The Jackson Review of Fixed Recoverable Costs

Submissions of the Public Law team at Garden Court Chambers

In these submissions, we use the following abbreviations:

'ALBA' refers to the Administrative Law Bar Association

'ATE' means after-the-event insurance

'CFA' means a conditional fee arrangement

'CPR' refers to the Civil Procedure Rules

'EU' refers to the European Union

'ECHR' refers to the European Convention on Human Rights

'FR' refers to the Jackson Final Report

'fixed costs' refers to any scheme of fixed recoverable costs

'ILPA' refers to the Immigration Law Practitioners Association

'LASPO' refers to the Legal Aid, Sentencing and Punishment of Offenders Act 2012

'PCO' is shorthand for a Protective Costs Order as they used to be and a Costs Capping Order as they are now

'QOCS' refers to qualified one-way costs shifting

Introduction and summary

1. We are set of 182 members of whom some 40 members have a 'core' Public Law practice in (primarily) claimant judicial review and a further 50 or so members have a significant judicial review practice arising from their particular field of expertise - housing, prisons, national security, planning and environmental law, community care, mental health, civil liberties, crime and immigration. Among our team are specialists, authors and contributors to practitioner works (Jordan's Practical Guide to Judicial Review, Macdonald Immigration Law & Practice, Legal Action and Archbold's), members of professional bodies such as ALBA and the current chair of ILPA. Most of our work is publicly funded and, owing to LASPO changes affecting claims at the pre-permission stage - usually at risk.

2. Our clients are mainly vulnerable people facing serious obstacles to justice. They are the disabled, the poor, the mentally ill, prisoners, Gypsies and Travellers, refugees and asylum seekers. As a team and as a Chambers we strive to provide the best service possible to those for whom justice may be otherwise inaccessible. Our public law team takes claims against public authorities of all kinds in a variety of fields and thus, we suggest, is in a strong position to provide evidence-based submissions on costs proposals under review. Access to justice is a key issue in all our work. We append to these submissions sample cases demonstrating the granular application of the points we make below.

3. In summary we are of the view that a proposal to impose a regime of fixed costs on judicial review claims is, on current evidence, both unworkable and counter-productive. We set out our reasons below which are submitted on behalf of the Public Law team as a whole[1]. Any questions concerning these submissions should be directed to Amanda Weston at amandaw@gclaw.co.uk or Emma Nash at EmmaNash@gclaw.co.uk.

4. Our submissions seek to make 5 points:

    a. We set out the flexible, dynamic nature of modern judicial review and the constitutional importance of its accessibility with some recent, concrete examples from the Public Law team's casework;
    b. We note the lack of emprical data that demonstrates any want of proportion in judicial review costs.
    c. We set out our view that a regime fixed costs in judicial review would be inappropriate and unworkable in both principle and practice;
    d. We consider and reject the extension of Aarhus to all judicial review claims.
    e. Lastly we make our recommendations for a separate enquiry and analysis as to any need for changes to the costs regime in JR and some alternative suggestions.

The changing nature of judicial review

The traditional view of judicial review

5. In the traditional view, judicial review remains a largely paper-based procedure, involving little by way of disclosure and is fundamentally about

[1] With the kind assistance of Stephen Clark, pupil.

clearly defined points of law with few, if any, factual disputes. The principal task of the court is seen as a search for errors on the face of the record and the traditional grounds of illegality, unfairness or irrationality. There is no formal disclosure process beyond the 'duty of candour', no factual disputes to resolve, no oral evidence or cross-examination and no need to consider any material beyond that which was before the decision-maker. The intensity of scrutiny is low and hearings are short.

6. This is a myth. With the transformation of administrative and constitutional law since the 1970s, judicial review procedure and practice have changed with it.

7. A great strength of the Woolf Reform's introduction of the Administrative Court and CPR 54 has been the ability of High Court judges to tailor their directions on a case-by-case basis and, by active case-management, to ensure the progression of cases expeditiously, fairly and at proportionate cost to the issues. As we set out below, there is a strong public interest in maintaining the court's role in facilitating the ventilation of public law challenges properly brought.

Modern judicial review is flexible and unpredictable

8. In reality, judicial review has expanded to accommodate the increased democratic and constitutional need for judicial scrutiny of executive action. The procedural steps required in any given claim vary widely. The specialist Administrative Court now considers a range of precedent fact challenges such as unlawful detention and human rights matters, the procedural trajectory of which is impossible to predict. Claims may develop, necessitating disclosure applications, closed material procedures, cross-examination – at all stages the court's obligation to satisfy itself as to the legality of the conduct by a public authority removes much control and responsibility from the claimant for the course taken by the litigation: the Court has "*a wide discretion as to what … orders are appropriate to the particular case*"[2].

