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|  | **How to do judicial review** February 2024 |

**Session 6: COSTS CAPPING ORDERS AND   
THIRD PARTY INTERVENTIONS**

**COSTS CAPPING ORDERS**

***Introduction***

1. The Criminal Justice and Courts Act 2015 brought in a new statutory framework for costs protection in public interest cases - Costs Capping Orders ("CCOs"). This put the common law regime of protective costs orders ("PCOs"), developed in particular by the Court of Appeal in R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192, on a statutory footing*.*
2. The aim of CCOs, like their predecessor PCOs, is to ensure that public interest cases which would not otherwise be able to brought, are considered by the courts. As recognised by the Court of Appeal in Corner House, "access to justice is sometimes unjustly impeded if there is slavish adherence to the n normal private law costs regime". Recognising the importance of ensuring access to justice in public interest cases which could not, in practice, be brought without costs protection for the claimant, costs protection or costs capping orders are a departure from the general rule that costs will ordinarily follow the event and from the court's ordinary discretion to consider costs.
3. The new regime for Costs Capping Orders ("CCOs") is found in sections 88-89 of the CJCA 2015. In essence, the provisions formalise the Corner House criteria for PCOs in judicial review cases into a statutory formulation (with some additional criteria), including by defining the meaning of the public interest.

***Background to costs protection - the common law regime***

4. Before considering the new statutory regime, it is worth noting the development of the common law   
practice of costs protection by the courts, as interpretation of the new statutory tests will be informed

by the courts' previous consideration of the public interest in under the Corner House principles.

5. Corner House was an expedited challenge to the Export Credits Guarantee Department’s decision to

change its anti-corruption procedures at the request of various exporters and banks. Corner House, an anti-corruption NGO, brought a claim for judicial review of this decision and was granted a PCO by the Court of Appeal.

6. In Corner House the Court of Appeal set down the following guidance on the grant of protective costs

orders:

a) 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:

* The issues are of general public importance.
* The public interest requires that those issues should be resolved.
* The Claimant has no private interest in the outcome of the case.
* Having regard to the financial resources of the parties and the amount of costs likely to be involved, it is fair and just to make the order.
* If the order is not made, the Claimant will probably discontinue the proceedings, and will be acting reasonably in doing so.

1. If those acting for the Claimant are doing so pro bono this will be likely to enhance the merits of the PCO application.
2. It is for the court, in its discretion, to decide whether it is fair and just to make the order in light of the above considerations.

7. The courts indicated that the guidance in Corner House was to be interpreted flexibly, with the aim of

doing justice between the parties. No one factor was considered decisive in itself (see R (Compton) v Wiltshire PCT [2009] 1 WLR 1436 per Waller LJ at [23] and Smith LJ at [25]; R (Buglife) v Thurrock Thames Gateway Development Corporation [2008] EWCA Civ 1209; Morgan v Hinton Organics [2009] EWCA Civ 107 at [40]).

***The new costs capping rules***

8. Section 88 sets out the conditions which must apply before an applicant for judicial review might benefit   
from a statutory costs capping order. Section 89 sets out the matters to which the court must have regard when considering whether to make an order, and what the terms of any such order should be.

*When does the costs capping framework apply?*

9. The new costs capping framework applies to all applications for protection made by parties to judicial review. Section 88(12) provides that "judicial review proceedings" means:

1. proceedings on an application for leave to apply for judicial review;
2. proceedings on an application for judicial review;
3. any proceedings on an application for leave to appeal from such proceedings; and
4. proceedings on an appeal from such a decision.

10. The statutory framework will not apply to the following:

1. Applications for costs protection in judicial review cases by **non-parties**;
2. **Proceedings other than judicial review**. For example, other civil claims, in respect of statutory appeals, common law claims in negligence or misfeasance in public office against public authorities, or statutory appeals against the conduct of public authorities. In these proceedings the common law will continue to apply to any application for costs protection;
3. **Environmental litigation and the Aarhus Convention**. The Criminal Justice and Courts Act 2015 (Disapplication of Sections 88 and 89) Regulations 2017/100 disapply the new costs capping statutory provisions in Aarhus Convention cases. These regulations came into force on 28 February 2017.

11. Following the decision in Begg v HM Treasury [2013] EWHC 1851 (Admin) it seemed that the new statutory framework might not apply to closed material procedures and judicial review claims subject to section 6 of the Justice and Security Act 2012, involving closed material procedures. However this decision was successfully appealed and the Court of Appeal held that this was the kind of case where the interests of fairness might require a protective costs order.

***When can the court make a costs capping order?***

*Public interest proceedings*

12. The conditions for making a costs capping order are set out in section 88(6). This provides that the court may only make a costs capping order if it is satisfied both that the proceedings are "public interest proceedings" and that without such an order, the applicant would be acting reasonably by withdrawing or ceasing to participate in the proceedings.

