Neutral Citation Number: [2023] EWCA Civ 717

Case Nos: CA-2022-001146
CA-2022-001250

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
MR C M G OCKELTON (Sitting as a Deputy Judge of the High Court)
CO/4226/2021

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 June 2023

Before :

LORD JUSTICE BEAN
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE WARBY

- -

Between :

The King on the Application of CR (by her litigation friend TI)	**Appellant**
- and -	
Director of Legal Aid Casework and Others	**Respondent**
- and –	
The Lord Chancellor and The London Borough of Lewisham	**Interested Parties**

- -
- -

Amanda Weston KC, Oliver Persey and Isaac Ricca-Richardson (instructed by **Public Law Project**) for the **Appellant**
Malcolm Birdling and Sophie Bird (instructed by the **Government Legal Department**) for the **Respondent**

Hearing date: 25 May 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on 23 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lady Justice Nicola Davies:

1. This appeal concerns the circumstances in which a costs capping order ("CCO") made under s.88 of the Criminal Justice and Courts Act 2015 ("CJCA") should be set aside or varied. On 13 April 2022 Mr M Ockelton, sitting as a Deputy Judge of the High Court ("the Judge"), ordered that the appellant's CCO dated 25 January 2022 should be varied so as to apply only to costs incurred before the date of service of the order.

2. It is agreed that, pursuant to CPR 46.19, the court had jurisdiction to vary a judicial review CCO. In advance of the application to the Judge, it was agreed between the parties that the CCO could be varied so as not to apply prospectively. The issue between the parties was whether, given the factual circumstances of the case, the CCO should be varied retrospectively.

Factual background

3. On 8 September 2021, TI, CR's litigation friend and prospective adoptive mother, made an emergency application for Exceptional Case Funding ("ECF") for representation in the Special Educational Needs and Disability ("SEND") Tribunal appeal. In a letter dated 9 September 2021, the respondent refused the application on the basis that it was not accepted that TI was acting in a representative capacity, stating that she was acting in a parental capacity. As a result, the respondent stated that it was necessary to carry out a full means assessment of TI and her partner in order to determine eligibility for funding.

4. On 27 October 2021 the appellant applied for legal aid to challenge the refusal by means of judicial review. On 3 November 2021 the respondent refused to grant legal aid on the ground that the judicial review prospects of success were poor (less than 45%). A review was sought pursuant to regulation 44 of the Civil Legal Aid (Procedure) Regulations 2012 and in a decision dated 29 November 2021, the refusal was maintained.

5. On 15 December 2021 the appellant issued proceedings for judicial review of the respondent's 9 September 2021 decision. On 21 December 2021 the appellant made an application for a CCO pursuant to sections 88 – 89 CJCA. The order sought by the appellant was that (i) its total liability for the defendant's costs, and the costs of any interested parties, be limited to £5,000 (inclusive of any VAT); and (ii) the defendant's liability for the claimant's costs, and the costs of any limited party, be limited to (a) the claimant's reasonable costs recoverable at Government Legal Department ("GLD") *inter partes* and Treasury Panel rates; and (b) disbursements.

6. On 25 January 2022 Mr T Smith, sitting as a Deputy Judge of the High Court, granted permission to apply for judicial review and made a CCO pursuant to CPR 46 Section VI, the terms of the CCO being:

    1. The claimant's total liability for the defendant's costs and the costs of any interested parties shall be limited to £10,000 (inclusive of VAT and disbursements), and

    2. The defendant's liability for the claimant's costs, and the costs of any interested party, shall (i) limit the claimant's representatives' remuneration to GLD *inter*

partes and Treasury Panel rates and (ii) be subject to an overall cap of £36,000 (inclusive of VAT and disbursements).

7. The claimant had been granted an adverse costs indemnity by the Law Society in order to cover her costs up to the permission stage of the judicial review proceedings. On 9 February 2022 the Law Society agreed to extend the adverse costs order indemnity to trial, up to a maximum of £10,000.

