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**INTRODUCTION TO JUDICIAL REVIEW**

**PREPARATION FOR THE SUBSTANTIVE HEARING**

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3. **Immediate Next Steps Following the Grant of Permission**
4. There are certain routine steps which should take place following the grant of permission in all judicial reviews: the filing of Detailed Grounds of Resistance and any supporting evidence by the Defendant; a listing date being secured; exchange of Skeleton Arguments; the hearing itself.
5. There are, however, many variations on that theme, depending upon matters such as the directions made at permission stage, the urgency of the case, the issues, whether the Claimant wishes to file further evidence or amend his or her Grounds, whether interim relief is sought, and whether there are any third party interveners.
6. The first immediate step to take is the payment by the Claimant of the continuation fee.[[2]](#footnote-3) The CPR then envisages the next stage being the filing and service of the Defendant’s Detailed Grounds and evidence.
7. CPR 54.10(1) provides that where permission to proceed is given the court may also give directions. The content of these directions will vary depending on the nature of the case, but typical directions made at permission stage are as follows:
8. Permission to apply for Judicial Review is granted.
9. The Defendant shall file with the Court and serve on the Claimant Detailed Grounds for contesting the application and any written evidence within 35 days from the date of service of this Order.
10. Any reply and any application by the Claimant to adduce further evidence must be filed within 14 days of service of the Detailed Grounds.
11. The application shall be listed on the first available date thereafter / after a specific date with a time estimate of X, [to take place in any event no later than Y].
12. The Claimant must file with the Court and serve on the Defendant a skeleton argument no later than 21 days before the hearing of the judicial review.
13. The Defendant must file with the Court and serve on the Claimant a skeleton argument not later than 14 days before the hearing of the judicial review.
14. An agreed hearing bundle must be filed and served by the Claimant no later than 14 days before the hearing of the judicial review.
15. The Claimant must file and serve an agreed bundle of authorities not less than

7 days before the date of the hearing of the judicial review.

1. The reference to the Defendant filing its Detailed Grounds for contesting the claim arises from CPR r.54.14:

*(1) A defendant and any other person served with the claim form who wishes to contest the claim or support it on additional grounds must file and serve –*

*(a) detailed grounds for contesting the claim or supporting it on additional grounds; and*

*(b) any written evidence,*

*within 35 days after service of the order giving permission.*

1. This standard 35-day timetable will not apply if the Judge when granting permission has made bespoke directions setting a different timetable.
2. CPR Part 54 does not explicitly envisage Claimants responding to the Detailed Grounds and evidence. However, it is now increasingly common for the Permission Judge to build into the timetable an opportunity for the Claimant to respond to the Detailed Grounds and file any further evidence. If acting for a Claimant, it is sensible to request that this be provided for in the order granting permission – bear this in mind as in most cases it should be built into your initial drafting when preparing the Claim Form and Statement of Facts and Grounds, at the outset of the claim.
3. Listing is dealt with in more detail below. However, if the claim is urgent, and the permission order recognises this, then steps should be taken very promptly after the grant of permission to ensure that a speedy listing is secured. In such cases, it is sensible for the Claimant’s solicitor to contact the Administrative Court list office (if in London – 020 7947 6655 – select option 3) or the nominated court lawyer. The solicitor can emphasise the need for an urgent hearing, as per the Permission Judge’s order, and press to secure a speedy listing. It will usually be the Claimant’s solicitor who is anxious to ensure that the case gets listed promptly, although in some cases the Defendant may wish to take these steps (for example where there is costly interim relief in place). An urgent hearing should not be requested unless the matter is genuinely urgent, and abuse of the urgent listings procedure will result in sanctions: *R (DVP) v SSHD* [2021] EWHC 606 (Admin)
4. In other cases, the list office will usually contact counsels’ clerks to discuss listing dates a number of weeks or months after permission has been granted.
5. **Interim Applications**
6. Formerly, many procedural issues in the Administrative Court were dealt with informally. There has been a significant change in approach and recent cases have stressed the need for procedural rigour and the need for formal applications to be made in good time. As the preface to the current ACO guide states:

“The Court has had occasion recently to restate that the CPR are there to ensure fairness to all parties. The conduct of litigation in accordance with the rules is integral to the overriding objective set out in the first part of the CPR and to the wider public interest in the fair and efficient disposal of claims (R (AB) v Chief Constable of Hampshire & Others [2019] EWHC 3461 (Admin)). This Guide sets out in clear terms what is expected. **Parties may be subject to sanctions if they fail to comply**” (added emphasis)

This is particularly important where a party is considering amending or adding to the way in which they put their case or they wish to adduce new evidence. In such cases it will be necessary to make a properly formulated application *R (Spahiu) v SSHD* [2019] 1 WLR 1297 para 25).

1. Particular care must be taken with urgent interim relief applications, which must be made in accordance with the new Practice Direction 54B. Applicants must ensure that all matters material to the application have been investigated, that the application is supported by evidence, and that the need for urgency is explained. In without notice applications or those likely to be determined *ex parte*, the court must be made aware of all matters relevant to whether or not interim relief should be granted, including those undermining the application (cf paragraph 2 of Practice Direction 54B).

