Trinity Term
[2015] UKSC 51
On appeal from: [2013] EWCA Civ 1320

JUDGMENT

Hunt (Appellant) *v* North Somerset Council (Respondent)

before

Lady Hale, Deputy President
Lord Wilson
Lord Reed
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

22 July 2015

Heard on 29 April 2015

Appellant	*Respondent*
David Wolfe QC Aileen McColgan (Instructed by Public Interest Lawyers)	Nigel Giffin QC Jane Oldham (Instructed by North Somerset Legal Services)

LORD TOULSON: (with whom Lady Hale, Lord Wilson, Lord Reed and Lord Hughes agree)

1. The appellant brought a claim for judicial review of a decision of the respondent, on 21 February 2012, to approve a Revenue Budget for 2012/13 in relation to the provision of youth services. In his claim form he applied for declarations that the respondent had failed to comply with section 149 of the Equality Act 2010 and section 507B of the Education Act 1996 and for an order quashing the decision to approve the budget.

2. The claim was dismissed at first instance (Wyn Williams J) and the appellant was ordered to pay the respondent's costs, subject to a proviso against enforcement of the order without further permission of the court. He obtained limited permission to appeal on two grounds. The Court of Appeal (Moore-Bick, Rimer and Underhill LJJ) decided the two substantive issues in his favour but did not grant him any relief, dismissed his appeal and ordered him to pay half of the respondent's costs of the appeal. This appeal is about the form of the Court of Appeal's disposal of the matter. The appellant submits that since the court held that the respondent had failed in its statutory obligations, it should have made a declaration to that effect and should have made an order for costs in his favour.

3. The underlying facts and issues are set out in the very thorough judgment of Wyn Williams J, [2012] EWHC 1928 (Admin), and recapitulated, so far as was necessary, in the judgment of the Court of Appeal delivered by Rimer LJ, [2013] EWCA Civ 1320. For present purposes a briefer outline will be sufficient.

4. The appellant was born on 17 April 1991. He suffers from ADHD and has other difficulties. He was therefore a "qualifying young person" within the meaning of section 507B of the 1996 Act, which required the respondent, so far as reasonably practicable, to secure access for him to sufficient educational and recreational leisure-time activities for the improvement of his well-being. Section 507B(9)(b) required the respondent in exercising its functions under that section to "secure that the views of qualifying young persons in the authority's area are taken into account".

5. The appellant's disability was also a protected characteristic which brought into play, in relation to him, the public sector equality duty ("PSED") contained in section 149 of the 2010 Act. The section required the respondent to "have due regard" to the statutory equality needs in the exercise of its functions.

6. By its decision on 21 February 2012 the respondent approved a reduction in its youth services budget for 2012/13 of £364,793. The appellant was concerned about the impact which this was likely to have on the provision of services for young persons with disabilities and, in particular, on a weekly youth club for vulnerable young people which he used to attend.

7. At first instance wide ranging criticisms were made of the way in which the respondent had reached its decision. They were all rejected. At the end of the hearing and before giving judgment, the judge asked counsel for written submissions on relief if he found that there had been illegality. The note on relief provided by Mr David Wolfe QC and Ms Aileen McColgan on behalf of the appellant stated that he asked for a quashing order. No mention was made of alternative relief in the form of a declaration. Ms Jane Oldham noted the omission in her response on behalf of the respondent, observing that "… it appears that no declaratory relief is sought and D takes it that the claim for declaratory relief [in the claim form] is abandoned, since otherwise C would, in response to the request of Wyn Williams J, have set out the terms of any declaratory relief sought". Mr Wolfe and Ms McColgan provided a written reply which again made no reference to asking for declaratory relief.

8. In view of the judge's rejection of the challenges to the legality of the respondent's approval of the budget, the question of relief did not arise for decision, but the judge rejected an argument by the respondent that the provisions of the Local Government Finance Act 1992 would have prevented him from quashing the decision to approve the budget. He said that if he had been persuaded that the respondent had acted unlawfully, it would have been open to him to grant any remedy which was appropriate.