8. On 18 February 2022 the appellant submitted a substantive application for legal aid in respect of the judicial review proceedings, which included a claim that the funding be backdated to the date of her original funding application, namely 10 December 2021. On 1 March 2022 the respondent granted the application, backdated to 10 December 2021.

9. On 17 March 2022 the appellant applied to amend her grounds of judicial review and, pursuant to CPR 46.19, to set aside the CCO *ab initio* indicating on the application form that an oral hearing of the application was not required. By a letter dated 18 March 2022 the GLD, instructed on behalf of the respondent, indicated that the respondent considered that any variation to the CCO should be prospective only.

10. In a letter dated 21 March 2022 the Public Law Project, now instructed on behalf of the appellant, wrote to the Administrative Court Office in response and stated:

> "We wish to respond to the Defendant and First IP's submission that the variation of the CCO should be prospective only (i.e. that it should continue to apply in its original form to any costs incurred prior to variation).
>
> Firstly, we note that neither party has provided any authority for this submission and that we are not aware of any authority capable of supporting it.
>
> Secondly, the submission of the Defendant and First IP runs contrary to the important points of principle we set out in our original application to set aside the CCO, dated 17 March 2022 and, in effect, amount (sic) to an attempt to secure a costs 'windfall' which is no longer reciprocal as this Claimant is now fully covered by backdated legal aid.
>
> Further, the CCO of 25 January 2022 imposes a two-fold limit on the costs the Claimant can recover if she is successful. The CCO both limits the Claimant's hourly rate remuneration to GLD and Treasury Panel rates **and** imposes an overall cap of £36,000 (including VAT) on the Claimant's costs.
>
> A 'prospective only' variation to the CCO would therefore result in the Claimant's costs for all work done prior to variation being set at a level much lower than *inter-partes* rates (c. 40% lower). This would flout the principle outlined in *R(E) v JFS* [2009] UKSC 1 that publicly funded representatives should ordinarily be able to recover their costs at *inter-partes* rates where

> successful — so that the work of such representatives does not become "*financially unsustainable*". The point of a CCO is that it is an arrangement only available where, absent such order the claim would not be able to be pursued. A 'reciprocal' cap on recoverable costs is a measure to reflect a fair balance where such a cap is needed, not a means by which a defendant may seek to avoid ordinarily payable costs where they arise.
>
> Naturally, even if the CCO is set aside *ab initio*, it will remain open to the Defendant and First IP to challenge the costs claimed by way of PoDs and detailed assessment in the normal way.
>
> There are also issues of fairness and probity in play. This Defendant determines applications for legal aid in respect of legal action against herself. In this case, the Defendant initially refused legal aid for the Claimant's judicial review on grounds of merits, a decision this Defendant (rightfully) did not uphold once the Claimant had been granted permission by the High Court. If the Claimant's CCO was set aside on a 'prospective only' basis, and the Claimant's claim succeeded, this Defendant would benefit from her earlier wrongful refusal of legal aid because her costs liability would be considerably lower. This could have concerning implications for other cases where funding is sought from the DLAC to challenge the DLAC.
>
> Finally, there is no rational basis to keep the CCO in place for any period whatsoever. The purpose of the CCO regime is to provide costs protection in public interest cases. The Claimant benefits from a legal aid certificate backdated to 10 December 2021, and therefore has costs protection under section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 from that date, rendering a CCO unnecessary. The Defendant and First IP's suggestion is misconceived…."

