
# The Public Law and Judicial Review North Conference 2013:

# Funding and Costs Issues in Judicial Review

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## Costs and legally aided JRs

1. There is good argument that the proposed restrictions on funding for JRs prior to the permission stage will end up costing the state more than could ever be saved, despite the chilling effect on claims that would undoubtedly ensue. Why? Because, for instance:
    a. Claimants' lawyers will be less likely to agree settlements without an order for inter partes costs, thus increasing the costs burden on public authorities (if not the LAA).
    b. Judges might grant permission more readily by adopting a more lenient conception of what is arguable—in order to reduce the number of cases that would be caught by the proposed legal aid arrangements.
    c. Courts might develop the costs consequences for defendants who inappropriately resist permission applications – so that a Defendant who resisted permission when it was then granted would be ordered to pay IP costs for that stage whatever the final result.

### Inter partes costs in JR

2. In this paper I will look at the issue of recovery of costs in particular. We need to consider some of the ways we can make sure JR work is still financially viable, even if the worst of the proposed changes are brought in, and so it is all the more crucial that claimants' lawyers are attuned to the circumstances in which costs will be payable *inter partes.* However, most of what I say below applies under the currently applicable rules too.

3. If a claimant succeeds at a final hearing then usually there is no difficulty in working out how costs are to be apportioned, certainly if the win is a clear one. Bear in mind the court still retains a discretion to enable it to make a just order on costs however, so that in some cases, even if a claimant establishes an error of law, she might not recover 100% of her costs from the defendant (for instance where the win derives from one very narrow ground, perhaps advanced late in the day, and where much of the litigation is taken up dealing with points which the defendant successfully resists).

4. But what about the position where the claim is settled prior to a final hearing? The old rule of thumb in such situations – derived from *R(Boxall) v Waltham Forest LBC*, was that there would be no order as to costs unless it was 'plain and obvious' to the judge that the Claimant would have been successful on a full hearing. Sometimes a claim was simple enough that this threshold could be passed by the claimant, usually after making a punchy and effective written submission after settlement. But there was rarely any guarantee of success and there were many cases where even settlement of a good case would result in no IP costs order. Defendants would point to the fact that the claim had been settled without admission of wrongdoing, and in an effort to save costs.

5. Recent cases have altered this position significantly. These are worth having to hand in order to persuade an unwilling defendant that costs ought to be paid. To start with *R (E) v Governing Body of JFS and the Admissions Appeal Panel of*

*JFS and others* [2009] UKSC 1 makes a very clear point about the impact of the claimant having legal aid in a JR (para [25]):

*"It is one thing for solicitors who do a substantial amount of publicly funded work, and who have to fund the substantial overheads that sustaining a legal practice involves, to take the risk of being paid at lower rates if a publicly funded case turns out to be unsuccessful. It is quite another for them to be unable to recover remuneration at inter partes rates in the event that their case is successful. If that were to become the practice, their businesses would very soon become financially unsustainable. The system of public funding would be gravely disadvantaged in its turn, as it depends upon there being a pool of reputable solicitors who are willing to undertake this work. In R (Boxall) v Waltham Forest London Borough Council Scott Baker J said that the fact that the claimants were legally aided was immaterial when deciding what, if any, costs order to make between the parties in a case where they were successful and he declined to order that each side should bear its own costs. It is, of course, true that legally aided litigants should not be treated differently from those who are not. But the consequences for solicitors who do publicly funded work is a factor which must be taken into account. A court should be very slow to impose an order that each side must be liable for its own costs in a high costs case where either or both sides are publicly funded. Had such an order been asked for in this case we would have refused to make it."*

6. Claimant's lawyers have been arguing as much for years, to what might be called a 'mixed reception'[1] from the courts. Since *JFS* we have had the Supreme Court behind us...

