



**Public Law Project**

**The Public Law Project's submission to Lord Justice  
Jackson's review of fixed recoverable costs**

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## Introduction

### The Review

Lord Justice Jackson's review of fixed recoverable costs was announced on 11 November 2016 with the following terms of reference:

1. To develop proposals for extending the present civil fixed recoverable costs regime in England and Wales so as to make the costs of going to court more certain, transparent and proportionate for litigants.
2. To consider the types and areas of litigation in which such costs should be extended, and the value of claims to which such a regime should apply.
3. To report to the Lord Chief Justice and the Master of the Rolls by the 31<sup>st</sup> July 2017.

The accompanying press release states that this review is:

“a logical extension of [Lord Justice Jackson's] wider review of civil litigation procedures and costs (published in 2010), in which he first recommended the application of fixed recoverable costs. This has been agreed with the Government and will inform its public consultation on proposed reforms, which will follow the review after consideration of its recommendations.”

Lord Justice Jackson has invited written evidence or submissions with no fixed format or list of questions, although the press release also indicates:

- If evidence is being submitted of actual recoverable costs, this should identify the type of case, and the source of evidence, taking into account the Civil Procedure Rules on proportionality (and the factors set out in rule 44.3 (5));
- Views on the level of claim at which fixed recoverable costs should stop and costs budgeting should apply instead are sought;
- Views on how to accommodate counsel's fees, experts' fees and other disbursements within a fixed recoverable costs regime are sought; and
- Comments on the difference which frequently arises between claimant and defendant costs, are also invited.

This document is PLP's submission to Lord Justice Jackson's review.

### PLP's work

The Public Law Project (PLP) is an independent national legal charity which aims to improve access to public law remedies for those whose access is restricted by poverty, discrimination or other similar barriers. Within this broad remit PLP has adopted three main objectives:

- increasing the accountability of public decision-makers
- enhancing the quality of public decision-making;
- improving access to justice.

Uniquely for an organisation of its kind, PLP undertakes research, policy initiatives, casework and training in order to achieve its charitable objectives. Research projects carried out by PLP have focussed on both the judicial review process and various aspects of alternative dispute resolution, and were often conducted in collaboration with academics specialising in public law at various universities. PLP's work has, over the years, played a part in the formation of government policy and legal reform. For example:

- (1) In 1995 PLP published *Judicial Review in perspective: Investigation of the trends in the use and operation of the Judicial Review procedure in England and Wales*.
- (2) Since then, PLP's completed research projects include *Third Party Interventions in Judicial Review: An Action Research Project*, (2001), which was followed by the insertion of CPR Rule 54.17, which sets out the procedure for third party interventions in the Administrative Court; *The Impact of the Human Rights Act 1998 on Judicial Review* (2003); *The Dynamics of Judicial Review* (2009) (which considered the resolution of public law challenges before final hearing); *Designing redress: a study about grievances against public bodies* (2012) and, most recently, *The Value and Effects of Judicial Review* (October 2015).
- (3) In October 2015, PLP also published, together with the Bingham Centre for the Rule of Law and JUSTICE, *Judicial Review and the Rule of Law: An Introduction to the Criminal Justice and Courts Act 2015, Part 4*. In a foreword to that report, The Rt Hon Lord Woolf CH, commending the report, commented that:

"It is helpful that its guidance is the product of three bodies, the Bingham Centre for the Rule of Law, JUSTICE and the Public Law Project, whose record demonstrates their commitment to justice. Their involvement means that this publication can be expected to be treated with the greatest of respect."

PLP's lawyers provide advice and representation acting for disadvantaged individuals and interest groups via civil proceedings (chiefly judicial review), and also complaints and Ombudsman schemes. Our cases are often brought on public interest grounds, where there is no or little financial value to the claimant. We have often made third party interventions in proceedings brought by others to raise matters of public interest, particularly in relation to questions of access to justice and costs (including costs protection). In addition to casework, we run a vibrant events and conferencing programme.

PLP undertakes and publishes empirical research, and engages constructively with policy issues impacting the public law/access to justice landscape.

PLP has been involved in a number of important cases concerning access to the court, particularly for disadvantaged members of society. Specific examples include:

- The establishment of guidelines for the exercise of the jurisdiction to grant a Protective Costs Order (*Corner House Research v Secretary of State for Trade and Industry* [2005] EWCA Civ 192; [2005] 1 W.L.R. 2600) (As Third Party Intervener)
- The circumstances in which a costs order should be made where judicial review proceedings are disposed of by consent pre-permission (*R (Bahta) v SSHD* [2011] EWCA Civ 895; [2011] C.P. Rep. 43) (As Third Party Intervener)
- The availability of judicial review of a decision of the Upper Tribunal (*R (Eba and Cart) v Upper Tribunal* [2012] 1 AC 710) (as Third Party Intervener)
- The correct application of the 'second appeals test' in CPR 52 to appeals from the Upper Tribunal in asylum cases (*JD Congo v SSHD* [2012] 1 W.L.R. 3273) (As Third Party Intervener)
- Confirmation that legal aid regulations providing for no payment to be made for work on judicial review proceedings unless permission is granted were *ultra vires* (*R (Ben Hoare Bell and others) v Lord Chancellor* [2015] EWHC 523 (Admin)) (As Solicitors).
- Supreme Court ruling that the imposition of a 'residence test' for civil legal aid would be *ultra vires* (*R (PLP) v Lord Chancellor* [2016] UKSC 39) (As Claimant).

Since 2013 a major policy focus for PLP has been to mitigate, where possible and appropriate, the worst effects of the legal aid cuts introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO'). In addition to some of the cases listed above PLP has provided a service to vulnerable litigants in need of 'Exceptional Case Funding' ('ECF'), assisting such individuals to obtain legal aid in compelling cases now removed from the scope of the general civil legal aid scheme. As a result of this work PLP has developed particular expertise in the technical scope and practical availability of legal aid post-LASPO.

## Structure of PLP's response

- i. **Introductory note on terminology:** In our research and consultation to inform this response we identified that there is no shared understanding as to the type of regime that 'fixed costs' may indicate and/or what that may encompass.
- ii. **Judicial review:** We explain why judicial review is a special case, both in principle and in practice. We give examples from our experience and provide some important context, including the current state of the legal aid scheme.
- iii. **Fixed costs – applicability/desirability of any fixed cost model in judicial review.** We consider the options in light of the evidence and conclude that the appropriate costs model for judicial review is qualified one way costs shifting (QOCS).
- iv. **Summary of key points.**

## i. Note on terminology

This consultation has triggered significant debate in the public law community. Whilst that it is of itself positive, it has appeared that there is no one definition of ‘fixed costs’ and the type of regime that might encompass. That uncertainty has not been assisted by PLP; the report we co-authored with JUSTICE and the Bingham Centre of the Rule of Law might have benefited from greater drafting precision. But it appears clear to us that stakeholders have been using the short-hand terminology of ‘fixed costs’ to refer to a number of different concepts and models. We seek to address that ambiguity here.