11. A reply dated 5 April 2022 sent by the GLD on behalf of the respondent contained the following:

> "…. The Defendant agrees that the order ought to be varied in light of the grant of legal aid to the Claimant, but does not consider that it would be appropriate to do so in the retrospective manner proposed. This is because the Claimant's proposal would retroactively expose the Defendant to a significantly greater adverse costs liability in respect of costs already incurred and currently covered by the CCO. That being so, while the Defendant agrees that it would be appropriate to vary the CCO, that variation should be prospective in nature, such that it does not apply in respect of costs incurred prior to the date of the Court's order varying the CCO. The effect would be that the Claimant could recover (in respect of costs incurred to date) up to the level of the cap, and further costs in the usual way from the date of the order onwards. Conversely, the Defendant would

be doubly restricted - it could only recover its costs to date in accordance with the terms of the CCO and subject to the statutory costs protection which the grant of legal aid provides.

As against this, the Claimant's representatives seek to justify the need for a retroactive order in their letter of 21 March 2022.

First, the Claimant complains that no authority is cited for the proposition that the variation of a CCO may be prospective only. The Defendant does not suggest that this is the case. Indeed, there is authority for the proposition that a CCO may be set aside where there has been material non-disclosure at the point of application: *R (Harvey) v Leighton Linslade Town Council* [2019] EWHC 760 (Admin) at para 112.

However, this is not such a case. What the Claimant seeks is an order which permits it to recover – in respect of costs already incurred, and which are currently subject to the CCO – at commercial rates and without any restrictions. So far as the Defendant is aware there is no authority which suggests that the Court may "vary" a cost capping order in a way which deprives the other party from reciprocal costs protection in respect of costs which have already been incurred. This is significant because the Criminal Justice and Courts Act 2015 requires (at s. 89(2)) that a "*costs capping order that limits or removes the liability of the applicant for judicial review to pay the costs of another party to the proceedings if relief is not granted to the applicant for judicial review must also limit or remove the liability of the other party to pay the applicant's costs if it is*".

Thus, what the Claimant is seeking is an order which would deprive the Defendant of the protection which Parliament has required as part of the quid-pro-quo for obtaining a CCO.

Second, the Claimant suggests that there are "*issues of fairness and probity in play*" in a paragraph which carries an insinuation of bad faith on behalf of the Defendant. This unfortunate suggestion is refuted in the strongest possible terms. Applications for legal aid for the purpose of challenging the Director's decisions are considered on their merits by a separate team from that involved in either the underlying decision or the proposed litigation. That process is subject to supervision by the Court (by way of judicial review).

Furthermore, the Claimant's suggestion that the initial refusal of legal aid in this case was "*wrongful*" (i.e. unlawful) is also incorrect. The merits of the substantive claim for judicial review were assessed in good faith by the Legal Aid Agency in accordance with the Civil Legal Aid (Merits Criteria) Regulations 2013, and initially assessed at less than 45%. That was a conclusion which was rationally open to those assessing

> the application, and is not rendered "wrongful" because the claim was considered arguable, such that permission was granted. The Claimant was entitled to (and did) avail herself of her right to a review of that assessment, which was conducted independently of the initial assessment. Further, when further information (the permission decision) was presented to the Legal Aid Agency, the prospects of success were re-considered, and the decision maker rationally concluded that the prospects of success were higher, with the consequence that legal aid was granted.
>
> Finally, the Claimant's representatives complain that a 'prospective only' variation to the CCO would result in the Claimant's costs for all work done prior to variation being set at a level lower than *inter-partes* rates. The starting point here is that the overriding purpose of a CCO is to prevent an impecunious claimant from being deterred from bringing a case of general public importance at all. It is not to ensure any particular level of remuneration for the claimant's legal representatives. That said, the Defendant is mindful of Lord Hope's observations in *R(E) v JFS* [2009] UKSC 1, to which the Claimant refers. It is for this reason that the Defendant accepts that the CCO should be lifted prospectively, such that (as explained above) the Claimant will – if successful – be able to recover its costs from now on at *inter-partes* rates."

12. On 13 April 2022 the Judge made the order under appeal varying the terms of the CCO dated 25 January 2022. As to reasons, the Judge stated: "It seems to me that the defendant's detailed reasons for the making of the order in the form above are correct."

