poland*, no. 28249/95, §§ 61 et seq., ECHR 2001-VI.

26 — See also the judgments of the European Court of Human Rights of 26 July 2005 in *Podbielski and PPU Polpure v. Poland*, no. 39199/98, § 67, and of 10 January 2006 in *Teltronic-CATV v. Poland*, no. 48140/99, in particular §§ 50 et seq., which concerned much lower advances.

27 — But see Compliance Committee, findings and recommendations of 18 June 2010, Plataforma Contra la Contaminación del Almendralejo/Spain (ACCC/C/2009/36, ECE/MP.PP/C.1/2010/4/Add.2, p. 12, paragraph 66).

28 — Compliance Committee, findings and recommendations in ClientEarth and Others/United Kingdom (cited in footnote 24), paragraph 92.

29 — See Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft* [2010] ECR I-13849, paragraphs 60 and 61, and the order of 13 June 2012 in Case C-156/12 *GREP*, paragraph 40 et seq.

39. Nevertheless, legal protection under the Aarhus Convention goes further than effective legal protection under Article 47 of the Charter of Fundamental Rights, as the Commission rightly points out. Article 47 expressly relates to the protection of *individual* rights. The basis for the assessment of the need to grant aid for effective legal protection is therefore the actual person whose rights and freedoms as guaranteed by the European Union have been violated, rather than the public interest of society, even if that interest may be one of the criteria for assessing the need for the aid. [30]

40. Legal protection in environmental matters, on the other hand, generally serves not only the individual interests of claimants, but also, or even exclusively, the public. This public interest has great importance in the European Union, since a high level of protection of the environment is one of the European Union's aims under Article 191(2) TFEU and Article 37 of the Charter of Fundamental Rights. [31]

41. The Convention has this two-fold interest in view. Under Article 1, each party must guarantee the right of access to justice in environmental matters 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 health and well-being. The seventh and eighth recitals in the preamble to the Convention confirm that aim and supplement it with the *duty* of every person to protect and improve the environment for the benefit of present and future generations. Consequently, according to its 18th recital, the Convention seeks to make effective judicial mechanisms accessible to the public, including organisations, so that its legitimate interests are protected and *the law is enforced*.

42. Recognition of the public interest in environmental protection is especially important since there may be many cases where the legally protected interests of particular individuals are not affected or are affected only peripherally. However, the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organisations.

43. The two-fold interest in environmental protection precludes risks in terms of prohibitive costs from being prevented only having regard to the capacity to pay of those who seek to enforce environmental law. They cannot be expected to bear the full risk in terms of costs of judicial proceedings up to the limit of their own capacity to pay if the proceedings are also, or even exclusively, in the public interest.

44. Consequently, in assessing whether costs of proceedings are prohibitive, due account must be taken of the respective public interest. Furthermore, the Compliance Committee rightly also infers this from the fair procedures likewise required by Article 9(4). [32]

45. Taking the public interest into account does not, however, rule out the inclusion of any individual interests of claimants. A person who combines extensive individual economic interests with proceedings to enforce environmental law can, as a rule, be expected to bear higher risks in terms of costs than a person who cannot anticipate any economic benefit. The threshold for accepting the existence of prohibitive costs may thus be higher where there are individual economic interests. This possibly explains why, in a dispute over odour nuisance between persons who were neighbours, hence a case with a relatively low public interest, the Compliance Committee did not consider a claim of more than GBP 5 000 in respect of part of the costs to be prohibitive. [33]

30 — *DEB Deutsche Energiehandels- und Beratungsgesellschaft* (cited in footnote 29), paragraph 42.

31 — See also the ninth recital in the preamble to the Treaty on European Union and Article 11 TFEU.

32 — See the findings and recommendations in Cultra Residents' Association/United Kingdom (cited in footnote 24), paragraph 45.

33 — Findings and recommendations in Morgan and Baker/United Kingdom (cited in footnote 24), paragraph 49.