9. Attention is drawn to the case examples appended to these representations which illustrate the lack of predictability or convenient categorisation in judicial review claims. The paradigm case for a flexible approach is in the unlawful detention context, where there will be parallel public law (a

[2] *R v. Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 per Lord Diplock

mandatory order for release) and private law (for breach of the tort of false imprisonment) proceedings in the Administrative Court. Disclosure may include years of medical records and detention reviews and the Secretary of State's officers may need to give evidence. A denial of British citizenship case may require no disclosure at all if the grounds are a dispute over statutory construction while another such case may require substantial disclosure and oral evidence where the Secretary of State defends the claim on grounds of alleged criminality or fraud.

Different legal orders

10. Judicial review claims in which we act often involve complex interaction between different legal orders. Public law proceedings often require practitioners to understand, apply and reconcile requirements of common law, legislation, European (both EU and ECHR) and international law and the interaction between them. Community care or detention cases arising out of human trafficking, for example, can engage questions about the Council of Europe's Anti-Trafficking Convention, Article 4 ECHR, domestic law on modern slavery, the EU Trafficking Directive and domestic standards of judicial review.

Judicial review is a dynamic, constitutionally vital remedy

11. The highly dynamic and responsive nature of judicial review means that the Administrative Court is constantly balancing the flexibility of the common law with the need for legal certainty, changing as the need for the prerogative orders and other remedies has changed in line with differing social conditions over the decades and centuries. Public law – adaptive and responsive - is always in a state of flux. For example, as regards intensity of review, the common law shift from Wednesbury to proportionality and the evolving wisdom that there is no longer any 'flat' standard of review applicable across all cases, but, instead, variable levels of intensity of review which can shorten or lengthen the task of the Administrative Court on a case by case basis.[3] Similarly the target may not remain static in a claim. Take another recent practical example[4]: a mentally disordered claimant who lacks capacity to conduct his affairs is being held in immigration detention, despite there being

[3] Lord Sumption, *R. (on the application of Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2014] UKSC 60; [2015] A.C. 945; Lord Dyson MR, *Sultan Azlan Shah Lecture: Is Judicial Review a Threat to Democracy?*, November 2015. Available on the Judiciary website here: < https://www.judiciary.gov.uk/announcements/speech-by-lord-dyson-is-judicial-review-a-threat-to-democracy/>

[4] CO/6377/2016

no prospect of deportation in a reasonable time. His detention is unlawful and a judicial review is commenced to that effect. If release is ordered, then the responsible NHS Trust and/or local authority may have to make assessment, funding and placement decisions about what if any care and treatment he should receive on release – which may trigger further collateral challenges if one or other of those bodies refuses to accept responsibility or if his immigration status bars provision in spite of assessed need. A claim that began with one defendant and one decision may become a claim with three, interlocking and interwoven decisions from separate defendants with very different statutory regimes depending on a developing situation.

Asymmetric workload

12. Claimants and defendants in judicial review do not carry out the same work at the same stage: work is not 'mirrored'. For claimants, the bulk of the costs may be incurred at the outset of the case and frontloaded – identifying the public law error, gathering together the material and drafting the Statement of Facts and grounds. The work is primarily done in the period from the date the decision is made to the date of filing the claim itself. This is not true of all claims, however. Unlawful detention and removal cases can involve continuous work and refinement up to the door of the court for trial. For defendants, the bulk of the costs are only incurred post-permission in the run up to trial. It is a common experience amongst counsel that an Acknowledgement of Service is drafted in terms to try and knock the claim out at the permission stage and the defendant's case only truly crystallises when counsel are instructed to draft the Detailed Grounds of Defence.

13. These points are given to illustrate the heterogeneous nature of modern judicial review proceedings. They are not static cases which 'crystallise' at the moment of the allegedly unlawful decision, but dynamic ones where law and procedure adapts to the specific circumstance of the case.

14. In our experience, public law litigation does not have the quality of certainty and predictability that may be found in other fields of civil litigation. Claims running under the fast or multi-track have a clear timetable to run to, with predictable litigation steps that can be anticipated. The same is not true in the Administrative Court. The great strength of judicial review proceedings is

their flexibility and the ability of the Administrative Court judges to tailor procedure to the specific cases before them.

What prospect then for fixed recoverable costs in judicial review?

15. We have four in-principle objections to the introduction of fixed recoverable costs to judicial review:

    a. First, the nature of judicial review proceedings means that a fixed costs scheme cannot be designed in a way which ensures cases can be disposed of justly and at proportionate costs or can only be designed in a way whereby fixed costs no longer achieve its goals of certainty and predictability.
    b. Second, such a proposal fails to appreciate impact on access to justice in that recovering costs at full commercial rates is vital for the survival of solicitors' firms who serve the population where the only options for litigation funding are legal aid and a CFA.
    c. Third, the evidence base for setting fixed costs rates at a workable level does not exist.
    d. Fourth, creating a fixed costs scheme which may fit would require a radical recrafting of judicial review procedure and practice which is outside of the scope of this Review. In any event that would be the tail wagging the dog – a costs regime should not be permitted to dictate rigidity and procedural design for a remedy which has been evolved successfully to fulfil an essential constitutional function.

