



Neutral Citation Number: [2025] EWCA Civ 1644

Case No: CA-2025-000583

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
HHJ JARMAN KC (SITTING AS A JUDGE OF THE HIGH COURT)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2025

Before:

LORD JUSTICE BEAN
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ELISABETH LAING

Between :

THE KING
on the application of:
PUBLIC AND COMMERCIAL SERVICES UNION **Appellant**
- and -
THE SECRETARY OF STATE FOR THE HOME **Respondent**
DEPARTMENT

Katherine Apps KC and Jake Thorold (instructed by **Thompsons Solicitors LLP**) for the
Appellant

Paul Skinner (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 25 November 2025

Approved Judgment

This judgment was handed down remotely at 10:00 on 16 December 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Bean:

1. The Appellant is the Public and Commercial Services Union (“PCSU”). PCSU is a trade union representing approximately 185,000 workers across the UK civil service and related areas, including 4,000 to 5,000 members working for Border Force.
2. On 11 December 2023 the then Secretary of State for the Home Department (“SSHD” or “Home Secretary”) made the Strikes (Minimum Service Levels: Border Security) Regulations 2023/1353 (“the MSL Regulations”) pursuant to powers conferred by Parliament in the Strikes (Minimum Service Levels) Act 2023 (“the 2023 Act”).
3. Regulation 3 of the MSL Regulations empowers the Respondent to serve on the Appellant (and other trade unions) a “work notice” seven days or less before planned strike dates, requiring it to take “reasonable steps” to ensure that specified staff in border services (widely defined in Regulation 2(2)(a)) do not participate in the strike, in order to guarantee that:

“on each day of the strike, the border services are no less effective than they would be if the strike were not taking place on that day”.
4. If a trade union served with such a notice fails to comply the union loses immunity from tort liability. Trade union members who do not comply lose their statutory protections from detriment and dismissal.
5. On 17 January 2024 PCSU sent the Home Secretary a letter pursuant to the Pre-Action Protocol for Judicial Review. The letter argued that the MSL Regulations constituted an unlawful interference with the Appellant’s members’ Article 11 ECHR rights. It invited the Respondent to withdraw / repeal the MSL Regulations and the Director of Border Revenue to issue no work notices, in order to avoid the need for litigation.
6. When Parliament passed the 2023 Act the Labour Party was in opposition. It opposed the Bill for what became the 2023 Act, and the MSL Regulations in particular, on the basis that they unlawfully and disproportionately restricted freedom of association.
7. In its pre-action protocol response dated 15 February 2024, provided after several extensions of time, the Respondent declined to withdraw or repeal the MSL Regulations and declined to confirm that no work notices would be made, contending (in summary and as is most relevant) that “[t]o the extent that the Regulations restrict the freedom of association enshrined under Article 11 ECHR, an interference limited to the setting of M[inimum] S[ervice] L[evels] is plainly justified by the Regulations’ aims”.
8. On 5 March 2024 PCSU issued judicial review proceedings to challenge the lawfulness of Regulation 3 of the MSL Regulations. The first two grounds of challenge (of three) both contended that regulation 3 impermissibly infringed Article 11 ECHR rights and was therefore unlawful. Ground 1 argued that the MSL Regulations exceeded the *vires* of the primary legislation because those *vires* were limited by Article 11 ECHR. Ground 2 sought to argue that the power in the Regulations resulted in a breach of Article 11. The Statement of Facts and Grounds

also set out how the Regulations provided for such short notice of any work notice that it would not be industrially feasible or effective for any challenge to an individual work notice to be brought in that short time frame; and also set out what were said to be the industrially chilling effect of the Regulations.

