Neutral Citation Number: [2020] EWCA Civ 1711

Case No: C1/2019/2984

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Queen's Bench Division, Administrative Court
Richard Whittam QC sitting as a Deputy High Court Judge
CO/358/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2020

Before :

LORD JUSTICE NEWEY
and
LORD JUSTICE GREEN

- -

Between :

THE QUEEN ON THE APPLICATION OF RS	**Appellant**
- and -	
LONDON BOROUGH OF BRENT	**Respondent**

- -
- -

Ms Galina Ward (instructed by **Duncan Lewis Solicitors**) for the **Appellant**
Mr Lindsay Johnson (instructed by **Brent Council Legal Department**) for the **Respondent**

Hearing date: Tuesday 27th October 2020

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Approved Judgment

Lord Justice Green :

Introduction: The Issues

1. The Appellant[1] suffers from a debilitating but non-physical condition which makes walking very difficult. He applied for a "Blue Badge" parking entitlement. This was refused absent a mobility assessment by an expert. He sought judicial review and the Respondent, in due course, entered into a Consent Order (the Order) under which the Appellant was granted a Blue Badge without having to undertake a mobility assessment. However no provision was made for costs. This matter was submitted to the Judge to determine. This appeal is against the ruling of Richard Whittam QC, sitting as a Deputy Judge of the High Court ("*the Ruling*" and "*the Judge*"), dated 14th November 2019 in which he refused to make an order for costs in favour of the Appellant.

2. It is said that the Judge erred in making no order. He should have made an order in favour of the Appellant since this was a case where, by virtue of the Order, the Appellant obtained in substance the relief he sought. In short, he won. The Court of Appeal in *M v Croydon LBC* [2012] 1 WLR 2607 ("*M*") categorised cases into three types and identified principles to be applied in each category whilst at the same time recognising that all cases were fact and context specific. The Appellant argues that the present case is a clear category (i) case where the Appellant achieved through the litigation essentially all that he was seeking. Accordingly he is, *prima facie*, entitled to his costs absent some other good reason not to award costs. No such reason exists here. The Judge therefore erred in failing to categorise this case as category (i) and also in identifying a policy reason for not awarding costs.

3. The Respondent disagrees. It is denied that the Appellant won outright. He did not obtain all of the relief that he sought in the judicial review proceedings. On this basis the Judge was entitled to treat this as category (ii) or (iii) case (where there is no starting assumption that the claimant gets costs), and in effect a "*nil all draw*". But even if that was wrong there were good policy reasons, based upon the need not to disincentive settlement, for not awarding costs. Standing back, the local authority took a pragmatic decision to grant the Appellant a Blue Badge and settled the litigation at the first reasonable point in time, and the Judge correctly exercised a discretion which on appeal, this court should be slow to interfere with absent some plain error, which there is not.

4. The issues on this appeal focus upon: (a) what is understood by a category (i) case in *M* and the difference with categories (ii) and (iii); (b) what amounts to a good reason for not awarding costs; and (c), whether the classification of the outcome of litigation in terms of the categories in *M* is one of discretion for the Judge, which the appeal court should be very loathe to interfere with, or one which involves the assessment of principle which this court can review.

The Facts

The Appellant

[1] An Anonymity Order has been made in favour of the Appellant.

5. The Appellant issued his application for judicial review on 24th January 2019, seeking an order requiring the Respondent to decide his application for a Blue Badge within four weeks of the date of an order being made, and damages for breach of Article 8 of the ECHR. The Appellant argued that the Respondent had misconstrued the relevant legislation as excluding from entitlement to a Blue Badge a person with a non-physical disability who nonetheless had a consequential inability to walk, and had imposed an unlawful, discriminatory and irrational obligation upon the Appellant to attend for a disability assessment before the Respondent would make any substantive decision.

6. The Appellant does not suffer from a physical disability. He does however suffer from various conditions including Autism Spectrum Disorder ("ASD"), learning difficulties and Hyperacusis which is a hearing disorder causing increased sensitivity to certain frequencies and volume ranges of sound. It can be debilitating. The Appellant was issued with Blue Badges by the Respondent during the period 2000-2013. An application for renewal made in March 2013 was however refused upon the basis that his conditions were "*no longer considered to be a qualification for a disabled blue badge*".