46. Conversely, the presence of individual interests cannot prevent all account being taken of public interests that are also being pursued. For example, the individual interests of a few people affected by an airport project cannot, upon assessment of the permissible costs, justify disregard for the considerable public interest in the case which in any event stems from the fact that the group of those affected is very much wider. [34]

47. The prospects of success may also be relevant with regard to the extent of the public interest. A clearly hopeless action is not in the interest of the public, even if it has an interest in the subject-matter of the action in principle.

48. As regards the level of permissible costs, it is lastly significant that provisions of the Convention on judicial proceedings are to be interpreted with the aim of ensuring 'wide access to justice'. [35] 'Wide access to justice' is admittedly only expressly mentioned in Article 9(2) of the Convention and the corresponding provisions of the directives in connection with the preconditions for an action relating to a sufficient interest and the impairment of a right. However, Article 9(2) at least makes clear that this is a general objective of the Convention. This principle of interpretation must therefore also apply in determining permissible costs. It would not be compatible with wide access to justice if the considerable risks in terms of cost are, as a rule, liable to prevent proceedings.

49. The answer to the second question is therefore that in examining whether costs of proceedings are prohibitive, account must be taken of the objective and subjective circumstances of the case, with the aim of enabling wide access to justice. The insufficient financial capacity of the claimant may not constitute an obstacle to proceedings. It is necessary always, hence including when determining the costs which can be expected of claimants having capacity to pay, to take due account of the public interest in environmental protection in the case at issue.

C – *The fourth question: actual deterrence*

50. The fourth question asks whether it is relevant that the claimant has not in fact been deterred from bringing or continuing with the proceedings.

51. Such an approach could make the proscription of prohibitive costs redundant: if proceedings were conducted, the risk in terms of costs evidently did not prevent them. In the absence of proceedings, the question of costs remains hypothetical. However, this cannot be the conclusion.

52. The question can be explained by the fact that in the United Kingdom there is the possibility, before a hearing on the merits, of a decision on an application for a protective costs order. Thus, in the main proceedings, Mrs Pallikaropoulos' risk in terms of costs before the Court of Appeal was capped at GBP 2 000, whilst at last instance, before the then House of Lords, her application for a protective costs order was refused. It might be inferred from the fact that Mrs Pallikaropoulos nevertheless maintained her appeal before the House of Lords that the risk in terms of costs was not prohibitive.

34 — This is illustrated by the findings and recommendations in Cultra Residents' Association/United Kingdom (cited in footnote 24).

35 — See *Djurgården-Lilla Värtans Miljöskyddsförening* (cited in footnote 11), paragraph 45, on the recognition of non-governmental organisations.

53. It should be noted, first of all, in this regard that, despite certain practical problems in its arrangements,[36] an instrument like the application for a protective costs order is in principle an appropriate element in the implementation of Article 9(4) of the Convention and the provisions of the directives. The decision on such an application makes it possible to prevent prohibitive costs in advance and thus simultaneously removes a further possible obstacle to bringing proceedings, namely the uncertainty over the potential costs of the proceedings.

54. If the decision on the application for a protective costs order has already correctly implemented Article 9(4) of the Aarhus Convention and the corresponding provisions of the directives, this outcome must, as a rule, no longer be called into question. The refusal of the application for a protective costs order may then be regarded as an indication that the risk in terms of costs did not preclude proceedings. In exceptional cases, however, it may become necessary to limit the payable costs afterwards, for example, if new considerations emerge in the proceedings which are relevant to the weighting of the public interest or if the costs are actually much higher than had been expected when the decision was made on the application for a protective costs order.

55. If, on the other hand, insufficient regard was had to the relevant considerations for preventing prohibitive costs, it is not possible to use willingness to bring proceedings as an indication that the permitted risk in terms of costs was not prohibitive. This would amount to depriving the claimant of his right to the prevention of prohibitive costs. Rather, it would have to be ensured that those rights were effective in the order for costs after the conclusion of the proceedings on the merits.[37]

56. Consequently, the fact that, despite the refusal of an application for a protective costs order, the claimant has not in fact been deterred from bringing or continuing with the proceedings may be taken duly into account afterwards in an order for costs if the obligation to prevent prohibitive costs was observed in the decision on the application for a protective costs order.