9. On 27 March 2024 the Respondent filed Summary Grounds of Defence in which it continued to assert that the MSL Regulations did not unlawfully infringe Article 11 ECHR rights.
10. On 8 May 2024 Holgate J (as he then was) granted PCSU permission to apply for judicial review in respect of grounds 1 and 2 of the Claim.
11. Later in May 2024 the Labour Party published a document called “Labour’s Plan to Make Work Pay”. It contained many proposals for reforms to employment and trade union law, including a pledge to repeal the 2023 Act.
12. On 26 June 2024 the Respondent filed Detailed Grounds of Defence, in which it continued to assert that the MSL Regulations did not unlawfully infringe Article 11 ECHR rights.
13. On 4 July 2024 the United Kingdom held a general election. The Labour Party obtained a substantial majority of seats in the House of Commons and subsequently formed a Government.
14. On 9 July 2024 the Appellant’s solicitors sent a letter, which included:

“We are ... writing to you to ask you to take immediate instructions from your client as to whether it intends to continue to defend these proceedings.

As you will appreciate it is not in the interests of justice nor in accordance with the overriding objective to litigate this case further if your client intends either to withdraw the Regulations or to repeal minimum service level legislation in

its entirety and does not intend to use the Regulations to invoke minimum service levels in Border Force in the intervening period before the repeal takes effect.

Our client therefore proposes resolution of this claim on terms to the effect that: (1) your client undertakes to withdraw or repeal the Regulations (2) your client undertakes that it will not issue any work notice or otherwise exercise any powers under the Regulations prior to any withdrawal or repeal taking effect; and (3) your client pays our client’s reasonable costs incurred to date, to be assessed if not agreed.”

15. On 6 August 2024, the Minister for Migration and Citizenship, Seema Malhotra MP, wrote to PCSU as follows:

“I am writing to update you on the Government’s plans for the Strikes (Minimum Service Levels) Act 2023.....

The 2023 Act enables minimum service levels to be applied to specified services by regulations within these sectors during strike action. **This Government believes that the 2023 Act unduly restricts the right to strike and undermines good industrial relations.** As you are aware, our ‘Plan to Make Work Pay’ pledged to repeal the 2023 Act to give trade unions the freedom to organise, represent, and negotiate on behalf of their workers.

We have begun preparations to repeal the 2023 Act as part of the forthcoming Employment Rights Bill. Amendments made by the 2023 Act to the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”) would accordingly be reversed and any minimum service regulations would lapse automatically once the Employment Rights Bill has Royal Assent. This would include the Strikes (Minimum Service Levels: Border Security) Regulations 2023 (“the border security MSL Regulations”). We are committed to ensuring that this legislation will be introduced in Parliament within the first 100 days of this Government.

Although the ability of the Home Secretary to issue work notices will legally continue until the 2023 Act is formally repealed and amendments to the 1992 Act are accordingly reversed, in this interim period, I can confirm that the Home Secretary will not exercise the powers granted under the 2023 Act and the border security MSL Regulations.” [emphasis added]

16. The following day PCSU’s solicitors received a letter from the Government Legal Department stating that, in light of the Minister’s letter, the claim had become academic, and inviting the Union to discontinue the claim. The letter also stated that the Home Secretary would not agree to pay the Appellant’s costs of the claim, since PCSU had “not demonstrated that the claim has become academic by virtue of the legal merits of the case”. The Respondent contended instead that the claim had “become academic for the reasons which are set out in the [Minister’s letter].”
17. Following correspondence between the parties, PCSU’s solicitors filed a notice of discontinuance, with the ordinary costs consequences of discontinuance being disapplied by consent and provision made for the parties to make submissions on costs. This order was approved by the Administrative Court on 9 September 2024. That order expressly incorporates the Minister’s letter by reference in the recitals. The letter was filed at court with the notice of discontinuance and consent order.
18. The Appellant filed its submissions on costs on 20 September 2024, contending that it should be awarded its costs in full, on the basis that it had been “wholly successful” in obtaining what it sought, namely the repeal of the MSL Regulations. The submissions set out relevant case law and addressed the arguments raised in correspondence.
19. On 1 October 2024 the Respondent filed its costs submissions. The central contention of these submissions was that “the claim has become academic for political reasons,

rather than for reasons connected with the merits of the claim”. The Respondent did not file any witness evidence alongside its submissions in support of this assertion.

