**SESSION 4: FUNDING**

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

**INTRODUCTION**

1. One of the biggest issues currently facing public lawyers for Claimants is how to fund judicial review

cases. The combination of severe cuts to the availability of legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (‘LASPO’), practices and provisions that force legal aid practitioners to work at risk, the impact of the cost capping provisions under the Criminal Justice and Courts Act 2015, and the effective abolition of success fees for CFAs as a result of the implementation of the Lord Justice Jackson reforms has been described as a *“perfect storm*4 which undermines the ability of individuals and organisations to hold public bodies to account through the vital mechanism of judicial review.

2. The important role of Claimant solicitors undertaking public interest litigation for impecunious clients   
via judicial review has been recognised at the highest level – see, for example, the comments of Lord Hope in In re appeals by Governing Body of JFS [2009] UKSC 1, [2009] 1 WLR 2353, paras. 24 and 25 (referred to in Session 4).

3. There are two aspects to funding that need to be considered by anyone thinking of bringing a judicial   
review:

1. Paying for your own legal costs
2. Paying the other side’s legal costs

4. To a significant degree these two facets are interlinked because, subject to what has just been said in

the previous session, generally costs follow the event so if you win your case you are likely to have to pay nothing (or a small amount depending on the nature of your funding agreement with your lawyers) but if you lose you will not only have to pay your own legal costs but also those of the successful Defendant (or the best part of them).

5. There are three main ways of covering your own legal costs in judicial review:

1. Paying privately;
2. Legal aid; or
3. Entering a Conditional Fee Agreement.

6. There are four main means of covering the potential liability to the other side:

1. Paying from your own resources;
2. Legal Aid costs protection;
3. Obtaining an Insurance policy;
4. Obtaining a Costs Capping Order (as Protective Costs Orders are now known following the

implementation of ss88-90 of the Criminal Justice and Courts Act 2015– considered further in session 6).

7. Typically judicial review cases will be brought and funded either: (a) by wealthy individuals, groups or companies who can afford to pay their own lawyers and run the risk of paying the Defendant’s costs if the claim fails; (b) the extremely impecunious who qualify for legal aid and thus have their legal costs paid (albeit at extremely low rates of pay) and are protected from adverse costs risk; or (c) other groups and individuals who must try to tailor an affordable package through a combination of using their own resources, raising fighting-funds (crowd-funding etc), negotiating CFAs with their lawyers, paying for After The Event insurance and, where appropriate, applying for Cost Capping Orders.

8. This session will deal briefly with private funding and crowdfunding and will then focus on Legal Aid and CFAs. Insurance is not covered in detail because it is so rare and unaffordable.

9. Before-the-event legal expenses insurance is often provided as an additional benefit on contents and other insurance policies, mortgage policies, credit card agreements and as a benefit to members of a trade union or association. The policies differ and each policy will list the types of court proceedings it covers. If the policy does provide cover, then the insurer will meet the Claimant’s legal costs to a specified level (and at specified rates) and, if there is sufficient cover, also the other side’s costs. The insurer must also allow the Claimant to instruct a solicitor of his or her choice. Unfortunately most such policies expressly exclude judicial review.

10. There is an after-the-event legal expenses insurance market which will cover the adverse costs risk and sometimes disbursements (but not usually legal fees). Even before the abolition of the recovery of insurance premiums from Defendants under the Jackson reforms, ATE insurance was only available in the strongest of judicial review cases and usually at a prohibitively high cost (usually in excess of 50% of the sum insured). With the loss of the ability to recover premiums from

Defendants, and with no damages in play which insurers can use to recoup the premium from, it seems highly unlikely that any insurer would touch a judicial review without an up-front payment of a very high premium.

**A. Paying Privately**

11. This can be split into:

1. Traditional hourly rate payment;
2. Fixed fees.

These two options are summarised below.

***(i) Traditional hourly rate payment***

12. Note:

* Hourly rates set by solicitors firms (and barristers) dependent upon location of firm and experience of fee earner;
* Disbursements (expenses) paid in addition (Court fees, travel expenses, expert fees etc.);
* Expensive – typically anything from £20-50,000 for a judicial review going all the way to final hearing, although this is dependent upon the case and the lawyers instructed;
* Possible to ask to have costs independently assessed - Part III of the Solicitors Act 1974.

