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policy ([2016] EWCA Civ 1113; March 2017 *Legal Action* 28). It was common ground that the 'benefit of the doubt' principle applied; if there was uncertainty, the individual should be treated as a child and referred to a local authority.

Evidence was before the court as to the significant numbers who were initially assessed (under this policy) as adults and were later found to be children. Additionally, medical research has shown that the margin of error can be five years either side. In a very detailed majority judgment, it was held that the word 'significantly' was insufficiently precise and thus the policy was unlawful. The policy was amended to coincide with the publication of the judgment and is as follows:[7]

*Two Home Office members of staff (one of at least CIO/HEO grade or equivalent) have separately assessed that the individual is an adult because their physical appearance and demeanour very strongly suggests that they are **25 years of age or over** and there is little or no supporting evidence for their claimed age* (para 55.9.3.1(C); emphasis in original).

Comment: The home secretary has applied to the Supreme Court for permission to appeal.

No need for second authority to assess separately

- **R (SN, PN and CN) v Enfield LBC and Haringey LBC**
  [2019] EWHC 793 (Admin), 29 March 2019

The claimants were the three children of SI, a Nigerian national who had come to the UK in 2010 as a visitor and overstayed. Their father, GN, who did not live with them, had been paying their rent until, SI claimed, October 2017, when he also stopped seeing the children. The rented property was in Haringey. SI then briefly moved to an address in Enfield, paid for by a friend, Chidi, and then to the household of another friend, NE, also in Enfield. When he asked her to leave in August 2018, due to overcrowding, she applied to Enfield under Children Act 1989 s17. Enfield provided interim support, pending assessment.

Enfield, having contacted the third parties, considered that SI lacked credibility regarding many aspects of her story. Chidi denied ever paying rent for her. NE denied that she had stayed with him, and she could not describe his family composition accurately. The school said that GN regularly did the school run and on occasions came with SI. GN was contacted, was vague and then declined to return calls. The inconsistencies were put to SI and Enfield found her answers to be unsatisfactory. Enfield was therefore unable to conclude that the children were in need due to uncertainties around her relationship with GN and how they had been supported in 2018. Furthermore, there was insufficient evidence of the family ever having lived in Enfield, as the GP and school were in Haringey. Enfield made a referral to Haringey. Enfield proposed to end its support and SN challenged this decision.

It was pleaded that Enfield had wrongfully relied on lack of physical presence in Enfield, which informed and infected the s17 assessment process, making it shorter and inadequate, and the principal reason behind the negative decision. Enfield conceded it was an error of law, but the judge found that this error did not justify quashing the assessment. The assessment was still done in good faith and reasonable enquiries were made with sufficient diligence.

It was also pleaded unsuccessfully that if the claim failed against Enfield, then Haringey should be ordered to assess. The judge held that where more than one authority has a duty to assess, there is not obviously a need for two separate assessments. Given that Enfield's assessment had been found to be lawful, it would not be appropriate to order another authority to duplicate the process. The claim was refused.

1 http://migrationpolicy.org.uk/wp-content/uploads/2019/11/eu-discussion.docx.
2 See *Local authority tables: children looked after in England including adoption 2017 to 2018*, DfE, 15 November 2018, table LAA1.
3 Clare Jennings, partner, Matthew Gold Solicitors, and Megan Ward, caseworker, Central England Law Centre.
4 www.nrpfnetwork.org.uk/Documents/Childcare-2-year-old-extended-eligibility.pdf.
5 New guidance should have been issued in November 2019 but has not been. In the meantime, local authorities should continue using the August 2019 guidance. The DfE has stated that new guidance is likely to be issued in the spring. Thanks to Karen Ashton for this information.
6 Yen Ly, solicitor, Scott-Moncrieff & Associates, London.
7 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/804785/Chapter-55-detention-v26.0ext.pdf.

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Judicial review: costs

Peter Todd outlines the current challenges in the funding structure for legal aid judicial review proceedings, considering the current state of the law as to recovery of costs on an inter partes basis and whether it is legitimate for the court to have regard to the legal aid status of the claimant.

