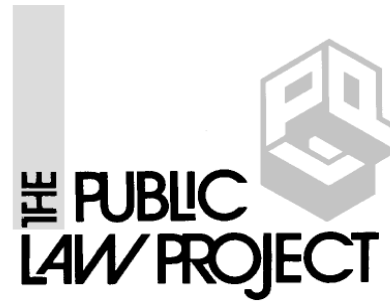


**Protective costs orders - an update**  
By Conrad Haley, Director, PLP  
Published in *Human Rights & Public  
Law Line News*



The purpose of this article is to provide practitioners with an update as to developments in the law of costs. This is because the Public Law Project has recently been successful in obtaining a full protective costs order on behalf of its client, the Refugee Legal Centre in the Court of Appeal, (*Refugee Legal Centre v Secretary of State for the Home Department* [2004] EWCA Civ 1239 and [2004] EWCA Civ 1296). A more detailed article will be published by the author in due course.

As anyone instructed by small non-governmental organisations (NGOs) will be aware, they have much to offer the court in terms of knowledge and expertise, but are not in a position to do so directly given the risk of exposure to costs. However, the courts have the power to make pre-emptive costs orders, the purpose of which is to assure a Claimant at an early stage in the proceedings that no costs will be ordered against them whatever the ultimate outcome, a jurisdiction recognised in the ultimately unsuccessful 'CPAG case'.

### **The CPAG case**

Such orders have been sought by claimants arguing that there is a public interest in the court resolving the matter at issue in the proceedings. The threshold set by the courts for granting a protective costs order was, however, set extremely high: see *R v Director of Public Prosecutions ex parte Amnesty International, R v Lord Chancellor ex part CPAG* [1998] 2 All ER 755 where Dyson J. laid down four factors relevant to the exercise of the court's discretion:

- The judicial review claim must be a 'public interest challenge';
- Such a challenge must contain two elements: the issues being of general importance; and the claimant having no private interest in the outcome;
- Even then, the discretion should only be exercised in 'the most exceptional circumstances';
- The public interest and legal merits of the Claimant's case must be of such importance such as to justify setting aside the 'basic rule' of English civil procedure, that the loser pays the winner's costs; generally this would not be

apparent until a full hearing;

#### **The CND case.**

An arguably more liberal approach was subsequently taken by the Court of Appeal in the case of The Queen (on the application or Campaign for Nuclear Disarmament) v Prime Minister and others [2002] EWHC 2712 Admin where the Court made an order to limit the amount the Defendants could recover to £25,000. The Court found the following three arguments 'compelling':

- 1 The claimants were a private company limited by guarantee of modest resources, which, in the event of a large adverse costs order, would be at risk either of going into liquidation or of having to curtail severely their activities. They stated that unless the court provided them with the certainty of a costs cap, they would be unable to proceed with the challenge. In addition, the time frame for the challenge was so short that it gave them no opportunity to seek to raise funds elsewhere.
- 2 Secondly, the obvious public importance of the issues they sought to bring before the court were easily manifest.
- 3 Thirdly, and in response to the defendant's argument that the challenge is and will be found to be clearly without merit and, indeed, non-justiciable, CND, whilst contesting that assertion, pointed out that, if it be right, then the proceedings may be expected to end at the preliminary hearing, in which event £25,000 would meet the defendant's entitlement to costs in any event.

#### **The RLC case.**

The Refugee Legal Centre sought to challenge the lawfulness of the 'Harmondsworth Super Fast Track' asylum determination procedure.

Individual claimants affected by the procedure could of course bring cases themselves, but the court agreed that such cases would decide nothing about the system itself. The substantive claim was thus a good example of how a body such as the RLC may not only have standing but be best placed to bring important questions such as this before the court. It was also clear that absent such an order, the RLC could not proceed with the appeal, (the Secretary of State having refused to renew his undertaking not to pursue costs which he had given at first instance).

In a hearing to determine whether the RLC should have costs protection in respect of their application for a protective costs order, (the Secretary of State having refused to provide even this limited comfort!), the Court indicated that

the new Civil Procedure Rules, with their emphasis on 'the interests of justice', might make such orders more common in public interest cases. In granting the application, Brooke LJ stated that:

*"Up to now there have been two decisions at first instance, and the principles underlying Dyson J's decision at first instance in pre-CPR days have been applied by this court, but without any careful scrutiny as to whether they are the appropriate principles on which the court should exercise its jurisdiction. In the course of argument there have been recent decisions of this court which portray a more flexible approach to the making of costs orders of one kind or another as fairness demands than was necessarily the vogue in 1998."*

The Secretary of State subsequently consented to an order that covered the RLC for the substantive appeal. Thus the court appears to have signalled its readiness to hear such applications and to consider them in a less restrictive manner than before. The Public Law Project would be happy to advise on the merits of obtaining such an order in individual cases, whether it be for other NGOs or for non-legally aided individuals.