13. Section 88(7) sets out that proceedings are only "public interest proceedings" if:

1. an issue that is the subject of the proceedings is of general public importance;
2. the public interest requires the issue to be resolved; and
3. the proceedings are likely to provide an appropriate means of resolving it.

14. In determining whether proceedings are "public interest proceedings", section 88(8) requires the court

to consider a number of matters. These include:

1. the number of people likely to be directly affected if relief is granted to the applicant for judicial review;
2. how significant the effect on those people is likely to be; and
3. whether the proceedings involve consideration of a point of law of general public importance.

15. These factors are not exhaustive. The provisions do not require the court to attribute particular weight

to any particular factor.

16. The Court of Appeal had previously considered the proper approach to the public importance and public

interest principles under the Corner House principles in R (Compton) v Wiltshire PCT [2009] 1 WLR 1436. Smith LJ gave a detailed explanation [75]-[78]:

*“The first governing principle requires the judge to evaluate the importance of the issues raised and to make a judgment as to whether they are of “general public importance”. I have three observations to make about that judgment. First, there is no absolute standard by which to define what amounts to an issue of general public importance. Second, there are degrees to which the requirement may be satisfied; some issues may be of the first rank of general public importance, others of lesser rank although still of general public importance. Third, making the judgment is an exercise in which two judges might legitimately reach a different view without either being wrong.*

*In my view, the Corner House case does not define what is an issue of general public importance. It provides some examples of the type of issue which will be of general public importance (see para 60 of Buxton LJ's judgment) but it does not seek to define or limit the field to issues of that nature. In particular, the Corner House case does not say that only issues of national importance will qualify. It does not, and could not, say how publicly important the issues have to be or how general the public importance has to be.*

*During the hearing, there was some discussion about the meaning of the word “general” in the context of “general public importance”. As Buxton LJ says, it must add something to mere “public importance”. In some cases, the answer is easy. For example, if the case will clarify the true construction of a statutory provision which applies to and potentially affects the whole population, the issues are of general public importance. But if the issue is of public importance and affects only a section of the population, it does not in my view follow that it is not of general public importance, although it will not be in the first rank of general public importance. Mr Havers for the PCT accepted that a local issue might be sufficiently “general” to be of general public importance but submitted that one could not decide whether it was so merely by taking a headcount of the numbers of people who*

*would be affected by the decision of the court. He may be right although he did not explain how the general importance of a local issue was to be assessed. It seems to me that a case may raise issues of general public importance even though only a small group of people will be directly affected by the decision. A much larger section of the public may be indirectly affected by the outcome. Because it is impossible to define what amounts to an issue of general public importance, the question of importance must be left to the evaluation of the judge without restrictive rules as to what is important and what is general.*

*Holman J gave careful consideration to the question whether the closure of the MIU gave rise to issues of general public importance. He rejected the applicant's counsel's claim that the case raised issues of general legal importance. It was not, he said, a test case. But, none the less, he considered that the issues were of sufficient general public importance to satisfy the first requirement, largely because the closure directly affected 30,000 to 50,000 people. I think that the judge recognised that the issues were of “borderline” general public importance and that is why he made the order in the particular form that he chose (an issue to which I will return). In my view, Holman J applied his mind to the relevant issues in respect of the first requirement and I respectfully disagree with Buxton LJ that his conclusion was plainly wrong.”*

1. The guidance provided in Compton on the public importance and public interest principles may properly inform the interpretation and application of the new statutory costs capping criteria.
2. Section 88(9) empowers the Lord Chancellor to make regulations by affirmative resolution of each House of Parliament to amend section 88 "by adding, omitting or amending matters to which the court must have regard when determining whether proceedings are public interest proceedings". It would obviously be of very real concern if the Lord Chancellor sought to exclude particular types of proceedings or classes of litigant from the definition of the public interest. To date no such regulations have been made.

*What kind of costs capping order?*

1. Section 89(1) sets out the matters to which the court must have regard when considering whether to make a costs capping order, and what the terms of any such order should be. This is a non-exhaustive list. The matters are as follows:
2. the financial resources of the parties to the proceedings, including the financial resources of any person who provides, or may provide, financial support to the parties;
3. the extent to which the applicant for the order is likely to benefit if relief is granted to the applicant for judicial review;
4. the extent to which any person who has provided, or may provide, the applicant with financial support is likely to benefit if relief is granted to the applicant for judicial review;
5. whether legal representatives for the applicant for the order are acting free of charge; and
6. whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally.
7. These considerations broadly reflect the Corner House criteria. It is important to note that there is now an express requirement to consider the appropriateness of the applicant to represent the interest of other persons or the public interest.
8. Section 89(3) empowers the Lord Chancellor to make regulations by affirmative resolution of each House of Parliament to amend section 89 "by adding, omitting or amending the matters listed". To date no such regulations have been made.

