Case No: C1/2016/1339

Neutral Citation Number: [2017] EWCA Civ 1630
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Haddon-Cave J
CO/5251/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 October 2017

Before :

LORD JUSTICE PATTEN
and
LADY JUSTICE ASPLIN

- -

Between :

THE QUEEN ON THE APPLICATION OF AGYEMANG	**Appellant**
- and -	
THE LONDON BOROUGH OF HARINGEY	**Respondent**

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- -

Mr Lee Parkhill (instructed by **John Ford Solicitors**) for the **Appellant**
Mr Hilton Harrop-Griffiths (instructed by **Corporate Legal Service, London Borough of Haringey**) for the Respondent

Hearing date : 17 October 2017

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Judgment

Lord Justice Patten :

1. This is an appeal by a claimant in judicial review proceedings against a costs order made by Haddon-Cave J on 17 February 2016 following the compromise of the proceedings. The judge made no order for costs. The claimant, who is publicly funded, says that she should have been awarded her costs because she had obtained by agreement substantially all of the relief which she had been seeking in the proceedings. This, she says, brought her within the first of the three categories of case described by Lord Neuberger MR in his judgment in *R (M) v Croydon London Borough Council* [2012] EWCA Civ 595 at [60]. The judge's order was, she contends, wrong in principle.

2. The background facts can be summarised quite shortly. The claimant is a Ghanaian citizen subject to immigration control who has a five year old daughter. They live within the London Borough of Haringey and the Respondent Council has provided accommodation for them as part of its functions under s.17 of the Children Act 1989. The claimant complained that the Council, in breach of s.17, had failed to make any subsistence payments to her and that she and her daughter were forced to live on the £20.70 she was receiving by way of child benefit. In April 2015 the Haringey Migrant Support Centre wrote to the Council on the claimant's behalf setting out the claimant's financial circumstances and saying that unless the failure to provide adequate subsistence payments could be justified they proposed to place the matter into the hands of solicitors.

3. The Council's response was that the claimant had failed to provide full information about various bank accounts which she held but these were eventually provided in September 2015. The Council continued not to make any subsistence payments and, according to the claimant, told her that she should first attempt to obtain financial support from the child's father. On 10 September 2015 solicitors instructed on behalf of the claimant sent an e-mail to the Council asking it to provide an explanation as to why it continued to refuse to make subsistence payments. A response was requested by 16 September.

4. It is convenient at this stage to set out the relevant provisions of s.17 which were in issue. So far as material, they provide:

> "(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—
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> (a) to safeguard and promote the welfare of children within their area who are in need; and
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> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families,
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> by providing a range and level of services appropriate to those children's needs.
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> …..

> (3) Any service provided by an authority in the exercise of functions conferred on them by this section may be provided for the family of a particular child in need or for any member of his family, if it is provided with a view to safeguarding or promoting the child's welfare.
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> …..
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> (6) The services provided by a local authority in the exercise of functions conferred on them by this section may include [providing accommodation and] giving assistance in kind or. . . in cash.
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> (7) Assistance may be unconditional or subject to conditions as to the repayment of the assistance or of its value (in whole or in part).
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> (8) Before giving any assistance or imposing any conditions, a local authority shall have regard to the means of the child concerned and of each of his parents."

5. There was no response to the 10 September e-mail by 16 September and on 15 October 2015 the claimant's solicitors sent to the Council a Pre-Action Protocol letter before claim setting out the factual background and the provisions of s.17(6) and (7). The letter requested the Council either to confirm that it would provide financial assistance or to give the reasons why it had decided not to do so by a deadline of 21 October 2015, failing which consideration would be given to issuing an application for judicial review.

6. On 20 October the Council responded by e-mail saying that it proposed to conduct a financial assessment of the claimant which it anticipated would be completed within 8 weeks. It would then make a decision on the claimant's application for subsistence payments.

7. The Council is required under s.17(8) to have regard to the parent's means but the claimant's solicitors responded on 21 October saying that, in their view, 8 weeks was too long a period for this purpose. They asked for confirmation that the assessment would be carried out within 4 weeks. The Council sent an e-mail in reply to the claimant's solicitors on 22 October. It said that it required 45 days to complete the assessment and would do so by 21 December. If a particular need arose in the meantime requiring immediate action then that need would be met.

8. On 29 October 2015 the claimant's solicitors lodged an application for judicial review with the Administrative Court and paid the fee. The claimant's witness statement was unsigned but the solicitors undertook to provide a signed copy once it was received from the claimant. The application challenged as irrational the Council's failure to provide any subsistence payments under s.17 and sought a mandatory order requiring the Council to determine the level of subsistence payable. It also sought interim relief in the form of an order that the Council should pay the claimant and her daughter the sum of £53.20 per week pending the determination of future support.