*Further evidence and amendment of the Claimant’s case*

1. Part 54 CPR contemplates that the evidence and issues will crystallise at the time of the Defendant’s Detailed Grounds and evidence.
2. The rules do not provide for the Claimant to serve evidence in response and in many cases this will be unnecessary, although increasingly provision is made at permission stage for further evidence and a reply, and it is prudent for Claimants to seek this from the outset in order to preserve their positions and to enable them to address unexpected issues without the need for a further application.
3. Permission may be given for further evidence under Part 54.16.
4. Permission is specifically required for any party to rely on expert evidence (even expert evidence relied on in the original grounds). This will not normally be heard live but CPR Part 35.4(1) still applies: *“no party may call an expert or put in evidence an expert’s report without the court’s permission” (R (Kemp) v Denbighshire Local Health Board* [2006] EWHC 181 (Admin); *R (HK Bulgaria) v SSHD*  [2016] EWHC 857 (Admin), Garnham J [10]-[18]).
5. In *R (The Law Society) v The Lord Chancellor* [2018] EWHC 2094 (Admin) the Divisional Court reaffirmed that expert evidence is “seldom reasonably required” in judicial review proceedings, because the court is not assessing the merits of the decision challenged. Expert evidence may however be required to enable the court to appreciate the technical basis of a decision challenged on irrationality grounds: *R (Transport Action Network Ltd) v Secretary of State for Transport* [2021] EWHC 2095 (Admin). Witness statements which amount to expert evidence of opinion will be given little weight: *R (Gardner & Anor) v Secretary of State for Health & Ors* [2021] EWHC 2946.
6. In practice most applications to admit further evidence are dealt with by consent. The parties will often provide the court with evidence bringing the facts up to date at the time of the hearing. Indeed, they may be under a duty to do so to comply with the duty of candour.
7. It may be necessary to change the focus of the Claimant’s case following receipt of the Defendant’s Detailed Grounds or evidence, or subsequently as the case develops (for example, where a decision or further decision is made in a community care case).
8. If the Claimant wishes to rely on grounds other than those for which permission was granted then s/he requires permission and must (Part 54.15 and PD 54A at [11.1]) give not less than 7 clear days’ notice *“to the court and to any other person served with the claim form”* before the hearing date (or warned date). The ACO Guide states that permission must be sought by making an application under CPR Part 23 (para 9.2) and see further para 21 below.
9. If the change goes further than adding to the grounds for the challenge to the original decision (for example, if there has been a fresh decision or failure to deal with new material) then an amendment to the grounds may be necessary: (Munby J in *R (P, W, F and G) v Essex County Council* [2004] EWHC 2027 (Admin), *R (MB) v Lambeth BC* [2006] EWHC 639, *R (F) v Wirral BC)* [2009] EWHC 1626, *R (O) v Hammersmith & Fulham BC* [2012] 1 WLR 1057 [18]). At [35] of the *Essex* case Munby J (as he then was) said:

*“Where a claimant seeks to make a case sufficiently different from that set out in his Form N461 as to require an amendment to the Form N461 then it seems to me that it is incumbent on him (a) to seek permission to amend his N461, (b) to give notice of his wish to amend at the earliest possible moment and in any event no later than 7 clear days before the hearing and (c) to formulate the new or additional case he wishes to make in a properly drafted document setting out, in the manner and with the detail required by CPR Part 54.6 and by Form N461, the precise amendments for which he is seeking permission.”*

1. Sometimes, following a claim for judicial review the Defendant either makes a fresh decision or withdraws the decision and says they will make a new one. In that case:
   1. It may not be appropriate to stay the claim pending the fresh decision - *Yousuf v SSHD* [2016] EWHC 663 (Admin) (Holman J); *R (Bhatti) v Bury MBC* [2013] EWHC 3093 (Admin) and ACG (Administrative Court Guide Judicial Review) [7.11] for a discussion of the circumstances in which a challenge to a fresh decision can be included in the original claim form at all.
   2. Where there is already a fresh decision then it may be appropriate to allow an amendment :

“there is no hard and fast rule. It will usually be better for all parties if judicial review proceedings are not treated as “rolling” or “evolving”, and it is generally simpler and more cost-effective for the reviewing court to avoid scrutinising post-decision material. But there will also be a need to maintain a certain procedural flexibility so as to do justice as between the parties” *Spahiu* para 63; *R (Raja) v Redbridge LBC* [2020] PTSR 2129 paras 19-21.

* 1. Where the court does grant permission then it may impose conditions, for example, about the re-formulation of the claim and bundles - *R (Hussain) v SSJ* [2016]EWCA Civ 1111.

1. This is an issue which should be to the forefront of a Claimant’s mind from the outset: e.g. in a community care case, where no assessment of needs has been conducted at the outset, a Defendant should not be able to frustrate the process simply by producing a poor assessment of needs post-issue or post-permission. If the Claimant has framed the challenge as being to the absence of any lawful assessment under the Children Act 1989 the production of a fresh assessment may be more readily encompassed within the existing grounds.
2. Note an important point highlighted in the White Book [54.15.1]: where permission to argue a particular ground has been expressly refused at an oral permission hearing, a Claimant wishing to challenge that should ordinarily do so by appealing that refusal to the Court of Appeal, but in some exceptional circumstances the Court hearing the substantive application may exercise its discretion under CPR r. 54.15 to permit the Claimant to argue that particular ground, e.g. if there has been a significant change of circumstances, or a proposition of law is now maintainable which was not previously so (such as where the Court of Appeal has overturned a decision of the High Court in a case raising similar issues). See, for example, *R (Opoku) v Southwark College Principal* [2003] 1 WLR 234, [2002] EWHC 2092 and *R (Smith) v Parole Board* [2003] 1 WLR 2548.

*Disclosure and applications to cross-examine*

1. CPR Part 31 (disclosure) applies to all proceedings except for those on the small claims track but CPR PD 54.12 states that disclosure is *“not required unless the court orders otherwise.”* The issue of disclosure is distinct to the duty of candour, which applies to both parties at all stages of a judicial review claim.
2. Formerly, very restrictive criteria applied to disclosure in the judicial review context, derived from *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement* [1995] 1 WLR 386. Disclosure would generally be ordered only where a party’s evidence could be shown to be materially inaccurate or misleading.
3. This is no longer the case. The rules were substantially relaxed by the House of Lords in *Tweed v Parades Commission of Northern Ireland* [2007] 1 AC 650.