An impossible design

16. What might the starting factors be for setting the bands of a judicial review fixed costs scheme? "Gravity of the alleged public law error" cannot work, because it presupposes that there is a hierarchy of categories of public law error – is an *ultra vires* act more or less grave than a failure to adopt a fair procedure? Given the heterogeneous subject matter of judicial review, it is also not possible to fix the bands by reference to the gravity of the consequences of the allegedly unlawful act. It would involve impermissible value judgments about what constitutes the most serious breaches and less serious breaches. It would also be contrary to the foundational judicial review principle that there is an inherent public interest in *preventing* unlawful exercise of power by the Executive – the reason why judicial review proceedings are brought in the name of the Crown and not between two private parties.

17. Could the New Zealand model be adopted whereby rates are fixed by reference to complexity? The problem is that any definition of 'complexity' would have to be so broad and all encapsulating that it becomes imprecise and loses the quality of certainty central to the aims and purpose of any fixed costs scheme.

18. If, as in New Zealand, a fixed costs model is designed with reference to the seniority/specialism of counsel required, then that generates problems of its own. The perceived need for senior counsel varies across practice areas – planning and environmental lawyers have a very different approach to those engaged in immigration and nationality work, for example. It would be inappropriate to allow different subject areas within judicial review to generate their own, subject specific practices on defining "complexity", yet given the broad scope of judicial review any universal approach would inevitably be too sweeping to function.

19. Furthermore, when would a case be assigned to a band? At the permission stage? The difficulty in such an approach would be twofold.

    a. First, it would deprive the claimant of knowing his potential adverse costs liability at the outset of the case and taking an informed decision in light of that. It will not manifest until, at the latest, an oral renewal hearing.

    b. Second, the burden on the Administrative Court workload results in very little docketing at the permission stage and the extensive use of Deputy High Court judges. What appears to be a simple or complex matter to a generalist judge on permission may, when reviewed by a specialist judge, turn out to be the converse. If there was no mechanism for review of the band allocation, justice could not be done because costs had been fixed at a *disproportionately low* level. If that mechanism was sufficiently broad to adequately accommodate those concerns, however, then it would lose the quality of certainty and finality. Cases would vacillate between bands as they progressed.

20. Instead of creating clarity and predictability, any fixed costs scheme which purports to be applied across the full span of judicial review proceedings will,

by the nature of the task, end up becoming rigidly defined bands of costs with considerable doubt and uncertainty about which band the case will fall into, with the consequential risks to access to justice that such uncertainty as to costs recovery would generate.

21. While we understand the rationale behind fixed recoverable costs, to design one fixed costs scheme which adequately and fairly encapsulates judicial review proceedings is not possible without either losing the benefits of fixed costs on the one hand or introducing a significant amount of arbitrariness into recoverable levels of costs on the other. In either the case the result would be seriously adverse impact on accessibility to judicial review remedies, particularly in publicly-funded cases.

The importance of inter-partes costs orders

22. Our client base comes from some of the most marginalised and socio-economically disadvantaged communities in the United Kingdom. For them, the ability to challenge abuses of power by public authorities is not just a matter of safeguarding the Rule of Law, but a question of securing their fundamental rights, livelihoods, their homes, their families and their liberty against state interference and breaches of public law duties, such as the duty to provide care or treatment or the duty not to discriminate.

23. In light of the financially precarious position of our client base, the overwhelming majority of cases where Chambers' counsel are instructed are funded either by legal aid or are taken on a no win-low or no fee basis. There is a dearth of litigation funding available outside legal aid and, for those ineligible on a means basis, we try to mitigate the size of that funding gap as much as possible.

24. However, this only makes the recovery of costs at a commercially viable rate in the cases we win all the more important. To quote Lord Hope, giving the unanimous judgment for the Supreme Court in *R (on the application of E) v. Governing Body of JFS and the Admissions Appeal Panel of JFS* [2010] UKSC 1:

"25. *It is one thing for solicitors who do a substantial amount of publicly funded work, and who have to fund the substantial overheads that sustaining a legal practice involves, to take the risk of being paid at lower rates if a publicly funded case turns*

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

25. This is true for our CFA-funded work as much as it is for legal aid. Without the prospect of recovery in the successful cases, there would be the invidious consequence that it would no longer be viable to offer a no win-low fee arrangement as we do at present. The consequence of withdrawal of that source of funding will be stark. It is not a question of one method of funding litigation becoming unviable, but the *only* method of funding litigation for clients who cannot qualify for legal aid at the very low income thresholds which now apply yet are too poor to pay privately, becoming unviable.

26. It is also worth emphasising that the principal source of costs protection for judicial review claims – ATE insurance – has also become unviable. The ATE insurance market has largely collapsed as a result of the cap on uplifts and becoming irrecoverable. While we recognise the problems with the combination of recoverable CFAs and ATE premiums that Sir Rupert set out in the FR, the failure to introduce QOCS or a similar mechanism in judicial review has left the area without any (or any adequate) adverse costs protection.

