

[2023] EWHC 865 (Admin)

Case No: CO/1133/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 April 2023

Before:
Dexter Dias KC
(sitting as a Deputy High Court Judge)

Between:

THE KING (on the application of CVN)
[anonymity order granted 30 June 2022;
amended 31 January 2023]

Claimant

- and -

LONDON BOROUGH OF CROYDON

Defendant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Interested Party

Ms Galina Ward KC for the claimant
Mr Francis Hoar for the defendant

Following written submissions on costs
(Substantive judgment 28 February 2023)

Approved Judgment

This judgment was handed down remotely at 10.30am on 21 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Dexter Dias KC :

(sitting as a Deputy High Court Judge)

1. This is a short judgment on costs.
2. It follows my judgment in *CVN v London Borough of Croydon* [2023] EWHC 464 (Admin) (the “Judgment”) and should be read in conjunction with that decision.

A. Introduction

3. The claimant CVN arrived in the United Kingdom as an unaccompanied child seeking asylum. He exhausted his appeal rights, but challenged the defendant local authority’s decision on 23 February 2022 to end accommodation and other leaving care support it had been providing him for several years. Following a fully contested substantive hearing, he succeeded and the decision was quashed. Directions were made for submissions on costs. I have received skeleton arguments from parties (defendant, 24 February 2023, 10pp. (“DS”); claimant, 2 March, 3pp. (“CS”)). Once more, Ms Ward KC acts for the claimant and Mr Hoar for the defendant.
4. As a preliminary point, the claimant complains that there has been no justification from the defendant for departure from the *ACO Costs Guidance* on limiting the length of written submissions (see [17]). There it states:

Submissions should be of a normal print size and should not normally exceed two A4 pages in length unless there is compelling reason to exceed this which is properly explained in the submissions.

5. However, that guidance from April 2016 states in terms at [1] that:

This guidance is applicable where the parties to judicial review have agreed to settle the claim but are unable to agree liability for costs and have submitted that issue for determination by the Court.

6. Indeed, the full title of the guidance says much the same. There was no settlement here – a matter of some significance, as will be seen shortly. In any event, due to the complexity of this case, I find it necessary to consider all submissions in their entirety in fairness to both parties.
7. The claimant seeks costs on an indemnity basis. The defendant argues for no order for costs or only costs following July 2022 (“only a portion” of costs, DS/§1) – that was when it received information from the claimant about his possible humanitarian claim.

B. Costs/No costs

8. I can take this matter shortly.
9. The defendant’s analysis suffers from a fundamental category error. In *R (M) v Croydon LBC* [2012] 1 WLR 2607 (CA), Lord Neuberger MR (as then was) held in respect of costs in judicial review:

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 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.

10. The case before the court is plainly not a Category (ii) case. This is because the claimant has been wholly successful following a contested hearing. He sought to quash the defendant's decision of 23 February 2023; it was quashed (see Judgment [14], [96]). He sought a declaration; it was granted (ibid. [97]). I note that the section of *M v Croydon* in which Lord Neuberger MR provided the guidance is entitled "The position where cases settle in the Administrative Court". This case has not settled. It was contested and won resoundingly by the claimant. In such circumstances, decided authority mandates a "sharp" distinction between the two categories of cases.
11. The rule therefore is that costs follow the event, subject to the court's general discretion. This discretion is found at CPR 44. It provides insofar as material:

44.2

- (1) The court has discretion as to –
- (a) whether costs are payable by one party to another;
 - (b) the amount of those costs; and
 - (c) when they are to be paid.
- (2) 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.

12. It was put this way in *M v Croydon* at [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.

13. The defendant has not identified or identified with sufficient clarity what the "good reason" or "special circumstances" would be to justify a departure from orthodox practice. If the argument (not made sufficiently explicit) is that such deviation is

merited by the pre-July situation, the submission in any event faces another decisive obstacle.

14. The starting-point is that the defendant has never made the decision now contended for, that the claimant's proposed application to the Secretary of State for the Home Department was "obviously hopeless or abusive" (DS/§3). Counsel made submissions to that effect, but there has been no decision. The defendant submits (DS/§21) that the court:

is in a much better position to consider the merits of the claim up to that date than a court would be when determining a contested costs application after the settlement of proceedings, where it may be appropriate for the court to make that decision (see *M v Croydon* para 62).

15. I judge that the court could not safely decide on the materials before it which party would succeed on the forensic hypothetical the defendant now presses to be determined. As stated in *M v Croydon* at [51] (and see also [62]-[63]):

In many cases which are settled on terms which do not accord with the relief which the claimant has sought, the court will normally be unable decide who has won, and therefore will not make any order for costs. However, in some cases, the court may be able to form a tolerably clear view without much effort.