13. Following the Judge's order, the appellant on 21 April 2022 sought an oral hearing of her application to set aside the CCO which was refused on 27 April 2022 by Collins Rice J. The refusal was upon the basis that as the parties had consented to the application being dealt with on the papers, any challenge to the order by the appellant should proceed by way of appeal rather than renewal. The appellant's challenge to this order is no longer pursued.

14. On 19 January 2023 the Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2023/45 were laid before Parliament, the provisions of which would entitle foster parents and prospective adoptive parents of looked-after children to non-means tested legal help and legal representation in SEND appeals. Further, the respondent has agreed to make extra-statutory payments to reimburse the appellant's education solicitors for their costs in the SEND tribunal appeal and those of the appellant's litigation friend in respect of the expert's disbursements incurred in the appeal. The appellant anticipates that the claim for judicial review will be disposed of by way of consent, she having succeeded in obtaining the remedy sought.

Grounds of appeal

15. The appellant contends that in determining the appellant's application to set aside the CCO, the Judge was wrong to set aside the CCO prospectively from 13 April 2022 instead of *ab initio* as he had wrongly:

(1) maintained the CCO for a period when the appellant did not meet the criteria in section 88 CJCA due to backdated legal aid funding being in place throughout the material times;

(2) irrationally made an order which permitted the respondent to benefit from her initial refusal to grant legal aid in the claim for judicial review, as her costs liability to the claimant remains partially capped;

(3) gave no or no adequate reasons for the order made in the light of detailed submissions on the application in the particular circumstances of the case;

(4) made a decision not to set aside the CCO *ab initio* which was wrong in all the material circumstances.

The statutory framework

16. Sections 88 and 89 of the CJCA provide (so far as is relevant):

> "88.— Capping of costs
>
> (1) A costs capping order may not be made by the High Court or the Court of Appeal in connection with judicial review proceedings except in accordance with this section and sections 89 and 90.
>
> (2) A *"costs capping order"* is an order limiting or removing the liability of a party to judicial review proceedings to pay another party's costs in connection with any stage of the proceedings.
>
> (3) The court may make a costs capping order only if leave to apply for judicial review has been granted.
>
> (4) The court may make a costs capping order only on an application for such an order made by the applicant for judicial review in accordance with rules of court.
>
> …….
>
> (6) The court may make a costs capping order only if it is satisfied that—
>
> (a) the proceedings are public interest proceedings,
>
> (b) in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings, and

(c) it would be reasonable for the applicant for judicial review to do so.

(7) The proceedings are "public interest proceedings" only if—

(a) an issue that is the subject of the proceedings is of general public importance,

(b) the public interest requires the issue to be resolved, and

(c) the proceedings are likely to provide an appropriate means of resolving it.

….

89.— Capping of costs: orders and their terms

(1) The matters to which the court must have regard when considering whether to make a costs capping order in connection with judicial review proceedings, and what the terms of such an order should be, include—

(a) the financial resources of the parties to the proceedings, including the financial resources of any person who provides, or may provide, financial support to the parties;

(b) the extent to which the applicant for the order is likely to benefit if relief is granted to the applicant for judicial review;

(c) the extent to which any person who has provided, or may provide, the applicant with financial support is likely to benefit if relief is granted to the applicant for judicial review;

(d) whether legal representatives for the applicant for the order are acting free of charge;

(e) whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally.

(2) A costs capping order that limits or removes the liability of the applicant for judicial review to pay the costs of another party to the proceedings if relief is not granted to the applicant for judicial review must also limit or remove the liability of the other party to pay the applicant's costs if it is."