The absence of need and evidence

27. The new definition of proportionality contained in CPR 44.3(5) has now been a part of the CPR for just short of four years. However, in the experience of Chambers' public law practitioners there have been few – if any – challenges by losing defendants to the costs claimed by winning claimants on

proportionality grounds. Very rarely indeed do our cases get taken to detailed assessment, with the vast majority settling at a substantial discount (usually 15 – 20%) in the interests of prompt recovery.

28. This leads to two observations. Firstly, it raises the question of whether there is any *need* for fixed costs in order to ensure proportionate judicial review costs. There may be an argument for fixed costs as a form of adverse costs protection (one which we do not endorse for the reasons set out below), but if both claimants and defendants are accepting the current levels of costs as being proportionate ones then all fixed costs would do is introduce both rigidity and uncertainty (with consequential adverse effects on access to justice) into a system which is already working well.

29. Secondly and more importantly, it raises the question about the evidence base for fixing costs at an appropriate level. With no approved costs budgets and no detailed assessments in judicial review, there are very few judicial decisions on reasonable, necessary and proportionate costs in judicial review and certainly none that may be extrapolated across other judicial review cases. In the absence of that evidence base, there is a lack of independently assessed costs data for the Review to draw upon.

30. The Review should not, we suggest, be tempted into drawing upon one-sided GLD figures as evidence. Given recent attacks on judicial review and the demonstrable unreliability of government statistics prayed in aid of such attacks[5], reliance on government figures would raise very real concerns about the reliability of data and what further attacks on access to justice it may be pressed into service to support. There is no real opportunity for claimants to rebut such an evidence base in any meaningful way. Unlike the GLD, costs data for winning defendants and claimants is distributed amongst a vast number of firms and we do not have the time and resources to pool it together to counterbalance the GLD's data. Equally, we will not know what sample of cases GLD may have sent the Review and have no opportunity to comment upon how representative it is of judicial review cases as a whole.

[5] See Bondy and Sunkin Who is afraid of judicial review? Debunking the myths of growth and abuse. UK Constitutional Law Blog 10.1.2013 http://ukconstitutionallaw.org

31. Given the constitutional importance of judicial review, there needs to be a proper evidence base for the introduction of any fixed costs rates. Our concern is that, given the current deficit of independent evidence, the Review is left between the invidious choice of using imperfect, partial evidence from one side to the litigation with an interest in closing down access to the remedy, or identifying a regime of fixed costs without any evidence base for doing so.

Implications for procedure and practice

32. If a fixed costs scheme were introduced, it could not take place in a vacuum. As Sir Rupert Jackson observes in *The Reform of Civil Litigation*, controlling costs to reasonable and proportionate level is not just a matter of reforming costs law, but also requires that procedural law is streamlined and proportionate in and of itself.

33. If we look back to the FR, Sir Rupert Jackson's recommendations on costs were matched by sensible, pragmatic reforms to the general scheme of civil litigation. The practice of ordering "standard" disclosure was deprecated in favour of a "disclosure menu" which could be tailored to the requirements of the case. Expert evidence costs could be reduced by the sensible deployment of concurrent expert evidence (formerly "hot tubbing"). Relief from sanctions under CPR 3.9 (and avoidance of sanctions altogether) would be reformed to provide incentives for the parties to conduct litigation expeditiously and in compliance with the CPR.

34. For good reason, no such reform took place in judicial review proceedings. Chapter 30 of the FR made two principal recommendations: firstly, that means-tested QOCS should be introduced as the general rule in judicial review; secondly, that *Boxall* should be superseded and the rule should be if the defendant settles a judicial review claim after issue and the claimant has complied with the protocol, the normal order should be that the defendant do pay the claimant's costs.

35. The second recommendation was implemented by Lord Neuberger MR in *M v. Croydon LBC*, albeit in our experience defendants started arguing that every consent order was a "pragmatic solution" until the Court of Appeal intervened in *Tesfay*.

36. If fixed costs were to be implemented in judicial review, then the current flexible procedure would become unsustainable. There would have to be a substantial rethinking of judicial review procedure from issue through to trial in order to ensure that the fixed costs levels are workable and ensure access to justice. For the reasons set out above that would be the tail wagging the dog. Judicial review has evolved dynamically for constitutionally sound reasons.

37. Any scheme that resulted in the prospect that claimants may incur costs above and beyond those in an fixed costs scheme, and in circumstances where those costs are incurred are beyond the control of the claimants' solicitors, will act as a massive disincentive to challenge public authorities acting in excess of their powers and failing in their duties to vulnerable claimants.

Should Aarhus be extended to all judicial review?

38. In our view, no. While those in Chambers who practice in environmental law have found Aarhus facilitates access to justice, there are two main problems with the Aarhus costs regime if it were extended to all judicial reviews:

    a. Inflexibility: The current thresholds of £5000 (for individual claimants) and £35,000 (defendant) adverse costs liability may be appropriate for environmental judicial reviews, but there is no evidence that the same is true for the mainstream of judicial reviews.