Peter Todd

Legal aid funding

The most fundamental challenge for solicitors carrying out publicly funded judicial review proceedings is that the hourly rates are set below the costs of carrying the work out. A solicitor (especially one in central London) needs to charge a minimum of £100 per hour in order solely to cover the inevitable overheads of salaries, rent, IT, training, marketing, professional indemnity etc. Yet the legal aid hourly rates payable for judicial review for preliminary advice and assistance (legal help) work are £52.65 per hour (£48.24 outside London) for preparation, attendance and advocacy, and £27.81 for travel and waiting (£27.00 outside London) (Civil Legal Aid (Remuneration) Regulations 2013 SI No 422 Sch 1). For certificated work, preparation and attendance are funded at £71.55 per hour (£67.50 outside London). Legal aid rates have not been increased in line with inflation for many years and in October 2011 rates were actually cut by 10 per cent. Such low hourly rates for legal aid are, of course, intended to reduce the cost to the public purse. But they may, perhaps, also have been designed to deter practitioners from pursuing unmeritorious claims.

An uplift or 'enhancement' can be claimed on non-routine work done if it meets certain criteria for being out of the ordinary. In judicial review proceedings, this enhancement can be up to 100 per cent, so the hourly rate in certain exceptional cases could be up to £140 per hour, although it is probably quite rare to achieve that level of enhancement, and modest levels on non-routine work are the norm. Even with enhancement, the hourly rates payable by the Legal Aid Agency (LAA) for judicial review work mean it is unsustainable for a legal practice to exist on legal aid work alone. Any practice that seeks to do so will eventually run out of cash and become insolvent. Much of the work is highly specialist. This required specialisation makes cross-funding from other areas impossible.

Given that a grade A solicitor in central London could charge a private paying client £400 per hour or more in the same judicial review proceedings, it

is no surprise that many firms have chosen to switch away from publicly funded to private work. Yet the hourly rates are not the only problem for legal aid practitioners in judicial review cases. Where permission for judicial review is refused, no time on the permission application can be claimed at all. Practitioners will inevitably have cases that fail, and for which they will be entirely unpaid.

Legal aid funding certificates for judicial review proceedings come with costs limitations so that the amount payable by the LAA cannot exceed that specified sum in any circumstances, even where more work was required than originally envisaged (as is commonly the case). The application of very low costs limitations on funding certificates means that practitioners often consider themselves lucky if they manage to get paid at all. It is not uncommon to find that once disbursements such as court fees, experts' fees and counsel's fees are claimed, also within the cost limit, it is not possible for the solicitor to recover the time they have put in, even at the unenhanced prescribed rates.

The legal aid environment is not an easy one. There has been a very significant reduction in the number of legal aid practitioners, especially following the Legal Aid, Sentencing and Punishment of Offenders Act 2012, and the collapse of many Law Centres, which lost over 60 per cent of their income (*LASPO Act 2012 post-implementation review – submission from the Law Centres Network*, September 2018, page 8; see page 5 of this issue for the latest closure).

Risk rates for high-costs cases

In high-costs cases (where costs to conclusion are expected to exceed £25,000), it gets worse. Only the costs up to £25,000 are payable at the usual prescribed rates. Above that figure, 'risk rates' apply: £70 per hour for solicitor work, £50 per hour for junior counsel and £90 per hour for a QC (*VHCC – solicitors information pack (non-family) 05 September 2017 v4*, LAA, page 11). Enhancement cannot be claimed on these rates, except in very exceptional circumstances.

These risk rates are deliberately below cost. The intention is to turn the usual incentive for anyone working on an hourly rate on its head, so that – if the claim fails – the more work done, the greater the loss suffered. The intention is that the legal aid funding is just a contribution and that the funding is substantially contingent on the outcome. This ensures that any practitioner who repeatedly pursues weak or bad cases on a risk-rate basis will inevitably become insolvent.

The importance of inter partes costs for legal aid practitioners

If a claim succeeds and the claimant is awarded their costs on an inter partes basis, there is a statutory waiver of the common law indemnity principle so that the claimant's legal representatives can claim their costs at the full private rates rather than at the legal aid rates, and regardless of any costs limitation. So an award of inter partes costs makes a notable difference for the claimant's lawyers and significantly contributes to the sustainability of the practice area.

Recovery of inter partes costs therefore needs to be the norm rather than the exception in successful and/or favourably settled cases. Otherwise, the whole practice area becomes loss-making and unsustainable, with inevitable implications for access to justice for individuals who cannot afford to pay privately (in reality, nearly all of the population).

Principles for the award of costs in favour of a legally-aided claimant in judicial review

In a claim for judicial review, where the claimant's case was funded by legal aid, to what extent should the court have regard to the fact of that legal aid funding when determining the costs between the parties? Can the court treat the parties differently by reference to the nature of their funding?