*Private benefit*

1. As previously under the PCO regime, the consideration of any benefit to the applicant in a case should not be determinative of the public interest in any case.
2. In Goodson v HM Coroner for Bedfordshire [2005] EWCA Civ 1172 the private interest requirement was interpreted restrictively. Ms Goodson sought a fuller enquiry into the circumstances of her father’s death. The Court of Appeal held that she had a private interest and her application for a PCO failed.
3. The principle that the Claimant must have no private interest in the outcome of the case has been subject to criticism, not least because the court in Corner House was not asked to consider the private interest issue and so at its highest, the private interest requirement is an *obiter* comment, not a binding rule. In any event, none of the Corner House requirements are binding rules and so they may be departed from where the interests of justice so require. Goodson has not been formally overruled but no judge who has considered it has yet failed to distinguish or disapprove it.
4. Under the PCO regime, it was recognised that a private interest was a relevant matter to take into account, but was not a bar in itself to a PCO. For example, in Wilkinson v Kitsinger [2006] EWHC 835 (Fam) Potter J held that the private interest principle was no more than *“a flexible element in the court’s consideration of whether it is fair and just to make the order”* [54]. Wilkinson was approved by the Court of Appeal in R (England) v LB Tower Hamlets [2006] EWCA Civ 1742 at [14]:

*“It is important, however, that means should be found to do this without that process itself becoming a source of additional cost. The recent report of a group chaired by Lord Justice Kay “Litigating the Public Interest” (July 2006) provides a valuable discussion of*

*the issues arising from the Corner House case. In particular, the report questions the requirement in the criteria there laid down that the applicant should not have any “private interest” in the outcome of the case. For our part we respectfully share the doubts expressed by Sir Mark Potter as to the appropriateness or workability of this criterion (Wilkinson v Kitzinger [2006] EWHC 835), but we note that a restrictive approach has been taken by this court in other cases (eg R (Goodson) v Bedfordshire and Luton Coroner [2005] EWCA Civ 1172).”*

1. A series of decisions reached the same conclusion. In R (Eley) v SSCLG (1 July 2008) Collins J held that, *“the no personal interest condition in Corner House is in my view unsustainable”.*
2. Cranston J’s treatment of the application for a PCO by Public Interest Lawyers in R (Public Interest Lawyers v Legal Services Commission [2010] EWHC 3259 (Admin)) is of particular relevance to this case. PIL were challenging an LSC decision that was likely to deprive the firm of substantial fees. Although the private interest was relevant, it was not decisive [25]-[26]:

*“I turn to the third principle, private interest. That is the most troubling aspect of the claimant's application. There is no doubt that both Public Interest Lawyers and RMNJ solicitors have a strong interest in the outcome of this case. In his second statement Mr Shiner, for the Public Interest Lawyers, identifies a benefit of some £44,000 over a three-year period as a result of the award of a contract as bid for. The equivalent figure for RMNJ is £135,000. There is no doubt that that represents a private interest. The supporting lawyers who have provided witness statements also have a financial interest in the outcome of the litigation. Mr Nicholls submitted that that was a fatal flaw in the award of a protective costs order. Moreover, he contended, that there was a lack of information about the financial situation of both law firms. On the other side of coin, the defendant was facing numerous calls on its resources and for money to be diverted into litigation about this matter would detract from the extent to which it could provide publicly funded legal assistance.*

*In my view, however, the private interest which the claimants obviously have is not such as to determine this application for a protective costs order. As I have explained, 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 a surrogate for others who seek to advance the public interest through public law actions. That being the case, it seems to me that it devalues the work that these firms undertake to describe their action in this case as primarily commercial. It seems to me that private interest is not a major factor in the balance in this case. In particular I draw on the part of the judgment by Lord Hope in In re appeals by Governing Body of JFS [2009] UKSC 1, [2009] 1 WLR 2353, paragraph 25, where, in a different context, his Lordship said that the system of public funding would be gravely disadvantaged if the pool of reputable solicitors willing to undertake this type of work was to be adversely affected.”*

*Pro bono representation*

1. As under the common law regime, section 89(1) required the court to consider whether legal representatives for the applicant are acting free of charge.
2. In Corner House the Court of Appeal held that an application for a PCO is more likely to succeed if the Claimant’s lawyers are acting pro bono. However, in numerous cases PCOs have been granted where the Claimant’s lawyers are not acting pro bono (see for example, R (Buglife) v Thurrock Thames Gateway Development Corporation [2008] EWCA Civ 1209; R (Eley) v SSCLG (1 July 2008)).
3. In R (Corner House & Campaign Against Arms Trade v Director of the Serious Fraud Office [2008] EWHC 71 (Admin) (known as *‘*Corner House 2’), the Defendant argued that the Claimant should have to adduce evidence that it had tried and failed to find pro bono representation as a pre-condition of obtaining a PCO. This argument failed on the facts, but Claimants would be well advised to deal with whether pro bono representation is a realistic option in their evidence in support of a PCO application.