    A claimant has to raise £x + £y, where 'x' is his adverse costs liability in the event that he loses and 'y' is the gap between his recoverable costs and his incurred costs in the event that he wins. If 'y' is allowed to become too large, then the required level of litigation funding for claimants becomes unachievable and the claimant is deterred from bringing his otherwise meritorious claim. Yet that is exactly the scenario which might proliferate if Aarhus was extended to the entirety of judicial review. Incurred costs levels in other areas of judicial review are not the same as those in environmental judicial reviews.

    b. Fundraising ability: In an environmental case, there is often more than one aggrieved person – the environmental harm impacts on an entire community, many of whom may be willing to fund or contribute

towards litigation costs. The need to raise the requisite litigation funds is distributed across the entire community. It is not uncommon to see the judicial reviews being brought in the name of unincorporated associations or campaigning organisations, the membership of which is from a defined geographical area.[6]

That diffusion of impact is not found in other areas of judicial review litigation. For the majority of our clients, the burden of funding the litigation falls on the individual's shoulders. To the extent that they can rely upon any other sources of funding, there may be some small, limited contributions from their family, but rarely sufficient to fund the litigation outright.

For those individual litigants, an adverse costs risk of £5,000 alone is too much to raise. To ask them to raise that £5,000, as well as the likely gap between incurred and recoverable costs, is to impose a financial liability so great that only very wealthy claimants will be able to afford to bring litigation. This would be a potentially fatal blow to the effectiveness of judicial review as a remedy for the most vulnerable in society in a time when access to justice – and public services - is already threatened by cuts to legal aid.

Our recommendations

Primary submission: QOCS

39. In our view, the only viable answer to an identified problem of adverse costs risk in judicial review proceedings is QOCS. While this proposal appears to have been rejected in 2011 (and 2013), the compelling points of principle and practice which commend QOCS as the appropriate costs tool in Judicial Review proceedings remain. It might be thought that any further rejection should perhaps be a reasoned and evidence-based one.

40. Our clients lack the resources to bear any adverse costs risk altogether and would struggle to fund any gap between incurred and reasonable costs. There is an asymmetrical relationship between claimants and the much more well-

[6] For example, the recent challenge to a fracking license in Ryedale was brought by both Friends of the Earth – a national non-governmental organisation – and "Frack Free Ryedale", an unincorporated association with 2000 members. *R (on the application of Friends of the Earth and Another) v. North Yorkshire County Council and Third Energy UK Gas Limited* [2016] EWHC 3303 (Admin)

resourced defendants. Furthermore, this would encourage defendants to litigate all the way to trial because the costs of litigating is for them a lesser price to pay than the reputational harm of being found to have acted unlawfully.

Secondary submission: The alternative to QOCS

41. If, however, the Review considers that change is currently indicated, then our submission is that there should be a separate, tailored review with broader terms of reference and more emphasis both on gathering evidence of need for change and on the assessment of the risks of any proposed change to both access to justice and accountability. This we say is essential, bearing in mind the impact that an accumulation of recent changes – non recoverability of legal aid in at-risk cases, reduced rates in High Cost Case Plans, limited access to PCOs – have already had. Given the risk of disproportionate impact that changes are likely to have on access to justice for groups protected by the Equality Act, this should careful consideration of the Public Sector Equality Duty.

A constitutional aberration

42. If our primary rationale is rejected and a fixed costs scheme is introduced for judicial review proceedings, there is an important point which – in our submission – must be made by the Review's report. It would be a grave breach of the separation of powers and the rules of natural justice if the ultimate responsibility for setting the levels of a judicial review fixed costs scheme lay in the hands of the Lord Chancellor.

43. Any recommendation to introduce of a fixed costs scheme in this area must be made conditional on the responsibility for setting and reviewing the levels of fixed costs being entrusted to a truly independent Costs Council. This arrangement features in the New Zealand system, where the levels of fixed costs are reviewed by the Rules Committee – equivalent to our Civil Procedure Rules Committee – and is done in consultation with the New Zealand Law Society and Bar Council.

44. However, it cannot be permissible for the power to rest in the hands of the single largest defendant in the Administrative Court – central Government. The Lord Chancellor herself is amenable to judicial review and is currently a defendant to a number of actions arising out of the legal aid provisions in LASPO.[7] On the most fundamental constitutional principles – as well as ensuring the overriding objective's goal of ensuring equality between the parties – it cannot be right to entrust the control of costs – and by extension access to litigation - to a party with an interest in deterring proceedings.

Garden Court Public Law Team

27.1.2017

[7] For example, *R (on the application of Rights of Women) v. Lord Chancellor*. At the time of writing, the High Court was hearing an application by the Association of British Insurers for judicial review of the Lord Chancellor's decision to review the discount rate in personal injury proceedings. The application was dismissed by Andrew Baker J, but is subject to an appeal to the Court of Appeal.

The Jackson Review of Fixed Recoverable Costs

Appendix to the submissions of the Public Law team at Garden Court Chambers

The following seven cases are some practical examples (additional to those already given in the main body of the submissions) of the progress of litigation in public law, demonstrating their diversity, flexibility and unpredictability.