20. On 11 October 2024, the Appellant filed costs submissions in reply in which it, among other matters, referred to the Respondent’s omission to submit any evidence demonstrating its rationale for deciding to withdraw the MSL Regulations.
21. On 20 February 2025 HHJ Jarman KC decided to make no order as to costs. The full extent of his reasoning was as follows:

“(1) The appropriate conclusion on the basis of the submissions is that the claim became academic for political reasons after a change of government and not because of this claim.

(2) The other points made are noted but do not impact upon that conclusion.

(3) In those circumstances the above cost order is just and proportionate.”

Relevant case law

22. This court has repeatedly reiterated the approach to be taken in appeals about costs articulated by Sir Murray Stuart-Smith in *Roache v News Group Newspapers Ltd* [1998] EMLR 161 at [172]:

"Before the court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account, or has taken into account, some feature that he should or should not have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors in the scale."

This passage has been approved in, for example, *Burgess v Lejonvarn* [2020] EWCA Civ 114; [2020] 4 WLR 43 and *R (Parveen) v Redbridge LBC* [2020] EWCA Civ 194; [2020] 4 WLR 53.

23. As to how this discretion should be exercised where a case has settled, the classic judgment remains that of Lord Neuberger MR in *R(M) v Croydon LBC* [2012] EWCA Civ 595; [2012] 1 WLR 2607. In paragraph [1] he said:-

“This appeal raises the issue as to the proper approach to awarding costs in judicial review proceedings, where the defendant public authority effectively concedes some or all of the relief which the claimant seeks. As with any question relating to costs, the issue is both highly fact-sensitive and very much a matter for the discretion of the first instance tribunal. However, a degree of consistency of approach is self-evidently desirable, and the issue gives rise to some points of principle and policy.”

24. At paras [44]-[46] he set out the general principles which apply after a trial in ordinary civil litigation:

“44. There are three relevant general principles which appear to me to apply to awards of costs after a trial in ordinary civil litigation. The first is that any decision relating to costs is primarily a matter for the discretion of the trial judge, which means that an appellate court should normally be very slow indeed to interfere with any decision on costs. However, while wide, the discretion must be exercised rationally and in accordance with certain generally accepted principles. To a large extent, those principles are set out in CPR 44.3, and in particular, paras (2), (4), (5), and (6). If the trial judge departs from rationality or the correct principles then it is legitimate for an appellate court to interfere with his conclusion.

45. The second principle is that, as has long been the case in English civil litigation, and is expressly stated in CPR 44.3.2(a), the general rule in all civil litigation is that a successful party can look to the unsuccessful party for his costs. Of course, as CPR 44.3(2)(b), (4), (5) and (6) demonstrate, there may be all sorts of reasons for departing from this principle, but it represents the *prima facie* position. For instance, the fact that the successful party lost on, or abandoned, an issue, will often involve his being deprived of some, or even all, of his costs (and, in an extreme case, he may even have to pay some of the unsuccessful party's costs) – CPR 44.3(4)(b). Further, the parties' conduct is a relevant matter, as CPR 44.3(4)(a) provides, so that failure to adhere to the provisions of any relevant protocol may well affect any decision the court makes on costs.

46. The third principle is that the basis upon which the successful party's lawyers are funded, whether privately in the traditional way, under a 'no win no fee' basis, by the Community Legal Service, by a Law Centre, or on a pro bono arrangement, will rarely, if ever, make any difference to that party's right to recover costs."

25. The next part of Lord Neuberger's judgment deals with cases which settle before trial in ordinary civil litigation. At [49] - [51] he said:

“49. ... Given the normal principles applicable to costs when litigation goes to a trial, it is hard to see why a claimant, who, after complying with any relevant Protocol and issuing proceedings, is accorded by consent all the relief he seeks, should not recover his costs from the defendant, at least in the absence of some good reason to the contrary. In particular, it seems to me that there is no ground for refusing the claimant his costs simply on the ground that he was accorded such relief by the defendants conceding it in a consent order, rather than

by the court ordering it after a contested hearing. In the words of CPR 44.3(2), the claimant in such a case is every bit as much the successful party as he would have been if he had won after a trial.