16. The decision here is not "tolerably clear" – far from it. The further determination sought by the defendant would necessitate at the very least further detailed written submissions, but in all likelihood a further hearing for the exclusive purpose of resolving the question of costs. That would be disproportionate (see also *R (MH (Eritrea)) v SSHD* [2023] 1 WLR 482 at [46]). I fail to see how this falls into the category of being "without much effort". Further, the Lord Neuberger's judgment continues at [51]:

In a number of such cases, the court may well be assisted by considering whether it is reasonably clear from the available material whether one party would have won if the case had proceeded to trial.

17. This case did proceed to trial. The defendant lost. The defendant now wishes the court to consider a question that parties agreed at trial was unnecessary to determine and had been "academic" (see, for example, CS/§5). The defendant conducted proceedings until the very eve of the trial on the basis that it could not take into account the claimant's proposed humanitarian claim until the Secretary of State had considered it. The defendant finally conceded what was obvious: this stance was plainly wrong in law (see concession at DS/§7(5)). As this court recorded in the Judgment at [18]:

On Friday 27 January 2023 – the pre-penultimate business day before the hearing - the defendant's solicitors informed the court and the claimant that the defendant no longer relied on CVN's ability to return to Albania.

18. In any event, in exercising my wide discretion (CPR 44.2(1)), I first take into account the conduct of the defendant in failing to provide any or any proper support to the claimant in making and application on humanitarian grounds. The defendant was duty-

bound to act as CVN's corporate parent. The scope of such duty was explained by Christopher Clarke LJ in *R (GE (Eritrea)) v Secretary of State for the Home Department* [2014] EWCA Civ 1490 at [17]:

The purpose of these provisions is to ensure that a relevant or eligible child is not simply left without support the moment he reaches his 18th birthday but receives the same sort of support and guidance which children can normally expect from their own families as and when they become adults.

19. On this question so critical to his entire future, the claimant was not or not adequately supported by the defendant. In that void, he resorted - and was forced to resort - to a pro bono advice agency, the Refugee Law Clinic provided by the University of London. That does great credit to the University, but none to the defendant. CVN, a former relevant child and someone with multiple vulnerabilities, was plainly unable to assess this complicated legal situation and make meaningful representations on his own.
20. Second, the defendant shifted its position significantly extremely late in the forensic day. It sought to argue in a strained way that the definition of "Convention rights" referred to in Schedule 3 Paragraph 3 of Nationality, Asylum and Immigration Act 2002 does not include Article 3 of the European Convention on Human Rights (see Judgment [31]-[68] for rejection of argument).
21. Third, the defendant sought to argue that the interference with the claimant's Article 2 Protocol 1 right to education was proportionate. The court ruled that it was not (see Judgment [69]-[88] for rejection of further argument).
22. The short point is that once the defendant directed itself - albeit very late in the day - to the correct legal position, it could have settled this claim. It chose not to. It contested it on two essential bases, both of which were rejected by the court. Without the court being confident that it can make a decision about the merits of the unargued point, the defendant's costs position is bound to fail. I have indicated that the materials do not reveal a "tolerably clear" further decision. Therefore, I reject the defendant's argument about the principle of costs.

C. Indemnity costs

23. I am bound to observe that I have found the conduct of the defendant to be suboptimal in several respects. The changes to its stance have indicated a lack of clarity of thought in its overall approach. But that is not the same as meeting the demanding test to merit an award of indemnity costs. For an example of a recent award of such costs in judicial review proceedings, see my judgment in *PZX v Secretary of State for the Home Department* [2022] EWHC 2890 (Admin). I judge that in this case, the conduct of the defendant overall does not meet the requisite standard of being "out of the norm" (*Excelsior Commercial and Industrial Holdings Ltd* [2002] EWCA Civ 879 at [31] per Lord Woolf LCJ, at [39] per Waller LJ) or "something outside the ordinary and reasonable conduct of proceedings" (*Esure Services Ltd v Quarcoo* [2009] EWCA Civ 595). Ultimately, the court must deal with the case "justly", as an expression of the overriding objective (CPR 44.3.9; CPR 1.1(1)). I judge that it would be unjust and disproportionate to order the defendant to pay indemnity costs in this case. The plain fact is that it sought to contest the claim on a number of shifting bases, but those forensic

repositionings did not, to my mind, amount to unreasonable conduct or conduct out of the norm. It contested the claim in various ways and lost.

24. Further, I reject the claimant's additional submission that there should be indemnity costs attaching to the cost of responding to the defendant's costs skeleton (CS/§9). It was reasonable for the defendant to make detailed costs submissions, overambitious and ultimately unsuccessful though they were.

25. Costs should be assessed on the standard basis.

D. Disposal

26. I make the following orders:

- (1) The defendant to pay the claimant's costs assessed on the standard basis;
- (2) Detailed assessment of the claimant's publicly funded costs.

27. That is my judgment.