The use of the terms ‘**fixed costs**’ and ‘**fixed recoverable costs**’ can mean one of a number of different costs regimes which seek to limit parties’ exposure to the costs incurred by the other party in litigation.<sup>1</sup> The press release announcing the review states that the purpose of the review is to “*develop proposals for extending the present civil fixed recoverable costs regime*”. In Part 3 of the Final Report of the Review of Civil Litigation Costs (‘the Final Report’) (December 2009), Lord Justice Jackson defined ‘fixed costs’ as “*a general term to embrace (a) costs for which figures are specified and (b) costs which can be calculated by a predetermined means, such as the formulae in CPR Part 45*”.<sup>2</sup> He further stated that “*I use “FRC” to mean the fixed recoverable costs set out in CPR Part 45, section II*”. Within the Final Report, Lord Justice Jackson canvassed – and made recommendations as to – a number of different models of fixed costs. These included fixed litigation and trial costs in fast track claims;<sup>3</sup> and ‘**qualified one way costs shifting**’ (‘**QOCS**’) for personal injury claims<sup>4</sup> and for claimants in other cases where the parties are in an asymmetric relationship, such as in actions against the police and judicial review claims.<sup>5</sup>

Part 45 of the Civil Procedure Rules (‘CPR’) now contains a variety of regimes of fixed costs, including:

- Fixed costs, determined in accordance with the value of the claim for the commencement of certain types of claim (Sections I and V) and for fast track trial costs (Section VI)

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<sup>1</sup> For example, those set out in Parts 44 and 45 CPR.

<sup>2</sup> Chapter 15, paragraph 1.2. See also the definition given in his January 2016 lecture: “an abbreviation for a regime of scale or fixed costs, under which the amount recoverable is prescribed by the rules or can be calculated arithmetically in accordance with the rules”.

<sup>3</sup> Chapter 15.

<sup>4</sup> Chapter 19.

<sup>5</sup> Chapter 9, paragraph 5.11 and Chapter 30.

- Fixed costs on settlement for Road Traffic Accidents ('RTA') claims, and for cases covered by the pre-action protocols for low value personal injury claims in RTAs, employers' liability and public liability claims (Sections II-III). In these claims the recoverable costs are based on a percentage of the damages recovered on judgment or settlement, or the value of the claim if costs are awarded to the defendant,<sup>6</sup> with provision for the claimant to seek assessment of costs and recover more than the fixed costs in 'exceptional circumstances'.
- 'Scale costs' in Intellectual Property claims, where a cap on the recoverable costs applies for each stage of proceedings up to a maximum of £50,000 following a final determination of liability, or £25,000 on an inquiry as to damages or account of profits (Section IV).
- Provision for environmental judicial review claims covered by the Aarhus Convention (Section VII), fixing the claimant's liability to pay the defendant's costs at £5000 (for individuals) or £10,000 (for businesses or other legal persons), and the defendant's liability to pay the claimant's costs at £35,000.

In these submissions, reference to **fixed costs** is to a regime of costs of the kind set out in Part 45, other than **Aarhus claims** which are addressed separately. **QOCS** is treated separately from other kinds of fixed costs.

Lord Justice Jackson proposed a regime by which all personal injury claimants and all judicial review claimants would benefit from protection akin to that which s. 11 of the Access to Justice Act 1999 then conferred on legally aided parties.<sup>7</sup> He proposed the insertion of a rule by which the costs recoverable from a claimant "*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*".<sup>8</sup> He considered that this formulation would allow the court to make an adverse costs order against the claimant where (a) the claimant has behaved unreasonably; (b) the defendant is neither insured nor a large organisation which is self-insured; or (c) the claimant is conspicuously wealthy.<sup>9</sup>

As an alternative, Lord Justice Jackson proposed that if thought appropriate, there could be a default position (in addition to the basic rule above) set out in a practice direction by which,

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<sup>6</sup> Determined in accordance with CPR 45.29F(4).

<sup>7</sup> Costs protection for legally aided parties is now provided by s. 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

<sup>8</sup> Paragraph 4.7 of Chapter 19.

<sup>9</sup> Chapter 19, paragraph 4.8.



and save in exceptional circumstances, the claimant's liability to pay the defendant's costs would be limited to £3,000 for pre-permission costs, and £5,000 for the whole case if permission is granted.<sup>10</sup>

**QOCS** has however come to mean the system of qualified one way costs shifting which was implemented by the Government following its consideration of the recommendations in the Final Report. This system (governed by CPR 44.13-17), which applies only to personal injury claims (including Fatal Accidents Act 1976 claims), may be summarised as follows:

- (1) If the claimant is successful, and the defendant is ordered to pay his costs, the claimant can recover the full amount of his assessed costs (subject to the normal rules on proportionality, reasonableness and necessity).
- (2) If the claimant is unsuccessful in his claim and recovers no damages he will not generally be liable to pay any of the defendant's costs.
- (3) If he is partially successful, but a costs order is made in the defendant's favour, the defendant will be able to recover his costs up to the total amount of damages and interest which the claimant has recovered.
- (4) There are specific exceptions allowing orders for costs to be enforced against claimants to the full extent (i) without permission where the claim is struck out as an abuse of process or because there are no reasonable grounds for bringing the claim and (ii) with the permission of the court where (a) the claim is fundamentally dishonest (b) the claim is made for the financial benefit of another or (c) the claim includes a claim for relief other than personal injury damages.

There is no consideration of the financial circumstances of the parties or of their conduct of the proceedings beyond that which falls within the specific exceptions identified above.

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<sup>10</sup> Chapter 30, paragraph 4.9.

## ii. Judicial review

PLP is chiefly concerned with the application and development of public law and administrative practice. This submission will therefore mainly focus on judicial review. In this respect we note that some of the points as to the particular significance of judicial review may also be applicable to other claims which while on one view quantifiable as money claims are also relevant to state abuse of power and attract additional constitutional significance as such (for example, actions against the police and/or claims under the Human Rights Act 1998). However, in line with PLP's remit and expertise our response will focus on judicial review proceedings.

### Constitutional role

There are important reasons of both principle and practice for treating judicial review as a special case when considering the question of costs. As to principle, the important constitutional role played by judicial review is well known and has been repeatedly stated by the senior judiciary. See, for example:

“Authority is not needed (although much exists) to show that there is no principle more basic to our system of law than the maintenance of rule of law itself and the constitutional protection afforded by judicial review.” (*R (Cart) v Upper Tribunal*, per Lord Dyson JSC at para 122)

“The constitutional importance of judicial review does not require elaboration...” (*R (PLP) v Secretary of State for Justice*, Moses LJ (in the Divisional Court) at para 31)

“There is however another relevant principle which must exist in a democratic society. That is the rule of law...The principles of judicial review give effect to the rule of law. They ensure that administrative decisions will be taken rationally, in accordance with a fair procedure and within the powers conferred by Parliament...” (*R (Alconbury Developments Ltd and Others) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, per Lord Hoffmann, para 73)

“Judicial review constitutes a safeguard which is essential for the rule of law: it ensures that public authorities are accountable and act lawfully; it guards against abuses of power and protects the rights of those affected by the exercise of public power; and it polices the parameters of the duties imposed and powers bestowed by Parliament.” (Response of the senior judiciary to the Ministry of Justice's consultation entitled 'Judicial Review: Proposals for Further Reform', November 2013<sup>11</sup>)

The special role of judicial review in the constitution has also been recognised by Government. For example, in the consultation paper that led to LASPO, explaining the reasons for its proposal to retain legal aid for judicial review proceedings, the Coalition Government explained that:

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<sup>11</sup> <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf>

“In our view, proceedings where the litigant is seeking to hold the state to account by judicial review are important, because these cases are the means by which individual citizens can seek to check the exercise of executive power by appeal to the judiciary. These proceedings therefore represent a crucial way of ensuring that state power is exercised responsibly.”<sup>12</sup>

The constitutional importance of judicial review is eloquently summarised in the introduction to the Bingham Centre for the Rule of Law’s paper, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law*.

