[QUEEN'S BENCH DIVISION]

REGINA v. LORD CHANCELLOR, *Ex parte* CHILD POVERTY ACTION GROUP

REGINA v. DIRECTOR OF PUBLIC PROSECUTIONS, *Ex parte* BULL AND ANOTHER

1998 Jan. 29, 30;
Feb. 6

Dyson J.

Costs - Order for costs - Interlocutory application - Applications for judicial review by organisations acting in public interest - Applicants seeking interlocutory orders that no order for costs be made against them in any event - Whether jurisdiction to make order as to costs in advance of hearing - R.S.C., Ord. 62, r. 3(3)

In two separate cases organisations acting in the public interest applied for judicial review of decisions by, respectively, the Lord Chancellor, refusing legal aid in cases before social security tribunals and commissioners, and the Director of Public Prosecutions, declining to prosecute two individuals for possession of instruments of torture. In each case the applicants applied for an interlocutory order that no order for costs be made against them whatever the outcome of the judicial review proceedings. It was accepted by the respondents that the court had discretion to make such an order under R.S.C., Ord. 62, r. 3(3).[1]

On the applications for pre-emptive orders for costs:-

Held, refusing the applications, that under Ord. 62, r. 3(3) the starting point was that costs were to follow the event and the discretion to make pre-emptive orders, even in cases involving public interest challenges, should be exercised only in the most exceptional circumstances; that the necessary conditions for such an order were that the court was satisfied both that the issues raised were truly ones of general public importance and that it had a sufficient appreciation of the merits of the claim to conclude that it was in the public interest to make the order; that, unless the court could be so satisfied by short argument, it was unlikely to make the order in any event, since otherwise there was a risk of such applications becoming dress rehearsals of the substantive applications; that the court must also have regard to the financial resources of the applicant and respondent, and the amount of costs likely to be in issue, and that it would be more likely to make an order where the respondent clearly had superior capacity to bear the costs than the applicant and it was satisfied that the applicant would discontinue the proceedings if the order was not made; but that in neither of the present applications were the foregoing conditions satisfied (post, pp. 355F-G, 358C-E, 359E, 360B).

The following cases are referred to in the judgment:

Aiden Shipping Co. Ltd. v. Interbulk Ltd. [1986] A.C. 965; [1986] 2 W.L.R. 1051; [1986] 2 All E.R. 409, H.L.(E.)

Davies (Joseph Owen) v. Eli Lilly & Co. [1987] 1 W.L.R. 1136; [1987] 3 All E.R. 94, C.A.

Hoffmann-La Roche (F.) & Co. A.G. v. Secretary of State for Trade and Industry [1975] A.C. 295; [1974] 3 W.L.R. 104; [1974] 2 All E.R. 1128, H.L.(E.)

[1] R.S.C., Ord. 62, r. 3(3): post, p. 353B.

McDonald v. Horn [1995] I.C.R. 685; [1995] 1 All E.R. 961 C.A.
New Zealand Maori Council v. Attorney-General of New Zealand [1994] 1 A.C. 466; [1994] 2 W.L.R. 254; [1994] 1 All E.R. 623, P.C.
Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd. [1982] A.C. 617; [1981] 2 W.L.R. 722; [1981] 2 All E.R. 93, H.L.(E.)

The following additional cases were cited in argument:

Liversidge v. Anderson [1942] A.C. 206; [1941] 3 All E.R. 338, H.L.(E.)
Reg. v. Commissioner of Police of the Metropolis, Ex parte Blackburn (No. 3) [1973] Q.B. 241; [1973] 2 W.L.R. 43; [1973] 1 All E.R. 324, C.A.
Reg. v. Secretary of State for Social Security, Ex parte Joint Council for the Welfare of Immigrants [1997] 1 W.L.R. 275; [1996] 4 All E.R. 385, C.A.
Wallersteiner v. Moir (No. 2) [1975] Q.B. 373; [1975] 2 W.L.R. 389; [1975] 1 All E.R. 849, C.A.

INTERLOCUTORY APPLICATIONS for costs of judicial review.

REGINA v. LORD CHANCELLOR, *Ex parte*
CHILD POVERTY ACTION GROUP

By notice of application for leave to move for judicial review dated 20 February 1997, Child Poverty Action Group, a registered charity and company limited by guarantee whose objects included the promotion of action for the relief of poverty among children and families with children, applied for an order of certiorari to quash the decision of the Lord Chancellor, communicated in a letter dated 22 November 1996, refusing to extend the availability of legal aid to representation in any cases before social security tribunals or commissioners, and an order of mandamus requiring the Lord Chancellor to reconsider the question of extending legal aid in at least some such cases. The grounds of the application are not relevant to the report. Before the application came on for hearing, the applicant applied for an order that no order as to costs be made against the applicant, whatever the outcome of the proceedings on the ground, inter alia, that the applicant was acting pro bono publico in bringing them.