D – *The fifth question: limitation of costs at different levels of jurisdiction*

57. Lastly, the Supreme Court asks whether a different approach is permissible with regard to the limitation of costs at the different levels of jurisdiction. In the main proceedings, costs protection was granted before the Court of Appeal, but not before the House of Lords.

58. Article 9(4) of the Convention and the provisions of the directives refer only to ‘procedures’ and do not differentiate between different levels of jurisdiction. It is true that the Convention does not require a certain appellate system, or even an appeal, to be guaranteed. However, the proceedings covered are not concluded until the decision in question becomes final. As a result, contrary to the view taken by Denmark, prohibitive costs must be prevented at all levels of jurisdiction.[38]

59. This also applies in principle to appeals lodged by a claimant who was protected against prohibitive costs at the lower level of jurisdiction. The criterion of procedural equality of arms, forming part of the fundamental right to a fair trial[39] which is also explicitly mentioned as a procedural principle in Article 9(4) of the Convention, prohibits the claimant from being exposed to the risk of prohibitive costs in appeal proceedings. Otherwise, it would have to be feared that the opposing party would gear its procedural strategy to an appeal being in practice ruled out for him.

36 — See the findings and recommendations in ClientEarth and Others/United Kingdom (cited in footnote 24), paragraph 129 et seq.

37 — Cf. Case C-275/09 *Brussels Hoofdstedelijk Gewest and Others* [2011] ECR I-1753, paragraph 37.

38 — Likewise, Compliance Committee, findings and recommendations of 21 January 2011, AJA and Others/Spain (ACCC/C/2008/24, ECE/MP.PP/C.1/2009/8/Add.1 …, p. 20, paragraph 108).

39 — *Ordre des barreaux francophones et germanophone and Others* (cited in footnote 14), paragraphs 29 to 31.

60. Mrs Pallikaropoulos also rightly states that under Article 267 TFEU only courts or tribunals of last instance are required to make a reference to the Court for a preliminary ruling in cases of doubt as to the interpretation or validity of EU law. If relevant questions have not yet been referred to the Court by the lower courts, it is not possible to bar the way to a court or tribunal which is required to make a reference by means of risks of prohibitive costs.

61. Nevertheless, it is also possible that after the decision by the lower court the public interest in the further continuation of the proceedings will dissipate or at least be reduced. It is therefore compatible with Article 9(4) of the Convention and with the provisions of the directives to re-examine at each level of jurisdiction the extent to which prohibitive costs must be prevented.

V – Conclusion

62. I therefore propose that the Court rule as follows:

(1) Under Article 9(4) of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters, Article 10a of Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC, and Article 15a of Directive 96/61/EC concerning integrated pollution prevention and control, as amended by Directive 2003/35, it is in principle for the Member States to determine how to avoid the judicial proceedings covered not being conducted on account of their costs. However, those measures must ensure in a sufficiently clear and binding manner that the objectives of the Aarhus Convention are satisfied in each individual case and, at the same time, observe the principles of effectiveness and equivalence and the fundamental rights under EU law.

(2) In examining whether costs of proceedings are prohibitive, account must be taken of the objective and subjective circumstances of the case, with the aim of enabling wide access to justice. The insufficient financial capacity of the claimant may not constitute an obstacle to proceedings. It is necessary always, hence including when determining the costs which can be expected of claimants having capacity to pay, to take due account of the public interest in environmental protection in the case at issue.

(3) The fact that, despite the refusal of an application for a protective costs order, the claimant has not in fact been deterred from bringing or continuing with the proceedings may be taken duly into account afterwards in an order for costs if the obligation to prevent prohibitive costs was observed in the decision on the application for a protective costs order.

(4) It is compatible with Article 9(4) of the Aarhus Convention and with Article 10a of Directive 85/337 and Article 15a of Directive 96/61 to re-examine at each level of jurisdiction the extent to which prohibitive costs must be prevented.