*“it would now be desirable to substitute for the rules hitherto applied a more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirements of the particular case, taking into account the facts and circumstances. It will not arise in most applications for judicial review, for they generally raise legal issues which do not call for disclosure of documents. For this reason the courts are correct in not ordering disclosure in the same routine manner as it is given in actions commenced by writ. Even in cases involving issues of proportionality disclosure should be carefully limited to the issues which require it in the interests of justice. This object will be assisted if parties seeking disclosure continue to follow the practice where possible of* *specifying the particular documents or classes of documents they require, as was done in the case before the House, rather than asking for an order for general disclosure.”* (At [32] per Lord Carswell and see Lord Brown at [56]).

1. However, this does not mean that disclosure will be ordered as a matter of routine. *“The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly”*[[3]](#footnote-4). Normally applications raise an issue of law and disclosure is unnecessary – See Lord Bingham at [2]-[3], *Tweed*. Disclosure should be limited to the minority of cases where the *“precise facts are significant”.* Lord Brown thought the impact would be simply that *“the courts may be expected to show a somewhat greater readiness than hitherto to order disclosure of the main documents underlying proportionality decisions”* and that orders for disclosure would remain exceptional [56]. In *Ford v FSA* [2012] EWHC 997 Burnett J refused disclosure of correspondence between the FSA and third parties about the use of confidential information because there was “*no reason to suppose that anything is amiss*”.
2. If an application for disclosure is made then it must be *“properly focussed on auditing the legality of public decision making”:* *Bredenkamp* [11].
3. Disclosure may be ordered despite the fact that documents are confidential. In appropriate cases the court may require documents to be produced to it so that it can assess whether disclosure is necessary *(Re Finucane’s application* [2013] NIQB 45, *R (NAPO) v SSJ* [2014] EWHC 4349 (Admin)) or it can order disclosure of the gist of information (*A (a Child) v CC Dorset* [2010] EWHC 1748 (Admin)).
4. Disclosure may be ordered to make the decision under challenge intelligible. For example, in *R (Firstgroup Plc) v Strategic Rail Authority* [2003] EWHC 1611 (Admin) anonymised disclosure was ordered of scores in a rail franchise exercise, in part so that the court could evaluate an irrationality challenge.
5. It may also be necessary to make disclosure so that cross examination can be effective – *Al Sweady* (below):

*“For there to have been effective cross-examination, it was vital for full disclosure to occur as otherwise the evidence of those witnesses could not be effectively challenged and appraised with the consequence that the truth would not have been discovered. Put in another way, where the court is involved in fact-finding on issues as crucial to the outcome of this case as they were in the present case, the approach to disclosure should be similar to that in an ordinary Queen’s Bench action”* : at [27].

1. Claimants should also consider applications for information under the Freedom of Information Act 2000 and Data Protection Act 1998.

*Closed Proceedings*

1. On a related issue, note the decision of the Supreme Court in *R (Belhaj) v DPP* [2018] 3 WLR 435, [2018] UKSC 33. The Claimants alleged that they had been unlawfully ‘rendered’ from one foreign state to another, where they had been imprisoned, tortured and subjected to other serious maltreatment by the authorities there; and that the rendition had been carried out with the assistance of the British Secret Intelligence Service and one of its senior officers. Following a police investigation the DPP informed them that the CPS had decided that there would be no prosecutions arising from the allegations because there was insufficient evidence for there to be any realistic prospect of convictions. The Claimants sought judicial review of the decision not to prosecute. In defending the claim for judicial review the DPP wished to rely on certain classified documents, and because of the national security concerns relating to those documents, the Foreign Secretary applied pursuant to s.6, Justice and Security Act 2013 for a declaration that the proceedings were proceedings in which an application might be made to the court for there to be closed material proceedings in which the documents would be considered.
2. The Claimants opposed that application on the grounds that there was no jurisdiction to hold closed material proceedings since a claim for judicial review of a decision not to prosecute amounted to *“proceedings in a criminal cause or matter”* for the purposes of s.6 of the Act. This was addressed as a preliminary issue, and was appealed to the Supreme Court. The Supreme Court held that, in accordance with its ordinary and natural meaning, the phrase “*proceedings in a criminal cause or matter*” in s. 6 included proceedings by way of judicial review of a decision made in a criminal cause; that the words *“criminal cause or matter”* in s. 6 meant a matter which required judicial determination at any stage of the proceedings where the subject matter was criminal, and if the cause or matter were carried to its conclusion might result in the conviction and sentence of the persons charged; that by their claim for judicial review the Claimants were seeking to require the DPP to prosecute a named individual and that was as much a criminal matter as the director's original decision not to prosecute; and that, accordingly, the claim was a *“criminal cause or matter”* for the purposes of s. 6, and so there was no jurisdiction to hold closed material proceedings.