17. CPR 46.19(1) – (3):

"Applications to vary judicial review costs capping orders

46.19

> (1) An application to vary a judicial review costs capping order must be made on notice and, subject to paragraphs (2) and (3), in accordance with Part 23.
>
> (2) Subject to paragraph (3), the applicant must serve a copy of the application notice and copies of any supporting documents on every other party.
>
> (3) If the application is supported by evidence setting out a summary of the applicant's financial resources, the court may, on application by the applicant, dispense with the need for the applicant to serve such evidence on one or more of the parties."

The appellant's submissions

Ground 1

18. The appellant contends that a CCO may not be made except in accordance with the criteria set out in sections 88 – 90 CJCA, in particular the mandatory criteria in 88(6)(a) – (c). At the time the original CCO was made the criteria were met but once the legal aid certificate was granted, conferring costs protection for the entire period of the litigation, the criteria could no longer be fulfilled.

19. The appellant accepts that in considering the application to set aside/vary the CCO, the Judge had an element of discretion. In exercising that discretion it is the appellant's case that the Judge should have taken into account the mandatory requirements of section 88(6) which reflect the legislative intent and purpose of the CCO provisions and the fact that the backdating of the legal aid certificate meant that the CCO was no longer compliant with the requirements of section 88(6).

20. Further, the appellant submits that in circumstances where it is the respondent's decision making which has generated the need for judicial review proceedings, account should be taken of that by the court when exercising its discretion.

21. As to the reciprocal cap for the respondent, provided by section 89(2), the appellant contends that its purpose is to balance the litigation risk faced by the respondent when a CCO is granted, it is not to provide a financial benefit or windfall where no CCO is necessary. As legal aid had been backdated to a date before the making of the CCO, there was no need for a reciprocal cap upon the respondent's costs during the period in which, albeit retrospectively, legal aid had been granted.

22. It is the appellant's case that the effect of the order is to deprive the appellant of the opportunity to claim *inter partes* rates. The difference as between the appellant's costs at a privately paid rate and those calculated at GLD rates, up to the date the CCO was set aside, would be between £84,444.74 (private) and £46,337.20 (GLD). The privately paid rates would be subject to detailed assessment, following which a reduction in the order of 20 – 30% is likely. Reliance is placed upon the observations of Lord Hope in *R(E) v JFS* [2009] UKSC 1, paras 24 – 25, namely that an appropriate level of recovery of costs for solicitors who carry out a substantial amount of publicly funded work is of importance in ensuring the financial sustainability of their business.

Ground 2

23. The appellant contends that the Judge's order is irrational in that he (i) failed to take relevant factors into account and (ii) made a decision which is legally unsustainable on all the available material. The order unreasonably permits the respondent to benefit from circumstances caused by her own flawed decision making. Unless the CCO is set aside *ab initio* the substantial proportion of the appellant's recoverable costs are capped notwithstanding the appellant's success in her claim for judicial review, and in all material respects, due to the concession made by the respondent and the first interested party. Such a cap will act as a disincentive to claimants who turn to CCOs as a means of seeking prompt access to justice.

24. The limit on the respondent's recoverable costs is a windfall because the only reason the appellant applied for a CCO was to secure costs protection which has since been provided by legal aid.

25. The appellant relies upon the authority of *R (Elan-Cane) v Secretary of State for the Home Department* [2020] EWCA Civ 363 and the recognition by the Court of Appeal of the legislative intention underpinning the CCO regime, namely the promotion of access to justice. At para 148 Henderson LJ stated:

> "Mr Mountford … is right to emphasise the underlying public policy which underpins the costs capping regime in the 2015 Act of promoting access to justice in judicial review proceedings which satisfy the test of being "public interest proceedings" within the meaning of section 88. If that test is satisfied, both sides will know from an early stage what their maximum exposure to costs will be, but they will also know that the costs which they actually incur in pursuing or defending the litigation are likely, to a greater or lesser extent, to prove irrecoverable. That is the price which has to be paid, in the wider public interest, so that justice can be obtained in important cases of this character."

Such access is not promoted if the appellant's solicitors, a legal charity, are restricted in their ability to recover *inter partes* costs.

