MICHAELMAS TERM
[2009] UKSC 1
On appeal from: [2009] EWCA Civ 626
[2009] EWCA Civ 681

JUDGMENT

R (on the application of E) (Respondent) *v* Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others

R (on the application of E) (Respondent) *v* Governing Body of JFS and the Admissions Appeal Panel of JFS (United Synagogue) and others (Appellants)

before

LORD HOPE, Deputy President
LADY HALE
LORD BROWN

JUDGMENT GIVEN ON

14th October 2009

Heard on 1st October 2009

Appellant (United Synagogue)
Ben Jaffey
Christopher McCrudden
(Instructed by Farrer & Co)

Respondent (E)
Dinah Rose QC
Helen Mountfield
(Instructed by Bindmans LLP)

Appellant (Governing Body of JFS and Admissions)
Lord Pannick QC
Peter Oldham
(Instructed by Stone King Sewell LLP)

Appellant (Legal Services Commission)
David Hart QC
Sarah Lambert
(Instructed by Legal Services Commission)

R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS (Appellants) and others

R (on the application of E) (Respondent) v Governing Body of JFS and the Admissions Appeal Panel of JFS and others (United Synagogue) (Appellants)

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LORD HOPE, DEPUTY PRESIDENT

1. This is a procedural application under rule 30 of the Supreme Court Rules 2009 (SI 2009/1603). The respondent (E) seeks an order that, whatever the outcome of the appeal, the appellants (JFS and the United Synagogue) shall not be entitled to seek the payment of any costs from himself or from the Legal Services Commission. Having heard argument at its first sitting on 1 October 2009, the Court decided to refuse E's application for a protective costs order for reasons to be given later. The following are our reasons for this decision.

Background

2. JFS is a voluntary aided maintained comprehensive school in the London Borough of Brent. The first and second appellants are the Governing Body of JFS ("the Governing Body") and its independent admission appeal panel ("the Panel"). The third appellant, the United Synagogue, is an association of Orthodox synagogues and the foundation body of JFS. E is the father of M, who is now aged 13. E is Jewish by descent and M's mother, who is of Italian national and ethnic origin, has converted to Judaism. But her conversion is not recognised by the Orthodox Jewish community. M was refused admission to JFS for the year 2007/2008 on the grounds that he was not recognised as being Jewish by the Office of the Chief Rabbi of the United Hebrew Congregations of the Commonwealth and that its admission criteria gave priority, in the event of oversubscription, to Orthodox Jewish children. E sought judicial review of the Governing Body's refusal to offer M a place at the school, of the Panel's decision to uphold the refusal and against them both for failing to comply with the duty imposed on public authorities under section 71 of the Race Relations Act 1976 and against the rejection of his objection by the Schools Adjudicator. On 3 July 2008 Munby J found the school to have been in breach of its duty under section 71 of the 1976 Act, but otherwise rejected the claims: [2008] EWHC 1535/1536 (Admin). The finding of a breach of

section 71 was not the subject of any appeal, but Munby J granted leave to appeal on the substantive discrimination issues.

3. On 25 June 2009 the Court of Appeal allowed E's appeal, finding that JFS's oversubscription criteria were unlawful as they amounted to direct, or alternatively indirect, discrimination as defined in section 1 of the Race Relations Act 1976: [2009] EWCA Civ 626; [2009] PTSR 1442. The Governing Body's refusal to admit M and the dismissal of his appeal by the Panel were both quashed. JFS was directed to reconsider M's admission in accordance with its admissions policy but without regard to the criteria held by the judgment of the court to be unlawful. Other issues arising in the appeal were adjourned and have yet to be determined. That part of the order directing JFS to reconsider M's admission was stayed for 14 days and, if a petition for leave to appeal were to be lodged, until the determination of that petition. As to costs, the Court of Appeal ordered that E's costs in that court and before Munby J be paid in the following proportions: 50% from JFS, 20% from the United Synagogue, which had participated in the case as an intervener in support of JFS, and as to the remaining 30% from other parties who are not concerned with this procedural application. Permission to appeal to the House of Lords was refused.

4. On 28 July 2008 an appeal committee of the House of Lords gave leave to the Governing Body and the Panel to appeal to the Supreme Court on the substantive discrimination issues and to the United Synagogue to appeal against the costs order that was made against it. On 31 July 2009 the House of Lords refused an application by the Governing Body and the Panel for a continuation of the stay of that part of the order of the Court of Appeal directing JFS to reconsider M's admission, with the result that the decision originally challenged in this claim has effectively been superseded.