9. According to the claimant, the application was lodged with the Administrative Court at about 14:37 on 29 October. The papers appear to have been despatched from the claimant's solicitors by 14:00 because copies were faxed and then e-mailed to the Council's solicitor at 14:07 under cover of a letter stating that the application had been sent to the Court. The Council's solicitor responded at 14:52 with confirmation that the Council would pay the claimant £32.50 per week until the completion of the s.17(8) assessment in December. The claimant's solicitors were asked to obtain instructions on this. They responded at 15:03 on the same day seeking confirmation that the first payment would be made the following day. But the e-mail went on:

> "We are still issuing regarding the time taken to complete the assessment but if you agree to the above regarding payment to our client this will resolve the issue of interim relief."

10. At 15:19 the Council's solicitor confirmed that the first payment would be made on the following day, 30 October.

11. Sometime during the afternoon of 29 October the application for judicial review was issued by the Administrative Court and Cranston J made an order on the papers for an *inter partes* hearing on 2 November 2015 to consider the question of interim relief. The judge expressed himself as puzzled as to how the claimant had supported herself since she first came to the UK aged 14 and said that he could understand why the Council needed information. Clearly some explanation was called for as to how the claimant had managed to support herself and her daughter in the last five years. On 30 October the Council took up this point in correspondence and said that there were serious questions about the extent of support available to the claimant. They did, however, repeat their offer to provide a sum of £32.50 per week until the completion of the assessment.

12. Prior to the hearing on 2 November the parties agreed terms for the disposal of both the application for interim relief and the substantive application for judicial review. A consent order was made by Cranston J on 2 November under which the Council undertook to pay the sum of £32.50 per week to the claimant until the completion of the s.17(8) assessment and for two weeks thereafter regardless of the outcome of the assessment. By paragraph 2 of the order the application for judicial review was withdrawn.

13. The parties had been unable to agree about the costs of the proceedings and the consent order provided for written submissions to be filed and for the matter to be decided by a judge on a consideration of the papers. Haddon-Cave J made no order for costs by reference to the principles set out in Lord Neuberger MR's judgment in *R (M) v Croydon LBC* and in his written reasons said this:

> "In *R (M) v Croydon LBC* 2011 EWCA 598, Lord Neuberger set out the principles to be applied when considering the issue of costs in the Administrative Court. He explained there may be circumstances where the appropriate order is no order as to costs. In this case, as explained above, the Claimant persisted with the claim notwithstanding it has been provided with an undertaking by the Defendant to provide additional subsistence until the Defendant had completed her s.17 assessment. The claim had

become otiose and unnecessary. The Claimant was, therefore, fortunate not to have a negative order for costs against her."

14. *R (M) v Croydon LBC* concerned the carrying out by the local authority of an age assessment in connection with the applicant's claim for asylum. The assessment was challenged in proceedings for judicial review which were eventually compromised save as to costs. The judge made no order as to costs on the basis that the outcome had been uncertain and depended on developments in the law which took place during the course of the proceedings. In setting out the principles to be followed by a judge who determines the incidence of costs in relation to judicial review proceedings which have been compromised, Lord Neuberger MR said this:

> [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.
>
> [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*'s case was decided on this basis.
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> [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*'s case. 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 a case.
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> [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."

15. Mr Parkhill, on behalf of the claimant, accepts that this Court will not interfere with a costs order unless it is clear that the judge's exercise of discretion can be shown to be wrong in principle or is clearly wrong in the sense of lying outside the legitimate bounds of his discretion having regard to the relevant factors under consideration. But he says that the judge's decision was wrong in two material respects: first, it was not right to say that the claimant persisted with her claim notwithstanding the offer to make the interim payments pending the determination of the financial assessment; and, second, the judge ought to have treated the case as falling within the first of the three categories of case identified by Lord Neuberger in *R (M) v Croydon LBC*.

16. In relation to the first ground of appeal, Mr Parkhill submits that the judge was simply mistaken in treating the offer to make the interim payments as having been made prior to the service on the Council of the draft proceedings. He points out that in paragraph 6 of his statement of reasons for his decision Haddon-Cave J records that the Council's undertaking to make interim payments of £32.50 was given after the issue of the application for judicial review but then in paragraphs 7 and 9 seems to accept that the claimant did not issue the proceedings until after the undertaking had been offered. The correct sequence of events he says was that no offer of payment was made in response to the request by the claimant's solicitors for an early determination of the assessment contained in the e-mails up to 22 October including the Pre-Action Protocol letter. It was only made in response to the service of the draft proceedings by e-mail on 29 October. The judge, he says, was wrong about the chronology. The proceedings were issued by the Administrative Court sometime in the afternoon of 29 October. This is apparent from the date stamp. But there is nothing to suggest that the issue post-dates the undertaking. Mr Parkhill says that the judge relied on the costs submissions of the Council which in turn rely upon the e-mail I quoted from in [9] above to infer that the issue of the proceedings had come after the undertaking. But the subsequent issue of the proceedings by the court staff was an administrative matter which could not properly be treated as the claimant having "persisted with the claim" notwithstanding

the Council's undertaking. Once the undertaking was received, it was accepted by the claimant as the basis of a compromise of the proceedings and the hearing fixed on 2 November to deal with the question of interim relief was abandoned save for the judge approving the consent order.