Ground 3

26. The appellant agreed that the Judge had accepted the respondent's reasons which were clearly set out in the letter dated 5 April 2022. As I understand the point which the appellant sought to make, it was that this application raised an important point of principle which went further than a discretionary costs assessment.

Ground 4

27. The appellant accepts that this ground adds little to grounds 1 – 3.

The respondent's submissions

Ground 1

28. The respondent contends that the appellant's reliance on section 88(6) CJCA is of limited effect in respect of revocation as this is a jurisdictional provision which the court must satisfy before it can make a CCO. The section does not provide that the CCO is revocable if, subsequently in the litigation, those criteria cease to be satisfied. There may be many reasons why criteria cease to be satisfied e.g. disclosure, a change in the law, or the case may cease to be one of public interest proceedings. Section 88 does not require the court to assess on a continuing basis whether the CCO remains appropriate.

29. The *quid pro quo* of the validly made CCO was the reciprocal cap for the respondent. This was the intention of Parliament, as provided by section 89(2) CJCA. The appellant's representatives knew at the time the CCO was made that they would not be recovering fees assessed at privately paid *inter partes* rates. The purpose of the CCO regime is to provide legal certainty to the parties as to their costs liability and potential costs recovery, an intention recognised by Henderson LJ in *Elan-Cane*. Such certainty would be undermined were the courts to revoke CCOs which were made on a properly informed basis at the start of the proceedings on the basis that something has subsequently changed.

30. The respondent contends that certainty is what the provisions are designed to achieve and a change of circumstances does not of itself justify the retrospective variation of the CCO. This is consistent with the authorities of *R (Harvey) v Leighton Linslade Town Council* [2019] EWHC 760 (Admin) in which a CCO was varied by reason of material non-disclosure (which does not apply on the facts of this case) and *Anti-Trafficking and Labour Exploitation Unit and Another v The Secretary of State for Justice* ("*ATLEU*") [2022] EWHC 1962 (Admin) in which Lane J was required to determine whether a CCO made by a previous judge should be varied. Lane J was satisfied there was no jurisdictional bar to the court making an order that retrospectively varied the original order (para 48) but recognised that:

> "50. … there are, nevertheless, extremely compelling public policy considerations, which mean that, even if the Court can do so, it should decline to revisit a CCO, where a party has incurred costs that fall within the ambit of the CCO. The same point applies to those carrying out professional work on the party's behalf, who are understandably concerned not to be retrospectively put out of pocket.
>
> 51. These considerations are both legitimate and powerful. It will therefore only be in an exceptional set of circumstances that the Court is likely to vary CCO in the way described. The question is whether the facts of the present case reach that threshold."

31. Lane J made the variation sought but did so on the basis that the circumstances were "of a sufficiently exceptional kind" namely that there were facts in existence which were not known to the judge when the original order was made.

Ground 2

32. The respondent relies upon the appellant's letter dated 21 March 2022 and the respondent's letter in response dated 5 April 2022 as evidence of the written representations which were before the judge and which he considered, when he made

the decision to vary. Given the detail of the letters, the respondent submits that there is no basis upon which the appellant can contend that the Judge failed to take into account relevant matters.

33. As to the appellant's "windfall" submission, the respondent describes it as 'misplaced' because the outcome of the Judge's order is the result of the correct application of the legislative provisions governing CCOs. Further, the submission appears to be premised on the suggestion that the initial refusal of legal aid was wrongful. This is strongly refuted by the respondent who submits that the merits of the substantive claim for judicial review were lawfully assessed in good faith. The conclusion reached was rationally open to those assessing the application. When permission to proceed to judicial review was granted, the prospects of success were reconsidered by the respondent and the rational conclusion, based on the materials then available was that the prospects of success were higher than previously assessed with the consequence that legal aid was granted. That development does not render the initial decision wrongful or unreasonable.