50. The outcome will normally be different in cases where the consent order does not involve the claimant getting all, or substantively all, the relief which he has claimed. In such cases, the court will often decide to make no order for costs, unless it can, without much effort decide that one of the parties has clearly won, or has won to a sufficient extent to justify some order for costs in its favour. Thus, the fact that the claimant has succeeded in obtaining part of the relief he sought may justify his recovering some of his costs, for instance where the issue on which the claimant succeeded was clearly the most important and/or expensive issue. But in many such cases, the court may consider that it cannot fairly award the claimant any costs because, for instance, it is not easy to assess whether the defendants should have their costs of the issue on which the claimant did not succeed, and whether that would wipe out the costs which the claimant might recover in relation to the issue on which he won.

51. In many cases which are settled on terms which do not accord with the relief which the claimant has sought, the court will normally be unable decide who has won, and therefore will not make any order for costs. However, in some cases, the court may be able to form a tolerably clear view without much effort. In a number of such cases, the court may well be assisted by considering whether it is reasonably clear from the available material whether one party would have won if the case had proceeded to trial. If, for instance, it is clear that the claimant would have won, that would lend considerable support to his argument that the terms of settlement represent success such that he should be awarded his costs."

26. At [60] Lord Neuberger said:

"... in Administrative Court cases, just as in other civil litigation, particularly where a claim has been settled, there is, in my view, a sharp difference between (i) a case where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement, and (ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement, and (iii) a case where there has been some compromise which does not actually reflect the claimant's claims. While in every case, the allocation of costs will depend on the specific facts, there are some points which can be made about these different types of case."

“61. In case (i), it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary. Whether pursuant to judgment following a contested hearing, or by virtue of a settlement, the claimant can, at least absent special circumstances, say that he has been vindicated, and, as the successful party, that he should recover his costs. In the latter case, the defendants can no doubt say that they were realistic in settling, and should not be penalised in costs, but the answer to that point is that the defendants should, on that basis, have settled before the proceedings were issued: that is one of the main points of the pre-action protocols.”

27. The Master of the Rolls went on to consider cases of type (ii) and (iii). At [62] he said that in case (ii), where there has been a settlement, the court will normally be in a significantly worse position to make findings on the degree of success achieved by each party than where the case has been fought out at a trial. There is often much to be said for concluding that there should be no order for costs, but much depends on the facts. In some such cases it may help to consider who would have won if the matter had proceeded to trial. In a case of type (iii) there is an even more powerful argument that the default position should be no order as to costs; but in some such cases it may well be sensible to look at the underlying claims and enquire whether it is tolerably clear to see who would have won if the matter had not settled.

28. In *R (Tesfay) v Secretary of State for the Home Department* [2016] EWCA Civ 415; [2016] 1 WLR 4853 Lloyd Jones LJ said at [57]:-

“Whereas in a settlement of private law litigation it is usually possible to identify with some precision the extent to which a party has been vindicated, the position following compromise of public law litigation is often not so clear cut. Proceedings for judicial review are brought by persons dissatisfied with decisions of public bodies. However, the courts are not the decision makers and often in public law the most that can be achieved is an order that the decision maker reconsider on a correct legal basis. That may not lead to ultimate victory for the applicant because the new decision may be a lawful decision against the interests of the applicant. Nevertheless, to achieve an order for reconsideration will often be a substantial achievement. Success in public law proceedings must be assessed not only by reference to what was sought and the basis on which it was sought and on which it was opposed, but also by reference to what was achievable.”

What causal link is required between the claim and the outcome?

29. In *Speciality Produce Ltd v Secretary of State for the Environment* [2014] EWCA Civ 225; [2014] C.P. Rep 29 the appellant had challenged a decision of the respondent Secretary of State’s Rural Payments Agency by two means: an internal appeal and a claim for judicial review. It was successful in the internal appeal and the decision was set aside. The judicial review was then discontinued by consent save that the court

was asked to decide whether the appellant could recover costs. Vos J made no order as to costs, observing:-

"36. What effectively has happened here is that SPL has backed two perfectly proper horses. The first horse was the abuse of process claim in the judicial review proceeding and the second horse was the statutory appeals process. Both were properly brought. SPL was entitled to make both claims and pursue both claims in parallel.....

