Funding Public Law Cases

This paper focuses on how public law cases are currently funded with an emphasis on 'public interest' litigation. It also examines the proposed changes to legal aid and to the funding of civil claims, including judicial review claims, as set out in the Government's responses to the consultations on the Reform of Civil Litigation Costs and Funding and the Proposals for the Reform of Legal Aid, published in 29 March 2011 and 21 June 2011 respectively. It also summarises the relevant provisions of the Legal Aid, Sentencing and Punishment of Offenders Bill by which most of the government proposals will be implemented. Finally, the paper summarises recent developments in relation to Protective Costs Orders which limit a claimant's party's liability in respect of an unsuccessful claim for judicial review.

1 Public funding - the current position

1.1 Public funding is available for individual claimants in judicial review proceeding, subject to financial eligibility. For most civil claims a costs-benefit ratio is applied but for judicial review, a priority under the current Funding Code, this is replaced by a proportionality test. This provides that "full representation will be refused unless the likely costs are proportionate to the likely benefits of the proceedings, having regard to the prospects of success and all other circumstances".[1]

1.2 However, in relation to judicial review, proceedings can be funded even if prospects of success are assessed as only "borderline" if one or more of the following apply:

- The case is of **overwhelming importance** to the client (see Funding Code Decision Making Guidance, 4.10)
- There has been a **significant breach of human rights** (FC DMG 6.4)
- There is **significant wider public interest** (FC DMG 5)

Public interest cases

1.3 Chapter 5 of the Funding Code, as amended in April 2010, provides:

> Individual cases which demonstrate a wider public interest are treated differently from other cases in the same category in terms of the merits and cost benefit thresholds. This means an individual case which, on their own particular facts, can be said to bring benefits to a section of the public, i.e. persons other than the individual bringing the proceedings. [para 5.1]

[1] See section 7 of the Code Criteria, specifically 7.4.6.

1.4 A case with a significant wider public interest may be funded even if prospects of success are in the borderline merits category or if the individual case would not, by itself, be cost effective.

"Wider public interest"

1.5 This means that:

- The case has the potential to produce real benefits for individuals other than the client; and
- It is considered on its facts to be an appropriate case to realise those benefits [this criteria added in April 2010].

1.6 Benefits have to be for members of public, but are linked to the individual case and the benefits/public interest in all cases that promote the rule of law or hold public bodies to account, is not sufficient.

Real benefits for individuals other than the client

1.7 Such benefits are categorised in para 5.2 as:

- Protection of life or other basic human rights (e.g. challenge to immigration policy affecting a class of asylum seekers);
- Direct financial benefit (e.g. challenge to welfare benefit entitlement leads to higher payment to a whole class of claimant);
- Potential financial benefit (e.g. test cases on liability for manufacture of dangerous product)
- Intangible benefits such as health, safety and quality of life (e.g. judicial review cases about education policy or healthcare provision).

Appropriate case on the facts

1.8 The case must have a real rather than a theoretical chance of benefiting the public. It might not be regarded as having wider public interest if:

- It is likely to be decided on a basis which doesn't determine the public interest one way or another;
- It is unlikely to reach a level where the determination of the issue will set a precedent;
- There are particular facts or features that make it less likely the court will determine the issue in the way contended, compared to other potential cases raising the similar issues;

1.9 If case not a good case on the facts, the LSC guidance states it would welcome other cases that might be a better vehicle.

What is significant wider public interest?

1.10 Para 5.3 provides that the more intangible and indirect the benefit, the harder it is to satisfy the test.

1.11 There is no limit or minimum number of people who must benefit. If benefits are general quality of life considerations, such as noise nuisance, the number of people affected must be very substantial. As a general guideline, even where benefits are substantial, the case would usually need at least 100 people to benefit from the outcome.

1.12 It is not usually enough that the court may clarify the law; it is more likely to establish significant wider public interest if the case directly raises a specific point of law which the court will have to resolve one way or another.

1.11 NB In deciding whether a case has a significant wider public interest it is only necessary to show that the case can produce real benefits for individuals other than the client. It is not necessary to consider competing public interests or any disbenefit the case may bring to the people.

Costs Benefit in Public Interest Cases

1.12 Para 5.4 provides that the likely benefit to the applicant and others must still justify the likely costs, having regard to the prospects of success and all other circumstances.

1.13 So, although Public Funding may be granted in a public interest case even when the prospects of success are borderline, the prospects of success is still a relevant factor and means that "Public interest cases with only borderline prospects of success will only be funded where the potential benefits of the proceedings are very substantial."

1.14 And, although competing interests aren't relevant when deciding whether a case has significant wider public interest, they can be taken into account in considering issues of cost benefit. This will include taking into account that in some cases the outcome may benefit one group of people but equally disadvantage another (e.g. obtaining treatment on the NHS). Also, in a more general sense, proceedings against public bodies responsible for providing services to the public may impact on the ability of the body to deliver those services "For example, costly legal proceedings against the Health Service or the Police may directly or indirectly take money away from the general provision of healthcare or policing."

1.15 However, competing interests will not be regarded as a decisive factor in cost benefit assessments but may be taken into account when deciding whether a case represents a worthwhile use of public funds.

Alternative Funding

1.15 Para 5.5 provides that as in all cases, funding may be refused if there are other persons or bodies who might benefit from the proceedings who can reasonably be expected to bring or fund the case.

1.16 Alternative funding may also be available from other bodies, e.g. EHRC and the LSC may enter into joint funding arrangements.