Case Study 1: *R (on the application of NN) v. Secretary of State for the Home Department* CO/1790/2016

Decision under review:

The original challenge was to:

(1) The Defendant's ongoing failure to confirm that she will not detain the Claimant at his reporting event on Wednesday 6 April 2016;

(2) The Defendant's ongoing failure to serve a copy of the decision on the Claimant's further representations, submitted on 23 February 2016, despite her confirming that it would be available to be served on Wednesday 6 April 2016.

The grounds were subsequently amended to challenge:

(1) Decision to detain the Claimant, dated 5 April 2016;
(2) Removal Directions, dated 5 April 2016;
(3) Decision to refuse to accept the Claimant's representations as a fresh claim, dated 6 April 2016.

Grounds of challenge:

- Ground 1: The Defendant's decision to detain the Claimant is unlawful because at the time the Defendant was purporting to exercise power the Claimant was subject to an order for bail in the FtT
- Ground 2: The Defendant's decision to detain the Claimant is unlawful because at the time the Claimant's removal was not imminent.
- Ground 3: The Defendant's decision to detain the Claimant is unlawful because she has failed to consider the evidence regarding the Claimant's mental health

The complexity of the case:

This was an extremely complex case.

In R (on the application of Raza) v Secretary of State for the Home Department (Bail – conditions – variation – Article 9 ECHR) IJR UKUT 00132 (IAC) the UT found that the FtT is empowered to adjudicate on applications to vary the terms of its bail orders and that it *'retained the exclusive power to vary any of its bail orders during their lifespan. The Chief Immigration Officer has no power to interfere with such orders or may any order in such circumstances.'* [Headnote]

In this case we argued that the Defendant has no power to interfere with the order granting the Claimant bail order on the basis of *Raza.* This was a novel point of law that had not at that time been determined in the Higher Courts.
The Claimant was extremely vulnerable and there was clear evidence that detention would have a detrimental impact on his mental health:

a. A Letter by the Claimant's Consultant Psychiatrist dated 24 September 2015 explaining that she does not think that he is fit for detention, his mental health is likely to deteriorate and there would be an increased risk of self harm and suicide;
b. A rule 35 report by a Consultant Forensic Psychiatrist dated 15 March 2016 detailing that the Claimant's health is likely to be injuriously affected by continued detention;
c. A psychiatric report by Medical Justice dated 29 March 2016 concluding that Detention is very likely to worsen the Claimant's mental state and lead to serious suicide attempts.

We applied for an order for interim relief preventing the Defendant from detaining the Claimant at his next reporting event. This was refused on the papers and the Claimant was detained.

Developments as the case progressed:

As outlined above, the original challenge was to the Defendant's ongoing failure not to confirm that she would not detain the Claimant. The Claimant was subsequently detained and we amended grounds to challenge his detention. We made an oral application for interim relief that the Claimant be released. This was granted. The Judge who granted the order list the matter for another interim relief application the following week, so the Defendant could be represented.

The Defendant did not comply with the order and the Claimant was not released. The Defendant sought an out of hours application to the administrative court in attempt to have the order set aside. As counsel in the case I telephoned the Administrative Court and asked to make submissions in the application. I waited for many hours until the Administrative Court Judge who heard the application informed me that he had informed the Defendant

that he was not able to set aside the order of a fellow Judge and the correct procedure would have been to appeal the order to the Court of Appeal.

The claimant was released 3 days later, the day before the re-listed interim relief hearing.

The interim relief hearing took most of the day. The Judge ordered that the Claimant remain on bail and ordered the removal directions in respect of the Claimant were cancelled.

It was difficult to agree the terms of the order with the other side. It took a lot of negotiation and at one point it looked as though we were going to have to return to Court the following day.

Costs outcome:

Notwithstanding the fact that interim relief was granted on two separate occasions we were refused permission to apply for judicial review and it was found to be totally without merit.

The Claimant was ordered to pay the costs of the Defendant's preparation of the AoS.

Case Study 2: *R (on the application of B) v Special Immigration Appeals Commission* [2015] EWCA Civ 445

Available here: <http://www.bailii.org/ew/cases/EWCA/Civ/2015/445.html>

This case started in April 2014 as a JR of SSHD's authorisation to detain B, who had been under SIAC bail for many years, and had remained so even though SIAC had found in February 2014 that he could not lawfully be detained compatibly with the Hardial Singh principles. The SSHD's authorisation was the basis for SIAC exercising its bail jurisdiction over B. Upon issue of the claim, however, SSHD withdrew the authorisation to detain, but SIAC, at a hearing, later ruled that it nevertheless did have jurisdiction to impose bail. B amended the claim to challenge that jurisdiction decision instead, within the same JR proceedings, since a common legal issue was involved – the construction of various provisions of the Immigration Act 1971. The Chair of SIAC, sitting as a High Court Judge, granted permission, but dismissed the claim for JR.