*Cross examination*

1. The traditional approach has always been that judicial review applications are ordinarily heard on paper and factual disputes will generally be resolved at trial in the Respondent’s favour: *R. v Board of Visitors of Hull Prison Ex p. St Germain (No.2)* [1979] 1 WLR 1401. This does not apply where the evidence is manifestly wrong, such as where it is inconsistent with undisputed objective evidence (see e.g. *S v* *Airedale NHS Trust* [2002] All ER (D) 79, per Stanley Burnton J) or where the documents show that the Defendant’s evidence *“cannot be correct”* (see Silber J in *R (Mc Vey) v Secretary of State for Health* [2010] CP Rep 38 at [35] and *R (Westech College) v SSHD* [2011] EWHC 1484 (Admin) at [22]-[27]).
2. Parties and the court should always consider carefully if there is any critical factual issue which requires orders for cross-examination or disclosure. Courts should not be reluctant to make such orders in suitable cases: see *R (Al Sweady) v Secretary of State* [2010] HRLR 2 at [27]-[28]. They must consider at an early stage whether cross examination may be necessary and seek appropriate directions – *ibid* at [64].
3. Examples of cases where applications to cross examine may be allowed are:
   1. The court has to reach a conclusion on disputed issues of fact, for example:
      1. a question of collateral fact or where there is a dispute as to the procedure that was actually followed (see e.g. *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs* [2012] EWHC 2115 (Admin). Even in this case the Court retains a discretion and may resolve the issues on the papers (*R v CC Thames Valley ex p Cotton* [1989] COD 318). The question is whether cross examination is necessary to deal with the case *“fairly and justly” (*see *R (St Matthews (West) Ltd) v HM Treasury* [2014] EWHC 2426 (Admin)).
      2. Where there is a disputed allegation of a human rights breach raising a hard edged question of fact. In *Al Sweady* (above) at [19] the court said:

*“In our view, it was necessary to allow cross-examination of makers of witness statements on those “hard-edged” questions of fact. We envisage that such cross-examination might occur with increasing regularity in cases where there are crucial factual disputes between the parties relating to jurisdiction of the ECHR and the engagement of its articles”.*

The issues of fact in that case were:

* Where had Al Sweady been killed. The applicability of Article 2 depended on this.
* Had the Claimants been subjected to ill treatment in a way that infringed their Article 3 rights?
* Was detention of some of the Claimants justified for the purposes of Article 5? Were they held for imperative reasons of security?
* Would the Claimants be subjected to ill-treatment if handed over to the Iraqi authorities?
  1. Where fundamental human rights are at stake and the court has to review the merits of the decision – for example questions as to the compulsory treatment of a detained patient -  *R (Wilkinson) v RMO Broadmoor Hospital* [2002] 1 WLR 419.

1. More recent cases have suggested that a more relaxed approach to ordering cross examination is not confined to fundamental human rights cases. For example:
   1. *R (MH) v SSHD* [2009] EWHC 2506 (Admin), per Sales J (as he then was):

*“The fact that a claim (such as a claim in tort) happens to be brought using the procedure in Part 54 does not mean that ordinary procedures employed by the courts for resolving substantial disputes of fact (including cross-examination) are not to be applied*”[[4]](#footnote-5).

* 1. *R (McVey) v Secretary of State for Health* [2010] CP Rep 38 – a case involving whether the Defendant had acted to amend a vCJD scheme when so advised by trustees. No application for cross examination was made but Silber J stated as a general rule:

*“The proper course for a claimant who wishes to challenge the correctness of an important aspect of the defendant's evidence relating to a factual matter on which the judge will have to make a critical factual finding is to apply to cross-examine the maker of the witness statement on which the defendant relies”.*

* 1. *R (Shoesmith) v OFSTED and others* [2010] EWHC 852 (Admin). The question whether the Claimant had had an adequate opportunity to address concerns may have been an issue for cross examination.

*Further Information*

1. Under CPR Part 18 a court may require a party to *“(a) clarify any matter which is in dispute in the proceedings or (b) give additional information in relation to any such matter whether or not the matter is contained or referred to in any case”*. In *Bredenkamp* Dingemans J allowed (in part) an application for FI but said that such requests should be exceptional. It was common ground that the principles in *Tweed*  should apply [19]-[20].
2. Even in the absence of a formal part 18 request parties should liaise to clarify the issues in dispute.

*Manner of making an interim application*

1. The procedure in CPR Part 23 applies and an application should be made in an application notice supported by evidence and with a draft order. Note that under CPR part 54.1A a Court officer who is a barrister or solicitor may decide matters that are incidental to civil proceedings in the High Court or where there is no substantial dispute. This is subject to review by a judge (54.1A(5)).
2. If there is a hearing then a skeleton argument should be produced 2 working days before the hearing [ACG 19].
3. **LISTING**
4. Listing policy is set out at <http://www.justice.gov.uk/courts/rcj-rolls-building/administrative-court/listing-policy> and ACG 14.1. Where counsel are on the record then the court usually attempts to fix a date convenient to counsel. Some cases are placed in the short warned list where they are liable to be called on at less than a day’s notice from the warned date.
5. Once listed a hearing will not generally be adjourned without good reason, even if the parties agree (ACG 14.4.2). The decision to adjourn is made by a judge, not the ACO.
6. The parties must keep the Court informed of any matters likely to affect the length of the hearing. They must also notify the court if there is a good reason for it not to be listed (e.g. settlement negotiations).
7. It is critical to notify the Court of reading time required. This should be made clear when the time estimate is provided. There have been many recent examples of inadequate listings which do not allow the Judges adequate time to read in. Be realistic, notify the Court and keep a paper trail!
8. **Settlement and discontinuance (ACG 23)**
9. Parties are required to consider settlement throughout the case (ACG 13.2.1) and encouraged to use ADR: *R (Cowl) v Plymouth City Council (Practice Note)* [2002] 1 WLR 803, [2001] EWCA Civ 1935. An unreasonable failure to mediate may be a reason to depart from the usual rule that costs follow the event *PGF II SA v OMFS Co1 Ltd* [2014] 1 WLR 1386, applied in *R (Crawford) v Newcastle University* [2014] EWHC 1197 (Admin).
10. If the parties do settle then they must inform the court promptly so as to avoid the Court wasting time reading and preparing the case: see *R (Craddock) v PCA* [2005] EWHC 95 Admin. Failure to do so may result in a wasted costs order: *R (Gassama) v SSHD* [2012] EWHC 3049 (Admin); *R (Grimshaw) v LBC Southwark ,* 17th July 2013, Leggatt J.
11. Where there is a settlement then (subject to discontinuance (below)) the proceedings are brought to an end by a consent order which requires an application and fee (ACG 23.4). including a statement of reasons why that order is merited (PD 54 Para 17, ACG 23.4.1, and Practice Direction (Administrative Court: Uncontested Proceedings) [2008] 1 WLR 1377). Any settlement on behalf of a child or a protected party must be approved by the court using the procedure in CPR 21 (ACG 23.5).
12. It often happens that the parties agree all issues with the exception of costs and costs are then dealt with on the papers (see below).