5. E has had the benefit in the proceedings below, and in the proceedings to date both in the House of Lords and this Court, of funding from the Legal Services Commission. He seeks the benefit of public funding for the substantive hearing of the appeal. But the Legal Services Commission was minded not to provide him with this benefit unless he takes steps to protect it against an order in the appellants' favour for the costs of the appeal. On 18 September 2009 Mr David Reddin, a Senior Case Manager in the Legal Services Commission, wrote to his solicitors in these terms:

> "I refer to your letter dated 15 September our telephone conversation of yesterday evening and your email of today's date. For the avoidance of doubt it is correct to say that I am minded to refuse your application for funding [E] as a respondent in the Supreme Court unless the other side is prepared to:

(a) Allow the cost [sic] order made in the Court of Appeal to stand in any event

(b) Agree an undertaking that there will be no costs order in the Supreme Court with both sides bearing their own costs.

If that is not acceptable we would expect an application to be made to the Court to seek an order along those lines failing which funding would not be provided.

Our reasoning behind this decision stems from the Funding Code which in the circumstances of this case allows the refusal of funding unless the likely costs are proportionate to the likely benefits of proceedings having regard to the prospects of success and all other circumstances."

6. Mr Reddin then set out a series of factors which he said were clearly relevant to the determination of proportionality. In summary, they were as follows: (1) that E had effectively succeeded in the primary purpose of the litigation and his situation would not change whatever the outcome of the proceedings, (2) the likely consequences for the Community Legal Service Fund if costs were to be awarded to the other side on an inter partes basis in the Court of Appeal and in this Court, (3) that it was not unreasonable to expect the appellants to pay for the case, as the real interest in overturning the decision of the Court of Appeal lay with them and (4) that, although the case was of some public interest, the number of people who were likely to benefit as being in a similar position to M was relatively small.

7. The terms proposed by Mr Reddin on the Legal Services Commission's behalf were not acceptable to the other parties. E wishes to maintain his opposition to the appeals, but he is not in a position to fund the legal representation that he requires himself. The result of the predicament in which he finds himself is that he has been left with no alternative but to apply to the Court for a protective costs order. JFS and the United Synagogue have opposed his application.

The issues

8. The order that E seeks is "that the Appellants shall not be entitled to seek the payment of any costs from the Legal Services Commission or the Respondent." As Ms Dinah Rose QC in her carefully worded submissions

made clear, the real purpose of this application is to ensure that E continues to have the benefit of public funding in this Court. Taking her application at its face value, however, it raises the question whether E and the Legal Services Commission should be protected against orders for costs in three distinct respects: (1) an order in favour of JFS for the costs of its appeal to this Court on the discrimination issues; (2) an order in favour of the United Synagogue for the costs of its appeal on the costs issue; and (3) an order in favour of either or both of these parties for their costs in the Court of Appeal, should they be successful in their appeals to this Court. Mr Reddin also asked in his letter of 18 September 2009 that an order should be sought that both sides should bear their own costs in any event. But Ms Rose did not seek an order in these terms. She said that it would have serious implications for access to justice and that it would be wrong in principle. We will comment briefly below on her reasons for not doing so.

9. Mr Hart QC for the Legal Services Commission very properly conceded at the outset of his submissions that the Commission would not insist as a condition of extending funding to E on his obtaining protection against an order in favour of the United Synagogue for the costs of its appeal to this Court on the costs issue. Nor would it insist on his obtaining protection against an award in favour of JFS or the United Synagogue of their costs in the Court of Appeal in the event of either or both of them being successful in their appeals to this court. Had he not made these concessions we would have had no hesitation in refusing to make orders to either effect. In both cases E's exposure to the risk of these awards is a direct result of the fact that the Legal Services Commission provided funding to E in the Court of Appeal. Having decided to do so, it must be taken to have assumed the risk that any orders as to costs that were made in E's favour in that court would be reversed on appeal by the Supreme Court. E had a legitimate expectation that the funding that was afforded to him in the Court of Appeal would extend to the consequences of any such order. Furthermore, as Mr Jaffey for the United Synagogue pointed out, an order protecting E and the Legal Services Commission against the payment to the United Synagogue of "any costs" would render its appeal on the costs issue pointless. It does not appear from Mr Reddin's letter of 18 September 2009 that he had applied his mind to the issue that the United Synagogue wishes to pursue. It is entirely separate from the discrimination issues raised by JFS. The costs issue raises no question of general public interest. A protective costs order in E's favour in regard to these costs would be entirely inappropriate.