7. Subsequently, the Appellant submitted expert medical evidence establishing that his non-motor condition nonetheless resulted in an inability safely to walk which justified the grant of a Blue Badge parking entitlement.

The Legislative Context

8. It is relevant at an early stage to say something about the legislative context. The judicial review concerned the interpretation of Regulation 4(2)(f) of the Disabled Persons (Badges for Motor Vehicles) Regulations 2000 ("*The 2000 Regulations*"). This was made under section 21 of the Chronically Sick and Disabled Persons Act 1970. It provides for badges ("*Blue Badges*") for display on motor vehicles used by disabled persons to be issued by local authorities. Section 21(2) states:

> "A badge may be issued to a disabled person of any prescribed description resident in the area of the issuing authority for one or more vehicles driven by him or used by him as a passenger."

9. It is clear that the provision provides a power (cf the word "*may*"), not a duty. At all times until 30th August 2019 the description of disabled persons included: "*a permanent and substantial disability which causes inability to walk or very considerable difficulty in walking*" (Regulation 4(2)(f)). The Respondent, in common with some other authorities, whilst accepting that persons with non-physical disabilities were not *per se* excluded, nonetheless construed this provision as limited to <u>physical</u> disability *causing* an applicant's mobility impediment. This therefore excluded non-physical obstacles to walking. Examples of the latter would include anxiety at being out in public or safety concerns arising out of mental health difficulties.

10. On 21st January 2018, the Department for Transport ("*the Department*") launched a public consultation about eligibility issues under the Blue Badge Scheme. The reason for the consultation was said to be (paragraph [3.5]) that in the course of discussions with local authorities and from correspondence with the public it had become clear

that the application of the scheme to those with non-physical disabilities was not "*clearly understood"*. In paragraph [3.11] the Department crystallised the issue around causation i.e. whether a walking impediment *caused* by a non-physical disability fell within the scheme or whether it only applied where the impediment to walking was caused by a physical disability. There was also confusion as to the nature of the impediment to walking. Did it only cover physical problems – for instance the ability to put one foot in front of another – or did it also include the sorts of impediments that a person with a non-physical disability might encounter which might flow from anxiety or fear and those which could give rise to safety concerns.

11. On 29th July 2018, the Department issued a consultation response which made clear that those with hidden disabilities which "*caused*" impediments to walking were, in principle, within the scope of the 2000 Regulations. In paragraph [2] the following was observed:

> "The current rules embrace all conditions, physical or otherwise, but it had become clear to us that the regulations and guidance were not clearly understood and that people with hidden disabilities were sometimes finding it difficult to access badges, even though their condition caused them very significant difficulties when undertaking a journey."

12. The amendment of legislation to clarify what Government considers is *already* the law is relatively unusual. Nonetheless, the Department stated an intention to amend the 2000 Regulations in order to:

> "… make it clear that people can qualify not just because of a physical difficulty in walking but for non-physical reasons that might make it equally difficult getting from the vehicle to the destination even though they can walk."

13. On 24th April 2019, The Disabled Persons (Badges for Motor Vehicles) (England) (Amendment) Regulations 2019/891 were made. They were laid before Parliament on 30th April 2019 and amended Regulation 4(2)(f) of the 2000 Regulations effective as from 30th August 2019. The Explanatory Memorandum stated (paragraph [7.2]):

> "Although the Department considers that people with non-physical disabilities are not currently excluded from receiving a Blue Badge, it had become clear through discussions with local authorities and from correspondence that the application of the Blue Badge Scheme to people with non-physical disabilities was not clearly understood or administered consistently across the country."

14. The Memorandum also explained that problems arose due to uncertainty as to the meaning of the phrase "*very considerable difficulty in walking*".

15. The effect of the amendment was to clarify that the right to a Blue Badge under the 2000 Regulations applied to a person certified by an expert assessor as having an enduring and substantial physical or non-physical disability which caused them, during the course of a journey, to (a) be unable to walk; (b) experience very

considerable difficulty whilst walking, which could include very considerable psychological distress; or (c), be at risk of serious harm when walking, or pose, when walking, a risk of serious harm to any other person.