The facts are stated in the judgment.

REGINA v. DIRECTOR OF PUBLIC PROSECUTIONS,
Ex Parte DAVID BULL AND ANOTHER

By notice of application for leave to move for judicial review the applicants, Amnesty International, an unincorporated association appearing by its director, David Neill Bull, and the Redress Trust, both human rights organisations whose objects included the abolition of torture, applied for an order of certiorari to quash the decision taken on behalf of the Director of Public Prosecutions and set out in letters to the applicants dated 28 May 1997 not to prosecute two individuals, Philip Morris and Gerald Hall, under section 5 of the Firearms Act 1968 for possession of electro-shock batons without a licence. The grounds of the application are not relevant to the report. Before the application came on for hearing, the applicants applied by notice of motion dated 2 December 1997 for an order that no order as to costs be made against the applicants, whatever the outcome of the proceedings on the ground, inter alia, that the applicants were acting pro bono publico in bringing them.

The facts are stated in the judgment.

Richard Drabble Q.C. and *Rabinder Singh* for the Child Poverty Action Group.
Richard Drabble Q.C., Ben Emmerson and *Philippa Kaufmann* for Amnesty International.
Richard Drabble Q.C. and *Murray Hunt* for the Redress Trust.
Philip Sales for the Lord Chancellor.
Philip Havers Q.C. and *Philippa Whipple* for the Director of Public Prosecutions.

Cur. adv. vult.

6 February. DYSON J. handed down the following judgment.There are before me interlocutory applications for orders that no order as to costs be made against the applicants in these proceedings, whatever their ultimate outcome. Mr. Drabble describes the orders that he seeks as "protective" costs orders. I think that the adjective pre-emptive" is more apt, but nothing turns on that. Leave to move for judicial review has been granted in both cases. Both respondents have refused to agree in advance not to seek an order for costs against the applicants if their applications for judicial review are dismissed. It is conceded by both respondents that there is jurisdiction to make pre-emptive costs orders in these cases. There is, however, no agreement as to the principles which should guide the court in deciding whether a pre-emptive costs order should be made in judicial review cases which concern what the Law Commission has described as "public interest challenges." Nor is there agreement whether, applying the relevant principles to the facts of the two cases, pre-emptive costs orders should be made. The researches of counsel have not discovered any case in which the court has been asked to decide whether or not to make a pre-emptive costs order in an application for judicial review. There is some authority as to the position that applies in ordinary private law litigation. In *McDonald v. Horn* [1995] I.C.R. 685, 694, Hoffmann L.J. said that the general rule that costs follow the event, encapsulated in R.S.C., Ord. 62, r. 3(3) was:

> "a formidable obstacle to any pre-emptive costs order as between adverse parties in ordinary litigation. It is difficult to imagine a case falling within the general principle in which it would be possible for a court properly to exercise its discretion in advance of the substantive decision."

It is not disputed that, if these applications were made in private law actions, I would be bound to dismiss them. The main question of principle that arises in these applications is whether different considerations of public policy apply in cases which can aptly be characterised as "public interest challenges." I shall explain later in this judgment what I understand to be meant by "public interest challenges." Before I come to deal with the submissions that were made before me, I ought to describe in outline the nature of the applications in the two cases.

Child Poverty Action Group ("C.P.A.G.")

C.P.A.G. is a registered charity which was founded in 1965. Its objects include the promotion of action for the relief of poverty among children and families with children. It is widely recognised as the leading anti-poverty organisation in the U.K. It has a particular reputation in the field

of welfare benefits law, and engages in test case work by supporting cases before Social Security Commissioners and courts in this country. Section 14 of the Legal Aid Act 1988, so far as material, provides:

> "(2) subject to subsection (3) below, Schedule 2 may be varied by regulations so as to extend or restrict the categories of proceedings for the purposes of which representation is available under this Part, by reference to the court, tribunal or statutory inquiry, to the issues involved, to the capacity in which the person seeking representation is concerned or otherwise . . . (4) Regulations under subsection (2) above which extend the categories of proceedings for the purposes of which representation is available under this Part shall not be made without the consent of the Treasury."