1. A Claimant may also discontinue their claim at any time by notice under CPR Part 38 (subject to the restrictions in that rule which include 38.2(2) – permission is required if there has been an injunction or undertaking). However, they must pay the Defendant’s costs unless the Court orders otherwise.
2. **PREPARATION FOR THE HEARING**

*Determination without a hearing*

1. Under CPR Part 54.18 the *“court may decide the claim for judicial review without a hearing where all the parties agree”.* This will normally be suitable for simple cases[[5]](#footnote-6) only but might also be used to “tie-break” where the parties have agreed on everything apart from a discrete issue but do not want to incur the costs of a hearing. The rules and practice direction do not set out any procedures for dealing with a case in this way[[6]](#footnote-7). Once permission has been granted then the Court does not have any other general power to dispose of it without a hearing unless the parties agree – *BP v SSHD* [2011] EWCA Civ 276.
2. Insisting on an oral hearing when it is not needed can be unreasonable conduct meriting an adverse costs order – *R (J) v LB Hackney* 25 Oct 2010.

*Hearing Bundles* (PD 54A.15, ACG 20)

1. Bundles must be lodged at the same time as the skeleton argument (or earlier if the court has so ordered). This should be a joint bundle with all documents to be relied on by either side. During the Coronavirus pandemic the court has adopted a procedure for electronic bundles available at [Administrative Court - GOV.UK (www.gov.uk)](https://www.gov.uk/courts-tribunals/administrative-court).
2. The bundle should:
   1. Present documents chronologically.
   2. Be numbered sequentially and indexed.
   3. Be double-sided with documents copied (legibly) in portrait format.
3. If there are more than 500 pp consider a core bundle and only include relevant extracts from long documents in the main bundle.

*“The judge may refuse to read a bundle which does not comply with these requirements, or direct that a revised bundle is submitted which does comply, in which event the judge may disallow the costs or make a different adverse costs order”* – ACG 20.4.5.

*Timetable and content of skeleton arguments*

(CPD 54A 14 & ACG 19, PD of 11 November 2013 para 8 for UT Immigration cases)

1. The Claimant must file a skeleton 21 working days before the hearing or the short warned list date. The Defendant must file their skeleton 14 working days before those dates. The court may refuse to permit a party to rely on a skeleton argument which does not comply with the ACG guidance, or is served late, or may make an adverse costs order [ACG 19.4.5].
2. The Claimant must file a bundle of documents with the court at the same time as the Claimant’s skeleton argument (unless alternative directions have been made): see PD54A, [15].
3. Skeleton arguments may be filed by email. Each region has its own email address. These are listed at ACG, annex 1.

1. PD 54A [14] requires that skeleton arguments must:
   1. not exceed 25 pages without the court’s permission;
   2. define and confine the areas of controversy;
   3. be in numbered paragraphs, cross referenced to any relevant document in the bundle;
   4. not contain extensive quotations from documents or authorities;
2. The ACG at 19.2.4 states that[[7]](#footnote-8):

“It is important that:

19.2.4.1. the decision or other conduct challenged under challenge is

clearly identified;

19.2.4.2. the relevant facts, including any relevant change of circumstances

since the Claim Form and supporting documentation were lodged, are set out;

19.2.4.3. the grounds for seeking judicial review (or interim relief, or any other order) are set out under numbered headings. The grounds must be stated shortly and numbered in sequence. Each ground should raise a distinct issue in relation to the decision under challenge;

19.2.4.4 arguments and submissions in support of the grounds are set out separately in relation to each ground;

19.2.4.5. relevant legal principles are set out. Lengthy extracts from statutory or international materials, case law and other sources should be avoided unless it is considered that this will materially speed up the Court’s pre-reading, the presentation of the oral argument or the preparation of judgment;

19.2.4.6. the remedy sought is identified;

19.2.4.7. any urgency or other matter relevant to the timing of the case is explained;

19.2.4.8. any other relevant point, such as delay, alternative remedy or any other bar to relief, is identified and addressed”

1. The document should be at least 1.5 spaced and not less than 12 point. It should be paginated and must not exceed 25 pages without the court’s permission. Skeleton arguments filed and served by email should be sent as Word documents, not pdf.
2. Citation of authorities should follow the Practice Direction of 9th April 2001 ([2001] 1 WLR 1001). In particular: *“The skeleton should…clearly identify what authorities, and what parts of what authorities, are relied on, and carry the certification of counsel as required by the Lord Chief Justice’s Practice Direction [2001] 1 WLR 1001*” – *R (Prokopp) v London Underground* [2003] EWCA Civ 961. See also Munby LJ’s *“afterword”* in *R (B) v CC Derbyshire Constabulary* [2011] EWHC 2362 (Admin) at [96]-[101].
3. At the time of drafting the skeleton argument Claimants should also take stock and reconsider:
   1. What the object is of the proceedings and what relief the Claimant seeks. It is helpful to have a draft of the orders that the Court might be invited to make.
   2. Whether it is necessary to pursue all of the arguments initially advanced or whether the case can be more usefully focused.