“Judicial review is the mechanism by which the courts hold public authorities to account for the legality of their conduct. It is the reason we can be confident that Ministers and other public bodies will do what Parliament has authorised and required them to do, and act in accordance with their common law duties. It is the mechanism by which individuals and businesses are protected from official or regulatory action that is unreasonable or unfair, arbitrary or abusive, unjustified or disproportionate. It ensures that the officials and bureaucrats who exercise public power are subject to the law, rather than being a law unto themselves. An effectively functioning system of judicial review is central to the rule of law.”<sup>13</sup>

The importance of practical accessibility was emphasised by the President of the Supreme Court, Lord Neuberger, in evidence to the House of Lords Constitution Select Committee in June 2014 when he said that: “*If you don't have a healthy and accessible judicial review function for the courts then you don't have a satisfactory modern democratic society.*”<sup>14</sup>

In the vast majority of cases, judicial review has at its heart an imbalance of power. On the one hand is an individual. They will almost always be a lay person, unfamiliar with the history, principles and procedure of judicial review. In many cases arising in the social welfare context they may be disabled, or unable to read or write in English. And by equal measure, in the vast majority of cases the defendant will be a (comparatively) well-resourced public body, well appraised of its legal powers and duties, and with a standing legal team, whether in-house or at the Government Legal Service/Treasury Solicitor.

There will of course be those cases in which the claimant is a body corporate and the inequality less stark. And there may be a very small number of cases where the inequality is in effect reversed (the parish council challenged by developers) but they are the exception rather than the rule.

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<sup>12</sup> Proposals for the Reform of Legal Aid in England and Wales, Consultation Paper CP12/10, November 2010, para 4.16.

<sup>13</sup> Michael Fordham QC, Martin Chamberlain QC, Iain Steele and Zahra Al-Rikabi, *Streamlining Judicial Review in Manner Consistent with the Rule of Law* (February 2014, Bingham Centre Report 2014/01), page 4 [http://www.biicl.org/files/6813\\_bingham\\_jr\\_report\\_web.pdf](http://www.biicl.org/files/6813_bingham_jr_report_web.pdf)

<sup>14</sup> <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldconst/18/1803.htm> para 11.

As Michael Fordham QC and Jessica Boyd explained in their paper presented to the Judicial review seminar held during the 2009 Review, “judicial review is special”:

“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.”<sup>15</sup>

## Procedural Differences

Flowing from its special constitutional status is the fact that judicial review can be distinguished from ordinary civil proceedings on a number of different bases including the procedure that is followed and the relief sought.

There are important practical reasons why claimants’ costs of judicial review proceedings will generally exceed defendants’ costs.

A lay claimant will need to provide detailed instructions before they can be advised whether there are meritorious grounds, a process which will almost inevitably be significantly more time consuming than the equivalent task with an experienced officer of a Defendant body, with knowledge of the legal process and all relevant documentation readily to hand.<sup>16</sup> There may well be research to undertake and/or witnesses from whom to take statements. The significant time this exercise takes will be greater where claimants are distressed, confused, illiterate, don’t speak English, mentally ill, communication impaired, or have other characteristics frequently seen by lawyers acting for more vulnerable groups.

The Pre-action Protocol requires the claimant to send a detailed letter before claim to the defendant setting out his/her case and proposed grounds of challenge. This also requires significant front-loading of work by the claimant’s representatives.

In order to commence proceedings, a judicial review claimant is required to provide with the claim form “a detailed statement of the ... grounds for bringing the claim for judicial review”, together with a statement of facts.<sup>17</sup> S/he must also provide copies of all documents on which s/he intends to rely, as well as the relevant statutory materials, and must provide a list of essential reading for the assistance of the court. There is no provision in the rules or

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<sup>15</sup> Quoted by Lord Justice Jackson, Final Report, Chapter 35, paragraph 2.2.

<sup>16</sup> “...the vast majority of the cards will start in the authority’s hands” (*R v Lancashire County Court, ex p. Huddleston* [1986] 2 All ER 941 at 945).

<sup>17</sup> Paragraph 5.6 of CPR PD54A.

practice directions for claimants to supplement their grounds or respond to any summary grounds of defence before permission is considered so there is a heavy onus to ensure that the facts and grounds are detailed and comprehensive at the outset.

There is a heavy duty on the claimant to act with candour in setting out his grounds for relief and in selecting, identifying and explaining the documents included in the permission bundle. As the Court of Appeal recently explained in *R (Khan) v SSHD* [2016] EWCA Civ 416, although the duty on a judicial review claimant is not as high as the duty on a government department:

“...providing a partial explanation in the statements of grounds and facts which is misleading will be a breach of the duty of candour in an application for judicial review even where it is not linked with a without notice application for an injunction. Beyond that, in particular, I do not consider that it suffices to provide a pile of undigested documents, particularly in a document heavy case, or where the claimant has knowledge which enables him or her to explain the full significance of a document. I also consider that in considering the effect of a failure to explain material in a disclosed document that is adverse to the claim, it is relevant to consider whether the failure to explain the material was innocent in the sense that the relevance of the material was not perceived.” (*per* Beatson LJ at para 46)

If urgent interim relief is sought, particularly on an *ex parte* basis, that duty is even higher. Munby J (as he then was) explained in *R (Lawler) v Restormel BC* [2007] EWHC 2299 (Admin) that in such circumstances:

“the duty to make proper disclosure requires more than merely including relevant documents in the court bundle. Proper disclosure for this purpose means specifically identifying all relevant documents for the judge, taking the judge to the particular passages in the documents which are material and taking appropriate steps to ensure that the judge correctly appreciates the significance of what he is being asked to read”.

By contrast at the permission stage the defendant is only required to provide an Acknowledgement of Service and set out a summary of his grounds for resisting the claim if he intends to do so. If the defendant fails to file an Acknowledgement of Service and permission is granted, he can still participate in the proceedings for judicial review providing that he complies with the rules or any directions as to the service of detailed grounds of defence and any evidence. The duty of candour on the claimant includes “*a duty to reassess the viability and propriety of a challenge in the light of the respondent's acknowledgment of service and summary grounds*” (*Khan*, para 48). If permission is refused the claimant may renew the application to an oral hearing which the defendant is not normally required to attend, and for which it may not ordinarily recover its costs of attending if not required to do so.

Although once permission is granted there is a heavy onus on the defendant to comply with the duty of candour and provide a full explanation for the decision, many judicial review claims settle before permission is considered.<sup>18</sup> Of those that continue to the permission stage, only a minority are granted permission<sup>19</sup> and of those that are, a further proportion will settle before the final hearing and often before the defendant has filed detailed grounds or evidence.

If the matter proceeds to a full hearing, the claimant bears the burden – and therefore cost – of preparing trial and authorities bundles for the court and all parties. It is the claimant's skeleton argument which must ordinarily be filed first. The claimant will open the hearing and so his advocate will need to set out the legal and factual framework into which the submissions on the grounds will fit.