Schedule 2 to the Act of 1988 lists the types of proceedings for which legal aid is available. It includes some tribunals, such as the Employment Appeal Tribunal, but not Social Security Tribunals or commissioners. It is not in issue that hearings before Social Security Tribunals and commissioners can be extremely complicated, especially if points of law are raised. On 4 November 1996, the solicitor acting for C.P.A.G. wrote to the Lord Chancellor, inviting him to exercise his power under section 14(2) of the Act of 1988 to extend legal aid to at least some cases before social security tribunals and commissioners. On 22 November 1996, the Lord Chancellor refused to do so, at least for the time being. The application for leave to move for judicial review of that decision was refused by Laws J. on the papers. It was renewed at an ex-parte hearing before Popplewell J., who granted leave on the basis of what C.P.A.G. calls its "European arguments." These arguments, which are novel and complex, and which Mr. Sales describes as "speculative," are set out at paragraphs 22 to 24 of the form 86A. The points are difficult. One or two of them were touched on lightly by counsel before me. It is obvious that I cannot begin to assess the likelihood of the European arguments succeeding, nor was I asked to do so.

The finance and administration sub-committee of C.P.A.G. resolved on 13 May 1997 that "C.P.A.G. should not allow itself to be exposed to the risk of an adverse costs order and that the case should be withdrawn if adequate protection in one form or another cannot be obtained." The sub-committee had delegated authority to make decisions on financial matters of that nature. Part of the background to that decision was the fact that C.P.A.G. had recently purchased the freehold of its office premises. This meant that, in the short term, there was an urgent need to raise several hundred thousand pounds to finance the purchase. Virtually all the organisation's fund-raising efforts had to be geared to this imperative. Accordingly, the view taken by C.P.A.G. was that, irrespective of the wisdom or otherwise of exposing C.P.A.G. to a large costs risk in "normal" times, it would be irresponsible to do so at the present time. In his affidavit sworn on behalf of C.P.A.G. on 23 September 1997, Mr. Thomas says that there is no reasonable possibility of an individual or another organisation agreeing to indemnify C.P.A.G. against any potential liability for costs to the Lord Chancellor. The reality is that, if a pre-emptive costs order is not made, the substantive application will "in all probability" have to be withdrawn.

Amnesty International U.K.("Amnesty")/Redress Trust ("Redress")

Both of these applicants are human rights organisations of international standing, whose objects include the abolition of torture, and the

implementation of national and international law against torture. They claim that they have an interest in ensuring the proper enforcement of laws relating to weapons of torture, including an interest in any particular case in which a decision is taken as to whether or not to prosecute for breach of such laws. Their substantive application is for judicial review of the decision made by the D.P.P. not to prosecute a Mr. Morris and a Mr. Hall for possession of an electro-shock baton without licence, contrary to section 5(1)(*b*) of the Firearms Act 1968. That is a strict liability offence. The factual background to the commission of the offences is complex, and it is unnecessary to go into it for the purposes of this judgment. Section 3(2) of the Prosecution of Offences Act 1985 sets out the duties of the D.P.P. in relation to the institution and conduct of criminal proceedings. They include the duty:

> "(*b*) to institute and have the conduct of criminal proceedings in any case where it appears to him that-(i) the importance or difficulty of the case makes it appropriate that proceedings should be instituted by him; or (ii) it is otherwise appropriate for proceedings to be instituted by him."

Paragraph 4.1 of the Code of Practice, issued by the D.P.P. pursuant to section 10 of the Act of 1985, provides for two stages in the decision to prosecute. First, an evidential test has to be satisfied. The D.P.P. was of the view in this case that the evidential test was satisfied in relation to both Mr. Morris and Mr. Hall. Secondly, as set out at paragraph 4.2 of the Code, there is a public interest test. A prosecution will only start or continue when the Crown prosecutor is satisfied that the case passes both tests. The public interest test is explained in paragraph 6 of the Code. So far as material, it provides:

> "6.2. In cases of any seriousness, a prosecution will usually take place unless there are public interest factors tending against prosecution, which clearly outweigh those tending in favour. Although there may be public interest factors against prosecution in a particular case, often the prosecution should go ahead and those factors should be put to the court for consideration when sentence is being passed. 6.3 Crown prosecutors must balance factors for and against prosecution carefully and fairly. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence or the circumstances of the offender. Some factors may increase the need to prosecute, but others may suggest that another course of action would be better. 6.4 *Some common public interest factors in favour of prosecution.* The more serious the offence, the more likely it is that a prosecution will be needed in the public interest. A prosecution will be likely to be needed if . . . [a number of factors is then set out] 6.5 *Some public interest factors against prosecution.* (a) The court is likely to impose a very small or nominal penalty. (b) The offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence)."