The Proceedings

16. On 1st October 2018, the authority withdrew a refusal decision but by a further decision dated 25th October 2018 (the decision under challenge in the judicial review proceedings) refused to reconsider the application pending the attendance by the Appellant of a physical mobility assessment. The Appellant objected to being required to attend the assessment.

17. The Appellant was granted legal aid. The claim form seeking judicial review was served on 24th January 2019. The Respondent's summary grounds of defence are dated 20th February 2019. Permission to apply for judicial review was granted on 25th March 2019.

18. The position of the Respondent is set out in a subsequent witness statement of Ms Sonja Binns, Team Leader, Brent Council, dated 14th May 2019. She deals candidly and fairly with her interpretation of the 2000 Regulations and the position adopted by the Department in the consultation exercise. The position was that Brent was "…*one of a number of local authorities that views the current eligibility criteria as not extending to those with non-physical disabilities*". At paragraph [7], having referred to the scheme as described in the 2000 Regulations, and its seeming focus upon physical disability, she said: "*That express limitation of automatic eligibility to physical difficulties suggests to me that the Regulations are focusing on physical rather than non-physical disabilities.*" She explained her construction of Departmental Guidance: those with non-physical disabilities were not, without more, qualified to receive a Blue Badge but they "*must also have considerable difficulties in walking*", and it is apparent from Ms Binns' statement that the difficulties must be *due* to physical disability. She goes on to describe how the authority has a process for determining cases and this can, if a case is not immediately clear, involve a mobility assessment.

19. In paragraph [12] she referred to the proposals to change the law. In her view these proposed changes addressed "… *the precise point"* in the litigation and she considered that the *"… need for those amendments indicates that the legislation was at least capable of being read as limited in the way I suggest it is limited*".

The Order

20. On 15th July 2019, the Order was sealed. This recorded that the Respondent had agreed to provide the Appellant with a Blue Badge within 14 days of the date of the Order and it transferred the claim for damages to the County Court. The operative recital to the Order was as follows:

> "UPON the Defendant agreeing to provide the Claimant with a Blue Badge within a time frame of not more than 14 days from the signing of this Order and Claimant providing a passport sized photograph whichever is the greater (absent special circumstances) in light of the prospective amendment to

> Regulation 4(1)(f) of the Disabled Persons (Badges for Motor Vehicles) (England) Regulations 2000/682 ("the 2000 Regulations") and the updated guidance on this topic from the Department for Transport ("DfT") which will come into force on 30 August 2019 which will recognise hidden disabilities, like the Claimant's such as autism, as previously recognised under the regulations applicable at the date of the decision challenged."

21. The words at the end of the Order "… *as previously recognised under the regulations applicable at the date of the decision challenged*" acknowledge that the 2019 amendment was clarificatory and that there was an entitlement to a Blue Badge for those suffering from non-physical disabilities under the predecessor provisions.

22. The County Court claim was subsequently compromised in a Tomlin Order, by the payment of damages (of £4000) and costs (of £2050). The damages were however subject to the legal aid statutory charge (under section 25 Legal Aid, Sentencing and Punishment of Offender Act 2012) due to the refusal of the Judge to make a costs order as part of the judicial review proceedings.

The Ruling Under Appeal

23. In the Ruling of 12th November 2019, the Judge decided to make no order as to costs:

> "Throughout the Defendant defended its decision, and the challenge to that decision has been withdrawn.
>
> The Defendant maintains that it adopted a pragmatic approach in the light of the prospective amendment to reg 4(1)(f) of the Disabled Persons (Badges for Motor Vehicles) England regulations 2000/682 and the updated Guidance from the Department of Transport which were to come into force on 30 August 2019 and will expressly recognise hidden disabilities such as autism.
>
> The Claimant, in strident fashion, contends that the Defendant unreasonably contested the claim and that he now had succeeded.
>
> The Defendant's position expressly is reflected in the Consent Order. It is important that parties should not be discouraged from compromising cases because of the risks of costs liability.
>
> This is a *Boxall* kind of case where the issue of costs is more nuanced. Clearly because of the impending change to the regulations the Defendant took a pragmatic view and the challenge to its decision making was withdrawn. If this is not a *Croydon iii* case it is a *Croydon ii* case.
>
> In those circumstances, I make no order as to costs."