B's appeal was successful in the Court of Appeal. The SSHD then introduced legislation seeking to reverse the Court of Appeal's decision in the Immigration Act 2016. The SSHD appealed to the Supreme Court. In response, B raised various retrospectivity points, as well as Article 5 ECHR, and sought a declaration of incompatibility. These were issues that had not been raised below, but had to be

raised in the Supreme Court to fairly represent B's interests, given the manoeuvres of the SSHD. The case is to be heard in November 2017.

A similar tactic was adopted by the SSHD in R (Khadir) v SSHD [2003] EWCA Civ 475, between the High Court and Court of Appeal, which led to various arguments about retrospectivity in the Court of Appeal, which, as in B's case, had been entirely unforeseen at the outset of the litigation.

Case Study 3: *R (on the application of Sathanantham & Others) v Secretary of State for the Home Department* [2016] EWHC 1781 (Admin)

Available here:
<http://www.bailii.org/ew/cases/EWHC/Admin/2016/1781.html>

This group of four cases challenged the delay in providing the Claimants with a bail address under s 4(1)(c) of the Immigration and Asylum Act 1999. The Claimants had complained of systemic delay in processing such applications from "high risk offenders" and it was necessary to obtain lengthy and complex witness evidence from BID, an NGO dealing with this client group, as well as to respond to extremely detailed evidence as to the particular difficulties being faced by the SSHD in sourcing accommodation. The case resulted in a finding by the Judge that the SSHD's system was being operated unlawfully – see [87]. The Judge was only able to reach this conclusion on the basis of wide ranging evidence and analysis from the parties as to the functioning of the system on the ground. That was in addition to addressing the various legal points of public importance advanced by the parties. Although the Claimants were only strictly successful on one ground (Ground 5) (see [7] and from [76]), the Judge accepted, at the remedies hearing, that the arguments advanced within the other grounds informed the Court's approach to Ground 5, and therefore made a 75% costs award in the Claimants' favour.

This case shows that cases raising challenges to the operation of a governmental system, which by definition requires a large volume of evidence, can be extremely unpredictable in terms of the time required. A 62 page statement from the SSHD's witness, containing around 170 pages of exhibits, including complex numerical information, just over 3 weeks before the hearing, as in this case, required significant hours of work and could not have been forecasted in advance.

Case Study 4: *R (on the application of Hossain & Others) v Secretary of State for the Home Department* [2016] EWHC 1331 (Admin)

Available here:
<http://www.bailii.org/ew/cases/EWHC/Admin/2016/1331.html>

This case concerned the lawfulness of the SSHD's Detained Asylum Casework procedure for deciding asylum claims in detention. Four claimants had been selected as lead cases. At the beginning of the second day of the trial (26 February 2016), the SSHD sought an adjournment on the basis that she was not in a position to continue. The Judge readily granted the adjournment. A continuation hearing was listed for 22 & 23 April 2016. During the intervening period the SSHD served around 800 pages of evidence, containing 14 witness statements and exhibits, plus a 38 page supplementary skeleton. The Claimants filed evidence in response plus further written submissions. The Judge's frustration at this is recorded at para 3 of the judgment (although it is noted that the Judge did not rule any of it out). This is a classic example of how proceedings can take unexpected turns and lead to exponential increases in workload, which cannot be foreseen or controlled.

Case Study 5: *R (on the application of JG by his litigation friend the Official Solicitor) v Bristol City Council (Defendant) and Secretary of State for the Home Department (Interested Party)* (unreported)

Judgment handed down: 11 August 2016

Case number: CO/1241/2016

Summary of the case

A successful judicial review challenge to an age assessment of an unaccompanied minor from abroad.

Cost issues

This was a contested and difficult age assessment case which went beyond the normal JR where oral evidence was heard and evidence put to the Defendant prior to issue which the Defendant was aware of before the claim was issued.

The additional component was that on disclosure there were clear issues concerning the claimant's mental health and learning disability. This required instruction of an expert which added to the costs.

The certificate was extended

The hearing turned into a pure finding of fact hearing with the judge preferring the evidence of a teacher. The precise nature of this set of proceedings and involved a lot more work and expense beyond that which is normally required.

Although the judge made a de-novo finding of fact in respect of the age he would not make any award of costs against the Defendant so both parties bore their own costs.

If he had made an award of costs the law centre would have benefitted greatly and would have been able to re-invest this in their not for profit work. Counsel was limited to an hourly rate of £71.00 per hour subject to a discretionary enhancement (Maximum would give £143 per hour) (Accepted commercial rates are between £225 – 300 per hour subject to taxation) still to be determined and work can only be billed at an hourly rate under the legal aid certificate within the limits of the certificate and there is no mechanism to claim a brief fee or fixed fee retainer for legal aid work so there would be a complete disconnect with the fixed fee scheme. Given the issues and complexity in such a cases and the fact new evidence and issues arise in the claims that as such work is generally unsustainable on legal aid rates alone and the course the case takes is unpredictable a fixed fee regime cannot easily apply.

