

Public Law Newsletter

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In this edition of Hardwicke's Public Law Newsletter Arthur Moore sets out the effect of the Jackson review on costs for public lawyers. Kerry Bretherton considers the advice to be given under s.190 Housing Act and David Lawson discusses the Equality Bill. If you have any questions please contact Louise Poppelwell on louise.poppelwell@hardwicke.co.uk

This month we have been...

- **Fiona Scolding** appeared in a judicial review challenging a consultation involving 82,000 people
- **Barbara Hewson** acted for the family of David Gray in the widely reported inquest into a death following treatment by an out of hours GP service in Cambridgeshire. Coroner William Morris made 13 recommendations under R.43 to improve patient safety. Barbara was also the "Times" Lawyer of the Week on Feb. 11th. To read the interview in full please click on the link below:
<http://business.timesonline.co.uk/tol/business/law/article/7022099.ece>
- **Alison Meacher** acted in a challenge over the provision in an allocations policy for the victims of domestic violence
- **Andrew Lane & Dean Underwood** led a round table discussion for social housing lawyers called "Addressing the impact of Weaver" on 27th January 2010
- **Kerry Bretherton** has been appearing in the Court of Protection in a case which continues to raise new and important issues concerning Article 5, the operation and scope of DOLS, funding of residential care homes and the application of Article 8 in such cases. The case has again been adjourned part heard and it is hoped Judgment will be handed down in March

And in case anyone is behind on their CPD we are involved in several seminars:

- **Alison Meacher** is speaking on "Domestic Violence, the

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housing manager's role" at a Jordans seminar on 25th February 2010

- **Hardwicke's education team** are hosting the Local Government Group Education Conference on 7 May 2010 and hosted the ELAS seminar on SEN on 10 February

The Jackson Report

Arthur Moore considers the Jackson report on the recoverability of legal costs as it applies to judicial review claims. The report is seen as bad news by many practitioners in other areas of litigation and proposes radical changes, for example banning referral fees in personal injury cases – thereby ending a good source of advertising income for local radio. For judicial review practitioners the proposals appear to offer a relaxation of costs risks for claimants.

The much-awaited report by Lord Justice Jackson into the costs of litigation was finally published in mid January. He made wide ranging proposals in respect of all types of litigation. As he noted, the Administrative Court is the busiest of the Queen's Bench Division, with in excess of 7,000 cases commenced in 2008. Thus, any proposals made in respect of the funding of Judicial Review claims will have a wide impact.

One of the central, and controversial, recommendations is that judicial review (and some other areas of litigation), should be subject to "qualified one way costs shifting". This means that a successful claimant would be able to recover his costs from a losing defendant, but a losing claimant will not pay the winning defendant's costs – or at least not all of them.

Jackson LJ gave six reasons for his recommendation:

- a) It was the most obvious way for the UK to comply with its obligations under the Aarhus Convention. This requires that access to the Courts to challenge decisions affecting the environment should not be "prohibitively expensive".
- b) It is undesirable that there should be one rule for "environmental" JR and one rule for other types.
- c) The permission stage weeds out unmeritorious claims. Nearly 80% of applications fail at permission – the sort of figure which enables almost any practitioner to feel good about their success rate.
- d) It is in the public interest that people should not be deterred from bringing judicial review claims by fear of the considerable financial risks.
- e) One way costs shifting has been successful in other jurisdictions e.g. Canada.
- f) The Protective Costs Order regime currently in place is expensive to run and uncertain in outcome. In many instances the PCO comes so late in proceedings as to be

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of no value.

Jackson LJ also noted that that qualified one way costs shifting already effectively operated where the claimant party had the benefit of Public Funding, as the funded party was protected from having to pay the (successful) Defendant's costs by the effect of s.11(1) Access to Justice Act 1999.

But what does "qualified one way costs shifting" mean in practice? Jackson LJ formulated the rule as follows:

"Costs ordered against the claimant in any claim for ... judicial review shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:

- a) the financial resources of all the parties to the proceedings, and
- b) their conduct in connection with the disputes to which the proceedings relate"

This language will of course be familiar, as it comes straight out of s.11(1) AJA 1999. The effect of such a rule, as explained by Jackson LJ, would be exactly the same for claimants of modest means (whether with the benefit of public funding or not). Other claimants will face potential adverse costs orders proportionate to their means.

Jackson LJ further recommended that a successful claimant should not be allowed to recover a success fee from the defendant. This was, effectively, the quid pro quo for the introduction of qualified one way costs shifting. He also went on to recommend that, in the wake of the introduction of the Protocol, the effect of the Boxall decision should be modified such that where a claimant has followed the protocol, and the defendant concedes some or all the relief after issue, the claimant should be entitled to his costs.