7. The next major step in the reform of the law in this area was in *R(Bahta) v Secretary of State for the Home Department* [2011] EWCA Civ 895. PLP intervened on this case. There the CA accepted that the general principle ought to be that where the defendant concedes the relief sought by the claimant, an inter partes costs order ought to follow. The court pointed in particular to it being harder for a defendant to resist such an order where there has been a well worded protocol letter setting out the claim and relief sought. The court described the 'starting point' as being that the successful claimant ought to be entitled to costs.

8. The most detailed guidance then came in *M v London Borough of Croydon* [2012] EWCA Civ 595. This was an age assessment case, which was settled prior to trial in the claimant's favour. The high court judge said there should be no order between the parties. The CA reviewed the principles and gave general guidance for awarding costs in settled claims for JR. Lord Neuberger said

*60. Thus, in Administrative Court cases, just as in other civil litigation, particularly where a claim has been settled, there is, in my view, a sharp difference between (i) a case where a claimant has been wholly successful*

[1] Q: "But these costs are all being paid out of the public purse somehow aren't they? Does it matter which specific public body pays?" A: "Yes it does."

*whether following a contested hearing or pursuant to a settlement, and (ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement, and (iii) a case where there has been some compromise which does not actually reflect the claimant's claims. While in every case, the allocation of costs will depend on the specific facts, there are some points which can be made about these different types of case.*

*61. In case (i), it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary. Whether pursuant to judgment following a contested hearing, or by virtue of a settlement, the claimant can, at least absent special circumstances, say that he has been vindicated, and, as the successful party, that he should recover his costs. In the latter case, the defendants can no doubt say that they were realistic in settling, and should not be penalised in costs, but the answer to that point is that the defendants should, on that basis, have settled before the proceedings were issued: that is one of the main points of the pre-action protocols. Ultimately, it seems to me that Bahta was decided on this basis.*

*62. In case (ii), when deciding how to allocate liability for costs after a trial, the court will normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim. Given that there will have been a hearing, the court will be in a reasonably good position to make findings on such questions. However, where there has been a settlement, the court will, at least normally, be in a significantly worse position to make findings on such issues than where the case has been fought out. In many such cases, the court will be able to form a view as to the appropriate costs order based on such issues; in other cases, it will be much more difficult. I would accept the argument that, where the parties have settled the claimant's substantive claims on the basis that he succeeds in part, but only in part, there is often much to be said for concluding that there is no order for costs. That I think was the approach adopted in Scott. However, where there is not a clear winner, so much would depend on the particular facts. In some such cases, it may help to consider who would have won if the matter had proceeded to trial, as, if it is tolerably clear, it may, for instance support or undermine the contention that one of the two claims was stronger than the other. Boxall appears to have been such case.*

*63. In case (iii), the court is often unable to gauge whether there is a successful party in any respect, and, if so, who it is. In such cases, therefore, there is an even more powerful argument that the default position should be no order for costs. However, in some such cases, it may well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. If it is, then that may well strongly support the contention that the party who would have won did better out of the settlement, and therefore did win.*

9. The CA urged parties to JR claims to try to agree provisions for costs wherever possible rather than simply agreeing an outcome and leaving costs to the court to decide (see paras 75-77).

10. Overall, the decision makes it clear that the contentions regularly made by defendants in JR (pragmatic solution not an acceptance we got it wrong; not clear the claimant would have won, etc) will not normally be sufficient to result in no order as to costs. The usual principles of civil litigation costs will apply – ie costs follow the event.

11. *M v Croydon* was further considered by the CA in *AL (Albania) v Secretary of State for the Home Department* [2012] EWCA Civ 710 (30 May 2012), which concerned appeals from the Upper Tribunal (Asylum and Immigration Chamber). The Court looked in particular at appeals in which the appellant was successful in having the matter sent back to the UT, or a grant of some status by the Secretary of State. But there isn't a pre action protocol stage in these cases. The home Secretary's habit was to resist costs in such cases, even on settlement favourable to the appellant, usually on the basis that she was acting 'pragmatically' in doing so. But importantly the CA confirmed that where an appeal was allowed by consent that could only happen where there was a demonstrable error of law. The court was not entitled to allow an appeal against a tribunal's decision just because the SSHD thinks it would be pragmatic to do so. Thus, an error of law having been established, costs ought usually to follow.

