

Costs in judicial review claims where a settlement is reached before trial

Where a judicial review claim settles who should bear the costs? The Court of Appeal recently gave judgment in *M v London Borough of Croydon* [2012] EWCA Civ 595.

M challenged Croydon's assessment of his age and claimed to be two years younger. He brought a claim for judicial review, primarily on the basis that Croydon had failed to give proper weight to the evidence of Dr Birch. In November 2009, the Supreme Court gave judgment in *R (A) v Croydon LBC* and *R (M) v Lambeth LBC* [2009] UKSC 8 [2009] 1 WLR 2557, changing the way age assessment cases were handled. Thereafter permission was granted, and in due course, the Council instructed Dr Stern. He considered that it was possible that M was the age he claimed, and the Council decided to concede the claim. However, they declined to pay the costs. These were therefore determined by Lindblom J following written submissions from the parties. Relying on *R (Boxall) v Waltham Forest LBC* (2001) 4 CCLR 258 as explained by *R (Scott) v Hackney LBC* [2009] EWCA Civ 217 (a judge must not be tempted too readily to adopt the default position of making no order for costs) he made no order as to costs. This was not a case where the outcome was clear from the start.

The Court of Appeal then handed down its judgment in *R (Bahta) v Secretary of State for the Home Department* [2011] EWCA Civ 895. That case gave a very clear indication that

- Public authorities could not expect special treatment in Court
- Any degree of success prima facie entitled the Claimant to full costs
- Failure to follow the pre-action protocol would be punished in costs.

Sullivan LJ – one of those who have judgment in *Bahta* – gave M permission to appeal against the order of Lindblom J.

The Court of Appeal took the opportunity to give clear guidance on costs in judicial review claims. The main judgment was given by the Master of the Rolls, Lord Neuberger.

The general rule as to costs applies: winner gets their costs. However, the Court has a discretion: CPR 44.3(2). The same rule applies to judicial review as to ordinary civil litigation. However, this did not mean that *Boxall* was wrongly decided. The position on costs is nuanced. Where a Claimant wins on some points and not on others, there is room for a different order as to costs – the harsh position adopted in *Bahta* is mitigated. Further, even where a litigant has been wholly successful, there may be reasons for not ordering the Defendant to pay the whole of the Claimant's costs. In this case, the Court of Appeal held, there were two good reasons the Council could rely on: most importantly, the change in the law between the start of the case and the grant of permission. Until then, the Council was on good ground in defending the claim. Secondly, the unreliability of the Claimant's "expert" witness, Dr Birch.

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The Council was therefore ordered to pay 50% of the Claimant's costs to the date of the grant of permission and 100% thereafter.

Stanley Burnton LJ took the opportunity to emphasise the desirability of a complete settlement. The Court will have to go through the merits of the case unless there is a clear winner – and that requires an expenditure of time and resources that the court would prefer to expend elsewhere!

Local authorities when settling a claim for judicial review should therefore make a complete offer on costs – rather than asking the Court to rule on the assumption that there will be no order as to costs. However, Claimants will no longer be able to rely on *Bahta* to argue that any degree of success would entitle them to their full costs.

Catherine Rowlands appeared for the London Borough of Croydon.