Other members of the public who stand to benefit

1.17 The Commission will consider whether any funding should be provided by those members of the public who stand to benefit from the outcome of the case, e.g. by all those affected getting together a fighting fund to finance the litigation. The Commission's normal approach is not to refuse funding, unless it is clear that the case can be funded privately in this way, but to consider whether public and private funding can be combined under a partnership approach between the Commission and those who have an interest in the case.

1.18 The Funding Code suggests that the Commission anticipates two scenarios: One in which there is a reasonably ascertainable group of people who can be expected to contribute to the cost of the litigation (e.g. the residents of a small area affected by a planning decision) and another, more commonly, in which there is no such group.

1.19 It is stated that the Commission supports the setting up of action groups or committees to organise the community and raise funds but will always consider what level of funding can reasonably and practically be contributed from the whole local community affected by the case, not what may be raised by the individual members of any action group or committee, "whose membership will inevitably be largely self selecting."

1.20 So, if a potential funding group does exist, the Commission's broad starting point will be to assess the likely economic circumstances of the group and the proportion likely to be eligible for public funding. That will indicate the proportion of the costs of the case to first instance determination.

1.21 The Commission will expect a larger proportion of private funding in cases where either there appears to be a significant number of people within the group who have substantial assets, or where the litigation will produce direct financial benefit for those directly affected, such as an increase in property prices. A smaller contribution will be accepted where the group is small or consists primarily of people with limited resources

and for cases where the expected benefits are less tangible, e.g. environmental cases or school and hospital closures.

1.22 The contribution will usually be fixed at the outset.

1.23 Once this has been determined, the Commission can either seek to claim a capital contribution under the certificate under reg. 38(3) of the CLS Financial Regulations 2000, or simply limit the extend of public funding to take into account the appropriate level of private funding. Usually, they do the latter so would grant a maximum costs limit which reflects the deduction by way of the private contribution. It is then a matter for the solicitors and the action group to arrange how to raise and collect the private contribution.

1.24 Para 5.5.6 states that "it will be important that risk is shared fairly at all stages between public and private funds" before going on to state that if the claim settles or is discontinued without recovery of costs from the other side, the private agreed contribution should be applied first, with the balance of any costs falling to the fund.

Aarhus proviso

1.25 Article 9 of the Aarhus Convention requires that environmental challenges should not be prohibitively expensive to members of the public.

1.26 Para 5.5.8 provides that environmental cases may be less likely to require significant private contributions compared to certain other types of public interest case, but in all cases the contribution will be fixed so as not to be prohibitively expensive, consistent with the Aarhus obligation.

The Advisory panel

1.27 In 2000 the Public Interest Advisory Panel was set up to advise on applications with a public interest element. In April 2010 this was replaced by the Special Controls Review Panel which has a wider jurisdiction, including consideration of the legal merits of cases within the Special Controls regime. Usually the Panel considers the case on the papers but can exceptionally agree to a hearing attended by the client and his or her advisers. The Panel reports to the Special Cases Unit in writing on all cases referred to it and the Director of that unit makes the final decision, taking into account the views of the Panel (but not being bound by the Panel's report).

The Panel reports can be found on the LSC website: www.legalservices.gov.uk.

2 Public funding - the proposed changes

2.1 The government set out its response to the recent consultation on 21 June 2011 and many of the proposals are in the Legal Aid, Sentencing and Punishment of Offenders Bill which is currently in the committee stage.

This section highlights the key proposals affecting public law and judicial review.

Judicial review claims

2.2 Claims for judicial review and claims for the writ of habeas corpus will remain in scope.

2.3 This is the case even if the judicial review claim is in relation to a substantive area of law is one removed from scope, such as welfare benefits.

Personal benefit test

2.4 The Bill also proposes to re-introduce the change that was made to the Funding Code in April 2010 but which was subsequently quashed in the case of *R (Evans) v The Lord Chancellor and SS for Justice*[2011] EWHC 1146 (Admin), 12 May 2011. The change is to prevent public interest claims where the claimant will gain no direct benefit from the outcome. The amendment was quashed on the grounds that "a legally inadmissible consideration was taken into account" in putting forward the proposed change, namely concerns expressed by the Ministry of Defence who were defending a number of claims arising from the military action in Iraq and in Afghanistan. Representations had been made to the Ministry of Justice making specific reference to the case of *Maya Evans No 1.* Further, the consultees should have been informed that those concerns were "part of the mix". The court did however indicate that the state is not bound to fund such litigation and is entitled to introduce the proposed criteria but only for legally proper reasons, the reasonable prioritisation of scarce public funds being capable of amounting to such a reason.

2.5 So, the bill provides that that legal aid for judicial review does not include "services provided to an individual in relation to judicial review that does not have the potential to provide a benefit for the individual, a member of the individual's family or the environment." [Schedule 1, para 17(3)]

2.6 Family is defined in para 17(8) as relatives of the full blood or half blood or by marriage of civil partnership, cohabitants as defined in Part 4 of the FLA 1996 or one person who has parental responsibility for the other.

Immigration judicial reviews

2.7 The Judges' Council consultation response suggested that a high number of unmeritorious judicial review claims were being brought, particularly in immigration and asylum cases, and proposed significant restrictions on the availability of legal aid for judicial review.,

2.8 The government, while acknowledging that only a minority of such cases are funded by legal aid, proposes that legal aid should be retained for immigration and asylum judicial review claims with some exceptions.