*Cost capping of Claimant’s costs*

1. The *quid pro quo* for granting the PCO was capping of the Claimant's costs. This is now provided for in section 89(2) which provides that:

"*A costs capping order that limits or removes the liability of the applicant for judicial review to pay the costs of another party to the proceedings if relief is not granted to the applicant for judicial review must also limit or remove the liability of the other party to pay the applicant’s costs if it is.*"

1. However, there is no requirement that the cross-cap mirrors the level of costs protection afforded to the applicants.
2. In Corner House the Court indicated that only the costs of junior counsel would be reasonable, but that has subsequently been overturned and two counsel were permitted in R (Public Interest Lawyers v Legal Services Commission [2010] EWHC 3259 (Admin), R (Medical Justice) v SSHD [2011] EWCA Civ 269 and Corner House 2*,* among others.
3. In Corner House 2 the Divisional Court held that costs under a CFA should be recoverable:

*“In this field of public interest litigation it is important that solicitors such as Leigh Day should be able to continue to operate so as to provide skilled public legal services to those concerned in public interest cases. To make an order that does not preserve the importance to them of CFA funding seems to me to be wrong, for 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. So any order we make should reflect the fact that the party is CFA funded [...]”*

1. It should be noted that these cases were decided before the CFA uplift was removed, and so it is likely that arguments about Claimants getting their costs under a CFA will be even stronger now.
2. In terms of the level of fees, in Medical Justice Cranston J held that the Claimant should be able to recover modest fees for leading and junior counsel and solicitors and a success fee. The *“suitable benchmark of modesty”* was held to be Treasury counsel rates. However, in Public Interest Lawyers Cranston J adopted a different approach, permitting recovery of £375 per hour and LSC rates for counsel, but no recovery of a success fee. The latter is more analogous to the current situation than the former.

*Timing of a Cost Capping Order*

1. Section 88(3) provides that a costs capping order may only be made if permission to apply for judicial review has been granted. This represents a significant change in practice, as previously a PCO could be sought at any stage in proceedings.
2. The procedural requirement that a CCO is not able to be provided until permission to bring JR has been granted causes real practical problems for litigants in need of a costs cap because they will be liable for the costs of the Defendant’s AOS if permission is refused. This can be contrasted with the previous position whereby a PCO application can be determined before the permission decision so that a litigant is able to make an informed decision about whether to incur any costs.
3. It is recognised that the defendant's costs of the permission stage may, in practice, be disproportionately high, despite being generally limited to the defendant's (and any interested parties') costs of preparing an Acknowledgement of Service.
4. This gives rise to concern that the costs associated with the permission stage could pose a significant deterrent to individuals with limited means who seek to challenge unlawfulness and that this could significantly restrict the ability of costs capping orders to serve the public interest. It may also have the effect of dissuading applicants from seeking a rolled-up hearing, if they need costs protection.

*Procedure for applying for a CCO*

1. The procedure for applying for a CCO is set out in CPR 46.16-46.19.
2. CPR 46.16 provides that an application for a judicial review costs capping order must:

a. be made on notice, and in accordance with CPR Part 23;

b. be supported by evidence setting out:

1. why a judicial review costs capping order should be made, having regard, in particular, to the matters at subsections (6) to (8) of section 88 of the 2015 Act and subsection (1) of section 89 of that Act;
2. a summary of the applicant's financial resources;
3. the costs (and disbursements) which the applicant considers the parties are likely to incur in the future conduct of the proceedings; and
4. if the applicant is a body corporate, whether it is able to demonstrate that it is likely to have financial resources available to meet liabilities arising in connection with the proceedings.
5. A copy of the application notice and supporting documents must be served on every other party (CPR 46.17(2). On application by the applicant, the court may dispense with the need for the applicant to serve the evidence setting out a summary of the applicant's financial resources on one or more of the parties (CPR 46.17(3)).
6. The court may also direct the applicant to provide additional information or evidence to support its application (CPR 46.17(4)).
7. If the applicant for a CCO is a body corporate, and the evidence supporting its application sets out that it is unable to demonstrate that it is likely to have financial resources available to meet liabilities arising in connection with the proceedings, the court must consider giving directions for the provision of information about the applicant's members and their ability to provide financial support for the purposes of the proceedings (CPR 46.18).
8. CPR 46.19 provides for applications to vary judicial review costs capping orders.