***(ii) Fixed Fees***

13. Note:

* Becoming more common for lawyers to agree to act on a fixed fee (or fees fixed by stage of the proceedings);
* Risky for lawyers given the unpredictable nature of litigation;
* Therefore usually offered as part of a CFA, with full fees payable in the event that the claim succeeds.

**B. Crowd funding**

14. It may be possible to raise money to meet your own legal costs and/or any liability to pay your opponent’s costs (most likely where these have been capped under a Costs Capping Order) through a fundraising campaign or appeal. The use of “crowd funding” to raise a fighting fund to litigate issues which have are of interest to a section of the public, or which may draw sympathy, has gained momentum in recent years.

15. Not all cases will be suitable for funding in this way. Such appeals are more likely to be successful where the issue is one which will grab the public’s attention, and especially if there is a group of people who are already interested in the issue, for example a campaign to save the closure of a local amenity such as a library. Even then it may be that the prospects of raising enough funds will be limited where the community with an interest is generally impecunious.

**C. CFAs**

16. CFAs are commonly known as *“no win, no fee”* agreements. Lawyers act ‘at risk’ of not being paid. However, in recognition of this risk the client agrees to pay the lawyers their full fees plus a success fee (of up to 100%) if they win.

1. CFAs are relatively rare in judicial review because of the unpredictability of outcome. This unpredictability of outcome is for a number of reasons, including: the nature of the process of judicial review itself (as we have previously seen, judicial review is a discretionary remedy). Compare tort claims, for example, where prospects of success can often be put at a very high level.
2. Typically, under a CFA disbursements will still have to be met by the client. It has now been confirmed by the Court of Appeal that lawyers can fund disbursements (and this is not champerty), but this is likely to be offered rarely: Flatman v. Germany [2013] EWCA Civ 278.
3. There are complex regulations which govern CFAs where a success fee is claimed. The ability to recover a success fee from the Defendant was abolished in April 2013, and the client is now liable for any success fee out of own pocket.

***‘CFA Lite’***

1. A ‘CFA Lite’ limits costs to those recovered from the other party. It is essentially an agreement that the lawyers will not seek any costs from the client whatever the result. However, the client must seek to recover costs from the other side and pay these costs to the lawyers.
2. It is now understood to be settled that such arrangements do not infringe the indemnity principle.
3. The great benefit of the CFA Lite for lawyers is that it cuts out the need to comply with all of the CFA regulations. However, the down-side for lawyers is it limits the costs that they are paid.

***Discounted CFA***

1. Under a Discounted CFA, costs are charged at discounted rates, or on a fixed fee basis with full fees payable (including a success fee under a traditional CFA arrangement) if the case is won. This can operate as a traditional CFA (with success fee) or as a CFA Lite agreement.
2. This has always been permissible but it is likely to become more common as lawyers seek ways of mitigating the risk now that success fees are no longer recoverable from the Defendant.

**D. Legal Aid6**

1. The ‘scope’ of the legal aid scheme is very limited. Legal aid is only available for certain issues set out in schedule 1 to LASPO. However, where a matter is not within scope, an application for Exceptional Case Funding can be made on the basis that there is a risk of a breach of Convention Rights if Legal Aid is not granted7. Judicial review matters remain within the scope of Legal Aid, subject to certain exclusions (for example, where the judicial review does not have the potential to benefit the individual, their family or the environment or certain immigration cases8).