2.9 The provisions are found in paragraph 17 of Schedule 1 which sets out those civil legal aid services that remain in scope. The specific exclusion in relation to immigration judicial reviews are:

> Where an issue relating to immigration ... has been the subject of judicial review or an appeal to a tribunal or court, in respect of the same issue or a substantially similar issue in the period of one year beginning with the day on which the previous judicial review or appeal was determined. [para 17(5)]
>
> Services in relation to judicial review of removal directions where the direction was given not more than one year after the latest of the following -
>
> (a) the making of the decision to remove by way of such a direction,
> (b) the refusal of leave to appeal against such a direction, or
> (c) the determination or withdrawal of an appeal against the decision. [17(6)]
>
> The following are not excluded by sub-paragraphs (5) and (6) [17(7)]:
>
> Judicial review in connection with a negative decision in relation to an asylum application (within the meaning of the EU Procedures Directive – (the Council Directive 2005/85/EC on minimum standards on procedures in Member states for granting and withdrawing refugee status);
>
> Judicial review of certification under s. 96 of the Nationaliy Immigration ans Asylum Act 2002 (certificate preventing appeal of of immigration decision).

Other claims against public authorities

2.10 Currently funding is available for most actions in damages against public authorities. And, even where damages are unlikely to exceed £5000, funding is available where there has been serious wrong-doing, abuse of position or power or significant breach of human rights.

Abuse of position or power

2.11 The bill proposes to restrict these cases so as to remove "serious wrong-doing" and to restrict the definition of abuse of position or power. Paragraph 19(6) of Schedule 1 provides that "... an act or omission by a public authority does not constitute an abuse of its position or powers unless the act or omission –

(a) is deliberate, dishonest, **and**
(b) results in harm to a person or property that was reasonably foreseeable.

2.11 The bill proposes that damages claims should not generally be funded by legal aid but civil legal services provided in relation to abuse by a public authority of its position or powers will remain in scope, including in relation to the following types of claim (which are otherwise removed from scope):

- Personal injury or death
- Negligence other than clinical negligence
- Assault, battery or false imprisonment
- Trespass to goods
- Trespass to land
- Damage to property
- Breach of statutory duty
- Damages claims in respect of acts or omissions of public bodies that involves a breach of Convention rights by the authority
- Claims regarding welfare benefit entitlement

Breach of human rights by public authority

2.13 In relation to an action for breach of convention right by a public authority paragraph 20(1) provides that the following remain in scope:

Civil legal services provided in relation to –
(a) a claim in tort, or
(b) a claim for damages (other than a claim in tort) in respect of an act or omission by a public authority that involves a significant breach of Convention rights by the authority.

This includes claims for:

- Personal injury or death
- Assault, battery or false imprisonment
- Trespass to goods
- Trespass to land
- Damage to property
- Breach of statutory duty

- Damages claims in respect of acts or omissions of public bodies that involves a breach of Convention rights by the authority
- Negligence other than clinical negligence
- Claims regarding welfare benefit entitlement

Equality

2.12 Paragraph 37 (1) provides that civil legal services provided in relation to contravention of the Equality Act 2010 will remain in scope but only in relation to matters that remain in scope, plus claims arising out of welfare benefit entitlement.

Out of scope public interest cases

2.13 Currently legal aid is available for cases that are out of scope (other than business cases) but which raise matters of significant wide public interest. It is proposed to abolish this rule. However, where a case is in scope and the type of proceeding is therefore a priority for funding, wider public interest will continue to be relevant to the assessment of merits and will allow a consideration of the benefit to other individuals of the case.

Other provisions on scope and on the method of providing services

Welfare benefits

2.14 Legal aid to be removed from welfare benefit cases but will be retained for judicial review of welfare benefit decisions and for claims about welfare benefits that relate to a contravention of the Equality Act 2010.

Asylum support

2.15 The government has made a concession in relation to asylum support cases about accommodation. The original proposal was to remove legal aid for all asylum support cases but to be consistent with the policy of providing legal aid where there is a risk of homelessness, asylum support cases where the individual is seeking help with accommodation will remain in scope.

Summary of proceedings remaining in scope (relevant to public law only)

2.16 The following proceedings remain in scope:

- Asylum
- Asylum support where accommodation is claimed

- Claims against public authorities (other than judicial review) concerning a significant beach of human rights, or an abuse of position or power.
- Community care
- Immigration detention
- SIAC appeals
- Public law cases (judicial review and other similar remedies) other than representative actions and certain immigration and asylum judicial reviews.
- Discrimination cases currently within scope (cases relating to a contravention of the Equality Act 2010).
- Environmental cases
- Appeals to the Court of Appeal and Supreme Court and ECJ references, (where the area of law to which the appeal relates remains in scope)
- Housing matters where the home is at immediate risk (excluding squatting), homelessness assistance, housing disrepair cases that pose a serious risk to life or health and anti-social behaviour cases in the county court.

Summary of all cases and proceedings removed from scope

2.17 The following cases are removed from scope:

- Asylum support (except where accommodation is claimed);
- Clinical negligence;
- Consumer and general contract;
- Criminal Injuries Compensation Authority cases;
- Debt, except where immediate risk to the home;
- Employment cases;
- Education cases, except SEN;
- Housing matters, other than those above.
- Immigration cases (non-detention);
- Miscellaneous – appeals to Upper Tribunal from General Regulatory Chamber of First Tier Tribunal, cash forfeiture actions under the Proceeds of Crime Act 2002, change of name, probate or land law, personal data, s.14 of Trusts of Land and Appointment of Trustees Act 1996,will making for the over 70s, disabled people, minors etc;
- Private family law (other than where domestic violence or child abuse present);
- Tort and other general claims, and
- Welfare benefits.