### Judicial Review – recent reforms

Recent years have seen the executive characterise judicial review as bad for business, unbalanced in favour of claimants and plagued by growth and abuse.<sup>20</sup>

PLP's empirical research does not support the Government's characterisation of judicial review. PLP's October 2015 report "*The Value and Effects of Judicial Review*"<sup>21</sup> sought to examine the basis for three key assumptions about judicial review which had underpinned recent government reform. First, that the past growth in the use of judicial review has been largely driven by claimants abusing the system, either deliberately or otherwise. Second, that the effect of judicial review on public administration is largely negative because it makes it more difficult for public bodies to deliver public services efficiently. Third, that judicial review tends to be an expensive and time consuming detour concerned with technical matters of procedure that rarely alters decisions of public bodies. PLP's research, based on a study of all judicial review claims which proceeded to a final hearing over a 20-month period as well

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<sup>18</sup> Research by PLP published in 2009 found that 34% of judicial review claims which are issued are withdrawn before permission, mostly because they settle: see *The Dynamics of Judicial Review Litigation*, June 2009, page 37. Available at: <http://www.publiclawproject.org.uk/data/resources/9/TheDynamicsofJudicialReviewLitigation.pdf>

<sup>19</sup> See the article by PLP's former research director Varda Bondy at <https://ukconstitutionallaw.org/2013/01/10/var-da-bondy-and-maurice-sunkin-judicial-review-reform-who-is-afraid-of-judicial-review-debunking-the-myths-of-growth-and-abuse/> for a discussion of the statistics relied on by the Government in support of its proposals for reform of judicial review (discussed below).

<sup>20</sup> *Judicial review: proposals for reform* December 2012; "*Judicial review: proposals for further reform*". September 2013; Criminal Justice & Courts Act 2015

<sup>21</sup> Varda Bondy, Lucinda Platt and Maurice Sunkin, *The Value and Effects of Judicial Review*, October 2015. Available at: <http://www.publiclawproject.org.uk/data/resources/210/Value-and-Effects-of-Judicial-Review.pdf>

as interviews with both claimant and defendant representatives, found that each of these assertions was unfounded. As the authors explained in an article about the research:

“Our findings do not indicate the existence of widespread abuse of the system by claimants seeking to use JR for public interest or political purposes. Instead, they illustrate the varied ways by which JR adds value in relation to the direct rights and interests of claimants, their experience of the legal system, and in terms of the wider contributions to such matters as the clarity and development of the law. Overall, the findings underscore the importance of access to the High Court’s inherent supervisory jurisdiction, for claimants, defendants, and for the wider public interest.”<sup>22</sup>

Importantly, PLP’s research found that “*While JR imposes costs on public bodies it is acknowledged to enable improvements in the quality of public administrative and assist public bodies to meet their legal obligations.*”<sup>23</sup>

### **Judicial Review - Practical Availability of Representation**

It is increasingly difficult for individual applicants of modest or limited means to access advice and representation in public law matters. Even leaving aside the risk of an adverse costs order, judicial review proceedings are prohibitively expensive for very many individual claimants, charities and other small organisations, and small and medium-sized enterprises.

Access to justice for these kinds of claimants nearly always depends on the availability of legal aid or conditional fee arrangements (‘CFAs’) in which lawyers agree to act for no (or significantly reduced) fees unless the claim is successful.

An ever decreasing percentage of the population is eligible for legal aid. The civil legal aid scheme began to operate in 1950 at which time it provided 80% of the population with means-tested entitlement to legal aid.<sup>24</sup> In 2007 only 29% of the population was estimated as being eligible<sup>25</sup>, and eligibility criteria have grown significantly more restrictive in the last ten years. The means test<sup>26</sup> is now such as to exclude a significant proportion of the population. Thus, for example:

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<sup>22</sup> See <http://blogs.lse.ac.uk/politicsandpolicy/judicial-review-provides-value-for-money-and-an-important-route-to-fair-treatment-for-individuals/>

<sup>23</sup> Value and Effects of Judicial Review, Principal Findings, page 2.

<sup>24</sup> S. Hynes & J. Robins *The Justice Gap* (2009, LAG) p.21

<sup>25</sup> The figures are contained in an answer to a parliamentary question by Dr Ashok Kumar MP, *Hansard HC Written Answers* cols 779W–780W, 20 February 2008, available at: [www.publications.parliament.uk](http://www.publications.parliament.uk).

<sup>26</sup> The means test described here is applicable to most forms of civil legal aid and contained in the Civil Legal Aid (Financial Resources and Payment of Services) Regulations 2013. Categories of case to which the means test does not apply are set out in Reg 5. There is also a power to waive the financial eligibility criteria in some categories of case: see regs 9-12.

- Eligible gross income is capped at £2657 per month.<sup>27</sup> For single earner households, that gross income threshold is lower than the national median household income.<sup>28</sup>
- Eligible disposable income is capped at £733 per month, with only very limited deductions being permissible from gross income to reach that figure.<sup>29</sup> For example, the maximum deduction for housing costs for applicants with no dependents is £545 so for many people (particularly in London and the South East) it does not take any account of a significant proportion of their actual housing costs.<sup>30</sup>
- Disposable capital is capped at £8000.<sup>31</sup> Any person (or couple) who has savings or other eligible capital above this level is ineligible for legal aid, regardless of their income.<sup>32</sup>
- An applicant with more than £8000 in capital is ineligible for legal aid in most categories of law (including judicial review). ‘Capital’ includes any equity in the applicant’s home over £100,000 after deduction of a *maximum* of £100,000 for mortgage or other debt secured on the home.<sup>33</sup> So any homeowner whose home has a net market value over £208,000 is ineligible for legal aid, regardless of the level of any mortgage debt.

As is well known, LASPO and the reforms which followed it have had a devastating impact on the availability of legal aid. Although legal aid for judicial review proceedings remains ‘in scope’ in general, the consequence of the removal of large swathes of other social welfare law from scope is that judicial review arising in the context of those categories of law is also affected in practice, while remaining in scope in theory. The following areas of social welfare

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<sup>27</sup> Civil Legal Aid (Financial Resources and Payment of Services) Regulations 2013, Regulation 7.

<sup>28</sup> A gross monthly income of £2657 equates to £24848 per annum after tax and National Insurance. In 2014/15 national median household income was £25,660 after deduction of direct taxes including income tax and council tax. See *UK Perspectives 2016: Personal and household finances in the UK*, ONS, 25 May 2016 at <http://visual.ons.gov.uk/uk-perspectives-2016-personal-and-household-finances-in-the-uk/>

<sup>29</sup> Deductions include: specified allowances for dependents (partner and dependent children or other dependent relatives living in the household); tax and national insurance; maintenance payments to a former partner, child or dependent relative; housing costs, capped at £545 for applicants with no dependants; a fixed sum of £45 for employment related expenses; and childcare expenses. Council tax and utility bills are not deducted.

<sup>30</sup> According to an article published in the Guardian in 2014, average UK rent was £665. See <https://www.theguardian.com/money/2014/jan/27/renting-london-costs-twice-elsewhere>

<sup>31</sup> Civil Legal Aid (Financial Resources and Payment of Services) Regulations 2013, Reg 8(3). For immigration and asylum category cases the disposable capital limit is £3000.

<sup>32</sup> Subject to a specific disregard for individuals over the age of 60 with a low disposable income: Reg 41.

<sup>33</sup> Civil Legal Aid (Financial Resources and Payment of Services) Regulations 2013, Regulation 37. There is an exception for pensioners.



law, in which resort to judicial review is frequently necessary, have been very significantly affected by the LASPO reforms:

- Welfare benefits (legal aid only available<sup>34</sup> in the Upper Tribunal and above).
- Housing (legal aid only available where a person is at risk of losing their home, or is homeless).
- Immigration (most non-asylum cases removed from scope).

There has been a dramatic shrinking in the legal aid market in recent years as a consequence of the cuts to legal aid.<sup>35</sup> Legal aid rates of remuneration are very low.<sup>36</sup> This position has been aggravated in recent years by the introduction of a ‘no permission no pay’ rule for judicial review claims where claimants’ lawyers will generally not be paid at all if permission is not granted.<sup>37</sup> The latest legal aid statistical bulletin shows a significant and steady decline in the number of applications for legal aid for judicial review granted each quarter since July-September 2015.<sup>38</sup>

PLP’s research has found that “*Legal aid played a significant role in enabling claimants to obtain tangible benefits*” and in particular:

“Legally aided claimants were more likely to have obtained tangible benefits from their claims than privately funded claimants.