The Civil Procedure Rules

The starting point in answering this question is obviously to look at the relevant Civil Procedure Rules 1998 (CPR) provision. CPR 44.2 gives the court a wide discretion when determining costs. CPR 44.2(2) states:

If the court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

This creates a rebuttable presumption that costs will follow the event. The award therefore depends on the outcome.

CPR 44.2(4) provides guidance, however, and states: 'In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including …' The list that follows does not include whether the claimant was funded by legal aid. However, the word 'including' means this is not an exhaustive list and does not exclude the possibility that legal aid funding status is a factor that can be taken into account. The context of the consequences to access to justice if inter partes costs are not awarded could be one of the circumstances.

Case law

Having looked at the rule, we need to consider the relevant authorities on this point.

In *R (E) v JFS Governing Body and others* [2009] UKSC 1, Lord Hope observed that it is important to recognise the consequences of inter partes costs orders for the survival of legal aid firms:

24. … the failure of a legally aided litigant to obtain a costs order against another party may have serious consequences. This is because, among other things, the level of remuneration for the lawyers is different between a legal aid and an inter partes determination of costs …

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 … the consequences for solicitors who do publicly funded work is a factor which must be taken into account.

This may be dismissed as an obiter comment, but nevertheless it is a statement that the existence of legal aid funding is a factor to which the court can properly have regard in the exercise of its considerable discretion as to costs. This did not sit entirely well with the then established principles that used to be applied by the court in judicial review proceedings as set out in *R (Boxall) v Waltham Forest LBC* (2001) 4 CCLR 258; May 2001 *Legal Action* 23.

The *Boxall* guidelines (para 22) were that:

(i) The court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs.

(ii) It will ordinarily be irrelevant that the claimant is legally aided.

(iii) The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost.

(iv) At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties.

(v) In the absence of a good reason to make any other order the fall back is to make no order as to costs.

(vi) The court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage.

Boxall therefore unhelpfully introduced a default of no order as to costs unless a fairly high hurdle of a 'good reason' could be established.

The case of *M v Croydon*

In January 2010, an unlikely hero emerged in the shape of Sir Rupert Jackson. In *Review of civil litigation costs: final report* (Ministry of Justice, December 2009; released 14 January 2010), Jackson suggested that the advent of the Pre-Action Protocol for Judicial Review justified the *Boxall* guidelines being revised (para 4.12, page 312). He contended that public authorities should bear the costs consequences of conceding a claim after failing to concede it in the substantive pre-action protocol response letter (para 4.13, page 313).

The Court of Appeal in *M v Croydon LBC* [2012] EWCA Civ 595 took the opportunity suggested by Jackson and revised the relevant principles. The court held that in the event the case fought to trial, costs should follow the event and whether or not the claimant was funded by legal aid was unlikely to make any significant difference. After all, if the claimant were substantially successful, they would be entitled to

their costs in any event and the nature of funding would not be a factor.

If, however, the case settled prior to trial, on the basis that the defendant conceded that the claimant was entitled to the relief sought, the Court of Appeal emphasised that the court should be no more generous to the public authority than any other body that has settled litigation on the basis of a concession:

[A] successful claimant who has brought such a claim is just as much entitled to his costs as he would be if it had been a private law claims. The court's duty to protect individuals from being wronged by the state, whether national or local government, is every bit as vital as its duty to enable them to vindicate their private law rights. And the fact that the defendants are public bodies should make no difference … (para 52).

The court went on to deal with a number of arguments that could be raised by the defendant as to why they should not pay the costs in such a settlement. Lord Neuberger MR, giving the lead judgment, gave the following helpful guidance:

- While government and public bodies should be encouraged to settle and not be penalised for doing so after proceedings are issued:
    - they should not be in a more privileged position than other parties;
    - it is unfair on the claimant and their lawyers not to recover the costs of bringing wholly successful proceedings, in the absence of special factors;
    - it will be a powerful incentive for them to settle if there are costs consequences if they do not at the pre-action stage; and
    - if defendants wish to settle, the time to do so is at the pre-action protocol stage, which is the purpose of the protocol.
- The shorter time for a protocol response to a public law claim compared with a private law claim might justify a costs order more generous to the defendant. However, it would not be good enough that the defendant had not had time to get round to dealing with the claim because of a heavy workload or constraints on resources. There is no major difference from private law, where the claim might be notified shortly before limitation.
- If a defendant decides to concede a claim because it is not economic to contest a case or because it is justified because of a technical point, the time to concede is at the pre-action stage.
- In the event that a weak claim is transformed into a strong one because of a subsequent development in the law, the defendant is entitled to argue that they should not have to bear all the costs, but the claimant can nonetheless raise all the normal reasons for receiving their costs. This applies in all civil litigation equally.
- Where the defendant argues that the claimant should be deprived of costs because of various failings on the claimant's part, this is no different from any civil litigation where the claimant is entitled to costs unless there is good reason to the contrary. Thus, where the claim has been conceded, the presumption of the award of costs may be displaced if there is good reason.

The *M v Croydon* guidelines were therefore a substantial redrawing of the principles to be applied to the award of costs and made it significantly easier for a claimant to recover inter partes costs, especially if the case had resolved in favour of the claimant, pre-trial. This, as I have set out earlier, is vitally important for legal aid practitioners.

Taking legal aid funding into account

In *R (Sino) v Secretary of State for the Home Department* [2016] EWHC 803 (Admin); July/August 2016 *Legal Action* 35, the Administrative Court (Hayden J) at first instance again stated (referring to appellate approval of the view) that the claimant's legally aided status can and ought to be properly taken into account when determining the issue of costs:

The appellate courts have expressed concern at the prospect that those lawyers who practise in publicly funded work, often taking on challenging points on behalf of individuals to whom neither the profession nor the public would be instinctively sympathetic, might not be able to recover remuneration at inter parties rates in cases where they were essentially successful. The real risk is that publicly funded practices would soon be unsustainable and access to justice compromised more widely. In my judgement, this is a factor which can and ought properly to be taken into account. It is not a subversion of the principles of the CPR, rather it is a reassertion of the principles in 44.2(2), ultimately therefore a restatement of a workable costs regime (para 28).

But no trump card

Yet the fact of legal aid funding is not a trump card that outweighs all other factors in the exercise of the court's discretion in determining a costs order. In *ZN (Afghanistan) and KA (Iraq) v Secretary of State for the Home Department* [2018] EWCA Civ 1059, the Court of Appeal refused to make costs orders in favour of two legally-aided litigants who had come to a pre-trial settlement on the basis of the relief they sought. The claimants contended that the court should have regard to their legal aid-funded status in making an award of costs in their favour. Although the court recognised that their legal aid funding was a factor that could be taken into account, the claimants had largely been unsuccessful in their cases and had only succeeded on a technicality, so the court decided the appropriate order was no order as to costs.

The court refused to lay down prescriptive rules as to when legal aid is to be taken into account but Singh LJ did comment that depending on the particular facts of the case, if a claimant obtains the outcome sought ('which is often the most a person can realistically hope to obtain in judicial review proceedings' (para 92)), even if they have not succeeded on every ground it is open to the court to take into account the legal aid considerations mentioned in cases such as *JFS* and *Sino*.

The Court of Appeal recently reviewed the authorities on this point again in the case *of R (Parveen) v Redbridge LBC* [2020] EWCA Civ 194, in a judgment handed down on 12 March 2020. The claimant appealed against the Administrative Court's decision to make no order as to costs. The judge, Steven Kovats QC, had found it was impossible, without conducting a full trial of the claim, to determine whether there was any causal connection between the claim for judicial review and the offer of suitable accommodation made to and accepted by the appellant shortly before the claim was due to be heard. The authority had denied any causal link. The Court of Appeal held that the judge had not been wrong to go straight to the question of causation. The conclusion that he had come to was reasonably open to him, in the exercise of his discretion as to costs.

Conclusion

Providing legal representation for legally-aided litigants in judicial review cases remains challenging, bearing in mind the current funding structure. However, the 2012 decision in *M v Croydon* is a vital tool in any legal aid lawyer's practice. It has made it somewhat easier for legal aid practitioners to recover costs at inter partes rates. The decision provides authority that where a case settles pre-trial, the fact of legal aid funding for a claimant can, in certain circumstances, be a relevant issue to which to have regard. A defendant who concedes a claim pre-trial that they failed to concede at pre-action stage is likely to have to bear the costs. However, legal aid funding is not a trump card and the award of costs is a fact-sensitive exercise of discretion that depends on all the individual circumstances of the case, so practitioners need to make realistic judgements about which cases they proceed with.

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