9. The grounds on which the appellant was given leave to appeal were that the respondent had failed in its equality duty (PSED) under section 149, because although equality impact assessments ("EIAs") had been carried out relating to the impact of the budgetary cuts, the EIAs had not been provided to the members who took the decision (and the judge had been wrong to infer that the members had read them merely because they had been told how they could be accessed); and that it had failed in its consultation duty under section 507B(9)(b) because there was no evidence of consultation with young people before making the decision to cut the budget (as distinct from meetings with management committees of young people's organisations to explain to them where the axe would fall). These grounds were developed in the appellant's skeleton arguments in the Court of Appeal. As to relief, it was submitted that the decision under challenge should be quashed. No alternative submission was made about declaratory relief.

10. The judgment of the Court of Appeal was given on 6 November 2013. The court upheld the appellant's argument under section 149. It expressed some doubt

about whether section 507B(9) was applicable, but this was not disputed by the respondent. Accordingly the court proceeded on the assumption (but without deciding) that the section was applicable, and on that assumption it upheld the appellant's argument. However, the court refused to make the quashing order which was sought. Rimer LJ said that although in theory a quashing order could be made, the court could not see how this could be done without quashing the respondent's decision to approve the entire revenue budget for the financial year 2012/13, which had expired nearly three months before the appeal was heard. He concluded:

> "94. … It is now too late to unwind what has been done. … Judicial review is a discretionary remedy and, even though we have accepted the substantive points which Mr Hunt has advanced, we are of the firm view that he ought not to be granted the quashing order for which he asks. To do so would be detrimental to good administration.
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> 95. We refuse to grant any relief to Mr Hunt and therefore dismiss the appeal."

11. No mention was made in the judgment about whether the order should include a declaration to reflect what was said in it about the respondent's failure to discharge its statutory obligations, no doubt because the subject had never been raised on behalf of the appellant and in any event it would be open to counsel to make suggestions as to the appropriate form of order in the light of the matters determined in the judgement. It would have also have been open to counsel to raise the matter of declaratory relief on receiving the judgment in draft if it was something which they had meant to raise. Counsel for the appellant did neither. Counsel for the respondent prepared a draft order stating that the appeal was dismissed, and counsel for the appellant stated in written submissions that the parties were agreed on the order except in relation to costs.

12. I would reject the appellant's complaint that the Court of Appeal was wrong not to make a declaration of its own initiative. The complaint is redolent of hindsight. It is no doubt triggered by the court's decision on costs, but they are separate matters. The judgment of the Court of Appeal itself ruled that the respondent acted unlawfully, and the authority of the judgment would be no greater or less by making or not making a declaration in the form of the order to the same effect. However, in circumstances where a public body has acted unlawfully but where it is not appropriate to make a mandatory, prohibitory or quashing order, it will usually be appropriate to make some form of declaratory order to reflect the court's finding. In some cases it may be sufficient to make no order except as to costs; but simply to dismiss the claim when there has been a finding of illegality is likely to convey a misleading impression and to leave the claimant with an understandable sense of injustice. That said, there is no "must" about making a

declaratory order, and if a party who has the benefit of experienced legal representation does not seek a declaratory order, the court is under no obligation to make or suggest it.

13. The appellant is on much stronger ground in relation to costs. The submissions to the Court of Appeal on his behalf made no reference to the costs at first instance, and it was remiss to agree to an order that the appeal should be dismissed, when there were obvious grounds for arguing that in relation to costs the judge's order should be set aside and replaced by an order in the appellant's favour. However, in relation to the costs in the Court of Appeal, the points were properly made that the appellant had succeeded on both the issues as to the respondent's statutory duty; that there were wider lessons for local authorities to learn from the case about their duties under each of the relevant sections; that the lapse of time, as a result of which the relevant financial year had now passed, was not the fault of the appellant; and that to deny the appellant his costs would be likely in practice to dissuade claimants from pursuing legitimate public law challenges. The respondent submitted that the appellant had not in substance been successful; that he had not obtained any result of any practical utility; and that he had known about the practical problems which would be involved in attempting to unwind the budget from evidence submitted by the respondent before the original hearing.