37. The question is whether, if one horse finishes first and entitles the applicant to the relief that it would have obtained if the other horse had finished first the applicant can seek the cost of both sets of proceedings.

...

39. In this case, unless it is possible for the court to say that SPL would have won its abuse of process ground without wasting undue judicial time, the normal default order, as Lord Neuberger makes clear, is no order as to costs. ... What matters is whether or not I can say that SPL would have succeeded in its abuse of process claim. That is something I cannot say on the evidence before me, as is common ground between the parties.

40. In these circumstances, though SPL can quite reasonably think that they have been deprived of the opportunity to argue their points, which they might well have won, it does not seem to me appropriate that they should be awarded their costs. They took a belt-and-braces approach to the litigation. They obviously regarded it as extremely important that they obtained the relief they wanted, by whichever route, as quickly as possible. For that they had to hazard some costs, as they said in another context they were prepared to do. Unfortunately for them (to mix my metaphors), the horse that they backed, which did not have very good odds, came home first. In those circumstances they cannot, unfortunately, claim the winnings for the horse that never came home because it did not need to."

30. In this court, the decision of Vos J was affirmed. Patten LJ said at [29]:-

"The decision in *M* represents an acceptance that there will be cases where the link between the claim and the agreed relief is so clear that the claimant can properly be treated as the successful party for the purpose of an award of costs. But for that link to be established the court is, I think, usually required to be satisfied that the claimant is likely to have won: see Lord Neuberger at [51] of *M*. In any event, the claim must be causative of the relief obtained."

31. In *R (RL) v Croydon LBC* [2018] EWCA Civ 726; [2019] 1 WLR 224 the claimants were a Ghanaian mother and her three children. The mother informed the local authority that they faced eviction. She was ineligible for assistance under the homelessness legislation because of her immigration status. The council began an assessment under s 17 of the Children Act 1989 to determine whether accommodation could be provided on the basis that the children were in need. Nearly two weeks after they had been evicted, with the s 17 assessment not yet completed, the claimants sought judicial review of the council's failure to provide accommodation under s 17, alleging unlawful delay. One week later the assessment was completed and recommended that temporary accommodation under s 17 be provided.
32. The claimants were refused permission to apply for judicial review on the papers. They sought an oral renewal of the permission application but withdrew the claim by consent before that application was heard. The judge made no order as to costs.
33. An appeal to this court against the decision on costs was unsuccessful. Underhill LJ, with whom Sir Rupert Jackson agreed, said:

“74. I do not believe that the Appellants can succeed in their claim for costs in this case on the conventional *M v Croydon* basis – that is, that they obtained substantially the relief sought and are accordingly to be viewed as the successful party. Although in broad terms the relief sought was the provision of accommodation, such relief was not, as Moylan LJ demonstrates, available as a matter of law. More accurately, what the Appellants were seeking was an assessment under section 17 of the 1989 Act, which might (and indeed eventually did) lead to the provision of accommodation. At the time that the proceedings were issued there was no dispute between the Appellants and the Council that it was under an obligation to carry out such an assessment: it had indeed started, to the Appellants' knowledge, some time prior to the commencement of proceedings. The object of the proceedings was not to secure an assessment but to secure it sooner than it was feared would otherwise be the case. That being so, the fact that the assessment was in fact completed, and that the Appellants were accommodated accordingly, does not represent "success": that would have happened anyway. I thus agree with Moylan LJ that that outcome was not the result of the proceedings. In a case of this kind the measure of "success" has to be whether as a result of the proceedings being brought the assessment was completed substantially sooner than it otherwise would have been. I can see no reason for supposing that to have been the case here, and indeed given the time-scales it seems very unlikely. Accordingly, I do not think it would be fair to award the Appellants their costs simply on the basis that they were "the successful party".

