

Protective costs orders and claims under the HRA

Desmond Rutledge and Sue Willman consider the scope for obtaining a protective costs order (PCO) in the context of recent case-law and ask whether the current state of the law is compatible with the Human Rights Act (HRA) 1998.

Introduction

Only a 'victim' within article 34 of the European Convention on Human Rights ('the convention') can bring a challenge under the HRA s7(1) and (7). However, to qualify for a PCO, the applicant must show that s/he has no 'private interest' in the case. So, an individual who wants to bring a human rights claim against a public body, and is ineligible for legal aid, risks an adverse costs order if s/he loses.

The issue of costs is high on the legal practitioner's agenda. The proportion of the population in England and Wales eligible for civil legal aid dropped by nearly 50 per cent between 1998 and 2007, from 52 per cent to 29 per cent of the population, with a particularly sharp decline between 2005 and 2007.¹ The number of legal aid suppliers is also declining.² So, it comes as no surprise that in the last 12 months, there have been no less than four Court of Appeal judgments on PCOs.

Yet there is still no statutory or procedural guidance on 'pre-emptive' or PCOs. The courts have jurisdiction to award costs under Supreme Court Act 1981 s51 and Part 44 of the Civil Procedure Rules (CPR), and usually follow the general rule that the unsuccessful party will be ordered to pay the costs of the successful party (CPR 44.3(2)(a)), although they have the power to make a different order (CPR 44.3(2)(b) and (4)). There is no mention of PCOs as such in the CPR. Instead, courts consider themselves bound by a 2005 Court of Appeal decision, *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, 1 March 2005; [2005] 1 WLR 2600, which established the following at para 74:

1. A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:

(i) the issues raised are of general public importance;

(ii) the public interest requires that those issues should be resolved;

(iii) the applicant has no private interest in the outcome of the case;

(iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;

(v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

2. If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.

3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.

Corner House also indicated that if an application for a PCO failed on the papers, the claimant could expect to pay the costs of the defendant and interested parties up to £1,000. If the application was then refused at an oral hearing, the applicant could be liable for costs up to £2,500 (paras 78–79). So, an individual will be exposed to a liability for costs even at the preliminary stage of any application for a PCO (although it may be possible in exceptional cases to obtain a pre-PCO or costs undertaking to cover the PCO application as in *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, 12 November 2004).

McAuslane v Secretary of State for Work and Pensions

These issues arose in the case of a pensioner, Mrs McAuslane, who had recently retired and was just above the legal aid financial eligibility threshold. She was granted leave by the Court of Appeal (C3/2007/1925, 18 October 2007, unreported. The case was concluded by consent on 21 August 2008) to bring a human rights challenge against the Secretary of State for Work and Pensions,

arguing that the current pension rules discriminated against her as a woman under article 1 of the First Protocol to the convention read with article 8.³ Lord Justice Waller granted leave on the basis that the appeal 'seems to raise an important point and to have some prospect of success'.

As Mrs McAuslane was not eligible for legal aid, her case was referred initially to the Bar Pro Bono Unit. After obtaining positive advice on the merits of her appeal, solicitors acting on a pro bono basis wrote to the Department for Work and Pensions (DWP). They asked for an undertaking that it would not seek to recover its legal costs from Mrs McAuslane if she lost in the Court of Appeal or that it would agree to a PCO capped at £1,000, given the public interest in the case. The DWP was not prepared to agree to this because in its view Mrs McAuslane's case had no merits and she was not entitled to a PCO as she had a 'private interest' in the outcome of the claim. It relied on the *Corner House* guidelines which have been interpreted to mean that a PCO should not be granted if the claimant stands to gain financially from the outcome, although if she had succeeded Mrs McAuslane would have only gained about £3 per week.