14. Delivering the reasons for the court's judgment on costs, ([2013] EWCA Civ 1483) Rimer LJ said that by the time that the appeal came on for hearing, it was far too late to consider granting any relief (by which he must have had in mind a quashing order), even if – as to which the court had doubts – it might have been appropriate for relief to be granted a year earlier when the matter was before Wyn Williams J. He continued:

> "5. In these circumstances, the court considers that it would be wrong in principle to award any costs to Mr Hunt. The appeal proved to be of no practical value to him; and, in the court's view it was always one which was destined to fail.
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> 6. As the council was the successful party in the appeal, the court considers that it is in principle entitled to its costs. On the other hand, the court has regard to the fact that the council resisted the appeal not only on the basis that this was not a case for relief, but also on the two substantive grounds on which it lost. Its resistance on those two grounds increased the costs of the appeal. We regard that consideration as pointing away from an order awarding the council all of its costs."

The court concluded that the respondent should be entitled to recover half of its costs of the appeal.

15. The discretion of a court in a matter of costs is wide and it is highly unusual for this court to entertain an appeal on an issue of costs alone. But the Court of Appeal said that it reached its decision as a matter of principle, treating the respondent as the "successful party". In adopting that approach, I consider that the court fell into error. The rejection of the respondent's case on the two issues on which the appellant was given leave to appeal was of greater significance than merely that the respondent had increased the costs of the appeal by its unsuccessful resistance. The respondent was "successful" only in the limited sense that the findings of failure came too late to do anything about what had happened in the past, not because the appellant had been slow to raise them but because the respondent had resisted them successfully until the Court of Appeal gave its judgment. The respondent was unsuccessful on the substantive issues regarding its statutory responsibilities.

16. There are also wider public factors to consider. Public law is not about private rights but about public wrongs, as Sedley J said in *R v Somerset County Council, Ex p Dixon* [1998] Env LR 111 when considering a question of standing. A court may refuse permission to bring a judicial review claim if it considers the claimant to be a mere meddler or if it considers that the proceedings are unlikely to be of sufficient significance to merit the time and costs involved. But in this case the court considered that the issues were of sufficient significance to give permission. And the ruling of the court, particularly under section 149, contained a lesson of general application for local authorities regarding the discharge by committee members of the council's equality duty. If a party who has been given leave to bring a judicial review claim succeeds in establishing after fully contested proceedings that the defendant acted unlawfully, some good reason would have to be shown why he should not recover his reasonable costs.

17. I cannot see that the fact that in this case the determination of illegality came after it was too late to consider reopening the 2012/13 budget provided a principled reason for making the appellant pay any part of the respondent's costs. On the contrary, for the reasons stated the appellant was in principle entitled to some form of costs order in his favour. The issues raised by the appellant at first instance were considerably wider than the issues on which he was given permission to appeal. They included, for example, a far-reaching challenge to the adequacy of the respondent's EIAs. This challenge required detailed rebuttal by the respondent. The appellant also persisted in seeking an order to quash the decision approving the budget when that was unrealistic. Those are reasons for limiting the order for costs in his favour. Logically it might be said that a distinction should be drawn between the costs at first instance and in the Court of Appeal to reflect the different issues,

but each hearing occupied the court for one day and the assessment can only be broad brush.

18. I would allow the appeal, set aside the Court of Appeal's order and substitute an order that the appellant should recover two thirds of his costs both at first instance and in the Court of Appeal.

19. Having succeeded in reversing the costs orders made by the courts below, the appellant is entitled to his reasonable costs of so doing. However, a significant proportion of his written and oral argument before this court was directed to the question of a declaration. On that issue his argument had no merit when examined against the way that his case was presented in the lower courts, which only emerged fully from the submissions of the respondent. As at present advised, I would order that the appellant should recover two thirds of his costs in this court, to be assessed if not agreed; but the order should not be drawn up for seven days, during which time either party may, if so advised, make written submissions as to why a different order should be made.