- o Higher cost to the legal aid fund was associated with greater benefit to claimants.
- o Higher costs, including to the legal aid fund, may therefore lead to ‘good value’, especially from the claimant’s perspective.
- o Restrictions on legal aid to support JR claims are likely to have a disproportionately adverse effect on those forced to resort to JR in order to obtain services to which they are legally entitled.”<sup>39</sup>

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<sup>34</sup> Subject in this category as in the others below to the possibility of ‘exceptional case funding’.

<sup>35</sup> See e.g. <https://www.lawgazette.co.uk/law/gradual-fall-in-number-of-legal-aid-providers/5056194.article> and “Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012”, 8<sup>th</sup> Report of the Justice Committee for 2014-15, 04.03.2015, chapter 5.

<sup>36</sup> For High Court work, preparation and attendance are paid at a basic rate of £71.55 per hour in London and £67.50 per hour outside of London, and advocacy at £67.50 per hour. These rates apply to both solicitors and barristers and are subject to an enhancement of up to 100% in the High Court for work done with exceptional competence, skill or expertise, or with exceptional speed, or for a case involving exceptional circumstances or complexity: see e.g. Regulation 7(3) of the Civil Legal Aid (Remuneration) Regulations 2013.

<sup>37</sup> Regulation 5A of the Civil Legal Aid (Remuneration) Regulations 2013.

<sup>38</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/584590/legal-aid-statistics-bulletin-july-sept-2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/584590/legal-aid-statistics-bulletin-july-sept-2016.pdf)

<sup>39</sup> *The Value and Effects of Judicial Review*, Principal Findings, page 2.

As the authors of that research have explained:

Our study is the first to explicitly address issues of funding and costs in JR cases. We were therefore very struck by the finding that legally-aided claimants were more likely to have obtained tangible benefits from their claims (65 per cent of cases) than privately funded claimants (42 per cent). Higher cost to the legal aid fund was also associated with greater benefit to claimants. These associations were robust to taking account of the outcome, the scope of the case and the costs order. The link between legal aid funding and obtaining tangible redress is of considerable importance, because it reminds us of the importance of ensuring that those who are most dependent on public services, often the most vulnerable, have effective access to JR.<sup>40</sup>

For most, if not all, firms and organisations, including PLP, providing civil legal services under a contract with the Legal Aid Agency, as well as barristers in independent practice, it is necessary to cross-subsidise legal aid income. For most non-commercial firms who act predominantly for legally aided individuals, this cross-subsidisation is achievable only because they are entitled<sup>41</sup> to recover their costs from their opponents at their normal commercial rates when successful. As Lord Hope explained in *In re appeals by Governing Body of JFS & Others* [2009] UKSC 1, [2009] 1 WLR 2353 ('JFS'):

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

Although those comments were made in the context of a suggestion that there should be an order that each side bear its own costs whatever the outcome of the appeal, the points made by Lord Hope are just as important in considering the impact of fixed costs. Legally aided claimants are by definition impecunious and will be unable to pay their lawyers for work done on their cases which exceeds the amount of any fixed costs.

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<sup>40</sup> <http://blogs.lse.ac.uk/politicsandpolicy/judicial-review-provides-value-for-money-and-an-important-route-to-fair-treatment-for-individuals/>

<sup>41</sup> Under Regulation 21 of the Civil Legal Aid (Costs) Regulations 2013

Even where lawyers agree to act under a CFA, that does not remove the adverse costs risk which claimants face. ATE insurance has always been difficult if not impossible to secure for judicial review proceedings and in any event insurance premiums are too high for many would-be claimants to consider. As explained below, Protective Costs Orders ('PCOs') are not an adequate response. Given the abolition of the recoverability of success fees, the risks of undertaking work on a CFA if recoverable costs were further limited would be significantly increased.

CFAs only work as a funding mechanism to improve access to justice in judicial review whilst the potential to recover costs *inter partes* subsists. Such funding mechanisms are inherently risky in any case, but in tortious claims the risk involved in establishing liability may be relatively straightforward to assess, particularly with the availability of pre-action disclosure and longer timeframes for investigating the merits before issue (or before pleading in any detail). In judicial review cases it is notoriously difficult to accurately assess merits, particularly in a case raising new issues of law.

### **Judicial Review - PLP Evidence on Costs and Costs of Costs**

We undertake a small volume of work and our cases vary enormously. There is no typical 'PLP' case, and we would be wary of extrapolating wider trends from our unusual caseload. However, we note the following, which we anticipate would also be of relevance to other claimant practices frequently undertaking complex work:

PLP is a charity and does not need to make a profit or satisfy any shareholders or partners. However, it does need to remain financially and operationally viable.

The vast majority of PLP's clients cannot afford to pay even modest private fees. Where charitable or corporate clients of means instruct PLP they do so on a matter of public interest, in respect of which they are usually unwilling or unable to risk their own viability.

PLP's current business model for operational viability assumes that its employed lawyers will recover *inter partes* costs (at full 'commercial' rates) at least 40% of the time. It also assumes that its lawyers will be paid at lower hourly rates (under the legal aid scheme or discounted fee agreements) for 50% of their time.

The only part of PLP's lawyers' practice currently conducted under a fixed fee regime (we assume 10% of time on pre-litigation advice and assistance under the Legal Help scheme) is undeniably loss-making. Whilst the nominal hourly rate on which the fixed fee is premised is

£51.80 an hour, our internal modelling indicates an actual recovery rate for fixed cost work of less than £36.00 an hour.

In a 'standard' judicial review case we might expect our first instance costs (assuming both that it is necessary to renew to oral permission and a contested final hearing) to range from about £30,000 to £60,000 at *inter partes* rates. This does not include counsel's fees. In more complex, evidence heavy and/or legally innovative cases our first instance costs might exceed £100,000. Neither figure includes counsel's fees, experts' fees or disbursements.

Whilst our lawyers conduct a relatively low volume of cases, we consider it worthy of note that our recoverable costs are nearly always settled by negotiation. A minority of our cases fail to settle and go to provisional assessment. Our records indicate that we have only pursued one of our cases to detailed costs assessment since the Final Report was published in 2009. That was a Supreme Court case conducted under a High Cost Case Plan (in circumstances similar to those addressed by Lord Hope in *JFS* cited above) in which our client was successful and the paying party was the Secretary of State for Work and Pensions. We beat all offers and recovered more than the sum provisionally assessed.

In general, we do not consider there is any evidence to suggest that the level of our recoverable costs are disproportionate to the work we undertake or the outcomes we achieve, particularly in cases in which there is often a public interest element. Equally, and despite our active presence in the UK administrative justice research arena, we are not aware of any empirical data suggesting that the level of recoverable claimant costs in judicial review are disproportionate and/or impeding access to justice more generally; nor are we aware of any data which indicates that the costs of assessing costs in judicial review is problematic. On the contrary, our understanding is that the current availability of recoverable costs (uncapped save for the powerful assessment principles of necessity, reasonableness and proportionality) actively enable claimant practitioners to continue to undertake high quality work on behalf those of no or limited means.