As *Corner House* makes it clear that an application for a PCO, if opposed, involves both a paper and an oral application, Mrs McAuslane could not insist that her case was only heard on the papers, so the DWP's refusal to agree costs made it impossible for her to pursue her appeal. The costs that she would have incurred if her application for a PCO was refused, or if she lost the discrimination case without a PCO, were prohibitive, for example, including the risk that a charge would be made on her home.

The role of the Equality and Human Rights Commission

As indicated above, the no 'private interest' requirement in *Corner House* is in direct conflict with the need to be a 'victim' under HRA s7. Mrs McAuslane, faced with the risk of costs she could not afford, which were disproportionate to the likely financial gain to her as an individual, sought help from the Equality and Human Rights Commission (EHRC), which was her last hope. The EHRC can become a party in legal proceedings if the case involves discrimination under an 'equality enactment' as defined in Equality Act (EA) 2006 ss28 and 33. Mrs McAuslane could not rely on the Sex Discrimination Act (SDA) 1975 as her case concerned the determination of an entitlement to a social security benefit by a court or tribunal.⁴

However, the EHRC also has a general duty to promote human rights, which includes

a duty to encourage public authorities to comply with the HRA (see EA s9(1)(d)). Representations were therefore made to the EHRC that the costs issue, and the inability to obtain a PCO, had the effect of denying Mrs McAuslane an effective remedy in relation to her discrimination claim. It was suggested that the EHRC should consider acting as an intervener to challenge the *Corner House* ruling as it applied to convention rights cases. However, it declined to become involved, saying that the appropriateness of awarding costs was 'a matter for judicial discretion'.⁵

Challenging the no 'private interest' requirement

More recently, the view that the no 'private interest' requirement is a precondition of obtaining a PCO has been doubted or distinguished in a number of cases. See, for example, Sir Mark Potter in *Wilkinson v Kitzinger* [2006] EWHC 835 (Fam), 12 April 2006, para 54 and the Court of Appeal (on an application for permission to appeal) in *R (England) v Tower Hamlets LBC and others* [2006] EWCA Civ 1742, 20 December 2006, para 14. In *Weaver v London & Quadrant Housing Trust* [2009] EWCA Civ 235, 17 February 2009, the trust was appealing against the finding that it is a public authority for the purposes of the HRA. The Legal Services Commission granted Mrs Weaver public funding for her own costs of defending the appeal but no costs protection because a possession order had been made so the appeal was academic for her, though of wider public interest. The court granted a PCO, rejecting the submission that the benefit of public law protection as an assured tenant if the appeal failed gave her a private interest. See also page 34 of this issue.

Although the issue of 'private interest' did not arise on the facts of *Corner House* as it concerned a non-governmental organisation (NGO), the rule has been applied consistently in subsequent cases such as *Goodson v HM Coroner for Bedfordshire and Luton and Luton and Dunstable Hospital NHS Trust* [2005] EWCA Civ 1172, 12 October 2005. Commentators have highlighted the difficulties of elements of the test.⁶ A 2006 working group, initiated by Liberty and chaired by Maurice Kay LJ, concluded that courts should be willing to grant PCOs in 'public interest' cases.⁷ Although the nature and extent of an applicant's private interest was a relevant factor, it should not be a precondition for a PCO that the person or body applying for it had no private interest in the outcome of the case.

Are the rules different in environmental law cases?

The 2008 Working Group on Access to

Environmental Justice led by Sullivan J considered the implications of the UN Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('the Aarhus convention') ratified by the UK in February 2005, which requires that access to justice in environmental proceedings should not be prohibitively expensive. Again, the group questioned the appropriateness or workability of the private interest criterion. Its report, *Ensuring access to environmental justice in England and Wales* (May 2008), concluded that costs should be regarded as prohibitively expensive if they would reasonably prevent an 'ordinary' member of the public (that is one who is 'neither very rich nor very poor, and would not be entitled to legal aid') from embarking on the challenge falling within the terms of the Aarhus convention.⁸ Subsequently, attempts have been made to argue that the courts need to take the Aarhus convention into account when considering whether or not to grant PCOs in environmental law cases.