*“One of the merits of great advocates, as Lord Pearce pointed out in Rondel v Worsley [1969] 1 AC 191 at p 255G, has been the ability ruthlessly to sacrifice nine points and win on the tenth and best…The leave no stone unturned approach is no longer to be encouraged…”*

Munby J in *R (Bateman) v LSC* [2001] EWHC Admin 797.

* 1. What documents (and authorities) are really necessary for the Court. In *Prokopp,* Schiemann LJ said:

*“Even if one were prepared to accept – which I am not - that they were all relevant to those actions they were certainly not relevant to the appeals before us. Their production before us not only involved a grotesque waste of environmental assets such as trees but an equally grotesque waste of public money and judicial time and energy in laying one’s hand on the few documents and authorities which are relevant. It is the duty of Counsel and solicitors to go through material in order to decide what is relevant. Counsel apparently did this and referred to what they thought was arguably relevant. Yet far more was placed before us”.*

The parties should agree a bundle of authorities which are really necessary. ACG 21 suggests that in most cases there will be no need for more than 10 and some cases will require fewer, if any, authorities.

1. **THE HEARING**

*Composition of the Court*

1. Criminal cases may be heard by a single judge or by a divisional court of two judges. Simpler cases will ordinarily be suitable for decision by a single judge but note that only a Divisional Court has power to make a Defendant’s costs order in a criminal case (Prosecution of Offences Act 1985 s. 16(5) – but see the limitations in 16A).
2. Civil cases are ordinarily heard by a single judge. The order granting permission may state that the case is suitable for decision by a deputy judge or specify more than one judge.
3. If a judge has refused permission on the papers then the case will not normally be listed before them (*R (Mohammed) v Special Adjudicator* [2002] EWHC 2496 Admin, [4]) but if it is then this will not ordinarily be a ground for asking the judge not to sit *Sengupta v Holmes* [2002] EWCA Civ 1104.
4. Standing can be considered again but overlaps with remedy – *R v Secretary of state for Health ex p Presvac Engineering Ltd* (1991) 4 Admin LR 121.
5. Delay – A decision at the permission stage that a claim was brought promptly or to extend time despite this is final and cannot be re-opened at the final hearing. However the Defendant may still argue that relief should be refused because of undue delay (*R v CICB ex p* A [1999] 2 AC 330). In *R (Lichfield Securities Ltd) v Lichfield* DC [2001] EWCA Civ 304 the Court of Appeal held that where the effect of undue delay had been fully argued at the permission hearing then it should be re-opened only where (a) the judge at the initial hearing had expressly so indicated; (b) new and relevant material was introduced at the substantive hearing; (c) in an exceptional case, the issues as they developed at the full hearing put a different aspect on the question of promptness; or (d) the first judge had plainly overlooked some relevant matter or had otherwise reached a decision *per incuriam*.
6. Where limited permission was given: As mentioned above, CPR Part 54.15 also permits a Claimant to give notice that they intend to rely on grounds in their original N.461 for which they were not granted or refused permission. However, this may be an abuse of process in the absence of significant justification– *R (Opoku) v Principal of Southwark College* [2002] EWHC (Admin) 272, and *R (Smith) v Parole Board* [2003] EWCA Civ 1014.
7. Relief may be refused at the full hearing (or before) without consideration of the merits if there has been a material non-disclosure by the Claimant.
8. Any difference. By s. 31(2A) and (2B) of the Senior Courts Act 2015 (inserted by s. 84 of the Criminal Justice and Courts Act 2015:

*“(2A) The High Court—*

*(a) must refuse to grant relief on an application for judicial review, and*

*(b) may not make an award under subsection (4) on such an application, if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.*

*(2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest”.*

1. See *R(Plan B Earth) v Secretary of State for Transport*  [2020] EWCA Civ 214[[8]](#footnote-9) at 227-3 for the general approach. The test remains a high one and the courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review.  “Self-interested speculations of this kind by an official of the public authority which has been found to have acted unlawfully should be approached with a degree of scepticism by a court” [*R (Public and Commercial Services Union) v Minister for the Cabinet Office [2018] ICR 269*](https://uk.westlaw.com/Document/IC8D0E8506D6811E7A4E2FB3F3A87D032/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)), para 91.
2. **Orders and appeals**
3. The time estimate given in the skeleton argument assumes that judgment will be given at the hearing. If so then it will be transcribed but counsel must still make a note in case of an urgent appeal. However in practice it is rare for judgment to be given at this time.
4. If judgment is not given at the hearing then usually a confidential draft judgment will be prepared in advance with a direction for the parties to submit typing corrections and notes of other obvious errors (PD40E). The parties need not attend for handing down of judgment if all consequential orders have been agreed and may not be able to recover costs if they attend when this is unnecessary. The court is not bound by the draft decision so circulated and in exceptional cases the court can be invited to alter it – *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*  [2011] QB 218.
5. Counsel will usually be asked to agree a draft minute of the Order to be lodged with the Court.
6. The Court may make any one of the Orders referred to in s. 31 of the SCA 1981 (mandatory, prohibiting, certiorari, declaration or injunction). Each of these remedies is discretionary but the starting point is that in most case in which a decision has been found to be flawed it would not be a proper exercise of discretion to refuse to quash it *(R (Edwards) v Environment Agency* [2009] 1 All ER 57, [63]).
7. If the court quashes a decision and is satisfied that but for the error there is only one decision that the defendant could have reached then it may substitute its own decision for the decision in question (SCA 1981 s. 31(5A)- (5B) and CPR 54.19). SCA s. 43 contains a separate power to vary a sentence in criminal proceedings where the original sentence was unlawful.
8. The court may award damages only where damages would have been awarded in a private law claim based on the same facts. Where a judicial review decision may lead to a complex damages claim or the assessment of damages is complex then the court may refer the case to another division or to the County Court for that issue to be dealt with.
9. Once sealed the Order of the Court is final, subject to correction under the slip rule (CPR 40.12).