*Tips for applying for a CCO*

1. Any application for a CCO must follow the requirements of CPR 46.16-46.18.
2. The judicial review claim should be accompanied by an application in accordance with CPR 23 including a full witness statement setting out the public importance of the claim, the Claimant’s means (see further below), why the case could not be brought without a CCO and why funds cannot be raised to bring it. The application and supporting evidence should address the matters set out at section 88(6)-(8) and 89(1) CJCA.
3. In any application for a CCO the applicant will need to be open about its financial position and a summary of the applicant's financial resources will be required. This is consistent with the approach to PCOs: see R (Badger Trust) v Welsh Ministers [2010] EWCA Civ 1316 per Pill LJ at [130], where he held that, *“frankness is required from a party seeking a PCO”.* This means that it is advisable to disclose a set of accounts, with an accompanying witness statement explaining them. For NGOs and charities, bear in mind that there is a good argument that restricted funds should be disregarded by the court when it is considering the applicant’s financial position. Thus, for example, grants that are restricted to discharging a particular charitable purpose or paying a particular salary should not form part of the assessment of how much a charity could contribute to its legal costs. It is advisable for details like this to be clearly explained so that an organisation that is not as rich as it looks does not get stung with an unmanageable CCO.
4. A Claimant will need to take a realistic view of how much money it can afford to risk on the litigation. Claimants will normally be expected to shoulder some risk. For example, in Buglife the Court required £10,000 from the Claimant and in Public Interest Lawyers the Claimant gathered £100,000 from a group of law firms who were affected by the decision under challenge.
5. The changes introduced by the CJCA require that information about the extent of financial resources "*likely to be available*" to the applicant be disclosed (sections 85-86 CJCA) and, as set out above, CPR 46.16 requires that if the applicant for a CCO is a body corporate, whether it is able to demonstrate that it is *likely* to have financial resources available to meet liabilities arising in connection with the proceedings. It remains to be seen how the courts will apply these new provisions consistently with the constitutional purpose of judicial review, the protection of the right of access to the courts protected by the common law and Articles 6 and 8 ECHR. It also remains to be seen how these requirements will be applied in cases funded through crowdfunding.
6. Given that an applicant for a CCO will need to justify their opponent not getting their costs, it is important to plead the underlying case clearly and succinctly. If particularly lengthy and rambling grounds are submitted with an application for a CCO, it is more likely that the court will consider that a defendant cannot be asked to resist the case without costs protection.
7. Finally, do not try to hide from difficult aspects of your CCO application. For example, if there is a private interest then be up front about it, demonstrate that it is not an absolute bar to getting a CCO and explain why no one else would be able to bring the claim. For example, in a pending application by the Howard League for Penal Reform and the Prisoners’ Advice Service for a PCO to challenge the cuts to prison legal aid, the charities have been clear that although they have prison legal aid contracts, and therefore stand to gain from winning the challenge, these contracts actually account for a tiny proportion of their income, thereby reducing the extent of their private interest.

**THIRD PARTY INTERVENTIONS**

*What are third party interventions?*

1. Judicial review claims often raise wider issues of public interest that go beyond the interests of the parties directly involved in the litigation. Many of these cases affect disadvantaged, marginalised or specialist groups whose interests are represented by voluntary sector organisations. Because of their specialist knowledge about how particular decisions impact upon the group they represent, these organisations have the ability to make informed submissions that could assist the court in reaching its decision. Third party interventions are a method by which such an organisation not otherwise involved in the litigation may submit specialist information or expertise to the court.
2. In some cases there may be a third party intervention because a party is unrepresented and it is appropriate for the legal arguments to be made by a third party. For example, in Lassal C-162/09, a case raising an important point of EU law referred to the Court of Justice of the European Union by the Court of Appeal, the claimant was unrepresented. As a result the Child Poverty Action Group intervened to represent the interests of claimants in general. It may be that these types of third party intervention become more common as legal aid is restricted.
3. Salutary guidance on third party interventions can be found in Lord Hoffman’s judgment in Re E [2008] UKHL 66:

“It may however be of some assistance in future cases if I comment on the intervention by the Northern Ireland Human Rights Commission. In recent years the House has frequently been assisted by the submissions of statutory bodies and non-governmental organisations on questions of general public importance. Leave is given to such bodies to intervene and make submissions, usually in writing but sometimes orally from the bar, in the expectation that their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain. The House is grateful to such bodies for their help.

An intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything. It is not the role of an intervener to be an additional counsel for one of the parties. This is particularly important in the case of an oral intervention. I am bound to say that in this appeal the oral submissions on behalf of the NIHRC only repeated in rather more emphatic terms the points which had already been quite adequately argued by counsel for the appellant. In future, I hope that interveners will avoid unnecessarily taking up the time of the House in this way.”

*What value can third party interventions add?*

1. In a speech at the Public Law Project Judicial Review Conference 2013, Lady Hale, Justice of the Supreme Court, emphasised the importance of third party interventions:

“But from our – or at least my - point of view, provided they stick to the rules, interventions are enormously helpful. They come in many shapes and sizes. The most frequent are NGOs such as Liberty and Justice, whose commitment is usually to a principle rather than a person. They usually supply arguments and authorities, rather than factual information, which the parties may not have supplied. I believe, for example, that it was Liberty who supplied the killer argument in the Belmarsh case (A v Secretary of State for the Home Department [2004] UKHL 56, [2005] 2 AC 68). And Justice intervened helpfully, for example, in the habeas corpus case of the man detained at Bhagram air base since 2004: Rahmatullah v Secretary of State for Defence [2012] UKSC 48, [2013] 1 AC 614.”