24. The gist of the Judge's reasoning was: (i) that the Respondent had defended its position; (ii) the Appellant persisted; (iii) the Respondent's decision to concede was "*pragmatic*" due to the "*updated*" guidance from the Department and "*the impending change to the regulations*"; (iv) the guidance would "*expressly recognise*" hidden disabilities such as autism; (v) the Respondent's position was expressly recorded in the Order; (vi) it was important that the risk of costs should not be used to discourage compromise; (vii) the position was therefore a "*nuanced*" one due to the "*impending*" change to the Regulations and the situation arising was *M* category (ii) or (iii).

25. Although the Judge does not explicitly so record, it is evident that he rejected the submission made to him that this was an *M* category (i) case.

Analysis and Conclusion

The "M" Categories

26. With respect to the Judge, in my judgment he erred in not treating this case as an *M* category (i) case and also in considering that there was a good policy reason why costs should not be awarded. The 3 categories set out in *M* were as follows:

> "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 divergence 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 reject 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."

27. In paragraph [61], the Court explained that in category (i) cases costs should follow. The fact that the conceding party was "*realistic*" (i.e. pragmatic) was not an answer; they should have confronted that reality "*before the proceedings were issued*":

> "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…"

Who Won?

28. In my view, the Appellant succeeded in a very real sense in obtaining through the Order, everything that he could realistically have wished for from the judicial review proceedings. There is, as counsel for the Respondent pointed out, a technical mismatch between the formal relief as drafted in the claim and the Order. However, in public law proceedings it is always necessary to have an eye for the realities of the case. It is in the nature of public law proceedings that a claimant must, perforce, cloak his *real* object in public law garb including, routinely, an application for remittal for reconsideration and/or a remittal of a damages claim for assessment in the County Court. The High Court does not in public law proceedings usually determine the ultimate merits of a dispute over a decision taken by a public body. In *R(Tesfay) v Home Secretary* [2016] EWCA Civ 415 at paragraph [57], the same point was made about the need to look at the real substance in public law proceedings to determine who had won. A court should consider: what was sought; the basis upon which it was sought and opposed; and, what was achievable. The Court highlighted that working out who had won in a public law case was not as easy as it might be in civil proceedings because of the fact: whilst a claimant might ultimately desire a substantive result on the merits, remittal might still be a "*substantial achievement*" and the best remedy available.

29. Here the Appellant's legal advisers drafted the relief sought in traditional and technical terms but, putting technicalities to one side, the nub of the Appellant's case was that he wanted a Blue Badge without having to go through a mobility assessment and by the Order he achieved just that. It is true that he did not, as of the date of the Order, obtain an award of damages (this came later when the County Court proceedings were compromised) but he did get a remittal of his claim for compensation to the County Court which is as much as he could ever have realistically expected from Administrative Court proceedings. In pith and substance this was not a nil all draw; it was a solid win for the Appellant.

30. Mr Johnson, argued that, notwithstanding, it was not in fact clear that the Appellant had truly won. He pointed out that the thrust of the judicial review was to overcome the requirement imposed by the authority that the Appellant attend a mobility assessment. The 2019 amending Regulations had introduced detailed new rules on mobility assessments. In the final outcome, it was not improper to require an applicant (including the present Appellant) to attend such an assessment. Had he done so then he would have been assessed by an independent expert. That person might have taken a different and wider view of the law and the scope of the entitlement than did the authority. Mr Johnson said that it was pure speculation to seek to work out what would have happened on the assessment. The Judge was obviously aware of this and had taken the resultant uncertainty as to outcome into account in the exercise of his discretion. The answer to this lies in the position of the authority as set out in the statement of Ms Binns. Under the rules, an assessor does no more than report back to the authority who then takes the final decision. If, to test the argument, the assessor had recommended a grant of a Blue Badge to the Appellant upon a basis that the authority considered to be unlawful and inconsistent with the 2000 Regulations then, a court is entitled to infer, the authority would have acted in accordance with *its* own view of the law and its obligations thereunder, and not that of the assessor. Upon the basis of the construction placed upon the law by the Respondent, there would have been no real point in the Appellant attending an

assessment since, on the law as understood by the authority, he would almost inevitably have failed.