10. The sole remaining issue relates to the costs that will be incurred by JFS in this court. The question is whether the Legal Services Commission is entitled to insist as a condition of extending funding to E to enable him to oppose JFS's appeal that he must obtain a protective order in his favour against these costs. Mr Hart confirmed that funding for this purpose would not be extended to E if an order was not made in his favour to this effect. He submitted that the relevant principles were identified by the Court of Appeal in

R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192, [2005] 1 WLR 2600, para 74, and that they applied by analogy to this case: (1) the issues raised by JFS are of general public importance, (2) the public interest requires that those issues should be resolved, (3) E does not have a private interest in the outcome, (4) having regard to the financial resources of the parties and to the amount of costs that are likely to be involved it is fair and just to make the order and (5) if the order is not made, E will probably discontinue the proceedings and will act reasonably in so doing. That was a case where the party who was seeking the order would discontinue the proceedings if it was not made. In this case, as in *Weaver v London Quadrant Housing Trust* [2009] EWCA Civ 235, it is the other party who is in control of the appeal. But it was held in *Weaver* that it was nevertheless appropriate for a protective costs order to be made in the respondent's favour to ensure that there was proper representation for both sides before the court: para 7.

11. Funding services as part of the Community Legal Service is available only to individuals: Access to Justice Act 1999, s 7. So the principles that were identified in *R (Corner House Research) v Secretary of State for Trade and Industry*, where the claimant was a non-governmental organisation of limited means and not eligible for public funding, do not provide a complete answer to the question which has been raised by this application. As in *Weaver v London Quadrant Housing Trust*, the prime mover behind the application in this case is the Legal Services Commission. It is not willing to fund E's legal representation except on its own terms. The question is whether the attitude which it has taken in this case is compatible with the scheme which has been laid down by the statute and in particular with the Code that has been prepared under section 8 of the 1999 Act. Ms Rose said that Mr Reddin's letter was hard to reconcile with the Code. Lord Pannick QC for JFS, whose arguments Ms Rose said she was content to follow, went further. He submitted that in the circumstances of this case to withdraw public funding from E at this stage would be unlawful.

The statutory framework

12. The basic rule that provides protection for individuals against an award of costs against them personally in cases that are publicly funded is set out in section 11(1) of the 1999 Act, which provides that, except in prescribed circumstances, costs ordered against an individual in relation to any proceedings funded for him shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, including the financial resources of all the parties to the proceedings, and their conduct in connection with the dispute to which the proceedings relate. Section 11(3) provides that regulations may make provision about costs in relation to proceedings in which services are funded by the Legal Services Commission for any of the parties as part of the Community Legal Service. Section 11(4)

sets out various matters with regard to which such regulations may make provision. Regulation 5 of the Community Legal Service (Cost Protection) Regulations 2000 (SI 2000/824) provides cost protection for the Legal Services Commission in cases where funded services are provided to a client in relation to proceedings, those proceedings are finally decided in favour of a non-funded party and the limit on costs set out in section 11(1) of the Act applies. In such cases the court may only make an order for payment by the Legal Services Commission to the non-funded party of the whole or part of the costs incurred by him in the proceedings in an appellate court if it is satisfied that it is just and equitable in the circumstances that provision for the costs should be made out of public funds: regulation 5(3)(d). The Governing Body is a charity supported by limited funds. Lord Pannick said that the Legal Services Commission was, in effect, seeking to deny it the benefit of this regulation. Mr Hart did not suggest that anything else was to be found in the Community Legal Service (Cost Protection) Regulations 2000 that bears on the issue that has been raised in this case.

13. Section 8(1) of the 1999 Act provides that the Legal Services Commission shall prepare a code setting out the criteria according to which it is to decide whether to fund (or continue to fund) services as part of the Community Legal Service for an individual for whom they may be so funded and, if so, what services are to be funded for him. As E was funded in the courts below his case can be taken then to have met all the relevant criteria, including those relating to financial eligibility. Our attention was drawn to a number of provisions in the Funding Code which might be relevant to the consideration of his case at this stage, faced as he is with an appeal by a party who seeks to reverse orders that were made in his favour in the court below. Part A of the Code sets out the general criteria for funding. Section 7 of this Part sets out the criteria for judicial review. Para 7.5.2 provides:

> "**7.5.2 The Presumption of Funding**
>
> If the case has a significant wider public interest, is of overwhelming importance to the client or raises significant human rights issues, then, provided the standard criteria in Section 4 and Section 5.4 are satisfied, funding shall be granted save where, in light of information which was not before the court at the permission stage or has subsequently come to light, it appears unreasonable for Legal Representation to be granted."