34. As to any argument by the appellant that a cap on recoverable costs would act as a disincentive to claimants who seek CCOs that is described as "flawed". CCOs are by definition a cap on recoverable costs, claimants are aware that costs prior to receiving legal aid may be capped, the purpose of a CCO is not to ensure any particular level of remuneration for a claimant's legal representative.

35. The decision of the Judge was within the wide discretion afforded to him. It involved no error of principle and resulted in a wholly lawful decision.

Discussion

Ground 1

36. The intention of Parliament, and the public policy which underpinned the introduction of the costs capping regime in the CJCA, was the promotion of access to justice for claimants in judicial review proceedings which are "public interest proceedings" within the meaning of section 88 CJCA. The CJCA recognised the need to ensure reciprocity for defendants by way of a reciprocal cap on their liability to pay the claimant's costs (section 89(2)). The effect of, and the intention behind, sections 88 and 89 CJCA was that claimants and defendants would know the extent of their costs liability. The purpose underlying these provisions was to provide legal certainty as was recognised by Henderson LJ in *Elan-Cane.*

37. It is accepted that the court has jurisdiction to vary or revoke a CCO pursuant to CPR 46.19. The circumstances in which an order can be varied are fact specific and, as was stated by Lane J in *ATLEU*, although there is no jurisdictional bar to the court making an order to retrospectively vary a CCO, it will only be in an exceptional set of circumstances that such a variation is appropriate. This is wholly consistent with the purposes behind the CCO legislation namely to provide access to justice for claimants, to ensure a degree of reciprocity for defendants and to provide legal certainty for both parties as to the recovery of costs.

38. The CCO made on 25 January 2022 by Mr Tim Smith was a valid order made in accordance with the relevant provisions which included section 88(6) of the CJCA.

Subsequent to the making of the order a change of circumstances occurred namely that the appellant was granted legal aid for the judicial review proceedings which had been instituted, the order being backdated to 10 December 2021. This change was neither unusual nor exceptional; as any litigator knows, changes of circumstances occur during the course of legal proceedings. The fact of such a change does not, of itself, invalidate the original order. There is nothing in section 88(6) which provides a basis for stating that, as the mandatory criteria are no longer satisfied, that of itself permits revocation of or retrospective variation of the CCO.

39. Any application for a setting aside or for a variation of a CCO has to be assessed upon its own facts and its merits. In considering such an application, the judge is exercising a discretion. This court would be slow to interfere with the exercise by a judge of a discretion particularly in respect of costs where the discretion is wide. I accept that this judge had not been the trial judge but he was in receipt of detailed written representations from both the appellant and the respondent.

40. The reality of the application to set aside the CCO, made by the Public Law Project representing the appellant, was to seek an order which would permit recovery at commercial rates and without any restrictions, in respect of costs already incurred and which had hitherto been the subject of the CCO. I accept the respondent's contention that such an order would deprive the respondent of the protection of the reciprocal cap which the CJCA had required as part of the *quid pro quo* for the appellant obtaining a CCO. In my view, such an order would undermine the concept of legal certainty which was an intention of the CCO regime. Further, the practical effect of such an order would be to retroactively expose the respondent to a significantly greater adverse costs liability in respect of costs already incurred and currently covered by the CCO.

41. The principles applicable to the setting of the reciprocal cap were summarised by Chamberlain J in *Western Sahara Campaign UK v Secretary of State for International Trade* [2021] EWHC 1756 (Admin) at para 43, they included:

   a. where a costs capping order is granted limiting the costs liability of a claimant in the event the claim fails, the court *must* impose the reciprocal cap limiting the liability of the other party (section 89(2);

   b. there is no requirement that the reciprocal cap should be set at the same level as the cap on the costs liability of the claimant and it is sometimes the case that the reciprocal cap is set substantially higher than the cap on the claimant's liability;