The D.P.P. gave three reasons for her decision not to prosecute. They were (i) the way in which the incident was prompted; (2) the impact of a genuine mistake or misunderstanding; and (3) the circumstances that were particular to the potential defendants. In amplification of the second reason, the Chief Crown Prosecutor, writing on behalf of the D.P.P. on

12 August 1997, said that both men mistakenly believed that they had lawful authority to possess the baton. A little later in his letter he said:

> "Additionally, the circumstances pointed in our view to a technical breach of the Firearms Act 1968. The unlawful possession of the articles for demonstration purposes in the mistaken belief that possession was lawful, and where there was no danger to the public, would not, we believe, be regarded as a serious offence and would be unlikely to be met with a significant penalty."

The form 86A identifies five grounds of challenge, one of which is particularly relied on by Mr. Emmerson as justifying the making of a pre-emptive costs order, and it concerns the second of the three reasons given for the decision not to prosecute. Mr. Emmerson submits that, when applying the public interest test in deciding whether or not to prosecute, the D.P.P. was not entitled to have regard to the fact that the two men had made an honest mistake. The offences were serious, and the state of mind of the men afforded no defence. Mr. Emmerson argues that the fact that the men were honestly mistaken, although relevant to sentence, was irrelevant to the decision whether or not to prosecute. The error is said to raise a public interest challenge. The extent of the discretion vested in the D.P.P., and in particular, the question whether she can take honest mistake (and, presumably, other matters of mitigation) into account, are matters which are of general public importance, being by no means limited to the facts of this case.

So much for the nature of the challenge. During argument, I expressed concern as to why this application is being made by two separate organisations. No satisfactory explanation was provided. I was told that all concerned are working pro bono publico (as indeed are those on the applicants' side in the C.P.A.G. case). Everyone should be grateful to all those who are giving their services free out of a sense of public duty, but that does not seem to me to be a sufficient reason for having two applicants (with separate representation) in the second case. Leave to move for judicial review was given by Forbes J. on the papers. Neither Amnesty nor Redress has said that if the application for pre-emptive costs fails, it will withdraw the application, but on the evidence that is certainly a possible outcome. The affidavit of Mr. Bull states that the board of Amnesty has become "more anxious" about the extent of the cost risk as the case has developed, and that it will have "great reservations" about proceeding to a substantive hearing if Amnesty remains potentially liable for the D.P.P.s costs at the end of the day. On behalf of Redress, Mr. Carmichael says in his affidavit that it will be "difficult" for the trustees to agree to commit the funds of the charity if this application fails, and that he is "very concerned" that Redress may have to discontinue proceedings in that event.

Jurisdiction

As I have already said, it is common ground that there is jurisdiction to make the orders sought in these cases. It is based on section 51 of the Supreme Court Act 1981, which, so far as relevant, provides:

> "(1) Subject to the provisions of this and any other Act and to rules of court, the costs of and incidental to all proceedings . . . shall be in the discretion of the court, and the court shall have full power to determine by whom and to what extent the costs shall be paid."

That the discretion conferred by that section is very wide was confirmed by the House of Lords in *Aiden Shipping Co. Ltd. v. Interbulk Ltd.*[1986] A.C. 965, in particular *per* Lord Goff of Chieveley, at p. 975F-H. The relevant rules as to costs in the High Court are contained in R.S.C., Ord. 62. Ord. 62, r. 2(4) provides, so far as relevant: "The powers and discretion of the court under section 51 of the Act . . . shall be exercised subject to and in accordance with this Order." The general rule is that costs follow the event, as stated in Ord. 62, r. 3(3), which provides:

> "If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the court shall order the costs to follow the event, except where it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

As Hoffmann L.J. said in *McDonald v. Horn* [1995] I.C.R. 685, 694D-E this rule reflects a basic rule of English civil procedure, that a successful litigant has a prima facie right to his costs. The Court of Appeal has held that, on its true construction, R.S.C., Ord. 62, r. 3(3) deals with the manner in which, as opposed to the time when, the court's discretion to order costs is to be exercised: see *Joseph Owen Davies v. Eli Lilly & Co.* [1987] 1 W.L.R. 1136. In that case, the trial judge had ordered that any costs that were ordered or fell to be borne by any plaintiff in the lead actions should be borne proportionately by all plaintiffs. His order was appealed on the grounds that making prospective orders as to costs was not within the jurisdiction of section 51 of the Supreme Court Act 1981 and Order 62. The Court of Appeal held that there was jurisdiction to make anticipatory costs orders. Lloyd L.J. said, at p. 1144:

> "In the normal way, of course, the discretion is exercised at the conclusion of the proceedings, whether final or interlocutory. But there is nothing in the language of Ord. 62, r. 3(3) to prohibit the exercise of the discretion at an earlier stage where the interests of justice so require."