Case Study 6: *R (Hakima Alemi) v Westminster City Council* [2015] EWHC 1765 (Admin)

Summary of the case

The Defendant council's allocation scheme for social housing was declared unlawful and quashed in that it suspended the ability of a homeless family to bid for social housing. The transcript has been made available. This case has also been reported in Inside Housing, the BBC, the Independent, the Local Government Lawyer and in local news in West End Extra. With the Labour Party calling on the Council to rethink its entire housing policy as a result.

Costs issues

The case started out as 3 conjoined cases. Two against Westminster and 1 against the Royal Borough of Kingston who were adopting a similar policy concerning client who had been trafficked where all medical evidence supported the need for secure social housing.

There were 4 grounds of JR advanced (1) which I will call substantive and (3) which were procedural in nature such as the PSED and a consultation requirement.

Following issue of all 3 with a view to them being joined the RBK case settled with admission to the scheme and elevation of the client to the top of the scheme providing security of tenure (this was settled on a no costs basis save for legal aid payment) as the at risk regulations did not bite.

The two Westminster cases progressed to a permission hearing on the papers – permission was refused. Renewal was sought and renewal was supported by the hand-down on the case of *R (Jakimaviciute) v Hammersmith & Fulham LBC* [2015] HLR 5 (CA). By the renewal hearing the Defendant had purported to complete a lawful

PSED assessment etc and as neither this ground could not be continued with also by the time of the renewal hearing one of the claimants had been offered private sector accommodation which she accepted in discharge of their homelessness duty (the at risk regulations did not bit and this claim was settled on a no order as to costs save for a legal aid assessment).

Permission was pursued on one ground only which was the core subject matter of the proceedings. Also as the point raised was deemed novel and of wider importance and arguably flew in the face of a House of Lords decision under previous legislation prior authorisation was granted for Queen's Counsel.

The case remained well within the limits of the legal aid certificate of £25K

The costs order was:

(1) Up to permission the Defendant do pay 25% of Claimant's costs give than only one ground could actively be pursued

(2) The Defendant to pay Claimant's reasonable costs to be assessed if not agreed on a standard basis

(3) Given the need for a detailed assessment D to pay £10, 000 by way of interim costs within 28 days

(4) Detailed assessment of costs.

It can be seen the complex way in which this case developed and was litigated and how the litigation affected the liability to pay costs.

The costs were settled without the need for a detailed assessment.

The reason for the interim payment is set out in the CPR given the delays in settling costs assessments.

Although there was no formal requirement for a High Costs case plan that as a QC was instructed the Legal Aid Agency required a plan of work and an estimate of costs at each stage before it would authorise and extend the certificate.

It is hard to see how a fixed recoverable costs scheme would fir with how this litigation operated.

Case Study 7: *R (AM) v London Borough of Havering and London Borough of Tower Hamlets* [2015] EWHC 1004 (Admin)

Summary of the case

The Defendant Councils' actions were declared unlawful following successful judicial review application by a homeless family. It was ruled that the local authority responsible for assessing the needs of children in these cases should be the borough

in which the family were actually living, and the local authority responsible for providing housing whilst an assessment of the children's needs takes place, should be the authority that had placed them there. The transcript has been made available. This case has also been reported in Inside Housing, Evening Standard, and Family Law. The appeal by Havering and Tower Hamlets was dismissed at an oral hearing by the Court of Appeal on 17 November 2015 as having become academic with costs awarded to the Claimant see Legal Action Magazine February 2016 page 45 for the report.

Costs issues

It can be seen that this was complicated by the involvement of 2 Defendants who in part were litigating against each other. There was a 3rd Local Authority initially joined as an interested party.

The case was funded on one legal aid certificate up to a maximum of £25k.

Up to the grant of permission the case involved junior counsel alone. On permission the Legal Aid Agency authorised instruction of QC but refused to have junior counsel funded as well despite the costs plan showing the savings to them on having 2 counsel. Junior counsel at 1st instance acted pro-bono to support QC. Just before the hearing of the 1st instance decision the LAA agreed that there was an error in their approach to funding but as all of the work had been done by QC they were not prepared to grant a certificate for both. Junior counsels costs were limited to the time he was on a legal aid retainer

It can be seen the case was hard fought and complex. During the case the 1st Defendant made staged disclosure of evidence and amended grounds requiring further disclosure and providing witness evidence. The 2nd Defendant failed to really engage with the process and caused more work for the claim.

The 1st Defendant was threatened with committal proceedings to fail to comply with the 1st instance judgement and failed to secure a stay on the order in their appeal application rending it academic.

The Defendant's obtained permission to appeal from the Court of Appeal prior to compliance with the 1st instance judgment and at this stage the LAA authorised the funding of junior and QC for the Respondent but on a staged High Cost case plan specifying work and limiting the costs which could be incurred under the legal aid retainer.

It is the case that the Defendant's are only liable to pay costs which are identified as authorised under a legal aid certificate.

The Defendant's appeal failed for the reasons in the judgement attached but required submissions on costs with a judgement being given on liability.

There has been an extensive costs dispute which is only now moving to settlement without the involvement of an assessment.

It can be seen this was complex and decisions of the LAA affected the impact on inter partes costs by limiting the use of counsel and the conduct of both Defendants.