It remains to be seen whether the recommendations are adopted and, if they are, the effect they have. It may well be that practitioners who appear largely in cases where the claimant has public funding (which accounts for a significant proportion of all Judicial Review business) will notice little or no change, other than the modification to the rule in Boxall. However public authorities will almost inevitably face a slight increase in properly argued claims. The public law courts would become accessible to people able to afford their own representation but unable risk paying their opponent's fees.

Equality Update

David Lawson summarises where we have got to with the Equality

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Bill and some of its impacts on public authorities.

The Equality Bill is in a race against time. It is due to finish its Parliamentary stages in April and the timetable provides for it to come into force largely in October. One Parliament gets to pass it into law but the next will decide whether to bring it into force.

A lot of the bill is much needed consolidation after 4 decades of piecemeal legislation and it is likely any government will implement those sections, providing a uniform anti-discrimination law. This is reflected in work by the Equality and Human Rights Commission to create new Codes of Practice. These will probably take a sector by sector approach, rather than dealing with each statute as at present. For example, consultation on the new Employment Code closes on 2 April 2010.

The bill will cover in one place all discrimination issues relating to age, disability, gender, sexuality, marriage, civil partnership, race and religion. Of course much of it relates to employment, housing and services but there are important changes for public lawyers. The bill attempts to reverse some of the consequences of the Malcolm decision by way of provisions for “discrimination arising from disability”. There is a unified public sector duty covering age, religion and sexuality in addition to the protected characteristics currently included in the race, sex and disability statutes. The power to treat people with protected characteristics more favourably remains and therefore extends in theory beyond disability (although it is not a power to do anything otherwise prohibited by the bill). The duty remains to have “due regard”. Further, there is provision that specific equality duties might require authorities to use their public procurement processes to further the aims of the equality duty.

There is a new power to take “positive action”, ie action which is a proportionate means of enabling persons who share a protected characteristic to overcome any disadvantage arising from that characteristic, meet needs related to that characteristic or participate in activities where they are under-represented. The explanatory notes confirm that this could mean directing government services at certain groups defined by age, gender, sexuality etc.

The bill begins with a provision, perhaps of symbolic importance or perhaps revolutionary, intended to reduce social inequality. Section 1 provides that some public authorities “must, when making decisions of a strategic nature ... have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage”.

Public authorities will be pleased by the provision that “A failure

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in respect of a performance of a duty imposed by or under this Chapter [on public sector equality duties] does not confer a cause of action at private law". This of course will not prevent challenges by way of judicial review.

The Savage Decision

Kerry Bretherton, who acted for the Claimant, considers the impact of the Savage decision.

George Pulman QC	1971 (1989)
John Friel	1974
Charles Calvert	1975
Barbara Hewson	1985
Karl King	1985
Deborah Hay	1991
Kerry Bretherton	1992
Arthur Moore	1992
Maggie Bloom	1994
Clive Rawlings	1994
Brendan Mullee	1996
Fiona Scolding	1996
Alison Meacher	1998
Alastair Redpath-Stevens	1998
Andrew Lane	1999
Sarah Malik	1999
John Mc Kendrick	1999
David Lawson	2000
Shazia Akhtar	2001
Dean Underwood	2002
Sarah Venn	2002
Morayo Fagborun Bennett	2004
Ajmal Azam	2006
Robin Jacobs	2006
Laura Tweedy	2007

In *Savage v Hillingdon L.B.C.* [2010] EWHC 88 (Admin) the Claimant challenged decisions that the local authority had complied with its obligations to her, pursuant to s.190 Housing Act 1996, as a person who was intentionally homeless and in priority need. The section provides that the housing authority will assess housing need (ss 4) and provide "advice and assistance" (ss (2)(b)).

The Claimant established that the Council had misapplied its policy with regard to rent deposits and so the application for judicial review succeeded.

However, the Claimant also disputed the proper test to be applied when assessing housing need under sub-section 4 and the standard of advice and assistance to be provided under sub-section 2(b). The Judge held that needs under s.190 were to be assessed after a decision had been reached on the nature of the duty owed but that an assessment had been conducted in this case and that adequate advice and assistance had been provided.

The Claimant argued that the standard advice given, namely to seek a loan or help from friends of family, is not sufficient to discharge the duty. The argument is that advice and assistance which, in a particular case, would never lead to the person finding accommodation could not be proper advice and assistance for that person. The issue of how this duty could be satisfied is novel and important and the Claimant is seeking permission to appeal.

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