1. Lady Hale also reminded her audience that an important class of interveners are government departments themselves:

“They intervene principally in order to protect the legislation and policy for which they are responsible. A good example is again Seldon v Clarkson, Wright and Jakes: having successfully defended its age discrimination regulations in Luxembourg, the Secretary of State for Business, Innovation and Skills intervened in a private discrimination dispute in order to promote the department’s view of how the legislation ought to work. A similar example is X v Mid-Sussex Citizen’s Advice Bureau [2012] UKSC 59, [2013] ICR 249, where the Secretary of State for Culture, Media and Sport intervened to safeguard the government’s view that ‘occupation’ in anti-discrimination law did not include volunteering; the Christian Institute intervened to the same effect, and other third sector organisations wrote to support the CAB’s case; while the Commission for Equality and Human Rights supported the claimant.

It should not be thought that the government’s interventions go all one way. Sometimes they can surprise us. The best example is Yemshaw v Hounslow London Borough Council [2011] UKSC 3, [2011] 1 WLR 433, on the meaning of ‘violence’ and ‘domestic violence’ in the homelessness legislation. The Court of Appeal had held that this was limited to direct physical contact, but the Secretary of State for Communities and Local Government intervened in support of a much wider definition. This intervention was backed up by a large amount of helpful national and international material and dovetailed quite neatly with the material on victims of domestic violence presented by the Women’s Aid Federation of England.”

1. A recent example of an “added-value” intervention can be found in the Court of Appeal case R (Das) v Secretary of State for the Home Department [2014] EWCA Civ 45. That case concerned the Secretary of State’s policy of detaining people with mental health problems in immigration detention. The case was brought by an individual who had been detained while she was suffering from various mental illnesses. The mental health charity Mind and the immigration detention charity Medical Justice were granted permission to intervene in the case because it raised an issue of principle and practice, namely

how should the policy be interpreted and what was the effect of that interpretation the ground. Mind and Medical Justice were able to provide case studies, expert reports and witness statements setting out the principles that should govern mental healthcare and demonstrating the problems with the policy. The interveners did this by providing written submissions and a small bundle of evidence, and then making oral submissions for 30 minutes during the hearing. The impact of the intervention is clear from the Court of Appeal judgment, which not only upheld the interveners’ approach but referred to their contribution more than fifteen times.

1. An even more recent example was in the Supreme Court in R(SG) v Secretary of State for Work and Pensions [2015] UKSC 16 (see above under ‘public law highlights’) where the judges referred to Child Poverty Action Group’s evidence that the cap disproportionately affects women and children; that it is unnecessary because families in work are already better off than families out of work and that the money saved is “marginal at best”. Lady Hale in her dissenting judgment said: “As CPAG point out, the Government accepted in its grounds of resistance to the claim that ‘the aim of incentivising claimants to work may be less pertinent for those who are not required to work’ (such as parents with young children)”.
2. Despite the courts’ clear appreciation of interveners, it may be that due to the unpredictability of judicial review proceedings interveners will be much more reluctant to provide assistance in the High Court and Court of Appeal in light of adverse costs consequences as section 87 of the Criminal Justice and Courts Act 2015 (set out in more detail below).

*Practical considerations and procedure for third party interventions*

1. The potential benefits of doing an intervention include:

* Raising the organisation’s public profile;
* Helping to achieve campaign objectives;
* Raising awareness of difficulties faced by particular groups in society, for example, children, elderly people or people with mental health problems.
* Raising awareness of issues that may not traditionally be at the forefront of a judge’s mind, such as the impact of planning laws on wildlife.
* The court may, as a result, have the benefit of information or evidence relevant to its decision which would not be put before it by one of the litigants but which will make its decision more relevant and evidence-based.
* Enabling arguments to be aired by non-victims in HRA-based judicial review cases. Claimants for judicial review under the 1998 Act must satisfy the “victim test”, which limits the issues of public interest that may be raised unless there are third parties that can intervene to do so.

42. The first question for any potential intervener must be to consider what they can add to a case that the parties cannot or have not already added. This may be expert evidence, information on the history or

development of a particular policy, case studies showing service user experience, an analysis of comparative law or a literature review.

43. If an organisation is sure that they have something to add that will assist the court, they will need to

apply for permission to intervene in the case. In order to do this it is likely to be helpful to enlist the assistance of a solicitor and counsel, unless these services are available in-house. Many solicitors and counsel will do interventions pro bono or for greatly reduced fees. It is important that organisations have a good working relationship with their lawyers from the outset so that arguments that further the organisation’s aims and objectives can be carefully put by the lawyers.

44. In preparing an application for permission to intervene it is important to consider the following issues.

These are all issues that lawyers will be able to advise on:

1. Permission of the parties
2. Costs and fees
3. Evidence
4. Written v. oral submissions
5. Other possible interveners
6. Timing

*Permission of the parties*

45. Before making an application for permission to intervene, an organisation should write to the parties to   
the litigation seeking their consent to the intervention, setting out why the intervention is necessary and seeking agreement on the costs position (see below). The responses of the parties should be included in an application for permission to intervene. It is often the case that one or both parties to the litigation will consent to the intervention, though it is not decisive for the judge’s decision.