Exceptional funding

2.18 A new exceptional funding scheme is to be introduced to provide funding for excluded cases where a failure to fund would be a breach of the individual's

Conventions rights or rights to the provision of legal services under EU law, or that it is appropriate to do so, in the particular circumstance of the case, having regard to any risk that failure to do so would be such a breach.

2.19 The existing significant wider public interest criterion for advocacy in inquest cases is retained. An exceptional case determination will be made if it is determined that advocacy for the individual is likely to produce significant benefits for a class of person, other than the individual and the members of the individual's family.

Exceptional funding decision making

2.10 The Director of the new legal aid agency (a civil servant) will make decisions subject to general criteria and guidance issued by Ministers. Ministers will be prevented by statute from giving the Director directions about funding in an individual case.

The merits test and alternative funding

2.11 It is proposed to amend the merits criteria to enable legal aid to be refused in any individual case which is suitable for alternative funding.

The mandatory single gateway to apply for legal aid

2.12 In spite of overwhelming opposition the government is maintaining the proposal is that if a person wants legally aided advice in a particular area of law, the person will be required to telephone the CLA Telephone Helpline in order to apply for legal aid. The system will be piloted initially in relation four areas of law:

- debt (insofar as it remains in scope);
- SEN cases;
- discrimination cases (claims relating to a contravention of the Equality Act 2010);
- community care.

2.13 In selecting these areas of law, the Commission claims to have considered:

- whether there was any increased risk within each area of law of clients' needs not being met by a telephone service;
- the likely frequency of the need for Legal Representation or Controlled Legal Representation;
- the likely frequency of emergency cases in the area of law;

- whether the existing Community Legal Advice (CLA) helpline service had any previous experience of delivering advice in the area of law.

2.14 The assumption is that in these areas of law it is generally unusual for clients to require representation or emergency advice (see Annex D, para 29 of the Government Response). At paragraph 30 it is stated:

"The existing CLA service already provides advice in debt and education cases, including SEN and advice in claims under the Equality Act 2010 across all the areas of law currently available, in particular employment and education. The service does not presently offer advice in community care but we believe that there are few reasons arising from the nature of the cases currently funded by legal aid as to why advice could not be delivered via the telephone."

Exceptions to the mandatory single gateway:

2.15 The following will not be required to use the single telephone gateway:

- cases where the client has previously been assessed by the mandatory single gateway as requiring face-to-face within the last twelve months and is seeking further help to resolve linked problems from the same face-to-face provider;
- clients in detention (including prison, a detention centre or secure hospital); and
- children.

Conditions that justify face-to-face services

2.16 The government has also indicated that were a case is an emergency the client will not be required to use the single gateway.

Emergency cases

2.17 The Government Response states that emergency cases should include cases where:

- there is a need for an urgent injunction or other emergency judicial procedure and the adviser will be required to represent the client in person, either at court, tribunal or other location for procedural reasons;
- there is an imminent risk to the life, liberty or physical safety of the client or his/her family or the roof over their heads; or
- any delay will cause a significant risk of miscarriage of justice, or unreasonable hardship to the client or irretrievable problems in handling the case and there are no other appropriate options to deal with the risk.

2.18 The Response states however that: "... the risk or likelihood that a client may need Legal Representation or Controlled Legal Representation in the future will not alone be an exemption to the requirement to use the gateway."

Other need for face-to-face services

2.19 Although it is stated that in some cases other than emergencies the client may require face-to-face support no criteria for such cases are set out. The Government's response refers to case complexity and level of documentation as presenting issues for some callers and states that they "will explore various options to mitigate the issues around handling documentation to reduce the burden and cost on the client. This will include the option for specialist advisers to refer the client to face-to-face advice services where considered necessary.

Cases eligible for exceptional funding

2.20 If the client visits a face-to-face provider who recognises that the case will not be within scope but may be eligible for exceptional funding, the application can be made straightaway without the client first telephoning the helpline.

Expansion of CLA services: legally aided advice by telephone

2.21 The CLA helpline currently offers specialist legal advice by telephone in debt, welfare benefits, housing, family, education and employment. When the proposed scope changes are made they will offer specialist legal advice in:

- debt (insofar as it remains in scope);
- SEN cases;
- discrimination cases (claims relating to a contravention of the Equality Act 2010);
- community care
- family
- housing.

2.22 For those accessing the helpline through the mandatory single gateway in debt, SEN cases, discrimination cases and community care, those eligible for legal aid will be transferred to the CLA specialist telephone adviser. Only if the conditions set out above are met will they be referred to face-to-face legal aid services.

2.23 In family and housing cases the caller can express a preference for face-to-face or telephone services.

2.24 The Response states that over time specialist telephone advice services will be available in other areas of law within scope (but not in asylum matters where it is accepted few cases will be suitable for telephone advice as many of the individuals are detained).

Telephone advice: the long-term proposals

2.25 It appears then that it is proposed that ultimately not only will a client be required to contact the single telephone gateway before being able to access substantive legally aided services but also that the substantive advice will be given via the CLA specialist advice line and that a person will only be referred for face-to-face advice in emergency cases or, in unspecified circumstances where it is determined the person needs face-to-face support.

2.26 In relation to issues around equalities legislation and anti-discrimination law raised by consultees the Government maintains that these are largely addressed by the measures the helpline already has in place (translation services, BSL, call back services etc) but proposes further 'engagement' to identify additional ways of providing reasonable adjustments for callers with specific needs.