17. The second ground of appeal is that the judge was wrong not to treat this as what can be termed a category 1 case: i.e. in which the claimant has, to use Lord Neuberger's words, been wholly successful in obtaining by consent the relief sought in the proceedings. The judge, in giving reasons for his decision, placed some reliance on the e-mail from the claimant's solicitors of 29 October in response to the Council's offer to make interim payments of £32.50 per week. As quoted earlier, the solicitors stated that they were still intending to issue the proceedings in relation to the time taken to carry out the assessment. Mr Parkhill says that there was, in fact, never any prospect of the claimant continuing her claim once the interim payments were agreed and that the Council's failure to make such payments was the only matter which was challenged in the application for judicial review.

18. He accepts that the claim form in the proceedings sought both interim relief and a mandatory order requiring the Council to progress its assessment of means and the determination of whether or not to provide financial assistance. But the claimant's only concern was to obtain the subsistence payments she sought. The claim for a mandatory order was included because if the claim for interim relief was refused by the Court then it would be in the claimant's interest for the assessment to be carried out in the shortest possible time. If, however, interim relief was obtained the claimant's concern about an early determination of the assessment largely disappeared. This is why, Mr Parkhill submits, there was never any real prospect of the proceedings being pursued to a full hearing once the undertaking was forthcoming.

19. Although he referred to the decision in *R (M) v Croydon LBC* in [9] of his reasons, the judge did not in terms treat this as a category 2 matter rather than a category 1 case in Lord Neuberger's classification. On one reading of his decision, he accepted that the offer of interim relief rendered the entirety of the application for judicial review "otiose and unnecessary" in the sense that the claimant had obtained a subsistence allowance consensually and could therefore afford to await the outcome of the assessment of her means. It was not necessary for her to obtain any relief at all from the Court. The judge, says Mr Parkhill, was correct to treat the claim as a single composite one for financial payment but wrong (for the reasons already discussed) to have assumed that the claimant's solicitors chose to issue the proceedings even after the undertaking had been received.

20. In my view, the judge made the right order for costs but not for the reasons which he gave. I think Mr Parkhill is probably right to say that once the application had been lodged with the Administrative Court the claimant had no real control over when it was stamped and issued and the correct approach is to treat the application as effectively made once the papers were lodged. The judge was at a disadvantage in not having copies of the various e-mails which were sent on 29 October. But, even with those e-mails, we have no evidence as to precisely when the papers were lodged with the Administrative Court and whether they could have been recalled following the receipt of the Council's undertaking. Looked at in this way, it is not therefore accurate to say that the claimant persisted with the claim even after the undertaking had been given by e-mail on the afternoon of 29 October. Moreover, the issue of the proceedings and their

subsequent consideration by Cranston J on the 29 October was routine and did not generate additional costs except for the issue fee. The substantial costs had already been incurred in advising the client, corresponding with the Council and instructing counsel to settle the proceedings. By the time that the date for the adjourned hearing on 2 November arrived, the case had been settled.

21. I do not therefore consider that the issue of the proceedings was a reason in itself to make no order for costs and the judge's exercise of the costs discretion was, I think, based on a false assumption both about the relevant timing of events and about their costs consequences. It therefore falls to us to re-exercise that discretion on the basis of the material and submissions we have heard.

22. In my view this was a category 2 case. Although the e-mail of 29 October which refers to the issue of the proceedings in relation to the timing of the assessment may not in the events which happened have generated any additional costs, it did recognise that the application for judicial review was not, contrary to Mr Parkhill's submissions, concerned only with the issue of interim payments pending the s.17(8) assessment. The application was a challenge to the rationality of the Council's failure to have made any subsistence payments to the claimant and to the time taken to make the assessment. In deciding whether to grant financial assistance, the Council was required to assess the means of the claimant who had been asked to provide information about her bank accounts. The failure by the Council to make any subsistence payments to the claimant could only be treated as irrational if the requests for additional information could be said to be unjustified or if the Council had delayed the assessment without good reason. None of these issues had been determined in the proceedings at the time when they were compromised and it was not possible for Haddon-Cave J, nor is it for us, to form any view as to how they are likely to have been resolved. The first two heads of relief in the claimant's statement of grounds depended upon these issues.

23. The claim also included one for interim relief which was compromised by the undertaking, although in a lower sum than sought. The e-mail I have just referred to confirms that it was treated as compromising no more than the claim for interim relief. To secure permanent funding the claimant needed to rely on her argument that the Council was acting irrationally in refusing to make payments based on the financial information it already had. The grant of interim relief cannot be relied on to predict or determine the outcome of the substantive application for judicial review which the claimant had abandoned. It does not amount to a case in which the claimant has been wholly successful. The Council had agreed to provide interim payments until 2 weeks after the completion of the assessment process but no further and the claimant had abandoned her claim that the Council has acted unlawfully throughout by refusing to make subsistence payments. At the date of the compromise it was impossible to predict whether the applicant would be found to be entitled to the subsistence payments she was seeking. This is at the very least a category 2 case. For the reasons I have given, I would make no order for costs.

24. For these reasons, I would dismiss the appeal.

Lady Justice Asplin :

25. I agree.