Duncan Lewis

Giving people a voice

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Court of Appeal criticises the approach of Administrative Court Costs Judges in a landmark case and restates Boxall[1] principles while emphasising the need to abide by the pre-action protocol in judicial review cases.

The Court of Appeal has today handed down a judgment in the case of Bhata[2] that overturns the practice that had built up in the Administrative Court of refusing the Claimant his costs where the Defendant settles before a final hearing.

The lead case on costs where a claim for judicial review settles before a full hearing is Boxall, well known to judicial review practitioners. The key principles in Boxall include: '*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 the absence of a good reason to make any other order the fall back is to make no order as to costs';* and '*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.'*

These principles had come to be interpreted by a number of judges in the Administrative Court as virtually amounting to a licence for Defendants to await a decision on permission and then, if permission is granted, concede the relief requested but claim that they were doing so for 'pragmatic reasons' and resist costs. The Appellants appealed against orders refusing them their costs on these bases.

The Court of Appeal recognising that the *'appeal raises a question of general application'* stated that:

- *'What is not acceptable is a state of mind in which the issues are not addressed by a defendant once an adequately formulated letter of claim is received by the defendant. In the absence of an adequate response, a claimant is entitled to proceed to institute proceedings. If the claimant then obtains the relief sought, or substantially similar relief, the claimant can expect to be awarded costs against the defendant.'*

- The Court had *'serious misgivings about* [the defendant]'s *claim to avoid costs when a claim is settled for "purely pragmatic reasons" … The expression "purely pragmatic" covers a multitude of possibilities. A clear explanation is required, and can expect to be analysed, so that the expression is not used as a device for avoiding an order for costs that ought to be made.'*

[1] *R (Boxall) v Waltham Forest LBC* 21 December 2000 (2001) 4 CCL Rep 258
[2] *Bhata & Others v SSHD* [2011] EWCA Civ 895, also known as *'AK'*

- There was also deep concern that failure to award costs in meritorious cases was hindering access to justice, to which the Court responded '*Lord Hope's statement that "the consequences for solicitors who do publicly funded work are a factor which must be taken into account"* [3] *is intended to be of general application … Moreover, a culture in which an order that there be no order as to costs in a case involving a public body as defendant, because a costs order would only transfer funds from one public body to another is in my judgment no longer acceptable.'*

Claimant lawyers will welcome the return to rigour presaged by this judgment, which will come as a particular relief to legally-aided lawyers, beset as they are by funding difficulties: at least they can now expect to receive their costs in good cases properly brought.

A full article dealing with the case in detail will be posted on the Duncan Lewis website on Monday next week.

[3] in *Re appeals by Governing Body of JFS* [2009] 1 WLR 2353