75. However, I do not think that that is the end of the matter. It is necessary to look at the particular circumstances of the case. The Appellants believed that the assessment had already been

unlawfully delayed, and although we now know that it would be completed within the week, that was something they had no way of knowing. That being so, I believe that it would be appropriate for them to be awarded their costs if the Court were in a position to decide with sufficient confidence both (a) that Croydon had been legally obliged to produce the assessment prior to 28 October 2015 and (b) that it was reasonable of the Appellants to issue the proceedings on that date. I say "with sufficient confidence" because it would not be proportionate to hold the equivalent of a full trial simply in order to determine liability for costs: the Court has to do its best to reach a fair conclusion on a summary basis, with the fallback of making no order if that is not possible.

76. I do not believe that the Appellants can satisfy element (a) in that approach. The starting point must be Garnham J's refusal of permission on the basis that the claim had no realistic prospect of success."

34. *ZN (Afghanistan) v Secretary of State for the Home Department* [2018] EWCA Civ 1059; [2018] 3 Costs L.O. 357 considered two applications for costs made by the appellants following consent orders approved by the court under which their appeals were withdrawn after the Home Office had agreed to consider their asylum claims. The appellants sought costs on the ground that they had in practice achieved what they had sought in the proceedings. Singh LJ said:-

"65. On behalf of the Respondent Ms Broadfoot QC submits that the reasoning of the Court in *M v Croydon* suggests that there must be a causal connection between the merits of a pleaded challenge and the decision on costs, whether or not the case proceeded to a substantive hearing. She submits that the Court took that approach in *Tesfay*. She submits that the Appellants have not been legally successful in the proceedings which they brought.

66. The fundamental difficulty with Mr Knafler's submission [for the Appellants] is that, if the appeals had proceeded to be determined on their merits, there can be no doubt that they would have been dismissed. In my view, the Appellants cannot be regarded as having been "successful"

67. The underlying rationale for the normal rule that costs follow the event is that a party has been compelled by the conduct of the other party to come to court in order to vindicate his legal rights. If those legal rights had been respected in the first place by the other party, it should never have been necessary to come to court. Accordingly, there will normally be a causal link between the fact that costs have been incurred and the underlying merits of the legal claim. This underlying rationale also explains why civil procedure normally requires a party to send a pre-action protocol letter to the other party. If

the response to that letter had been to accept the merits of the claim in advance, it should never have been necessary to bring that claim to court.

68. The point can be tested in this way. **Suppose that for some entirely extrinsic reason an appeal becomes academic:** for example, if events occur in the Appellant's country of origin which mean that it may be unsafe for him to be returned there even though the Secretary of State has not previously accepted that there is such a risk. In those circumstances the Secretary of State may accept that she should reconsider the claim in this country. Mr Knafler fairly accepted at the hearing before this Court that, in such circumstances, he would not be entitled to his costs. **This is because there would be no causal link at all** between the reason why the appeal has ended with an outcome which is favourable to an appellant and the fact that costs were incurred by him. However, Mr Knafler submits that the present cases are distinguishable because the reason why the appeals have become academic is not for some entirely extrinsic reason but arises from the conduct of the Respondent herself.

69. In my view, the answer to that submission is that what CPR rule 44.2(4)(a) (which refers to taking into account "the conduct of all the parties") is normally concerned with is the conduct of a party in the litigation itself, not some other conduct. In the present case, there is no criticism which can be made of the Respondent's conduct of the litigation itself. What Mr Knafler fastens upon is the administrative failures of the Secretary of State outside the context of the litigation. It is because of those administrative failures that the appeals have become academic. In my view, those failures are extrinsic to the litigation." [emphasis added]

35. At [102] - [103] Leggatt LJ said:-

"102. The general rule prescribed by CPR 44.2(2) is that the unsuccessful party will be ordered to pay the costs of the successful party, although the court may make a different order. When a claim for judicial review is settled or withdrawn after the defendant has taken or agreed to take a step which was a material part of the relief sought by the claimant, it is often not straightforward to determine whether or to what extent the claimant can be judged to have been successful. The defendant may, for example, assert that it has taken the step in question for reasons unconnected with the merits of the claim; and the claimant may have achieved part, but only part, of what was claimed.