There has been no change to E's financial position or to the merits of the discrimination issues which are the subject of the appeal to this Court. The only change is that, as a result of the lifting of the stay, the decision originally challenged has been superseded.

14. Part C of the Funding Code provides guidance about decision making. Para 13.5 of this Part provides:

> "**13.5 Discharge on the Merits**
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> …
>
> 3. The importance of a case to the client must always be considered in decisions to discharge, especially if discharge is being considered at a very late stage in the proceedings. The client's rights under ECHR Article 6 must be considered in such circumstances…."

Para 13.7 provides:

> "**13.7 Claims Not Subject to cost Benefit Ratios**
>
> 1. This guidance applies to:
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> ...
>
> (c) certificates for Full Representation or Litigation Support in proceedings which have a significant wider public interest.
>
> 2. The starting point in deciding whether such a certificate should continue or should be discharged is to reapply the relevant Criteria for the Level of Service in question, taking into account the latest available information….
>
> …
>
> 3. If, when prospects of success and cost benefit Criteria are applied to the certificate as interpreted in the way described above, those Criteria are satisfied, funding will continue and the certificate will not be discharged. If those Criteria are not satisfied, the certificate will normally be discharged, but the Commission will retain a discretion to continue funding. This discretion will generally be approached in the following way:
>
> (a) funding will be continued if there is a significant wider public interest in doing so…
>
> …
>
> (d) if proceedings are at a late stage the client's Article 6 rights must be considered.
>
> (e) otherwise the issue for the Commission is whether it is in the interests of the Community Legal Service Fund for funding to

> continue. The certificate should be continued if it is in the Fund's interest to do so, but discharged if it is not…"

15. The guidance that is given in Part C of the Funding Code appears to be directed primarily to the decisions that need to be taken at the outset of proceedings and about the discharge of certificates while proceedings are still at first instance. Mr Hart admitted that this was the first occasion that the Legal Services Commission had insisted upon a protective costs order as a condition of providing funding for an appeal against orders made in its client's favour by the court below for which the House of Lords had given leave. He was unable point to anything in the Code that provided direct support for the reasons that the Legal Services Commission has given in this case for refusing funding in these circumstances. So far as it goes, however, Part C of the Code suggests that the following considerations are relevant at this stage of the proceedings: (a) the Commission is entitled to consider whether it is in the interests of the Community Legal Service Fund for funding to be continued: para 13.7.3(e); but (b) where the case is of significant wider public interest, the presumption is that funding that has been granted under Part A, para 7.5.2 should continue: para 13.7.3(a); (c) the client's interests must also be considered: para 13.5.3; and (d) especially if proceedings are at a late stage, his Article 6 rights must be considered too: paras 13.5.3 and 13.7.3(d).

Discussion

16. It is clear that E would not have made this application had he not been forced to do so by the Legal Services Commission. It is also clear that without the support of public funding he will not be able, as he wishes to do, to continue to resist this appeal. As in *Weaver v London Quadrant Housing Trust* [2009] EWCA Civ 235, it is essential that there should be representation for both sides before the Court. The case raises issues of considerable public importance, and it is plainly in the public interest that both sides of the argument should be properly presented. The date for the hearing of the appeal, which in view of the importance of the issues has been expedited, has already been fixed. The hearing is to take place at the end of this month. Time is now too short for effective alternative arrangements to be made for the Court to be provided with an *amicus* to argue the case in E's place. So the real issue that must be addressed is not whether the case is suitable for a protective costs order under the *Corner House Research* case principles, but whether the decision of the Legal Services Commission to refuse funding in this case unless it has the benefit of a protective costs order is compatible with the Funding Code and open to attack on traditional *Wednesbury* grounds.