2.27 The enabling provision in the bill is found in clause 26 which provides:

Choice of provider of services etc

(1) The Lord Chancellor's duty under section 1(1) does not include a duty to secure that, where services are made available to an individual under this Part, they are made available by the means selected by the individual.
(2) The Lord Chancellor may discharge that duty, in particular, by arranging for the services to be provided by telephone or by other electronic means.
(3) The Lord Chancellor's duty under section 1(1) does not include a duty to secure that, where services are made available to an individual under this Part, they are made available by a person selected by the individual, subject to subsections (4) to (10).

[(4) to (10) refer to representation in criminal proceedings]

Legal Aid, Sentencing and Punishment of Offenders Bill – other important provisions

Director of legal casework

2.28 Clauses 1 to 6 deal with the new arrangements under which the Lord Chancellor will designate a civil servant to be a Director of Legal Casework. The Director must comply with directions and guidance given by the Lord Chancellor about the carrying out of the

legal aid functions but the Lord Chancellor may not give directions or guidance about the carrying out of those functions in relation to individual cases.

Civil legal services - definition

2.29 Legal services are defined in clause 7(1) as:

(a) providing advice as to how the law applies in particular circumstances,
(b) providing advice and assistance in relation to legal proceedings,
(c) providing other advice and assistance in relation to the prevention of disputes about legal rights or duties or the settlement or other resolution of legal disputes, and
(d) providing advice and assistance in relation to the enforcement of decisions in legal proceedings or other decisions by which legal disputes are resolved.

7(2) The services include, in particular, advice and assistance in the form of –

(a) representation, and
(b) mediation and other forms of dispute resolution.

Qualifying for civil legal aid

2.30 The bill makes similar provision to those found in the Access to Justice Act 1999 for decisions as to which individuals qualify for legal aid and the criteria under which such decisions will be made. See clauses 10 and 20. However an additional principle for the setting of the criteria is added at clause 10(5): The criteria must reflect the principle that, in many disputes, mediation and other forms of dispute resolution are more appropriate than legal proceedings.

Costs protection

2.31 Clause 25 mirrors section 11 of the AJA 1999, providing:

(1) Costs ordered against an individual in relevant civil proceedings must not exceed the amount (if any) which it is reasonable for the individual to pay having regard to all the circumstances, including –

(a) the financial resources of all of the parties to the proceedings, and
(b) their conduct in connection with the dispute to which the proceedings relate.

Code of Conduct

2.32 The Lord Chancellor must publish a code of conduct to be observed by civil servants and employees of a body established and maintained by the Lord Chancellor.

The Code must include:

(a) duties to avoid discrimination;
(b) duties to protect the interests of the individuals for whom services are provided;
(c) duties to courts and tribunals;
(d) duties to avoid conflicts of interest;
(e) duties of confidentiality; and
(f) duties on persons who are members of a professional body to comply with the rules of the body.

2.33 Clause 36 provides for the abolition of the Legal Services Commission

3 The Jackson proposals

Costs orders in judicial review

3.1 The usual costs rule applies to claims for judicial review. Under CPR 44.3 the court has a discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid. Rule 44.3(2) provides that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party but that the court may make a different order.

3.2 Although the usual costs order applies, there are two features particular to judicial review claims:

(1) Claims for judicial review are claims to review the lawfulness of an enactment or a decision, action of failure to act in relation to the exercise of a public function. There is a public interest in ensuring that such claims are not deterred by the fear of an adverse costs order being made.

(2) The nature of the proceedings means that the outcome is less predictable and many claims are settled without a final hearing by way of the public body defendant agreeing to reconsider the decision subject to challenge. Public bodies will usually present this as being a response to developments unrelated to the proceedings or being a sensible way of avoiding costly litigation, the outcome of which may be at best a reconsideration.

3.3 This raises two issues: (1) how the courts can ensure that important claims, which it is in the public interest to resolve, are not prevented by the 'chilling effect' of a possible adverse costs order; and (2) how the courts should deal with costs when a claim for judicial review is compromised before final hearing.

3.4 In his Final Report of the Review of Civil Litigation Costs Lord Justice Jackson addressed both these issues.

Qualified one way costs shifting

3.5 In relation to the first, he proposed that for certain kinds of cases, including judicial review there should be 'qualified one way costs shifting' (QOCS). Sir Rupert's final report recommends that the following rule (modelled on s.11 AJA) would apply:

> *"Costs ordered against the claimant in any claim for personal injuries, clinical negligence or judicial review shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:*
>
> *(a) the financial resources of all the parties to the proceedings, and*
> *(b) their conduct in connection with the dispute to which the proceedings relate."*

3.6 This is one way costs shifting or 'costs protection', similar to that operating in favour of legally aided litigants: if successful the party recovers his/her costs but if unsuccessful his/her costs liability to the opponent is limited to that which is reasonable having regard to financial resources and conduct. The 'qualified' part of the proposed rule referred to the fact that the court could order the unsuccessful party to pay costs if such an order was justified having regard to such matters as conduct and resources. Many respondents objected that this gave insufficient assurance to the potential claimant in a judicial review claim and that the fear of adverse costs orders would still deter many important claims. PLP referred to the submissions put forward in a paper prepared by Michael Fordham QC and Jessica Boyd that Judicial review is a special case and that:

> *"A public law costs regime should promote access to justice. It should be workable and straightforward. It should facilitate the operation of public law scrutiny on the executive, in the public interest. This is the key point. For judicial review is a constitutional protection, which operates in the public interest, to hold public authorities to the rule of law. It is well-established that judicial review principles 'give effect to the rule of law'…The facilitation of judicial review is a constitutional imperative."*

3.7 The coalition government's consultation paper on the Reform of Civil Costs proposes to adopt the recommendation of Lord Justice Jackson that success fees under CFAs should not be recoverable from an opponent. However, despite Sir Rupert's own response pointing out that his proposed reforms should be seen as a package and that the abolition of recoverable success fees was justified if QOCS were introduced, the government decided to abolish recoverable success fees for judicial review but not to introduced QOCS.