The government's position is that the Aarhus convention is unenforceable because it has not been incorporated in domestic law (see (1) *The Bard Campaign* (2) *Bliss v Secretary of State for Communities and Local Government and Weston Front (interested party)* [2009] EWHC 308 (Admin), 25 February 2009). See also page 32 of this issue. In *R (Buglife – the Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation and Rosemound Developments Ltd (interested party)* [2008] EWCA Civ 1209, 4 November 2008; [2008] WLR (D) 348 (see below), the Master of the Rolls considered that there should be '... no difference in principle between the approach to PCOs in cases which raise environmental issues and the approach in cases which raise other serious issues and vice versa ...' (para 17).

The reports referred to above have been noted with approval in three Court of Appeal decisions: *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749, 1 July 2008; *Buglife* (see above); and (1) *Morgan & Baker v Hinton Organics (Wessex) Ltd and CAJE (intervener)* [2009] EWCA Civ 107, 2 March 2009. See also page 35 of this issue. In *Compton*, Waller LJ favoured a 'flexible' or 'non-rigorous' interpretation of the guidelines and his approach was approved in the two subsequent cases. The difficulty for future claimants is that none of these decisions turned on the 'private interest' point. Some imagination is needed to interpret 'private interest' this flexibly as it is clearly one of the five requirements for a PCO according to

Corner House. In *Morgan and Baker*, the claimants were residents of Publow, a rural hamlet affected by foul smells of composting from Hinton Organics. It is hard to see how a court could not conclude that the claimants had a private interest in the challenge, as well as there being a wider public interest.

Conclusion

Where does all this leave applicants who are unable to pursue their claim or appeal where there is a strong public interest as well as a (perhaps small) potential private interest in the case being heard? Hopefully, we will not have to wait too long before the victim of a human rights violation risks seeking a PCO and gives the courts a chance to review the law. In November 2008, it was announced that there was to be a fundamental review of the costs of civil litigation conducted by Jackson LJ.⁹ His report is due in December 2009. It is to be hoped that the report includes recommendations to resolve the issue of PCOs, for the benefit of both NGOs and individuals like Mrs McAuslane.

- 1 See Adam Griffith, 'Dramatic drop in civil legal aid eligibility', September 2008 *Legal Action* 10, and Steve Hynes and Jon Robins, *The Justice Gap: whatever happened to legal aid?*, LAG, April 2009.
- 2 See Gareth Mitchell and Stephen Pierce, 'On the edge of the abyss: legal aid from 2010 – Part 1', March 2009 *Legal Action* 6.
- 3 Steve Scully, the appellant's brother, represented her before the deputy commissioner in *CP/4017/2006*, 30 May 2007 and drafted grounds of appeal to the Court of Appeal.
- 4 See *CPC/4173/2007*, 23 July 2008, para 9 on the SDA; *CDLA/3585/2007*, 4 April 2008, paras 8–10 on the Disability Discrimination Act (DDA) 1995; and *CTC/591/2008*, 7 August 2008, paras 15–18 on the Race Relations Act (RRA) 1976, in which it was held that a commissioner has no jurisdiction to deal with an appeal based on a contention that the decision is unlawful by reason of the SDA, DDA 1995 or RRA.
- 5 Quote from an e-mail sent by the EHRC to Pierce Glynn solicitors, dated 4 July 2008.
- 6 See Richard Clayton QC, 'Public interest litigation, costs and the role of legal aid', *Public Law*, July 2006.
- 7 *Litigating the public interest: report of the Working Group on Facilitating Public Interest Litigation*, July 2006, available at: www.liberty-human-rights.org.uk/publications/6-reports/litigating-the-public-interest.pdf.
- 8 Available at: www.wwf.org.uk/filelibrary/pdf/justice_report_08.pdf.
- 9 See: www.judiciary.gov.uk/about_judiciary/cost-review/index.htm.

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