12. What happens, post *M v Croydon*, in the more difficult cases? That will depend on the facts. In *R (on the application of Naureen and another) v Salford City Council* [2012] EWCA Civ 1795 the challenge was brought on the basis that the council had unlawfully failed to provide accommodation and support under s21 NAA 1948 to failed asylum seekers. Interim relief was granted to the claimants at a contested hearing. The case had proceeded for some time, but by the time of settlement it had still not reached the permission stage (a rolled up hearing had been directed). The claim was settled because the SSHD had by then conceded that one of the claimants ought to be granted leave to remain in the UK. The HC judge made no order as to costs.

13. The claimants argued that:

- They had achieved the substantive benefit which they were seeking, namely long term housing and welfare support. The court considered however that they had ended up with this largely because of the actions of the SSHD rather than the council.
- That they had achieved an immediate benefit, namely interim relief, which they could not have achieved without litigation. But the court accepted that the HC judge had expressly granted interim relief on the basis that he was not deciding the merits finally and was conducting a broad brush assessment only.
- They had complied with the pre-action protocol and sent appropriate letters to the council before commencing proceedings. The court considered that there was no decision of the court nor concession by the council as to wrongdoing.
- Their case was strong, and it was very likely that they would have won. The

court did not consider this was the case. The HC judge's decision was upheld.

14. Finally *R(Emezie) v SSHD* [2013] EWCA Civ 733 was a very recent case where the parties made written submissions after the compromise of a JR regarding the provision of accommodation under the asylum support scheme. But neither party, nor then the high court judge who decided on costs, referred to *M v Croydon* as being the applicable test. The judge had decided the case on *Boxall* principles and refused to order IP costs were payable to the claimant. The CA considered that *M v Croydon* was the appropriate test and ordered costs *were* payable.

## Some tips

15. What can you do generally to make sure you have the best chance of winning and getting costs?

(1) Appreciate just about all JRs are complicated, need to be progressed quickly and effectively, and need accordingly need to have proper attention devoted to them at all times.
(2) Spend time on getting the letter before claim right. Work out what you think is unlawful about the decision, set it out carefully and authoritatively, and don't resort to generic letters. Set out clearly what you want in terms of relief. The chances of getting costs on a later settlement will be much improved: *Bahta.*
(3) When a case is settled, make sure that if possible the relief granted is in the same or very similar terms to that requested in the letter before claim.
(4) Push for Defendants to pay costs on failed resistance of a permission application/hearing, whatever the final outcome.
(5) Where appropriate, propose ADR, or settlement of some other sort, and draw the defendant's failure to agree to the court on costs.
(6) Where the case involves a wider public interest, seek a proportion of costs inter partes even if the precise relief sought is not granted: see for example *R(Public Interest Lawyers) v LSC* [2010] EWHC 3227 (decision in question not quashed but LSC ordered to change the way it acted with other applicants; Cs awarded 70% costs IP).

## Mitigating the worst of the changes

16. Most of what I say above applies to JR work done under the current legal aid system. But if we assume for now the JR costs changes currently proposed come in (no legal costs from issue til the grant of permission) what else can we do?

(1) There is no current proposal to remove legal aid from the *pre* permission stage. So get what you can from that. All JRs are front loaded to some extent. Make yours even more so.

(2) Limit the amount of your costs which are to be ‘at risk’ pending permission. Have as many precedents for the necessary documents as you can. Work out an efficient system and stick to it.
(3) Don’t agree to a rolled up hearing, or for permission to be dealt with at an oral hearing, unless you, counsel and you client think this is truly the best way to go.

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