3.8 Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Bill deals with "Litigation Funding and Costs". While a success fee may still be included in a CFA it will not be

recoverable from the unsuccessful party. If a success fee is charged it will be payable by the client. To mitigate the effect of this, provision is also made for the civil procedure rules to provide for a percentage uplift in respect of damages recovered where a claimant's offer to settle has been made and has been 'beaten'. In addition it is proposed that damages be increased across the board by 10%. Of course, damages are rare in claims for judicial review so this is of no assistance in public law.

3.9 The government's position is that the case for QOCS was not established in claims for judicial review as legal aid will remain available for such claims and they have indicated that they intend to review the criteria for the application of Protective Costs Orders (see below) and are currently considering whether to consult before doing so.

Costs when judicial review claims settle

3.10 Most claims for judicial review are settled by agreement before a final hearing, often before even a permission decision has been made.[2] In such cases the court can make an order that one party pay the other party's costs. The principles that apply when making such an order are set out in the case of *R (Boxall) v The Mayor and Burgesses of Waltham Forest LBC* (2000) 4 CCLR 258 at para [22]:[3]

"(i) The court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs.

(ii) It will ordinarily be irrelevant that the Claimant is legally aided.

(iii) The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost.

(iv) At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties.

(v) In the absence of a good reason to make any other order the fall back is to make no order as to costs.

(vi) The court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage"

[2] See *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing,* Bondy and Sunkin, June 2009.

[3] Recently followed in *R (Scott) v LB Hackney* [2009] EWCA Civ 217 but distinguished in *R (SOSHD) v E* [2009] EWHC 597 (Admin) where Mitting J held that a closer scrutiny of the likelihood of success was necessary in a human rights case (there a Control Order).

3.11 These principles are commonly referred to as the 'Boxall rules'. *Boxall* was decided before the introduction of a Pre-Action Protocol for Judicial Review and in his Final Report Sir Rupert also recommended that the position should be reviewed. He proposed that where the Claimant has complied with the protocol if the Defendant settles after issue by conceding any material part of the claim then the normal order should be that the Defendant pays the Claimant's costs.

3.12 Again, the coalition government did not accept this recommendation. However, the Court of Appeal has recently considered whether the *Boxall* approach should be modified in the case of *R(AK(Afghanistan)) v SSHD* (CO/2010/2346) which was heard on June 2011 and judgment is awaited.

4 Costs protection for judicial review - Protective Costs Orders

4.1 A Protective Costs Order is an order usually umade at the outset or early in the proceedings limiting the costs liability of one party to the other. Its purpose is to allow a claimant of limited means access to the court to advance the claim without the fear of an order for substantial costs being made against him/her, the fear of which would deter the claimant from continuing with the case at all.

4.2 There are a variety of forms a PCO may take. The order may provide that at the end of the case there shall be no order for costs or may 'cap' the claimant's liability in the event of the claim being unsuccessful. Any cap will be set based on an assessment of the resources available to the claimant, including any funds that could be expected to be raised from those supporting or likely to benefit from the action. To achieve a fair balance the court may also apply a cap to the defendant's liability if the claim succeeds or may limit the rates that can be charged by the claimant's lawyers. The different kinds of orders that the courts have made are illustrated below.

4.3 In *R v Lord Chancellor ex p CPAG* [1999] 1WLR 347, Lord Dyson set out the principles applying in relation to such an order holding that it was only in the most exceptional circumstances that the discretion to make a PCO should be exercised in a case involving a public interest challenge. The following principles applied:[4]

(i) the court must be satisfied that the issues raised are truly ones of general public importance;
(ii) the court must be satisfied, following short argument, that it has a sufficient appreciation of the merits of the claim that it can be concluded that it is in the public interest to make the order;
(iii) the court must have regard to the financial resources of the applicant and respondent, and the amount of costs likely to be in issue;

[4] At p 358 C-E.

(iv) the court will be more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings than the applicant,
(v) and
(vi) where it is satisfied that, unless the order is made, the applicant will probably discontinue the proceedings, and will be acting reasonably in so doing.

On the facts of the two cases before him, involving CPAG and Amnesty, the criteria were not satisfied and the PCOs were not made.

4.4 In *R v The Prime Minister ex p CND* [2002] EWHC 2712 (Admin) the Divisional Court made a PCO in favour of the claimants to the extent that any award of costs against them should be capped in the sum of £25,000. They were seeking an advisory declaration to the effect that UN Security Council Resolution 1441 did not authorise the use of force against Iraq in the event of a breach of that resolution. Although the order was being sought before permission to apply for judicial review had been granted, Simon Brown LJ found that all the *CPAG* tests were satisfied, and that it was right to afford the claimants the relatively limited security that the order would afford them. Maurice Kay J, agreeing, suggested a procedure by which applications of this kind should be made in future.