*Appeals*

*Civil cases*

1. In a civil case an appeal lies to the Court of Appeal[[9]](#footnote-10), with permission of either the lower court or Court of Appeal. It is not necessary to seek permission from the lower court but it is usual to do so. Permission will only be granted by either court if either [Part 52.6]:
   1. There is a real prospect of success or
   2. There is some other compelling reason why the appeal should be heard. This can lead to an appeal on a point of public importance even if the prospects of success are poor – *R (Benabdelaziz) v Haringey LBC* [2001] EWCA Civ.
2. Time for appealing runs from the date on which the decision is given and not the date on which the order is sealed [CPR 52.12].
3. An application for permission to the Administrative Court is usually made when judgment is handed down. If time permits then it should be accompanied by draft grounds of appeal. An application for permission to the Court of Appeal is contained in the Notice of Appeal (N161) itself and must be accompanied by grounds and a skeleton argument in support.
4. The Appellant has 21 days to appeal but this time limit can be extended by the Administrative Court whether or not it actually grants permission provided the application is made within the 21 day period. Any application for an extension outside that period must be made to the Court of Appeal.

*Criminal cases*

1. In the case of a criminal cause or matter an appeal lies to the Supreme Court (under the Administration of Justice Act 1960). It is a precondition of such an appeal that:
   1. The High Court grants a certificate that the case raises a point of law of general public importance. Only the High Court can grant this.
   2. The High Court or the Supreme Court grants leave to appeal. An application must be made first to the High Court but in practice it is very rare that court to grant leave. An application for leave to appeal must be made to the Administrative Court within 28 days of the decision and must be accompanied by a draft of the question that the Court is being asked to certify. If that Court refuses permission then the Appellant must present a petition to the Supreme Court within 28 days.
2. **Costs (ACG 24)**
3. The CPR does not recognise a particular costs regime applicable to judicial review. Costs orders therefore have to be fitted within a framework mainly designed to cope with litigation between private parties.
4. Costs are in the discretion of the Court (s. 52 of the Senior Courts Act 1981). Guidance is given in CPR Part 44.2 about how this discretion should be exercised. The general rule is that costs follow the event but the court may make a different order. Relevant factors include how far a party has succeeded and their conduct.
5. For many judicial review hearings the court will want to conduct a summary assessment of costs PD 44 para 9. The Court will normally do so in any case lasting less than one day. A schedule of costs must be served not less than 24 hours before the hearing. The court will not make a summary assessment of the costs of a publicly funded litigant but may so assess the costs payable by them.

*Public interest litigation*

1. Where a Claimant has brought a claim concerning an issue of genuine public importance then that may be a reason not to award costs to a successful Defendant. *New Zealand Maori Council v AG of New Zealand* [1994] 1 AC 466; *R (Friends of the Earth & Greenpeace) v Secretary of State* [2001] EWCA Civ 1950). The difficulty in predicting whether or not this will be the outcome after a trial led to the development of protective costs orders (now costs capping orders).
2. In other cases (for example, but not limited to those involving best interests declarations) no costs should be awarded to reflect “a proper recognition that a judicial resolution of the best interests issue between two parties with conflicting rights and duties was the only means of resolving it” – *Wyatt v Portsmouth Hospital NHS Trust* [2006] EWCA Civ 526. The same considerations will not apply on appeal.
3. A claimant may be ordered to pay costs where they pursue a claim unnecessarily. In *R (Khullar) v (1) Feltham Magistrates Court, (2) Hounslow LBC* OBD Phillip Mott QC 17 Apr 2013 a claimant brought proceedings to set aside a liability order for council tax. The order was set aside and the claimant was invited to withdraw his claim but did not do so. The authority was awarded its costs after the order had been set aside.

*Partial success*

1. Orders the Court may make include those listed in CPR 44.2.6. These include an order that the paying party pay costs up to or from a certain date, or that they pay a proportion only of the costs, or that they pay the costs of a certain issue only. The court must avoid an ‘issue’ order if it can do so (CPR 44.3(7)). The Court should start by asking which party has been successful overall and then ask whether there is a good reason to make a different order from the normal one.
   1. *R (Bateman) v Legal Services Commission* [2001] EWHC Admin 797 – Claimants succeeded in quashing a decision of the LSC but were deprived of 25% and 15% of their costs respectively of the issues on which they failed. CPR 44.3 can *“properly and where appropriate should be applied in such a way as positively to encourage litigants to be selective as to the points they take and positively to discourage litigants taking a multiplicity of bad points”:* Munby J at [18[[10]](#footnote-11)].
   2. Where there is partial success then the Court generally makes a rough and ready assessment of the relevant proportions[[11]](#footnote-12). The default position is no Order where the proportions cannot be assessed (e.g. *Hackney LBC v (1) Burley Campbell (2) Lawrence Oliver Campbell* [2005] EWCA Civ 613 – a possession action).