103. In my view, in such cases the public interest in facilitating access to justice may properly influence the exercise of the court's discretion as to costs in at least three ways. First, it is a

reason to analyse the circumstances of the particular case to try to work out whether the claimant has been successful rather than too readily adopting the fallback position of making no order for costs.....Second, it is a reason not to set the bar too high in judging what constitutes success and to treat it as sufficient to characterise the claimant as the successful party for the purposes of CPR 44.2(2) that as a result of the litigation the claimant has achieved any material part of the relief sought. Third, it is a reason not to be too astute to pare down awards of costs or to deprive a claimant who has achieved such a measure of success of costs just because the claimant has not been wholly successful, provided that the claim has been conducted reasonably.”

36. Males LJ said in *Parveen* at [31]:

“The fact that the claimant has obtained the relief which he or she was seeking in the proceedings does not necessarily mean that the existence of the proceedings has caused or contributed to that result. It may be that it would have happened anyway. The cases show that causation is a relevant and sometimes decisive factor in the exercise of the court's discretion concerning costs.”

Grounds of appeal

37. The Appellant brought this appeal on the following grounds:

- (1) The Judge did not properly address that the Claimant had achieved substantial success in their claim;
- (2) The Judge made an unevidenced finding of fact and/or failed to apply the correct test;
- (3) The Judge did not engage with the submissions made and/or gave inadequate reasons.

38. Arnold LJ granted permission to appeal on all three pleaded grounds. He wrote, however, that “the Appellant faces a high hurdle to overcome given that this is an appeal on costs”.

Appellant's submissions

39. Ms Apps and Mr Thorold submit that:-

“The Costs Order was premised on a supposed principle that “political reasons after a change of government” constitutes a sufficient basis on which to deny a Claimant in judicial review proceedings their costs, even in circumstances where the new government has vindicated that claimant’s claim for relief, and the central core of their claim (in this case based on the challenged Regulation disproportionately restricting the right to

strike/ freedom of association). In the Appellant's submission, such a principle runs contrary to the existing authorities. Furthermore, it cannot be reconciled with the position that the government, and more specifically the Great Offices of State, are continuous in nature irrespective of the identity of the political party / individuals who constitute it. The fact that the new Labour administration is (and was in opposition) not supportive of the MSL Act / Regulations cannot mean that the Respondent can be absolved of responsibility for the acts of the previous administration. The Appellant submits that the Court of Appeal should take this opportunity to reassert this important principle."

40. They also submit that none of the authorities place an evidential burden on a claimant to show that a defendant's concession withdrawing the measure or decision challenged was caused by the litigation itself. They refer to the change of policy with regard to costs in compromised judicial review claims which began with the case of *R (Bahta) v SSHD* [2011] EWCA Civ 195; [2011] 5 Costs LR 857 pursuant to which a defendant could no longer escape liability for costs by saying that the claim had been settled for "purely pragmatic" reasons, and indicating that a clear explanation from a defendant is required. They also argue that the judge did not engage with the fact that the claim had been wholly successful and took no account of the sentence in the Minister's letter to PCSU expressing the view that the Regulations were "unduly restrictive" of the right to strike.

Respondent's submissions

41. Mr Skinner submitted that it remained necessary for a claimant seeking to recover costs when a claim is withdrawn or compromised to demonstrate causation. He relied on *Speciality Produce, ZN (Afghanistan)* and *Parveen*. He accepted that it has been established since the decision in *M v Croydon* that "where it is tolerably clear" that if the matter had gone to a contested trial the claimant would have won, that will usually mean that the claimant will be entitled to costs, but pointed out (correctly) that it has not been suggested that the judge should have made an order for costs in the present case on that basis.