### iii. Fixed Costs

#### *Access to justice*

Lord Justice Jackson identified in his speech “Fixed Costs - The Time Has Come”, delivered on 28 January 2016<sup>42</sup>, that the problem that fixed costs seeks to address is that “*High litigation costs inhibit access to justice. They are a problem not only for individual litigants, but also for public justice generally.*” He went on to identify that the genesis of the problem is that the level of costs has evolved over time under the influence of costs shifting and the system of “*hourly rate*” remuneration, where remuneration on a time basis rewards inefficiency. Lord Justice Jackson refers to other jurisdictions with complex laws and procedural rules where litigation costs are significantly lower than in England and Wales. Lord Justice Jackson then refers to numerous reforms arising from his recommendations in the Final Report, including ending the recoverability of CFA success fees and ATE premiums, which he states have cut out one layer of excessive costs. Lord Justice Jackson goes on to suggest that despite these reforms, “*there is a need to extend the fixed costs regime*”.

Improving access to justice is central to PLP’s work, and of fundamental importance in a democratic society governed by the rule of law, and thus we welcome any measures that will realise this aim, particularly for those who are disadvantaged by poverty, discrimination or other barriers to access.

Legal aid provides protection against adverse costs risk (s. 26 of LASPO replacing s.11 of the Access to Justice Act). The underlying policy reason is the express recognition that access to justice cannot be achieved merely through providing the impecunious with representation they could not otherwise afford, but that it is also necessary to ensure that adverse costs risk does not act to inhibit meritorious claims. Similarly, it is accepted that the ‘usual’ litigation rules resulted in a scheme incompatible with the access to justice requirements of the Aarhus Convention.

However for the increasing numbers of individuals who do not qualify for legal aid, but are nonetheless of modest means, the risk of being ordered to pay high litigation costs is highly

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<sup>42</sup> <https://www.judiciary.gov.uk/wp-content/uploads/2016/01/fixedcostslecture-1.pdf>

likely to be factor inhibiting access to justice in judicial review, by virtue of its having a chilling effect on potential claimants' willingness and/or ability to apply for judicial review.<sup>43</sup>

In a joint 2015 report on Part 4 of the Criminal Justice and Courts Act 2015, produced with The Bingham Centre and JUSTICE and entitled 'Judicial Review and The Rule of Law',<sup>44</sup> PLP highlighted the need for a cautious, evidence-based approach to reform of judicial review. The report stated:

5.3 The constitutional function of judicial review creates a particular imperative for evidence-based and cautious reform, in a manner consistent with the rule of law. While there may be means to further increase the efficiency of the process, any further reform should be evidenced based, proportionate, consistent in its impact on both claimants and respondents and respectful of the fundamental role which the remedy plays in our constitutional framework.

5.4 For example, the problems raised by Section 88(3) CJCA 2015 – and the need for an effective and proportionate framework for costs protection – are a manifestation of a wider problem relating to judicial review claimants' costs exposure that warrants consideration of a wider solution. We are concerned that the guidance in *Mount Cook*<sup>45</sup> does not offer responsible judicial review claimants sufficient comfort to outweigh the deterrent effect of claimants' liability for defendants' costs to permission in many cases. A fixed or guideline fee regime both for defendants' costs to permission and defendants' costs of the costs capping application would accord with the approach taken in environmental judicial review claims that are subject to Article 9(4) of the Aarhus Convention." (emphasis added)

The report goes on to refer at paragraph 5.5 to Lord Justice Jackson's recommendation in the Final Report for a fixed or guideline fee regime for defendants' costs. As an alternative to his primary recommendation<sup>46</sup> that QOCS<sup>47</sup> should be introduced for all judicial review proceedings, Lord Justice Jackson proposed that: "*save in exceptional circumstances, (i) the cap on the claimant's liability for adverse costs up to the grant of permission should be no less than £3,000; and (ii) if permission is granted, the cap on the claimant's liability for*

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<sup>43</sup> Other significant inhibitors of access to justice which cannot be overlooked include the restricted availability of advice and assistance, and significant increases in court and tribunal fees.

<sup>44</sup> Available at: <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2015/10/Judicial-Review-and-the-Rule-of-Law-FINAL-FOR-WEB-19-Oct-2015.pdf>

<sup>45</sup> I.e. the approach approved in *R (Mount Cook) v Mount Eden Land Limited and Westminster City Council* [2004] C.P. Rep. 12 that Defendants who comply with the pre-action protocol should normally recover their costs of filing an Acknowledgement of Service but not any additional costs of attending an oral permission hearing.

<sup>46</sup> In retrospect, and on re-reading Chapter 30 of the Final Report, we recognise that the PLP, Bingham Centre and Justice report does not reflect the fact that this was an alternative recommendation, intended only in the event that his primary recommendation for QOCS was rejected. We regret this drafting error (which so far as the authors recall arose during the editing process) and any confusion caused.

<sup>47</sup> As defined by Lord Justice Jackson in the Final Report, rather than as implemented in Section II of Part 44 CPR.

*adverse costs (in respect of the whole case) should be no less than £5,000*', these amounts to be fixed in a practice direction.<sup>48</sup> This alternative had been proposed by Lord Justice Jackson at the Judicial Review seminar held as part of the 2009 review process, as a 'middle way'.<sup>49</sup> It was clearly intended to be a form of QOCS, albeit one with a fixed cap on the claimant's potential liability to pay the defendant's costs rather than the less certain model of what is reasonable.

The 2015 PLP, Bingham Centre and Justice report continued:

5.6 Capping defendants' costs, as Lord Justice Jackson proposed, would impose discipline on defendants and interested parties at the permission stage. If defendants and interested parties were encouraged to spend proportionately on resisting permission, fewer, better points would be taken, focused on any knock-out blow(s). Some may be encouraged not to contest permission at all. The permission hurdle could truly act as a filter on weak cases, would cost less to administer, and would drive down costs for both claimants and defendants.<sup>50</sup>

The joint report then sets out (paragraph 5.7) three possible solutions worth further consideration, namely fixed fees in the Civil Procedure Rules, in a Practice Direction, or an indicative fee regime set out in either, with the following additional comments:

"5.7 ... safeguards may be necessary to ensure that a fixed fee approach would not inhibit the ability of parties to secure effective representation and to conduct their cases fully and proportionately...

There is every reason to have a regime of this kind given the limited but crucial filtering purpose of the permission hurdle. Effective use of the pre-action protocol ought to mean that the Acknowledgment of Service is a simple document to draft. The amounts suggested in the Jackson report, in our view, strike a sensible balance....

5.8 This is a change which could improve practice beyond public interest claims and ought – as Lord Justice Jackson acknowledged – lead to better practice in all judicial review claims, not only those where costs capping orders might be necessary and appropriate."<sup>51</sup>

In short, chapter 5 of the joint 'Judicial Review and The Rule of Law' report sought to highlight concerns regarding judicial review *claimants'* costs exposure, and suggests that a fixed, or guideline, fee regime for *defendants'* recoverable costs may be a solution that warrants further consideration, consistently with the position adopted by PLP in its

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<sup>48</sup> Chapter 30, paragraph 4.9.

<sup>49</sup> Chapter 30 of the Final Report, paragraph 2.12.

<sup>50</sup> Chapter 5, paragraph 5.4

<sup>51</sup> p. 62.

submissions to the 2009 Review,<sup>52</sup> and the recommendations made by Lord Justice Jackson in the Final Report.<sup>53</sup>

In his January 2016 lecture on fixed costs, Lord Justice Jackson referred to chapter 5 of the joint report as a proposal for a fixed costs regime for judicial review claims, supported by the view that the introduction of fixed costs would promote the rule of law and state accountability.<sup>54</sup>

As explained above, the joint report does not advocate a fixed costs regime of general application, but rather explores the possibility of fixing *defendants'* recoverable costs to improve access to justice in judicial review. However, and as already acknowledged, the quoted section of the report could, and indeed should, have been clearer.