Relevant Policy Considerations

31. If therefore the Appellant is entitled to costs, is there any good policy reason which should apply to strip him of the fruits of his victory? The Judge (albeit upon the basis that this was not an *M* category (i) case) held that there was, namely the policy that awarding costs could stifle settlements. With respect, even standing alone this reasoning is not convincing. We accept that there is some force in the Judge's observation, but it requires qualification. If costs are not awarded litigants might feel compelled to persist in the litigation, rather than settle, upon the basis that it is only at the culmination of the judicial process that costs can be recovered. As such, it is not always the case that making no award of costs will encourage settlement; the converse can occur, and this would disincentivise settlement. The issue must also be seen in the broader context of access to justice. This case concerned the rights of a person suffering from a disability to a social benefit that could ease the burdens of his everyday life. Sadly, to obtain the permit he was compelled to resort to litigation. This is a step not lightly taken and can involve a significant exposure to an adverse costs order which can create a risk disproportionate to the sought-after benefit. An adverse costs order, which includes no order for costs, can be ruinous. Many litigants in the position of the Appellant are unable to fund litigation which involves even a modest costs risk. If a litigant who prevails does not receive the benefit of an order for costs this also can, in an era where legal aid for the vindication of civil rights is virtually non-existent, serve to deter the enforcement of rights. The fact that the Appellant has, in this case, been legally aided does not alter the broader picture. If those advising vulnerable litigants cannot recover their costs, they will be deterred from representing them in the first place. In short, and with respect to the Judge, I am of the conclusion that insofar as policy considerations were relevant, the analysis in the Ruling was partial and incorrect.

32. My conclusion as to who won, and as to the absence of countervailing policy reasons, suffices to dispose of the appeal on the basis that this is an *M* category (i) case. It is not necessary to consider who would have won on the merits had the matter proceeded to a full hearing.

33. In *M*, the Court indicated that it could be helpful to consider who would have won if the matter had proceeded to a final determination, at least in a case under categories (ii) and (iii). This could be undertaken "*if it was tolerably clear*" as to the final legal position (ibid paragraph [63]) We did not hear detailed argument on the ultimate merits of the law so I express my view as provisional and not definitive. Nonetheless, it is "*tolerably clear*" to me that at a final judicial review, the Appellant would have had the stronger case on the construction of the 2000 Regulations and to this extent it corroborates my conclusion as to who, in substance, prevailed. There are two points which influence this conclusion.

34. First, the starting point is to apply an orthodox purposive method of interpretation to the 2000 Regulations. The purpose behind the measures is to enable those who cannot readily walk to be granted a Blue Badge. The reason (or cause) for not being able to walk should, on a purposive construction of the measure, be irrelevant *provided* that the reason is genuine. To this extent whether the reason is attributable to

a physical cause (as is likely to be the case most often) or a non-physical cause does not matter to the purpose and object of the measure: either way the person is subject to a genuine disability and is in equal need of the proffered assistance. There is no language in the 2000 Regulations which precludes this interpretation which focuses upon causality between a disability (hidden or motor) and the impediment to walking.

35. Second, the fact that the Department took this broader view of the 2000 Regulations in the consultation paper and as a result introduced clarificatory wording into the 2000 Regulations is relevant and supports the conclusion that I have arrived at. The amendments were clarificatory and intended to shed light upon the 2000 Regulations and make clear that those Regulations did encompass a person such as the Appellant, with a hidden, non-physical, disability, which caused an impediment to walking. A consultation paper and response published in 2018 cannot, strictly speaking in terms of the rules governing admissible guides to the construction of legislative measures, be relevant to the meaning of the 2000 Regulations since these Departmental statements post-date the 2000 Regulations by some 18 years. They do of course predate the 2019 amendment provisions and do guide their construction, insofar as any ambiguity remains. Generally, even if not strictly a guide to construction, they can be taken as informative as the views of an authoritative and well-informed source. To this extent, they support the conclusion I have arrived at applying normal principles of construction.