Discussion

42. The judge's reasons for making no order as to costs were expressed with telegraphic brevity, namely that "the claim became academic for political reasons after a change of government and not because of the claim". Nevertheless, though minimalist, they are sufficient to indicate the basis of his decision. He was saying that the claim was not causative of the incoming Government's decision, set out in the Minister's letter, that they would put legislation before Parliament to repeal the 2023 Act and in the meantime would not exercise the Secretary of State's power to issue work notices to the Border Force pursuant to the MSL Regulations. The question for us is whether the judge's decision to make no order for costs for that reason involved an error of principle or error of law.
43. I agree with the constitutional position powerfully articulated by Ms Apps and Mr Thorold, as set out above, that an incoming Government or incoming Secretary of

State “cannot be absolved of [legal] responsibility for the acts of the previous administration”. But that is not what the Government which took office in July 2024, or the Government Legal Department on its behalf, are asserting.

44. I also agree with the submission on behalf of the PCSU that the decisions of this court in *Bahta* and *M v Croydon* represented an important change in the attitude of the courts to cases where claims for judicial review against public bodies such as the Home Office are settled for what defendants used to describe as “purely pragmatic reasons”. The previous default position had been to make no order as to costs. Following *Bahta* and *M v Croydon*, in the typical case where the Home Secretary, following the issue of a claim for judicial review, agrees to consider a decision adverse to the claimant, and there is no dispute about the causal link between the litigation and the defendant’s agreement to reconsider, the claimant will generally be entitled to costs. That is an example of Lord Neuberger’s category (i).
45. However, several decisions of this court subsequent to *M v Croydon* show that where a claim has become academic for reasons *not* attributable to the issue of proceedings, there is no *prima facie* entitlement to costs, at any rate unless it can be shown to be “tolerably clear” (to use Lord Neuberger’s phrase), without the court having to hear detailed argument, that the claimant would have been likely to succeed at a trial. It has, realistically in my view, not been suggested on behalf of PCSU that this is a case which the Union clearly would have won at a trial. Article 11 cases have not usually resulted in easy victories for claimants, either in our domestic courts or at Strasbourg. So the question is whether the bringing of the claim made a difference to the outcome, either by changing the decision which would otherwise have been taken or at least achieving the desired result more quickly than would otherwise have occurred.
46. I do not accept the argument on behalf of PCSU that the Minister’s letter amounts to an admission that the claim was soundly based in law or that it would have succeeded at a trial. The use of the phrase “unduly restrictive” is the only specific reference in the letter on which the Appellant relies, and I do not consider that it will bear the legal weight which Ms Apps sought to place on it. It simply repeats the view, expressed consistently by the Labour Party since the 2023 Bill was before Parliament, that primary and secondary legislation providing for minimum service levels in Border Force and elsewhere was unduly restrictive of union members’ right to take industrial action. It cannot be read as if it said something on these lines:

“The Government’s view is that if this case had gone to trial the High Court would have found that the MSL Regulations amounted to a breach of the Article 11 rights of PCSU and its members, or were *ultra vires* the 2023 Act, or would have found that that such interference went beyond the margin of appreciation to be accorded to a decision by the UK Parliament as to whether or not such interference was necessary in the interests of national security, territorial integrity or public safety.” ”
47. I accept the submission of Mr Skinner that the commitment of the Labour Party to repeal or revoke the restrictions imposed in 2023 was so clear that there was good reason to believe it would have come about in any event, even if PCSU had not issued their claim for judicial review. In other words, using the terminology of Singh LJ in

the *ZN (Afghanistan)* case, the outcome was achieved for an “extrinsic reason”; or the likelihood is that, in the words of Males LJ in *Parveen*, it “would have happened anyway”. As in *R (RL) v Croydon*, the Claimant got what it wanted, but it has not shown that it got what it wanted, or even got it more quickly, because of the issue of the claim.

Conclusion

48. I regard this case as quite close to the borderline, but I am not satisfied that Judge Jarman made any error of principle or error of law which would justify us in overturning his exercise of the discretion to make no order as to costs. I would therefore dismiss this appeal.

Lord Justice Peter Jackson:

49. I agree.

Lady Justice Elisabeth Laing:

50. I also agree.