So jurisdiction is not in doubt. The issue that divides the parties is: in what circumstances will the discretion to make pre-emptive costs orders be exercised?

Principles governing the exercise of discretion in cases involving public interest challenges

I should start by explaining what I understand to be meant by a public interest challenge. The essential characteristics of a public law challenge are that it raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case. It is obvious that many, indeed most judicial review challenges, do not fall into the category of public interest challenges so defined. This is because, even if they do raise issues of general importance, they are cases in which the applicant is seeking to protect some private interest of his or her own. The central submission advanced on behalf of the applicants is that, because of those essential characteristics, the court should be more willing to make no order as to costs against an unsuccessful applicant in public interest challenge cases than in other cases. It is submitted that public interest challenges are not "ordinary litigation" between adverse parties of the kind

that Hoffmann L.J. was contemplating in *McDonald v. Horn*[1995] I.C.R. 685.

It is argued that it is now recognised by the courts that the true nature of the court's role in public law cases is not to determine the rights of individual applicants, but to ensure that public bodies do not exceed or abuse their powers. It is a consequence of this recognition that procedural rules and practices that apply to the adjudication of the classic lis inter partes in private law cannot apply without modification to a public interest challenge to a decision of government. Hence, for example, the liberalisation of the law of standing. In *Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617, Lord Diplock said at p. 644:

> "It would, in my view, be a grave lacuna in our system of public law if a pressure group like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."

Mr. Drabble submits that if the courts did not make pre-emptive costs orders in public interest challenge cases, there would arguably be an even greater lacuna in our public law, since genuine public interest challenges could effectively be stifled, unless the executive agreed in advance not to seek its costs whatever the outcome of the proceedings. In fact, as he points out, there have been several cases in which, admittedly at the conclusion of the proceedings, courts have decided that costs should not be ordered against an unsuccessful party because of the general importance of and significant public interest in the resolution of the questions raised by the particular case. By way of example, I was referred to *New Zealand Maori Council v. Attorney-General of New Zealand* [1994] 1 A.C. 466, where Lord Woolf, delivering the judgment of the Privy Council, said, at p. 485:

> "There remains the question of costs. Although the appeal is to be dismissed, the applicants were not bringing the proceedings out of any motive of personal gain. They were pursuing proceedings in the interest of taonga which is an important part of the heritage of New Zealand. Because of the different views expressed by the members of the Court of Appeal on the issues raised on this appeal, an undesirable lack of clarity inevitably existed in an important area of the law which it was important that their Lordships examine and in the circumstances their Lordships regard it as just that there should be no order as to the costs on this appeal."

That case was concerned with the question whether certain legislation, which it was contended threatened the survival of the Maori language (taonga), was inconsistent with a treaty made between the Crown and Maori. It is clear that this was a good example of a public interest challenge.

It is submitted by Mr. Drabble that the same considerations that would lead a court to make no order for costs in such a case at the conclusion of the proceedings, should also persuade a court to make a pre-emptive order for costs to like effect at the interlocutory stage. He says that the factors that the court takes into account when deciding whether to make no order for costs against the unsuccessful applicant at the end of the proceedings are familiar. These applications in essence ask the court to

treat the costs question as if the substantive application has already failed, and simply bring forward the point at which the exercise of the costs discretion is carried out. It is obviously of benefit to an applicant to know where he stands in relation to costs; the uncertainty as to whether he will be liable to pay the respondents costs if the application fails may, deter an applicant from pursuing his application at all.

The uncertainty of costs issue was considered by the Ontario Law Reform Commission in a report in 1989. It proposed that the applicant could ask for a decision on costs at any point in a public interest case, and that the court would be prevented from ordering costs against the applicant if the following conditions were met: (i) the case involves issues whose importance extends beyond the immediate interests of the parties involved; (ii) the applicant has no personal, proprietary or pecuniary interest in the outcome of the case; and (iii) the respondent has a clearly superior capacity to bear the costs of the proceedings.