The Exercise of the Appellate Jurisdiction / Respecting the Exercise of Discretion by the Costs Judge

36. The final argument of Mr Johnson, lest he was wrong on his other points, was that this was a case where the Judge received only brief submissions in writing and was asked to make a decision on the papers. He did not have the benefit (that we undoubtedly have had) of detailed written submissions and close oral argument. In *R(Parveen) v Redbridge LB* [2020] EWCA Civ 194 ("*Parveen*"), the Court of Appeal has, in effect, warned this court to be chary of interfering in the exercise of discretion by first instance judges on costs matters. Such judges are often required to take relatively rough and ready decisions, often on the papers only, and it is inimical to an efficient administration of justice if the appeal court pores over the fine details and picks holes in findings. A judge's decision should not be overturned simply because the appellate court, after far fuller argument, might take a different view. In *Parveen* the outcome pivoted upon a variety of non-legal matters. The Court was attracted to certain conclusions that the costs judge, on a relatively rough and ready basis, had not considered persuasive. The Court nonetheless dismissed the appeal and emphasised that, bearing in mind the quite different nature of the hearing before the costs judge and that before the appeal court, the appeal court should only interfere if the conclusion of the costs judge was not "*open to him*". The position would have been different had the result been unjust or perverse or had there been an error of law (*ibid* paragraph [54])

37. Before us it has been argued that the judge's conclusion were "*open* "to him and were based upon finding of fact. The Judge did his best with limited ammunition and assistance and made a sensible exercise of discretion. At base, the Judge took a rounded view of all the facts and exercised a valid discretion. It was perhaps a rough and ready decision, but it was none the worse for that and for the reasons given by the Court of Appeal in *Parveen* this court should not interfere.

38. Mr Johnson said that this approach was consistent with the judgment in *M* where, at paragraph [65], the Court stated:

> "Having given such general guidance on costs issues in relation to Administrative Court cases which settle on all issues save costs, it is right to emphasise that, as in most cases involving judicial guidance on costs, each case turns on its own facts. A particular case may have an unusual feature which would, or at least could, justify departing from what would otherwise be the appropriate order."

39. Mr Johnson argued that his client compromised the proceedings at the first realistic point in time i.e. in anticipation of the 2019 amendment Regulations being made (albeit that they did not come into effect for some considerable time thereafter) and this was a fact that the Judge took into account as a sensible exercise in pragmatism.

40. I see considerable force in the submission that when a costs judge addresses the relevant facts and forms a view on them, the appellate court should be slow to intervene. It is in my view, proper for the appellate court to show circumspection where the issue is whether the judge below took a view on facts, which the appellate court might not have taken.

41. However, the position is different when the disputed issue is one which has a legal content to it, as recognised in *Parveen*. The classification of a case as *M* category (i), as opposed to (ii) or (iii), is a decision which can contain a significant element of principle. The judge has a discretion, but that discretion must be exercised in accordance with principle. The very rationale behind the Court of Appeal in *M* setting out principles to be applied was because earlier courts had been giving inconsistent rulings (*ibid* paragraphs [1] and [45]). The principles set out in *M* are intended to guide the exercise of the costs discretion and if, in a given case, a judge errs in the application of those principles then that is an error of law and the appellate court can interfere, if needs be retaking the decision.

42. In this case, the Judge decided that this was an *M* category (ii) or (iii) case (see paragraph [26] above). He did not address in a clear way whether the Appellant had won. On my view of what transpired, the Appellant won. This was therefore an *M* category (i) case and the error made was of principle. As such the Appellant was entitled to an award of costs absent some good reason and as to this I am of the view that the analysis of the countervailing policy reason was incomplete and did not serve to rebut the basic position, namely that the Appellant was entitled to his costs. It follows that although I have sympathy with the Judge, I conclude that there was an error of principle in his reasoning and that this is therefore a case where this court can form its own view.