***Financial Eligibility***

26. There are strict means eligibility criteria which govern the availability of legal aid to an individual. In summary:

a) Income:

* Monthly *“disposable income”* of less than £315 (or less than £733 subject to an ongoing monthly contribution);
* *“Disposable income”* is very strictly construed by reference to certain listed allowances;
* Maximum gross monthly income of £2,657 in any event;

1. Receipt of certain income-based benefits bypass the income assessment, but no longer exempt individuals from capital assessment.
2. Capital: less than £3,000 (or less than £8,000 with a capital contribution). As of 28 January 2021 all of the mortgage on the client’s home is disregarded9. £100,000 of the client’s equity in their home is also disregarded. The remaining value is included in the capital assessment. Following the case of GR v. Director of Legal Aid Casework [2020] EWHC 3140 the Legal Aid Agency (LAA) has a discretion to value capital *other than money* on an equitable basis (i.e. by valuing at ‘nil’ so that it does not affect eligibility)10. The LAA should be invited to do so if valuing a property or asset at market value would be unfair e.g. because a client has ‘trapped capital’ which exists on paper but in practice cannot be accessed or used to fund legal representation11. Notwithstanding these positive recent developments, many home-owners are still unlikely to be eligible for legal aid. For a judicial review, it is likely that anyone falling in the contribution band for capital (£3,001-£8,000) will in practice have to make the full capital contribution of £4,999;

27. It is important to remember that means eligibility is also calculated by reference to joint income with a partner. If another person ‘is, has been or is likely to be substantially maintaining’ the individual or making resources available to them, the LAA can take that persons resources into account in the assessment (Reg 16(5) of the Means Regulations).

***Legal Aid: Funding Types***

28. There are three different types of legal aid funding of relevance:

1. **Legal Help**: for initial advice and assistance;
2. **Investigative Representation**: to cover the cost of investigating a potential claim where additional work is required to assess the merits (e.g. where expert evidence or counsel’s opinion is required);
3. **Full Representation:** level of funding required to issue JR proceedings.

*(i) Legal Help*

29. This is the level of service whereby solicitors can provide basic legal advice to a client on a public law issue where the solicitors giving the advice have a public law contract with the LAA. Note:

* Solicitors are able to offer legal help without reference to the LAA (subject to an annually allocated number of matters);
* “Public law” is defined for the purposes of solicitors’ contracts with the LAA to exclude non-judicial review matters such as complaints to an ombudsman;
* In most cases advice should be provided face to face;
* Lawyers are paid a fixed fee (£259) or an hourly rate once the escape fee (£777) has been reached.
* Cannot generally instruct counsel or incur significant expenses;
* In most cases the LAA expect this work to include engaging in Pre-action Protocol correspondence with a public body, although this is a grey area.

*(ii) Legal Representation*

30. “Legal representation” is defined in Reg 18(2) of the Civil Legal Aid (Merits Criteria) Regulations 2013 as:

“the provision of civil legal services, other than acting as a mediator or arbitrator, to an individual or legal person in particular proceedings where that individual or legal person—

1. is a party to those proceedings;
2. wishes to be joined as a party to those proceedings; or
3. is contemplating issuing those proceedings.”

There are two types of Legal Representation, as stated above, namely Investigative Representation, and Full Representation. These are the types of legal aid that are required if a person is

contemplating taking active steps towards litigation.

31. It is possible to apply for legal aid on an ‘emergency basis’ in which case the application will be decided on the basis of limited information (without full evidence of means), with a 48 hour target for

consideration by the Legal Aid Agency. A substantive application must then be made within 7 days. An

emergency certificate can be withdrawn or revoked if the client is later found to be ineligible on consideration of the substantive application12.

*(ii)(a) Investigative Representation*

1. This level of funding is limited to investigating the strength of contemplated proceedings, where, without the work for which legal aid is sought, the merits of the claim are unclear. In these circumstances, investigative representation can cover evidence gathering, the instruction of an expert or, obtaining counsel’s advice on the merits where the case involves a difficult point of law or the application of the law to the facts is complicated.
2. Solicitors must apply to the LAA for a ‘certificate’ to provide this service to a particular client. The certificate will limit the work undertaken and set the maximum costs which can be incurred.
3. Once the merits of the potential claim are clear, and if it is a sufficiently strong case, you can apply to the LAA for Full Representation.