The applicants suggest the following as examples of the sorts of factors which may be relevant in determining when it is appropriate to make a pre-emptive costs order. (a) Is the substantive point (objectively) one of general public importance which ought to be litigated, e.g. because it concerns the legality of action by a public authority which goes beyond the immediate interests of the parties concerned, or concerns issues of fundamental human rights? (b) Would the point of law probably not otherwise be litigated, e.g. because none of those affected has the resources to fund proceedings personally, or is able to secure legal aid, or has the capacity to bring proceedings? (c) Would legal aid probably have been given so that the point of law would have been brought to the attention of the court if the claim (being a money claim) had been for a greater sum? (d) Is the applicant the best representative of the interests directly affected by the challenged decision or measure, and/or is it well-placed, because of its expertise in the area, to bring the issue before the court? (e) Is the respondent able to, and should it, bear its own costs whatever the outcome of the case, since it is a public body and it is in the public interest that the issue of law was raised should be resolved?

In my judgment, the discretion to make pre-emptive costs orders even in cases involving public interest challenges should be exercised only in the most exceptional circumstances. The starting point must be the basic rule encapsulated in R.S.C., Ord. 62, r. 3(3) that costs follow the event. It is true that the role of the court in all public law cases is to ensure that public bodies do not exceed or abuse their powers, but the parties to such proceedings are nevertheless adverse as is the litigation. As Lord Diplock said in *F. Hoffman-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295, 365:

> "Under our legal system, however, the courts as the judicial arm of government do not act on their own initiative. Their jurisdiction to determine that a statutory instrument is ultra vires does not arise until its validity is challenged in proceedings inter partes either brought by one party to enforce the law declared by the instrument against another party or brought by a party whose interests are affected by the law so declared sufficiently directly to give him locus standi to initiate proceedings to challenge the validity of the instrument."

I accept the submission of Mr. Sales that what lies behind the general rule that costs follow the event is the principle that it is an important function of rules as to costs to encourage parties in a sensible approach to

increasingly expensive litigation. Where any claim is brought in court, costs have to be incurred on either side against a background of greater or lesser degrees of risk as to the ultimate result. If it transpires that the respondent has acted unlawfully, it is generally right that it should pay the claimant's costs of establishing that. If it transpires that the claimant's claim is ill-founded, it is generally right that it should pay the respondent's costs of having to respond. This general rule promotes discipline within the litigation system, compelling parties to assess carefully for themselves the strength of any claim.

The basic rule that costs follow the event ensures that the assets of the successful party are not depleted by reason of having to go to court to meet a claim by an unsuccessful party. This is as desirable in public law cases as it is in private law cases. As Mr. Sales points out, where an unsuccessful claim is brought against a public body, it imposes costs on that body which have to be met out of public funds diverted from the funds available to fulfil its primary public functions. I did not understand Mr. Drabble to take serious issue with any of the foregoing. It is plainly right that in the normal run of the mill public law case, the unsuccessful party should pay the other side's costs. To this Mr. Drabble would respond by saying that typical judicial review proceedings involve adversarial litigation, in which the applicant is seeking to promote or protect his or her own private interest: it does not raise a public interest challenge as defined. Nevertheless, in considering whether, and in what circumstances, there should be a departure from the basic rule that costs follow the event in public interest challenge cases, in my view it is important to have in mind the rationale for that basic rule, and that it is for the applicants to show why, exceptionally, there should be a departure from it.

As I said earlier, Mr. Drabble relies on those cases where, at the end of proceedings, the court made no order for costs against the unsuccessful applicant, on the ground that the issues raised were ones of general public importance. Mr. Sales and Mr. Havers submit that the court was able to take that exceptional course in those cases because it was seised of all the arguments, and could decide whether, in all the circumstances, it was truly in the public interest that the claim should have been brought. It cannot be right, they argue, that every claim for judicial review, however bad it proves to be, should attract the same favourable treatment. The critical point about such cases is that the court feels able, after full argument, to decide that public money should be spent (by denial of recoupment from the unsuccessful party) on the clarification of the point of law. Mr. Drabble counters this by submitting that there is an important distinction between (i) the merits of the claim, and (ii) the merits of bringing the claim. An assessment of the merits of the claim may be complex, and will not finally be determined until judgment is given on the substantive application. The merits of bringing the claim, however, although related to the merits of the claim, can be assessed at the interlocutory stage without a detailed examination of the merits of the claim itself. He submits that the court can, and should, make a pre-emptive costs order, where it is satisfied that the claim raises a point of general public importance, and that the applicant does not have any private interest in the outcome. He says that the court can be so satisfied at the interlocutory stage, without reaching any conclusion as to the merits of the claim itself, save on the question whether it is arguable. If leave to move for judicial review has been granted, then ex hypothesi, the claim is arguable.