*Costs and fees*

46. As stated above, most solicitors and barristers will be willing to represent an organisation doing a third   
party intervention pro bono or for reduced fees. The standard practice had previously been to state that the intervener will not seek its costs from any party and that in return it requires an undertaking that no party will seek their costs from the intervener. However for claims issued on or after 13 April 2015, section 87(3) of the Criminal Justice and Courts Act 2015 applies and interveners will be precluded from recovering its costs from another party unless the court considers there are exceptional circumstances which make it appropriate to do so.

47. Of more concern to interveners is the effect that section 87 of the CJCA will have in practice on liability

for other parties’ costs in the High Court or Court of Appeal (the Supreme Court has its own rules). Under section 87(5) of the CJCA if a party applies for costs against the intervener the court must order any costs that have been incurred as a result of the intervener’s involvement the court if one of four

conditions are met, unless the court considers there are exceptional circumstances that make it inappropriate to do so. The four conditions are as follows:

1. the intervener has acted, in substance, as the sole or principal applicant, defendant, appellant or respondent;
2. the intervener’s evidence and representations, taken as a whole, have not been of significant assistance to the court;
3. a significant part of the intervener’s evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of the stage in the proceedings;
4. the intervener has behaved unreasonably.
5. As with costs more generally, it is important that an intervener protects its costs position by acting reasonably (have Lord Hoffman’s warning in mind), only making points that the parties are not making, and not descending into the facts of the particular case or trying to advocate for a particular outcome on those facts.
6. It is still relevant for interveners to continue to seek the agreement of the parties that there should be no order as to costs for them; in effect, to ask other parties to confirm that they will not make an application under section 87(5) of the CJCA. This should be done prior to the application for permission to intervene and any related correspondence can be provided to the court in the application. It is difficult to see what incentive parties would have to agree to this, however time will tell.
7. Applying for permission to intervene at any level requires the intervener to pay a fee. There is no consistent guidance or practice on the circumstances in which the fee can be waived, although it is common practice for the Supreme Court to agree to waive the fee. If an organisation is in difficulty paying this fee, it should make representations to the court office about why the fee should be waived in its case.

*Evidence*

1. In some interventions it will be helpful and appropriate for the intervener to provide the court with evidence. If this is anticipated the application for permission to intervene should include a request for permission to make written and/or oral submissions (see further below) and a request for permission to provide succinct and relevant evidence. It will never be appropriate for an intervener to provide bundles and bundles of material for the court and the other parties to read and if it does, it risks getting into dangerous territory with costs. However, short bundles of pertinent evidence only can be of great assistance and can enable the intervener to make good their submissions in a unique way.

*Written v. oral submissions*

1. Interveners need to decide whether they want to apply simply to provide written submissions to the court or whether they want time to make oral submissions at the hearing. This is a matter of judgment depending on how much the intervener has to add. There is an argument that choosing not to do oral submissions risks the intervention being ignored, but there is clear evidence (see for example the Supreme Court’s emphatic reference to Mind’s written intervention in *SL (FC) v Westminster City Council* [2013] UKSC 27) that judges do pay heed to written submissions.
2. If a decision is taken to only make written submissions, it is possible for counsel for the intervener to attend the hearing anyway and then if an issue comes up which the judge would like assistance with from the intervener, counsel can provide that assistance.
3. If an intervener plans to apply for oral submissions, these should be realistic and modest. It is rare for the courts to grant permission for oral submissions from an intervener for more than one hour.

*Other possible interveners*

54. Interveners should consider approaching other organisations who might also have something to add to a case that is beyond the first intervener’s experience or remit. Many cases have more than one intervention (in the Supreme Court appeal of Cheshire West and Chester Council v P and Surrey County Council v P and Q there were 3 interventions - Mind and the National Autistic Society, the AIRE Centre and the Equality and Human Rights Commission), and it is also possible for organisations to merge their expertise so as to provide a joint intervention (see for example, Mind and Medical Justice in R (Das) v Secretary of State for the Home Department [2014] EWCA Civ 45). In the recent case concerning whether women from Northern Ireland are currently unlawfully denied abortions paid for by the NHS in England, heard by the Supreme Court in November 2016 (on appeal from R (A and B) v Secretary of State for Health [2015] EWCA Civ 771, six organisations in total intervened. Five organisations (Alliance for Choice, British Pregnancy Advisory Service, Birthrights, The Family Planning Association, The Abortion Support Network) made a joint intervention (with oral and written submissions) focusing on the legal framework concerning women's autonomy, dignity and choicer, and the relevance of the wider international law framework. The British Humanist Association made a separate intervention (with written submissions) focusing on the approach to justification of discriminatory treatment.

*Timing*

56. Applications for permission to intervene should be done as soon as possible - it is neither advisable nor effective to wait to apply for permission only to find that the preparation of the intervention then has to be squeezed into a very short time frame. This risks lowering the quality of the intervention and damaging the changes of future interventions being granted. It should be borne in mind that even if a hearing is not listed for months, it may still take the court a long time to get around to determining the application for permission to intervene.