43. As to the argument that the authority acted at the first reasonable point in time I do not agree. The Respondent could have seen the writing being written on the wall when the Department's consultation paper was published in January 2018 (nearly 17 months before the settlement Order) and then even more vividly in the consultation response published in July 2018 (about a year before the Order). Mr Johnson argues that the Department's view could have been wrong in its legal construction of the 2000 Regulations and that it was sensible for the authority to await the formal change

to the Regulations. If the Department had been promulgating an entirely eccentric and unsustainable view of the law, then there might have been some force in this argument. However, it was in my view not. I have set out my provisional views on this at paragraphs [33] – [35] above. The Department's analysis sought to eradicate a potentially discriminatory application of the rules and in this respect, took steps to clarify the position and its interpretation is consistent with the purpose of the 2000 Regulations.

44. Finally, there is a peculiarity about the Respondent's position in relation to discretion which Ms Ward, for the Appellant, pounced upon. She argued that if the authority had been correct in its interpretation of the 2000 Regulations then the grant by it to the Appellant of the Blue Badge, *prior* to the coming into effect of the amending 2019 Regulations, was, on its own case, *ultra vires* and unlawful and it had no right to compromise public law litigation upon the basis of an unlawful act, even for "*pragmatic*" reasons. She interpreted the compromise as, in effect, a recognition by the Respondent that its legal case was unsustainable.

Conclusion

45. For all these reasons I would allow the appeal. In my judgment the costs of the judicial review should be awarded to the Appellant.

46. I would add two closing observations.

47. First, this litigation amounts to a sorry episode on almost every score. I have read the court file which records the manner in which the Appellant's solicitors aggressively expanded their battle against the authority with distracting and personalised complaints about public officials to the SRA and to the Information Commissioner. The correspondence does not make pretty reading involving as it does a number of unfortunate allegations, some of which were addressed in the pleadings before the High Court[2]. For its part, the authority made an error of law but its position towards the Appellant was not advanced in bad faith and arose because of a misconstruction, shared by other authorities, of legislation which has been acknowledged by Government as being less than pellucidly clear. We are told that the Appellant's costs incurred to the point of the settlement were significantly over £60,000. It is at least a possibility that the aggression evidenced in correspondence, and the resultant strain placed on relations between the parties, added to the costs incurred.

48. Second, this is precisely the sort of dispute which should have been sorted out without litigation which amounts to a drain on the strained financial and human resources of the authority. Had this matter proceeded to a hearing and had the authority then lost it could have faced a costs bill approaching £100,000. On the other side of the coin, disputes of this nature expose individuals in difficult social and economic circumstances to potentially disastrous litigation risk. For both sides, this sort of litigation should be avoided. It is apparent that the decision taken by the Respondent was subject to internal re-review by a person unconnected to the case. This was however unsuccessful and did not lead to the decision being rescinded prior to

[2] For the avoidance of any doubt I would make clear that the solicitor who now has conduct of this case, Mr James Packer, was not the solicitor who had conduct of the case at the time that the complaints were made to the SRA and Information Commissioner. No criticism attaches to Mr Packer.

litigation. The increasingly common process of administrative re-review is desirable. It allows administrative decisions to be internally reassessed by a fresh and independent set of eyes, in particular eyes not blinkered by the potentially strained nature of the relationship between the parties. Experience in both central and local Government indicates that where internal review is sufficiently rigorous and robust it can markedly reduce the number and incidence of disputes and consequential appeals. The authority might wish to consider why it did not succeed in this case. Had it worked it could have saved a good deal of time and public money and resource.

49. Finally, I should express my thanks to both counsel for their realistic and focused written and oral submissions in this appeal.

Lord Justice Newey:

50. I agree that the appeal should be allowed, essentially for the reasons given by Green LJ. I have not myself, however, formed even a provisional view on the correct construction of the 2000 Regulations. As Green LJ recognises in his judgment, we did not hear full argument on the point and it is not necessary to arrive at any conclusion on it to dispose of this appeal.