The reasons why, in my judgment, it is appropriate to make a pre-emptive costs order only in exceptional cases are as follows. First, it will often not become clear whether an issue is of sufficient public importance to justify departure from the basic rule that costs follow the event until the hearing of the substantive application. Let us take the challenge by C.P.A.G. as an example. C.P.A.G. do not contend that the Lord Chancellor should make legal aid available in all cases before the Social Security Tribunals and Commissioners, but only in a minority of cases. Certain criteria are proposed for determining which class of case should qualify for legal aid. These include (i) the complexity of the case; (ii) its general importance; and (iii) the vulnerability of the claimant. The Lord Chancellor opposes the application, inter alia, on the grounds that the existing procedures provide adequate safeguards to protect the interests of claimants. It seems to me that the court will be in a better position than I am now to judge whether the point is of sufficient general public importance to justify a departure from the basic rule that costs should follow the event, after it has seen all the material and heard all the arguments. I accept that there will be cases where it is possible to say at the interlocutory stage that the issue raised is of sufficient general public importance, but that will often not be the case.

The second reason why, in my view, it will only be in an exceptional case that a pre-emptive costs order should be made is that it will rarely be possible to make a sufficient assessment of the merits of the claim at the interlocutory stage. I do not consider that the fact that leave to move to apply for judicial review is enough. Leave will often have been granted on the papers, or following an ex-parte oral application. Even if the application is made at an inter partes hearing, the respondent may not at that stage place before the judge all the material or outline all the arguments that will eventually be considered by the court hearing the substantive application. It may ultimately transpire that the application is hopeless. As Lord Scarman said in *Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617, 653:

> "The curb represented by the need for an applicant to show, when he seeks leave to apply, that he has such a case is an essential protection against abuse of legal process. It enables the court to prevent abuse by busybodies, cranks, and other mischief-makers. I do not see any further purpose served by the requirement for leave."

The case of *New Zealand Maori Council v. Attorney-General of New Zealand* [1994] 1 A.C. 466 may (I emphasise "may") be an example of one of those rare cases in which it would have been appropriate to make a pre-emptive costs order. First, it was obvious that the point raised was one of great public importance, since it potentially involved the very survival of the Maori language. Secondly, so far as the merits were concerned, it was clear, by the time the stage of an appeal to the Privy Council had been reached, that there was much to be said in favour of the point sought to be argued by the appellants. This was not least because Cooke P. had dissented in the Court of Appeal.

Mr. Drabble relies to some extent on the liberalisation of the law standing in support of his arguments for pre-emptive costs. But it is significant that, although the courts undoubtedly take a less strict view of the requirements for standing than previously, it has been decided that standing should not be treated as a preliminary issue, but must be taken

in the legal and factual context of the whole case: see *Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617, per Lord Wilberforce at p. 630D, Lord Fraser of Tullybelton at p. 645D and Lord Scarman at p. 653F. It seems to me that, in so far as any assistance may be derived from the cases on standing, they support the proposition that the court should be extremely cautious about making pre-emptive orders for costs. What the court is being asked by the applicants to do is to say, in advance, that a public body should subsidise proceedings that have been brought against it, and to do so even at a time when the court has an incomplete appreciation of the merits of the claim, and when it may also be unable to assess properly the extent of the general public importance of the issues raised by the proceedings. I cannot accept that a departure from the basic rule that costs should follow the event is justified in such circumstances.

I conclude, therefore, that the necessary conditions for the making of a pre-emptive costs order in public interest challenge cases are that the court is satisfied that the issues raised are truly ones of general public importance, and that it has a sufficient appreciation of the merits of the claim that it can conclude that it is in the public interest to make the order. Unless the court can be so satisfied by short argument, it is unlikely to make the order in any event. Otherwise, there is a real risk that such applications would lead, in effect, to dress rehearsals of the substantive applications, which in my view would be undesirable. These necessary conditions are not, however, sufficient for the making of an order. The court must also have regard to the financial resources of the applicant and respondent, and the amount of costs likely to be in issue. It will be more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings than the applicant, and where it is satisfied that, unless the order is made, the applicant will probably discontinue the proceedings, and will be acting reasonably in so doing.

With that discussion of what I consider to be the correct approach to applications for pre-emptive costs, I turn to the particular applications that are before me.

C.P.A.G.