4.5 In *R (Refugee Legal Centre) v Home Secretary* [2004] EWCA Civ 1296 this court set a day aside to consider whether a PCO should be granted in favour of the claimants in relation to a substantive appeal in a matter in which they had been protected by an undertaking by the Home Office not to seek an order for costs against them at first instance. In the event the court made a PCO by consent. The previous week Brooke LJ had made a PCO in their favour to cover the PCO hearing before the full court, on the clear understanding that they would not be looking for their costs against the Secretary of State if they were to win. The claimant's lawyers had been acting *pro bono* throughout, and their clients were an independent not-for-profit charity which had overall responsibility for ensuring the delivery of quality legal services to those seeking human rights protection. What was under challenge was the fairness of the very streamlined new arrangements for processing asylum-seekers' claims at Harmondsworth.

4.6 In *R (Cornerhouse Research) v SSTI* [2005] EWCA Civ 192, the Court of Appeal again considered the applicable principles and, having reviewed the distinctive features relating to costs in public law litigation and the liberalisation of the rules as to standing in judicial review cases,[5] refined the principles on which such orders should be made and set out the procedure that should be followed when making an order.

The Corner House principles

4.7 The Court of Appeal set out the following guidance for the making of PCOs.

[5] See *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 in which Lord Diplock justified the modern approach to standing and identified the purpose of judicial review (to vindicate the rule of law and to get unlawful conduct stopped).

A PCO 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 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 and the amount of costs 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 doing so.

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

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.

Procedure on applying for a PCO

4.9 The Court of Appeal set out the following procedure:

In normal circumstances a PCO should be sought on the face of the claim form, supported by evidence which should include a schedule of the claimant's anticipated future costs. If the defendant wishes to resist the making of the PCO it should set out reasons in the acknowledgment of service. The claimant will be liable for the defendant's costs if the defendant successfully resists an application for a PCO but it would be expected that the defendant's proportionate costs should not normally exceed £1,000.[6] The judge will consider the application on the papers and decide whether to make the order, on what terms and the amount of any cap that should be placed on the claimant's recoverable costs, when deciding whether to grant permission. If the judge refuses to grant a PCO the claimant can request reconsideration at a hearing, which should be limited to one hour. The claimant will face a liability for costs if the PCO is again refused. The defendant's proportionate costs are unlikely to exceed £2,500. The defendant can challenge the making of a PCO but, by analogy with CPR 52.9(2), the court should not set aside the order unless there is a compelling reason to do so. The claimant will have the benefit of the PCO in relation to such an application made by a defendant. Where an unmeritorious application to set aside a PCO is made, an order for indemnity costs should be made and any cap imposed by the PCO should not apply.

4.10 The principles set out in *Cornerhouse* have developed over the last six years. In particular, the 'requirement' that the claimant should have no private interest in the litigation has been modified.

[6] *Mount Cook Land Ltd v Westminster City Council* [2003] EWCA Civ 1346 at para 76(1)).

4.11 In *R (Compton) v Wiltshire PCT* [2008] EWCA Civ 749, the Court of Appeal considered a challenge to the closure of a local hospital. It held that:

- Exceptionality is not an additional criteria but rather a predictor of the type of case in which the criteria set out in *Cornerhouse* are likely to be satisfied;
- General public importance may include matters of local rather than national interest, such as hospital closures;
- An applicant for a PCO must disclose their means and those of their supporters and the court will take account of the claimant's ability to raise funds and whether others can support the action;
- The *Cornerhouse* criteria are not to be interpreted as statutory provisions or in an over-restrictive way;
- Judges must give decisions for their decisions on PCOs.

No private interest

4.12 In *Compton* the Court of Appeal also indicated that the 'no private interest' condition might be dispensed with if the other conditions are met. However, in *Goodson v HM Coroner for Bedfordshire* [2005] EWCA Civ 1172, the requirement was interpreted narrowly and restrictively; the court refused to make a PCO in relation to a woman who sought a fuller inquiry into the circumstances of her father's death. The Court of Appeal held that her personal interest, albeit not a financial one, was sufficient to rule out a PCO and that an individual "litigant who has sufficient standing to apply for judicial review will normally have a private interest in the outcome of the case" [28]. The only exceptions therefore appeared to be for pressure groups or public spirited individuals in relation to matters in which they have no direct personal interest apart from that of the population as a whole.

4.13 Nevertheless, in a number of cases since *Goodson*, the case has been distinguished or disapproved including the following:

Wilkinson v Kitsinger [2006] EWHC 835: a case about the validity of a foreign lesbian marriage. It was held that the 'private interest' test was no more than "a flexible element in the court's consideration of whether it is fair and just to make the order"[54]. A PCO was made with a cap on the claimant's liability of £25,000.

R (Bullmore) v West Hertfordshire Hospitals NHS Trust [2007] EWHC 1350 in which it was stated that the private interest requirement had been 'diluted' since *Cornerhouse*.

R (Eley) v SSCLG (1 July 2008) in which the Court of Appeal dismissed an application by the Secretary of State for permission to appeal against the making of a PCO, holding that the fact that a person has standing for the purpose of bringing a claim for judicial review or a statutory planning appeal is not a bar to being granted a PCO.

4.14 In *Morgan v Hinton Organics* [2009] EWCA 107 Civ, Carnwath LJ stated at [39]:

"On a strict view, it could be said, *Goodson* remains binding authority in this court as to the application of the private interest requirement. It has not been expressly overruled in this court. However, it is impossible in our view to ignore the criticisms of this narrow approach referred to above, and their implicit endorsement by this court [in *Bullmore* and *Buglife*]. Although they were directly concerned with other aspects of the Corner House guidelines, the flexible approach which they approved seems to us intended to be of general application."