   c. while there is a strong public interest in ensuring the costs orders permits the proper funding of solicitors who take public interest cases and who take the risk of losing, this must be read subject to the caveat that a claimant who benefits from a cap limiting its costs liability cannot expect itself to recover costs at commercial rates. The reciprocal cap should never allow a claimant to recover at more than "a reasonable modest rate" (*R (Western Sahara Campaign UK) v HM Revenue and Customs* [2015] EWHC 1798 (Admin), [44]). This reflects Lord Phillips CJ's statement in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2006] 1 WLR 2600, [76], that the reciprocal cap should limit the claimant's recoverable costs to "a reasonably modest amount".

42. The purpose of a CCO is not to ensure any particular level of remuneration for a claimant's legal representatives. It is of note that when the appellant applied for the original CCO, an order was sought which included a provision that the defendant's liability for the claimant's costs and the costs of any interested party be limited to the claimant's reasonable costs recoverable at GLD *inter partes* Treasury panel rates and any disbursements. I bear in mind the observations of Lord Hope in *R(E) v JFS* (para 22 above). It was that reasoning which provided the basis for the respondent accepting that the CCO should be lifted prospectively such that the appellant's representatives will be able to recover their prospective costs at *inter partes* rates. In my view, such an approach fairly reflected the balancing of interests as between the appellant and the respondent, and as such was accepted by the Judge when he made the order of 13 April 2022.

Ground 2

43. I regard the appellant's contention that the judge failed to take into account relevant factors as misconceived. The application by the appellant to set aside the CCO included a request that it be done on the papers. Pursuant to that request, the appellant and the respondent filed letters with the court which set out with clarity and detail their respective submissions (paras 10 and 11 above). In his order the Judge records that having read the documents and made the order "It seems to me that the defendant's detailed reasons for the making of the order in the form above are correct." I am satisfied that before the Judge were submissions which identified all relevant facts and arguments and which were read and considered by the Judge. They included the appellant's arguments as to the effect of setting aside the CCO only upon a prospective basis.

44. The appellant's letter also raised what were described as "issues of fairness and probity in play". It identified the fact that the respondent determined applications for legal aid in respect of legal aid actions against herself and there had been an initial refusal of legal aid which was subsequently changed. A prospective only basis of variation permitted the defendant to benefit from her earlier wrongful refusal of legal aid. This suggestion was "refuted in the strongest possible terms" in the respondent's letter in reply. Firstly, the rationale for the subsequent grant of legal aid reflected the grant of permission by the court (para 33 above). Secondly, a point made in the respondent's letter and at this hearing is that applications for legal aid for the purpose of challenging the Director's decisions are considered on their merits by a separate team from that involved in either the underlying decision or the proposed litigation. The process is subject to supervision by the court by way of judicial review. In my judgment, there is no sound evidential basis to support this aspect of the appellant's submissions.

45. This court would be slow to interfere with the exercise by a judge of a discretion particularly in respect of costs where the discretion of the judge is wide. I accept that this Judge had not been the trial judge, but he was in receipt of detailed submissions contained in the letters from the appellant and the respondent. The Judge considered the letters which properly addressed all relevant issues and having done so, he decided that he preferred the reasoning of the respondent. In so determining, what the Judge was doing was identifying and balancing the interests of the respective parties in the context of the legislation and its purpose. In my view, the Judge's acceptance of the respondent's reasons was not only reasonable, it was fair.

Ground 3

46. This ground was not pursued with any vigour by the appellant before this court. Such an approach realistically reflects the position that the judge, having identified his acceptance of the detailed reasoning of the respondent, all parties knew and understood, or should have understood, the reasoned basis for his decision.

Ground 4

47. The appellant was correct to state that this ground added little to grounds 1 – 3.

48. For the reasons given, I would dismiss grounds 1 – 4 of this appeal.

Lord Justice Warby:

49. I agree.

Lord Justice Bean:

50. I also agree.