Apportioning the costs of settled judicial review cases

Parties to judicial review proceedings should make clear their intention to settle at the earliest opportunity if they want to avoid adverse costs orders, says **Sarah Sackman**

What every client wants to know before embarking on public law litigation is how much could this cost me? The opportunity to reach a settlement at an early stage in judicial review to keep costs down and avoid the unpredictability of litigation may be welcomed by defendants and claimants alike, however, following the Court of Appeal's latest guidance in *M v Croydon LBC* [2012] EWCA Civ 595, public lawyers need to be aware of the costs implications of settling.

As in ordinary civil litigation, costs in judicial review will generally follow the event with the losing party being ordered to pay the costs of the successful party. But what is the position where the parties settle on all issues except costs before or at the main hearing?

Following last year's Court of Appeal decision in *R (Batha and Ors) v Secretary of State for the Home Department* [2011] EWCA Civ 895, the court issued further guidance on the subject in *M v Croydon LBC*.

Batha had already heralded an important shift in favour of claimants by ordering defendants to pay a claimant's costs in cases where the claim was settled or conceded in the Administrative Court. The court held in *M*, following Batha, that where a local authority had conceded a claim brought by an asylum seeker in relation to a disputed age assessment, the judge had been wrong to make no order as to costs on the grounds that it had not be obvious from the outset, in a developing area of law, what the outcome of the case would be. The court eventually ordered the local authority to pay 50 per cent of the claimant's costs until the issue of proceedings and 100 per cent thereafter.

The main points to emerge from *M* were:

(1) The costs position where cases settle in the Administrative Court is no different from the general rule in civil litigation that costs follow the event;

(2) Where a claimant obtains all the relief he was seeking, whether by consent or after a contested hearing, he is entitled to his full costs, unless there is a good reason to the contrary (*Batha* applied).

(3) Where a claimant obtains only part of the relief which he was seeking, the position on costs will be more nuanced and will turn on the specific facts of the case (see *R (on the application of Scott) v Hackney LBC* [2009] EWCA Civ 217 applied).

There is a big difference between a case where a claimant was wholly successful, a case where he only succeeded in part and a case where there had been some compromise which did not reflect the claimant's claims. The allocation of costs will ultimately turn on the particular circumstances of the case.

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Even if the claimant is accepted to be the successful party, there may be arguments as to the importance of the issue raised in the claim, or the costs relating to the issue on which he failed. Where a claimant has only partially succeeded the court will normally consider 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 pursuing the unsuccessful claim.

In a case where there has been some kind of compromise between the parties which does not actually reflect the claimant's claims, the court will find it difficult to gauge which party has been successful. In such cases the court may look at the underlying claims and ask whether it was reasonably clear who would have won if the matter had not settled. If that produces no clear answer, the Court of Appeal said there was a powerful argument that the default position should be no order for costs.

Encouraging settlement and making concessions

The courts are naturally eager to encourage settlement. There are all sorts of tactical considerations which may inform a defendant's decision to provide the relief requested by the claimant. The defendant should always be prepared to provide a clear explanation for why it has compromised as it has done. If the defendant gives the claimant what he wants, without accepting the likelihood of succeeding, then the court may conclude that the defendant should not be liable for the claimant's costs.

In any event, public authorities intending to settle a claim should not leave it to the last moment to do so. In *R (U) v Newham LBC* [2012] EWHC 610 the judge awarded indemnity costs against the local authority which had waited until two days before the substantive hearing to indicate that it was prepared to concede the claim. The judge said it was simply not acceptable for the parties to compromise a case which raised important legal issues and had been listed for a full day so soon before the proposed hearing. The judge acknowledged the financial and staffing pressures at local authorities which might lead to delays in offering and achieving a settlement but, where the power to offer relief lay in the authority's hands, such a delay was unreasonable.

The lesson for claimants and defendants therefore seems to be to identify appropriate opportunities for settlement in a timely fashion and be clear why and on what grounds you are prepared to reach that compromise.

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