4.15 Most recently the test was considered in *R (Public Interest Lawyers) v LSC* [2010] 3259 (Admin). The challenge was brought by two firms of solicitors against a decision by the LSC that was likely to deprive the firm of fee income. The evidence was that one firm would benefit by £44,000 over three years and the other by £135,000 over the same period. A PCO was made capping the claimant's costs liability at £100,000, set on the basis of the contributions that could be expected from each of the firms who expected to benefit from the case and an indemnity provided by the Law Society. It was held that "the private interest which the claimants obviously have is not such as to determine this application for a protective costs order. ... the firms supporting the litigation, and the two firms themselves, are prominent players in advancing public interest matters. I regard the first claimant, in particular, as surrogate for others who seek to advance the public interest through public law actions."

Nature of a PCO

Pro bono representation:

4.16 In *Corner House* the Court of Appeal indicated that a PCO was more likely to be granted if the claimant's representatives were acting *pro bono*. If the claimant's lawyers are acting on a *pro bono* basis there will usually be no claim for costs against the defendant in the event that the claim is successful.[7] However, the lawyers representing *Corner House* were in fact acting on a CFA and in a number of subsequent cases PCOs have been made when the claimant's lawyers were not acting pro bono and would be seeking a costs order against the defendant if successful.

Cross capping and limiting the claimant's costs:

4.17 The defendants in *Corner House* argued that the claimants ought not to be able to recover a CFA uplift if they won but this was rejected, Moses J holding that "In this field of public interest ligitation it is important that solicitors such as Leigh Day should be able to continue

[7] However, since October 2008 a successful party with *pro bono* representation can apply for a *pro bono* costs order and any costs paid will be paid to the Access to Justice Foundation which will distribute the funds to organisations providing *pro bono* representation: s.194 Legal Services Act 2007.

to operate so as to provide skilled public legal services to those concerned in public interest cases. ... it is inevitable that they will lose a percentage of their cases for which they will not recover any costs; and no firm can continue to operate bearing in mind that risk." The court also rejected the defendant's argument that their liability should be capped at the same amount as the claimant's under the PCO.

4.18 In *Buglife v Thames Gateway Development Corporation* [2009] EWCA Civ 29 the defendants argued that an identical cap ought to apply to their liability as to the claimant's . The court held that "... there should be no assumption, whether explicit or implicit, that it is appropriate, where the claimant's liability for costs is capped, that the defendant's liability for costs should be capped in the same amount." Nevertheless, the Court of Appeal did in fact approve the "mirrored cap" imposed in the court below and imposed one for the Court of Appeal proceedings.

Setting fee levels

4.19 In *R (Medical Justice) v SSHD*[2010] EWHC 1925 (Admin), the claimant's obtained a PCO on a paper application, limiting their liability for the defendant's costs to £5,000. At a hearing to consider interim relief and the continuance of the PCO, the court declined to set a mirrored cross cap but did direct that the rates recoverable should be 'modest'; the benchmark for counsel's fees should be the rates paid to those payable to the defendant's counsel, namely Treasury Counsel rates. However, as the claimant's lawyers were acting under a CFA they were also entitled to claim uplift if the claim succeeded, the court acknowledging the importance to firms and charities doing public interest work of being able to recover success fees in CFA cases to balance the fact that no payment would be made in cases that were unsuccessful.

4.20 In *Public Interest Lawyers* the 'modest' rates set were no more than £375 ph for solicitors and LSC rates for the barristers (more generous than Treasury Counsel rates).

Disclosure of financial and fee information

4.21 A claimant seeking a PCO will be expected to disclose information about its resources, the way the case is funded and to give an estimate of the likely level of costs if the case goes to trial. In *Buglife* and *Medical Justice* the claimants were required to disclose the level of the success fee under the CFA, which is not normally required until costs are assessed.

4.22 In *R (Badger Trust) v Welsh Ministers* [2010] EWCA Civ 1316, the claimants were not acting under a CFA. A PCO was made limiting the claimant's liability to £10,000 and a reciprocal cap was applied to the amount of costs recoverable by the claimants, with liberty to apply. The claimants had indicated that they intended to apply to set aside the cap if they were successful in the claim but had declined to provide details of their own legal costs. They were successful in the Court of Appeal and served a schedule of costs for more than £165,000. The Court held that the claimants should have disclosed at an early stage their estimate of costs and should have challenged the 'cross cap' at an early stage. It was not

open to the claimant to "keep its powder dry" and having won on appeal to challenge the reciprocal costs order and put in a schedule of costs that massively exceeded the sums provided for in that order. "Frankness is required from a party seeking a PCO, as is clear from *Cornerhouse* and from *Buglife*."[130]

4.23 However, the situation may be different regarding disclosure of the resources of an individual in a case concerning the environment. In *R (Garner) v Elmbridge BC* [2010] EWCA Civ 1006 the claimant was an individual seeking to challenge the grant of planning permission for the redevelopment of a site near to Hampton Court Palace. He applied for a PCO but refused to give any detailed information about his means. At first instance this was held to be fatal to the PCO application. The Court of Appeal upheld his appeal, relying on the terms of the Aarhus Convention which provides that with regard to environmental matters member states must ensure that procedures for review must provide adequate and effective remedies and be fair, equitable, timely and not prohibitively expensive. There is an outstanding complaint to the Aarhus Compliance Committee on the issue of whether the "not prohibitively expensive" requirement is a wholly objective one. The Court of Appeal held that a purely subjective approach, as applied to Mr Garner was not consistent with the objectives underlying the directive and that these objectives "would be frustrated if the court was entitled to consider the matter solely by reference to the means of the claimant who happened to come forward, without having to consider whether the potential costs would be prohibitively expensive for an ordinary member of "the public concerned" ... [46]

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