### Qualified One Way Costs Shifting

In 2009, Lord Justice Jackson recommended QOCS for judicial review, on the basis that he was satisfied that some categories of claimants merited protection against liability for adverse costs.<sup>55</sup> He set out six principal reasons for his conclusion:

- (i) This is the simplest and most obvious way to comply with the UK's obligations under the Aarhus Convention in respect of environmental judicial review cases.
- (ii) For the reasons stated by the Court of Appeal on several occasions, it is undesirable to have different costs rules for (a) environmental judicial review and (b) other judicial review cases.
- (iii) The permission requirement is an effective filter to weed out unmeritorious cases. Therefore two way costs shifting is not generally necessary to deter frivolous claims.
- (iv) As stated in the FB paper<sup>56</sup>, it is not in the public interest that potential claimants should be deterred from bringing properly arguable judicial review proceedings by the very considerable financial risks involved.

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<sup>52</sup> See Final Report, Chapter 30, paragraph 3.17 for a summary of PLP's position.

<sup>53</sup> The report also recommends, as an alternative, adopting the recommendations made in the Bingham Centre for the Rule of Law's *Streamlining Judicial Review in a Manner Consistent with the Rule of Law* report ([http://www.biicl.org/files/6813\\_bingham\\_jr\\_report\\_web.pdf](http://www.biicl.org/files/6813_bingham_jr_report_web.pdf)): see paragraph 5.8.

<sup>54</sup> <https://www.judiciary.gov.uk/wp-content/uploads/2016/01/fixedcostslecture-1.pdf> paragraph 2.11

<sup>55</sup> Chapter 30, paragraphs 4.8 and 5.1.

<sup>56</sup> A paper submitted to the Jackson review by Michael Fordham QC and Jessica Boyd



- (v) One way costs shifting in judicial review cases has proved satisfactory in Canada: see PR paragraphs 35.3.8 and 35.3.9.<sup>57</sup>
- (vi) The PCO regime is not effective to protect claimants against excessive costs liability. It is expensive to operate and uncertain in its outcome. In many instances the PCO decision comes too late in the proceedings to be of value.

Earlier in the report, Lord Justice Jackson had noted the reasons given by Michael Fordham QC and Jessica Boyd in their paper to the review in favour of QOCS:

Take the fairness rationale. It must be remembered that public authorities have at the heart of their function and being the duty to act in the public interest...The facilitation of judicial review scrutiny is itself in the public interest. There is no 'unfairness' in the State absorbing the cost of this vital public law audit. The State readily absorbs the costs of an ombudsman investigation, an inquest, a public inquiry. Viewed in this light, there is nothing 'unfair' in the State being expected to absorb the cost where the Court has 'called in' a public law matter, having identified viable grounds of challenge at the permission stage. The threat of a costs order will never prevent the authorities of the State from defending themselves on judicial review. There is nothing 'unfair' in removing the costs-risk bar which would serve to exclude judicial review claimants.<sup>58</sup>

As noted above, notwithstanding Lord Justice Jackson's recommendation, the Government subsequently introduced QOCS only for personal injury claims, and without qualification as to the claimant's financial circumstances, but not in judicial review proceedings. When the Government consulted on the proposals made in the Final Report, it expressed reservations about extending QOCS to judicial review proceedings, primarily on the basis that it was concerned that this would increase the number of unmeritorious claims for judicial review.<sup>59</sup> It also noted the availability of PCOs in appropriate cases.<sup>60</sup> Following the consultation, and despite the fact that the majority of respondents supported the introduction of QOCS for judicial review, the Government decided against it. The only explanation advanced was that at paragraph 27 of its Response to the Final Report in which it stated that:

While Sir Rupert suggested that QOCS might be considered for introduction in some non-personal injury claims, the Government is not persuaded that the case for this has been made out at this stage. CFAs are very much a minority form of funding in these claims, and rolling out QOCS to these cases would distort the market by imposing substantial changes on all cases in a particular category of proceedings for a small number of claimants. The Government will examine the experience of QOCS in personal injury claims before considering whether it should be extended further.

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<sup>57</sup> Chapter 30, paragraph 4.1.

<sup>58</sup> Cited at paragraph 2.3 of Chapter 30, p. 303.

<sup>59</sup> Proposals for Reform of Civil Litigation Funding and Costs in England and Wales - Implementation of Lord Justice Jackson's Recommendations, November 2010, paragraphs 160-169 in particular.

<sup>60</sup> Paragraphs 166-168.

PLP considers that the reasons advanced by Lord Justice Jackson in support of his conclusions in the Final Report, and cited above, as to why QOCS is necessary in judicial review proceedings, remain true today. That separate costs rules have been introduced for Aarhus cases despite the recognised undesirability of parallel costs rules is no reason in itself not to address the ongoing inequality in the current costs rules for non-environmental judicial review.

In fact, the case for QOCS for judicial review proceedings has increased yet further since the Final Report was published in 2009, given the significant worsening of access to the courts and legal advice, especially for those who are disadvantaged by poverty and other barriers to access to justice, for the following reasons:

- Tightening of legal aid rules and eligibility criteria mean that fewer people are eligible for legal aid and therefore fewer claims have legal aid costs protection;
- Payment (even at modest legal aid rates) for judicial review claimants' lawyers is no longer guaranteed until and unless permission is granted;
- There have been substantial increases in court fees, which have particularly hit those without access to legal aid or significant funds. Further court fee increases are expected;
- The abolition of recoverable success fees particularly impacts on claimants bringing judicial review or other claims with little or no monetary value (including those against state authorities that may raise important issues of principle and accountability);
- New restrictions on the Administrative Court's discretion on relief and on costs have been imposed in defendants' favour;
- A new requirement on claimants to identify third party funders of litigation above a certain amount and a requirement on the court to consider making adverse costs orders against the named individuals;
- The introduction of Cost Capping Orders (s.88 and 89 Criminal Justice and Courts Act 2015 ('CJCA')) make the costs protection offered in the place of PCOs less effective (see further below);
- There is no evidence to suggest that claimants' recoverable costs are a problem.
- There is no evidence to support governmental claims of growth and/or abuse, nor to give credence to the fears that would be the consequence of an introduction of QOCS.

PLP therefore considers that the case for the introduction of QOCS in judicial review proceedings not only remains compelling but has intensified. In the face of considerable

evidence that access to the judicial review courts was already skewed in favour of defendants, the Government introduced further provisions with the effect of disadvantaging claimants still further.

The permission filter exists to provide a check on unmeritorious claims. As such, the Government's concerns about an increase in the number of unmeritorious claims are far outweighed by the importance of ensuring access to justice in these constitutionally important claims.

As to the form of QOCS, PLP supports the model proposed by Lord Justice Jackson in Chapter 30 of the Final Report, of one way costs shifting in which any liability of the claimant to pay the defendant's costs is dependent on consideration of the financial circumstances of the parties and their conduct during proceedings.