*(ii)(b) Full Representation*

1. This is the level of service required to issue (or to represent a client in extant) JR proceedings.
2. Solicitors must apply to the LAA for a ‘certificate’ to represent the client. Certificates issued by the LAA control the stages of work that can be carried out in a JR and the maximum costs that can be incurred.
3. In order to be awarded Legal Representation (i.e. either Investigative Representation or Full Representation), the client needs to satisfy the merits criteria set out in the *Civil Legal Aid (Merits Criteria) Regulations 2013.* This includes both Standard and Additional criteria (Regs 39 and 53) and Public Law Specific criteria (Reg. 56).
4. **Standard & Additional Criteria (Regs. 39, 53):** It is necessary to show that:

* No other source of funding is available to bring the claim (e.g. union, charity, financial backer etc.), including other individuals who would benefit from the outcome of the proceedings (39);
* The case is unsuitable for a CFA (NB: note difficulties with insurance for JRs) (39);
* All ‘effective’ alternative remedies have been exhausted (39 and 53);
* There is a need for legal representation in the circumstances of the case (39);
* The act, omission or matter complained of is susceptible to JR (53).

39. **Public Law Specific Criteria for Full Representation (Reg 56)** It is necessary to show that:

* A letter before claim has been sent to the Public Authority (except where impracticable) (56(2)(a));
* The proportionality test is met (56(2)):

*“the likely benefits of the proceedings to the individual and others justify the likely costs, having regard to the prospects of success and all the other circumstances of the case” (Reg. 8)*

 The prospects of success test is met (56(3)), meaning that either:

* The prospects of success are moderate or better (above 50%)
* The prospects of success are marginal (45-49%) or borderline and:
* the case is of significant wider public interest;
* the case is one with overwhelming importance to the individual;
* the substance of the case relates to a breach of Convention right.13

***Refusal of Legal Representation***

1. An application for a certificate may be refused at the outset, or the certificate may be withdrawn by the LAA if they consider that the criteria are no longer met.
2. A review may be requested of the decision within 14 days.
3. If the decision is upheld, an appeal may be made to an Independent Funding Adjudicator. The appeal is usually dealt with on the papers. The Adjudicator’s decision is not always binding on the LAA but it would be very unusual for it not to be followed.
4. Note that there is no right of appeal to an IFA where an application has been submitted under the emergency procedure.
5. Note that the Adjudicator can only determine certain issues relating to the Merits criteria and not, for instance, whether someone is means eligible or whether the services fall within LASPO.
6. The only alternative avenue if an appeal is not successful (or available) would be another judicial review.

***Payment on Permission***

1. Not content with the sweeping restrictions on legal aid rates introduced by LASPO, the Government has also restricted the circumstances in which legal aid will be paid to lawyers in judicial review cases.
2. Regulation 5A inserted into the Civil Legal Aid (Remuneration) Regulations 2013 by the Civil Legal Aid (Remuneration) (Amendment) (No3) Regulations 2014 placed all pre-permission work at risk. This came into force on 22 April 2014.
3. However in R(Ben Hoare Bell & ors.) v Lord Chancellor, the Court found that there was no rational connection between the effect of the regulations and its stated purpose [43], and that the reach of the regulations “*extends well beyond those in which such a regulation could lawfully incentivise providers to a sharper focus on the merits test in the way described in the consultation papers”* [52]. Accordingly, the Court found that the Lord Chancellor did not have the power to make such regulations and they were quashed.
4. In response the Lord Chancellor immediately (and without any further consultation) introduced new regulations. The position now is that for any application for a legal aid certificate for a judicial review made on or after 27 March 2015, funding will be ‘at risk’ at the permission stage if permission is refused, unless a Defendant withdraws the decision under challenge, or the court directs an oral permission hearing, or a ‘rolled up’ hearing of the claim14.
5. In other situations where the Court has neither granted nor refused permission, payment is at the discretion of the Lord Chancellor and he may only make payment if he considers it is reasonable in the circumstances of the case, taking into account, in particular—
6. the reason why the provider did not obtain a costs order or costs agreement in favour of the legally aided person;
7. the extent to which, and the reason why, the legally aided person obtained the outcome sought in the proceedings, and
8. the strength of the application for permission at the time it was filed, based on the law and on the facts which the provider knew or ought to have known at that time.

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