I am not persuaded that I have enough material to be able to form a concluded view as to how considerable a point of public importance is raised by this application. At first sight, the question whether legal aid should be available for hearings before Social Security tribunals and Commissioners, would appear to be a matter of great public importance. But as I said earlier, C.P.A.G. is contending that legal aid should be available only in a minority of cases. On the material before me, it is not possible to assess, even approximately, the number of cases which would be likely to attract legal aid, if the applicant's arguments were to succeed at the substantive hearing. It is not obvious at this stage that so many claimants would or might benefit from legal aid if C.P.A.G. were to succeed, that I can say with any confidence that the issue raised is of such general public importance that I ought to make a pre-emptive costs order. Nor am I satisfied that I have a sufficient appreciation of the merits of the application to be able to conclude that it is in the public interest to make the order. C.P.A.G. seeks to advance difficult arguments of law. It contends that it is inconsistent with the obligations imposed by article 6 of Council Directive (76/207/E.E.C.) (Equal Treatment Directive on employment) and

Council Directive (79/7/E.E.C.) (Directive on equal treatment in social security) to fail to provide legal aid for cases involving those Directives. E.C. law requires that there should be effective access to judicial remedies for the protection of rights which are directly effective under E.C. law. Reference is made to decisions of the European Court of Justice.

C.P.A.G. also contends that the decision of the Lord Chancellor is in breach of article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969) (the European Convention on Human Rights), which so far as material provides:

> "In the determination of his civil rights . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Reliance is placed on a number of decisions of the European Court of Human Rights, and it is submitted that the refusal to make legal aid available in complicated social security cases amounts to a breach of article 6.1 of the Convention. By these complex arguments, C.P.A.G. seek to break new ground. I am quite unable to form a view as to their merits at this stage. It is possible that, once the considerable relevant statutory and case-law material has been examined, the arguments will be exposed as wholly lacking in substance. On the other hand, it may be that, although the arguments are finally rejected at the substantive hearing, the court will decide that they were by no means without merit, and that, in all the circumstances, C.P.A.G. should not be ordered to pay the Lord Chancellor's costs. At this stage, however, I am unable to assess the merits sufficiently, to be able to conclude that it is in the public interest that a pre-emptive costs order should be made.

Accordingly, neither of the conditions that I have identified as being necessary for the making of a pre-emptive costs order is satisfied. If they had been satisfied, I would have been minded to make the order sought, because the Lord Chancellor clearly has a superior capacity to bear the costs of the proceedings than C.P.A.G., and it seems that, unless the order is made, C.P.A.G. will probably discontinue the proceedings, and, in my judgment, will be acting reasonably in so doing.

Amnesty/Redress

It is said by the applicants that this is an important test case which raises significant points of principle. In her affidavit, Jan Gould puts the point in this way:

> "A number of the grounds of review raise key questions that potentially have an impact on future prosecutorial decisions, notably the extent to which factors that go to evidential sufficiency can also be relevant public interest factors, the scope (if any) of the D.P.P.'s discretion to give weight to mens rea in the context of offences of strict liability and the relevance of international obligations as public interest factors."

I am not convinced that the court that decides the substantive application in this case will necessarily make any statements of general principle and application as to how the D.P.P. should exercise her discretion whether or not to prosecute. The court might decide the case quite narrowly, in which event, the decision will be of limited general public importance. There is a significant factual content in this challenge to the decision of the D.P.P. not to prosecute. It is this element of the case which

compels me to conclude that the first necessary condition for a successful application for a pre-emptive costs order is not satisfied. As regards the merits of the application, I am wholly unable to form a view as to the applicants' prospects of success. The public interest test set out in paragraph 6 of the Code requires the D.P.P. to carry out a balancing exercise, and it may well be difficult for the applicants' challenge to succeed. But as in the C.P.A.G. challenge, I have heard very little argument indeed on the point. For the same reasons as I gave in relation to that case, I am unable to assess the merits sufficiently to be able to say whether it is in the public interest to make a pre-emptive costs order.

Even if I had been persuaded that the two necessary conditions that I have identified were satisfied, I doubt whether I would have made a pre-emptive costs order in this case in any event. I am prepared to assume that the D.P.P. clearly has a superior capacity to bear the costs of the proceedings than the applicants. I am not, however, satisfied on the evidence that if the order is not made, both applicants will discontinue the proceedings. The evidence is that each applicant would be concerned or anxious about continuing; neither says that discontinuance would be the probable result if a pre-emptive costs order were not made. It is perhaps of greater significance that their evidence does not address the obvious possibility that the application be continued in the name of one of the applicants only, and that the proceedings be financed by both of them.

Conclusion

For the reasons that I have given, both of these applications are dismissed.

Applications dismissed.
Respondents' costs in cause.
Leave to appeal.

Solicitors: David Thomas, Child Poverty Action Group; Jan Gould, Public Law Project; Treasury Solicitor.

[Reported by DURAND MALET ESQ., Barrister]