There are two disadvantages of this approach from an access to justice perspective. The first is that it leaves a degree of uncertainty for claimants of moderate means, at least until a body of caselaw and practice has been established on the basis of which lawyers can advise their clients as to the likely level of costs that they might be ordered to pay. PLP has considered whether the alternative approach proposed by Lord Justice Jackson at paragraph 4.9 of the Final Report, whereby the claimant's liability to pay the defendant's costs would be capped at £3000 at the permission stage and £5000 if permission is granted, would be preferable. The merits of this proposal were acknowledged by PLP, the Bingham Centre on the Rule of Law and Justice in their 2015 report on Part 4 of the CJCA, as discussed above. The precise mechanism of this approach is not clear but provided that (1) it operated as part of a one way costs shifting mechanism so that claimants would in any event ordinarily be able to recover their costs in full from their opponents and (2) it operated as a cap on the claimant's liability and their financial circumstances would still be taken into consideration, PLP considers that it has the merit of certainty. The second caveat is particularly important because there are likely to be a significant number of claimants who are ineligible for legal aid but for whom even the risk of being ordered to pay £3000 of adverse costs would be too great.

The second disadvantage of the model proposed in Chapter 30 from an access to justice perspective is that it would enable commercial or otherwise wealthy litigants to bring claims for judicial review, potentially against small regulatory bodies or local authorities with already stretched budgets, without the deterrent effect of the risk of an adverse costs order. In order to meet this concern, PLP considers that there could be a mechanism to enable defendants to apply to the court to disapply QOCS on the ground of the claimant's financial circumstances at an early stage of proceedings. Unsuccessful applications by defendants

should be met with an order that they meet the costs of the application, regardless of the outcome of the substantive proceedings. Similarly, where commercial claimants unreasonably resist (or refuse to consent to) an application to disapply QOCS, there should be provision for them to be ordered to pay the defendant's costs of making the application.

The model of QOCS contained in the rules in CPR 44 for personal injury claims does not appear particularly suitable for judicial review claims because it is unusual in such claims for the claimant to recover any damages.

### **Fixed Costs (CPR 45)**

The nature of the relief ordinarily sought in judicial review proceedings means that it is not possible to identify the complexity of the cases or appropriate level of costs from the remedies obtained or the value of damages (if any) awarded, and indeed it would be inappropriate to try. The factual and legal complexity can vary hugely between cases, and it is difficult to identify predictors of what is likely to increase costs. These differences were recognised by Lord Justice Jackson in the Preliminary Report of the Review of Civil Litigation Costs published in May 2009.<sup>61</sup>

#### *Aarhus Claims*

Since April 2013, special provision has been made for fixed costs in certain environmental judicial reviews (Aarhus convention claims), which automatically limits the claimant's costs liability to £5,000 and their recovery to a maximum of £35,000, with the option to opt out.

Whilst the Aarhus provisions may provide certainty for the parties in environmental judicial review, for most individuals of modest means a £5,000 costs risk remains wholly prohibitive. According to the Money Advice Service at least 21 million adults in the UK don't have even £500 in savings.<sup>62</sup> A £5,000 cap is no better than unlimited liability if in practice it makes the court no more accessible.

It is important to note that environmental cases by definition impact upon others in addition to the claimant. This means that community contributions, fundraising and/or crowd-funding may well be available to supplement an impecunious claimant. However, in a non-environmental context the claimant and/or their immediate family may be the only affected parties, and the opportunities for community contribution and/or crowd funding that arise in environmental cases cannot be assumed.

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<sup>61</sup> Chapter 35: Judicial Review Claims, paragraphs 1.2-1.3.

<sup>62</sup> <https://www.moneyadviceservice.org.uk/en/corporate/four-out-of-10-adults-are-not-in-control-of-their-finances-new-strategy-launched-to-improve-uks-financial-capability>

In addition, PLP has not seen an evidence base supporting a cap on claimant costs, even in the environmental context. As recognised by the Supreme Court, the claimant judicial review ‘market’ is already fragile, and the viability of many respected and specialist practices dependent on the potential recovery of their costs at *inter partes* rates. This is how claimants who cannot afford those commercial/market rates achieve justice. There is no evidence to suggest that artificial suppression of those rates will improve access to the courts.

The practical impact of the Aarhus provisions on access to justice would benefit from empirical research. In December 2015 an umbrella environmental organisation (Link) published their response to the Ministry of Justice Proposals on Costs Protection in Environmental Claims<sup>63</sup>, indicating that the number of environmental cases lodged in England and Wales did not increase following the introduction of the special provisions and the success rates when compared with non-environmental judicial review remained high, which are encouraging findings. However the Ministry of Justice has since indicated that it will be amending the rules to allow for variation in the fixed costs caps in individual cases<sup>64</sup>, i.e. a hybrid regime, and “*introducing more of a level playing field so that defendants are not unduly discouraged from challenging a claimant’s entitlement to costs protection*”. New rules are awaited. Given the question mark over the future of the Aarhus provisions and the current lack of research regarding the consequential impact on access to justice, there is currently no good case for an extension of the Aarhus provisions to other judicial review claims.

### **Protective Costs Orders/Costs Capping Orders**

As the existence of the jurisdiction to grant PCOs was cited as an argument against the need to extend QOCS to judicial review proceedings in the Government consultation which followed the Final Report, it may assist to consider the limitations of that jurisdiction.

The criteria for the grant of what is now termed a costs capping order (‘CCO’) are now set out at s. 88 CJCA 2015. While PCOs/CCOs have an important role to play in ensuring that significant issues of public interest can be brought before the court, judicial review proceedings have a constitutional significance and importance in enabling public bodies to be held to account and in upholding the rule of law which is not restricted to public interest proceedings. In PLP’s view, the following features of the cost capping regime means that they have a more limited role to play in ensuring access to the judicial review court than

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<sup>63</sup> <http://www.wcl.org.uk/docs/Wildlife%20and%20Countryside%20Link%20-%20Cost%20Protection%20in%20Environmental%20Claims%20-%20consultation%20response.pdf>

<sup>64</sup> <https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims/results/costs-protection-in-environmental-claims-govt-response.pdf>

alternative means of limiting exposure to adverse costs orders, such as the proposal for QOCS in the Final Report.

- (1) The jurisdiction to make a PCO was developed by the courts in order to provide a mechanism to facilitate access to justice for public interest claims. It is a requirement (both at common law and under the CJCA) that the proceedings be “public interest proceedings”. “Public interest proceedings” are defined in s88(7) CJCA as involving issues of general public importance, which the public interest requires to be resolved, and where the proceedings are likely to provide an appropriate means of resolving it.
- (2) Under s88(3) CJCA, a CCO may only be granted after permission has been granted. This means that claimants must be able to accept the risk of being ordered to pay the defendant’s costs up to the permission stage if they are unsuccessful.
- (3) The Court is required by s89(1)(b) to take account of the extent to which the applicant is likely to benefit from the judicial review proceedings in deciding whether to grant an order, and if so at what level. Thus the less the claim is concerned with issues of wider public interest and the more it is likely to result in a benefit to the individual claimant, the less likely it is that a restrictive cap will be imposed on the defendant’s ability to recover his costs.
- (4) Under s89(2) CJCA, the Court is required to impose a reciprocal cap on the applicant’s ability to recover his costs. Prior to the CJCA, although reciprocal caps were often imposed as part of a PCO, this was not always the case.

## IV. Summary

PLP submits that:

- (1) The extension of **fixed costs** along the lines of those contained in Part 45 CPR would be inappropriate and unworkable in the judicial review context.
- (2) The extension of fixed costs to defendants' recoverable costs would improve access to justice in the judicial review context.
- (3) The extension of fixed costs to claimants' recoverable costs would be a significant barrier to justice.
- (4) The model of **QOCS** proposed by Lord Justice Jackson in Chapter 30 of the Final Report should be implemented for judicial review proceedings, subject to the two suggested modifications set out at pp. 27-28 above.
- (5) Further research is necessary.