1. The Supreme Court Practice Direction 6 (available on the Supreme Court website) sets out clear rules

and guidance on how to apply for permission to intervene and the timetable that kicks in if permission is granted. There is no equivalent guidance for the Administrative Court or the Court of Appeal. In order to ensure that parties are given sufficient time to consider the intervention and any evidence that is provided with it , it is advisable for interveners to prepare a draft order with a timetable for filing their documents. This is what Moses LJ advised in the case of R (HC) v Secretary of State for the Home Department and the Commissioner of Police of the Metropolis [2013] EWHC (Admin) 982:

“Much of the substantial material with which the court was provided came as a result of the submissions of the two interveners. A single judge, who it was not intended should sit on the application, gave permission for Coram Children's League Centre and the Howard League to intervene in writing. Despite an application seeking directions by the Secretary of State, no directions as to timing or the sequence of events which should be followed were obtained from that judge. The result was that lengthy written submissions from both were sent to the court at the same time as the first defendant's response. The first defendant's counsel had no reasonable opportunity to consider them in depth before the application started. No adjournment was sought, but it placed the first defendant under some difficulty. The court ordered both interveners to produce a summary of their submissions and provide the authorities and materials on which they rely. A huge bundle of authorities and other materials then appeared on the second day.

Counsel for the Secretary of State was too courteous to complain and skilfully dealt with the points which arose. But he should not have been placed under that sort of pressure. The interventions should have arrived at a proper time to be incorporated, insofar as the claimant wished, in the claimant's submissions and at a time when the defendants could properly respond. Many of the important arguments were not contained in the claimant's submissions but rather emerged, if one delved into the interstices, within the intervener's submissions.

All of this could have been avoided if a timetable had been set which required the interventions to be served at a time when the defendants could properly respond and the claimant decide which of the arguments within those interventions he wished to deploy. This application cried out for directions to be obtained, either in writing or at a case management hearing well before the hearing of the application and, if at all possible, by one of the judges who was going to hear it.”

*What to do if you don’t get permission to intervene?*

1. If you are refused permission to intervene in a case then that might not be the end of your organisation’s involvement in the issues. One way of trying to get your points across without intervening is to provide evidence through one of the parties to the litigation. This could take the form of a witness statement from your organisation that supports one of the party’s approach or you could informally contact one of the parties and identify the evidence and material that you think the court should have regard to - many will be receptive to your views and advice and will try to get this evidence before the court if it assists their case by putting it in context and helping the judges reach a good decision.
2. It is possible that you will not get permission to intervene at one stage of the case but that you may want to apply to intervene again if the case proceeds to a different court. There is nothing to stop an organisation applying for permission to intervene in the Court of Appeal or Supreme Court where it has been refused permission in the court below.

*Examples of cases where interventions have been valuable*

1. There is not room to go through the myriad interventions that have assisted the courts to reach their decisions in public interest cases. The following is a list of some key interventions which, if you are considering making an application for permission to intervene, would be useful material to show the value of an intervention, the shape that effective interventions take and the reliance that judges place on them:

* R v Lord Chancellor, ex parte Witham [1997] 2 All ER 779 (Public Law Project intervening).
* A v Secretary of State for the Home Department [2004] UKHL 56 (Liberty intervening).
* R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192

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|  | (Public Law Project intervening). |  |  |
| • | Yemshaw v Hounslow London Borough Council | [2011] | UKSC 3 (Secretary of State for |
|  | Communities and Local Government intervening). |  |  |

* X v Mid-Sussex Citizen’s Advice Bureau [2012] UKSC 59 (Secretary of State for Culture, Media and Sport intervening).
* R (T) v Greater Manchester Police and Secretary of State for the Home Department; R (JB) v Secretary of State for the Home Department; R (AW) v Secretary of State for Justice [2013] EWCA Civ 25 (Liberty and the Equality and Human Rights Commission intervening).
* Rabone v Pennine Care NHS Trust [2012] UKSC 2 (joint intervention by Liberty, JUSTICE, INQUEST and Mind).
* R (HC) v Secretary of State for the Home Department and the Commissioner of Police of the Metropolis [2013] EWHC (Admin) 982 (Coram Children’s Legal Centre and the Howard League for Penal Reform intervening).
* HH and PH v Italian Judicial Authority; F-K v Polish Judicial Authority [2012] UKSC 25 (Official Solicitor, Coram Children’s Legal Centre and JUSTICE intervening).
* R (Das) v Secretary of State for the Home Department [2014] EWCA Civ 45 (Mind and Medical Justice intervening).
* SL (FC) v Westminster City Council [2013] UKSC 27 (Mind and Freedom from Torture intervening).
* R(MM and DM) v Secretary of State for Work and Pensions [2013] EWCA Civ 1565 (Mind, the National Autistic Society and Rethink Mental Illness joint intervention).

**Public Law Project   
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