17. The Legal Services Commission seeks protection from the ordinary consequences of the statutory scheme under which public funding is provided. It wishes to eliminate the risk of an order being made against it in favour of JFS under regulation 5(3)(d) of the 2000 Regulations. In *Weaver v London*

Quadrant Housing Trust [2009] EWCA Civ 235, where the applicant was publicly funded, an order was made that the Trust could not recover its costs against the applicant or the Legal Services Commission. That case shows that it cannot be said that an order in such terms will never be appropriate where the applicant is publicly funded. But, as Toulson LJ said in para 16, the background to the application in that case was highly unusual. The appeal had been brought by the Trust, which was a registered social landlord. It was brought to establish a point of general importance, namely whether a registered social landlord was to be regarded as a "public authority" for the purposes of section 6(3)(b) of the Human Rights Act 1998. The applicant no longer had any interest in the proceedings. The court had dismissed her challenge to the possession order that was made against her on the facts. So, as Elias LJ pointed out in para 12, the possession order against her would stand come what may. Any personal interest that she might derive – and it hard to see what this could have been – was no greater than that which would accrue to the benefit of all tenants in the same position that she had been before the order was made against her.

18. This case is significantly different, in various respects. In the first place, in *Weaver* it was inconceivable that, had the Legal Services Commission withdrawn their support and the Trust then succeed in their appeal, any costs order would have been made against the tenant. Here, by contrast, were his certificate to be discharged and the appeal to succeed, there is a real risk that E would be saddled with a very substantial liability for future costs. Furthermore, E maintains that he still has a personal interest in the outcome of this appeal. As he has made clear throughout, he feels strongly that other children should not be denied a school place on the same racially discriminatory basis as the Court of Appeal has held happened in M's case. The private law claim by M on whose behalf the application for judicial review was brought is still unresolved, and its outcome is dependent upon the result of these proceedings. Moreover the public interest in the substantive discrimination issues which JFS wishes to argue is much greater than Mr Reddin appears to have envisaged. Far from the number of people who are likely to benefit as being in a similar position to M being relatively small, as he said in his letter of 18 September 2009, those who are likely to benefit extend across the widest possible spectrum of children who are exposed to discrimination on racial grounds. The issue is not confined to the Jewish community or even to children who wish to be educated in religious schools. So the case for insisting that JFS should be denied the benefit of regulation 5(3)(d) of the 2000 Regulations by the making of a protective costs order against it is much weaker than it was in *Weaver's* case.

19. Then there is the stage at which this issue has been raised. Leave to appeal was given on 28 July 2009. On 31 July 2009 the House of Lords refused to make a protective costs order in E's favour. He was invited to renew his application if his financial circumstances changed so that his eligibility for

public funding came into question. There has been no change in his financial position or in the circumstances that affect the merits of the discrimination issues. All that has changed is the removal of the stay and M's admission to the school. The prospects of success remain the same as they were in the courts below. It was in these circumstances that immediately after the hearing on 31 July 2009 E's solicitors contacted the Legal Services Commission about the funding for the appeal to this Court. Having attempted without success to obtain funding from another source, they made an application for further funding from the Legal Services Commission on 8 September 2009. Mr Reddin's letter of 18 September 2009 was the result.

20. Mr Reddin cannot be criticised for delay. But his refusal to provide funding to enable E to resist JFS's appeal without a protective costs order ignores the consequences of that refusal for access to justice. As Ms Rose pointed out, it would mean that publicly funded litigants would have to be warned that they might be exposed to personal liability for the other side's costs on appeal even if they were entirely successful in the courts below. Many litigants would be unable to face that risk, with the result that they would be shut out of court. In consequence of JFS's appeal against the decision in his favour by the Court of Appeal, for which he was publicly funded, E would be exposed to the risk of having to pay costs incurred after public funding has been withdrawn from him even if he takes no further part in these proceedings. Conversely, the case has only reached this court because E had the benefit of public funding in the Court of Appeal. He had a legitimate expectation that, as he was provided with public funding in the Court of Appeal he would be provided with public funding to enable him to resist this appeal.

21. We take full account of the points made by Mr Reddin in his witness statement of 29 September 2009, and in particular the risk to the Legal Services Commission of an adverse costs order if JFS is successful in its appeal. We take account too of the fact that JFS would not be entitled to recover costs against an amicus were one to be appointed: see *Weaver v London Quadrant Housing Trust* [2009] EWCA Civ 235, para 7. But the position which Mr Reddin has adopted on the Commission's behalf cannot be reconciled with the statutory scheme. In his letter of 18 September 2009 he said that the Funding Code in the circumstances of this case allows the refusal of funding unless the likely costs are proportionate to the likely benefits of the proceedings and all other circumstances. This takes no account of the stage in the proceedings at which the client is in need of funding. Compelling reasons would have to be shown for withdrawing public funding from a litigant who was publicly funded in the court below, was successful in that court and wished to resist an appeal to a higher court by the unsuccessful party. No such reasons have been demonstrated in this case.

22. It should be understood, as a principle of general application, that if the Legal Services Commission decide to fund a litigant whether by way of claim

or a defence who is successful in his cause, that decision must ordinarily be seen to carry with it something close to an assurance that the Commission will continue to support him in any subsequent appeal by the unsuccessful party whilst he remains financially eligible. This will particularly be so where (a) the withdrawal of support would expose the publicly funded litigant to a substantial risk for future costs, (b) he retains a significant interest, quite apart from his interest in resisting any future costs liability, in maintaining his success in the litigation and (c) the issues raised on the appeal are of general public importance which it is in the public interest to resolve and his case on these issues is unlikely to be properly argued unless he continues to be funded by the Legal Services Commission. All three of these circumstances prevail in this case. It should be noted too that in *Weaver* the Court of Appeal, in making the protective costs order, expressly recognised that, were funding to be withdrawn, the necessary representation would have to be provided either by the Equality and Human Rights Commission or by appointing an *amicus*, against whom the Trust would not be able to recover its costs: [2009] EWCA Civ 235, paras 7 and 17. Those alternatives are not available here. Although the Equality and Human Rights Commission are intervening in the appeal, they propose to advance different arguments from those which E wishes to advance. As we have said, it is too late for the effective appointment of an *amicus*. The decision to refuse public funding at this stage appeared to us in all the circumstances to be so unreasonable as to be unlawful.

23. It was suggested that, if the Legal Services Commission adhered to this position despite a finding to that effect, the matter could be taken to judicial review. But time is short. No advantage is to be gained by going through that procedure, and the delay and expense of doing so is best avoided. We concluded that E is entitled to an immediate declaration in these proceedings that the only reasonable decision open to the Legal Services Commission is to continue to provide him with public funding for this appeal.

No costs orders

24. As has already been noted, Ms Rose declined to seek an order that each side should be liable for its own costs in any event on the ground that to do so would be wrong in principle. As Scott Baker J observed in *R (Boxall) v Waltham Forest London Borough Council* (2001) 4 CCLR 258, para 12, the failure of a legally aided litigant to obtain a costs order against another party may have serious consequences. This is because, among other things, the level of remuneration for the lawyers is different between a legal aid and an inter partes determination of costs. This disadvantage is all the greater in a case such as this. It is a high costs case, for which lawyers representing publicly funded parties are required to enter a high costs case plan with the Legal Services Commission. It is a common feature of these plans that they limit the number of hours to an artificially low level and the rates at which solicitors and counsel are paid to rates that are markedly lower than those that are usual in the

public sector. Mr Reddin has indicated that, as they are defending a win, E's solicitors would not be expected to be paid at risk rates. Nevertheless the rate of remuneration that is likely to be agreed for this appeal will be considerably lower than that which would be reasonable if costs were to be determined inter partes.

25. It is one thing for solicitors who do a substantial amount of publicly funded work, and who have to fund the substantial overheads that sustaining a legal practice involves, to take the risk of being paid at lower rates if a publicly funded case turns out to be unsuccessful. It is quite another for them to be unable to recover remuneration at inter partes rates in the event that their case is successful. If that were to become the practice, their businesses would very soon become financially unsustainable. The system of public funding would be gravely disadvantaged in its turn, as it depends upon there being a pool of reputable solicitors who are willing to undertake this work. In *R (Boxall) v Waltham Forest London Borough Council* Scott Baker J said that the fact that the claimants were legally aided was immaterial when deciding what, if any, costs order to make between the parties in a case where they were successful and he declined to order that each side should bear its own costs. It is, of course, true that legally aided litigants should not be treated differently from those who are not. But the consequences for solicitors who do publicly funded work is a factor which must be taken into account. A court should be very slow to impose an order that each side must be liable for its own costs in a high costs case where either or both sides are publicly funded. Had such an order been asked for in this case we would have refused to make it.

Conclusion

26. For these reasons we refused E's application for a protective costs order. We declared that the only reasonable decision open to the Legal Services Commission in the circumstances was to continue public funding without a protective costs order. The Legal Services Commission must pay to E, JFS and the United Synagogue the costs of this application. Nothing is to be published which may tend to identify the child who is concerned in these appeals.