*Costs as sanctions*

1. The ordinary costs orders can be departed from because of a party’s conduct. The conduct does not have to causative of the loss (contrast wasted costs orders).
   1. *Aegis Group PLC v Commissioners Inland Revenue* [2005] EWCH 1468 Ch Park J. Late response to a judicial review pre-action protocol letter with no adequate explanation for the delay. Defendant recovered only 85% of their costs.
   2. *R(B) v LB Lambeth* [2006] EWHC 639 Munby J – failure to amend to reflect changed case.
   3. However, there is no case where, because of conduct alone, a successful defendant has had to pay all of the costs of an unsuccessful claimant – *R (Royal Free London NHS Foudation Trust) v Secretary of State for Health*  [2013] EWHC 4101 (Admin) Coulson J.
2. Costs can be awarded on an indemnity basis where there has been “unreasonable behaviour of such a high degree that it can be characterised as exceptional”[[12]](#footnote-13). Examples include taking “almost every possible point under the sun” – *R* *v Costwold DC ex p Kissel* February 28 1997 unreported, or failure to give proper disclosure – *R (Banks) v SSEFRA* [2004] EWHC 1031 (Admin), *Al Sweady* (above) at [13] (where the approach to disclosure was *“lamentable”).*

*Where there has been no determination on the merits*

1. A practice has developed whereby the parties often agree the substantive issues but not costs. In the judicial review context the leading cases are now *R (Bahta) v SSHD* [2011] CP Rep 43, *M v Croydon LBC* [2012] 1 WLR 2607. They establish that public bodies are not in an special position allowing them to resist costs orders. Broadly the same principles apply on appeal from the Upper Tribunal (*AL (Albania) v SSHD* [2012]1 WLR 2898. The principles derived from those cases can be summarised as:
   1. Category 1: Where a claimant obtains all the relief sought by them then that triggers the ‘loser pays’ principle and there is no reason to depart from that approach because the success was achieved by consent rather than a contested hearing (*M* at [49], [61], *Emezie v SSHD* [2013] 5 Costs LR 685).
   2. Category 2: If the Claimant gets only part of what they sought then *“the court will often decide to make no order for costs, unless it can without much effort decide that one of the parties has clearly won, or has won to a sufficient extent to justify some order for costs in its favour”.* In that case the court may make a partial costs order (*M* at [50], [62]).
   3. Category 3: If the settlement does not accord with the relief sought then normally there will be no order unless the court can form a clear view about which party has succeeded. If one party would clearly have won if the case had fought then that may assist the conclusion that the settlement represents ‘win’ for them *(M* at [51], [63][[13]](#footnote-14)). The same principle applies where intervention by a third party has made the claim academic. In *R (Naureen, Hayat) v Salford CC* [2012] EWCA 1795 the challenge was against the local authority in respect of a refusal to accommodate but the claim became academic when one of the claimants was given exceptional leave to remain and so was entitled to accommodation. Costs were refused because it was not clear who would have won or lost. It did not matter that the Claimants had succeeded in obtaining an interim injunction because that did not mean that they had succeeded in the action. But contrast *R (Dempsey) v Sutton LBC* 22 Feb 2013 CA where judicial review proceedings were started in an emergency when the authority had failed to provide an assessment and the claimant obtained interim relief. Accommodation later became available but she was still entitled to her costs in view of the way that the authority had handled the matter. In *ZN Afghanistan* (below) Singh LJ referred to the need for a principled basis for an order for costs explaining the receiving party has been compelled by he conduct of the paying party to come to court to vindicate their rights (para 67). “if those legal rights had been respected in the first place by the other party, it should never have been necessary to come to court. Accordingly, there will normally be a causal link between the fact that costs have been incurred and the underlying merits of the legal claim”.
   4. The fact that one party is in receipt of legal aid is irrelevant either way– *Bahta* at[61]-[62].
   5. The burden lies on the paying party to show that there should be a departure from the general rule (*Bahta,* [65]).
   6. The following are not generally reasons to depart from the general rule.
      1. The Defendant could not, for resource reasons address the claim before issue (see *Bahta* at [59]-[60] and *M* at [54])*.*
      2. The claim was settled because it was not proportionate to fight the case – the response to this is that the D ought to make up its mind before issue (*M* at [55]).
      3. The claim was settled for *“pragmatic reasons”.* If a D wishes to rely on this then they must fully spell out what the reasons are and why they justify a different order – *Bahta* at [63].
   7. The following might justify a different order, particularly that the C should not get all of their costs:
      1. There was either no pre-action protocol letter or it was not clear (*M* at [57]). But if the claimant has achieved success in this sense then that may outweigh an earlier failure to comply with the pre-action protocol provided that was not causally significant -  *KR v SSHD*  [2012] EWCA Civ 1555.
      2. Poor and inefficient conduct of the litigation. In *R (Srinvasans Solicitors) v Croydon County Court* [2013] EWCA Civ 249 an order of the County Court was quashed when it lacked jurisdiction (the matter could only be brought in the High Court). But the claimant firm had not succeeded on its whole claim and it had failed to raise points at the right time and had abandoned others. The judge was entitled to make no order.
      3. There has been a relevant change in the law or other circumstances changing whether it is reasonable to bring or defend the claim – *M* at [56].
2. These developments go some way to giving effect to The Final Report of the Review of Civil Litigation Costs conducted by Sir Rupert Jackson recommended that where the Claimant has complied with the protocol then if the Defendant settled after issue by conceding any material part of the claim then the normal order should be that the Defendant pays the Claimant’s costs.
3. Applications for costs must follow the guidance in ACG 24 and in particular (where applications for costs are made following settlement) the ACO guidance at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/716591/ac013-eng.pdf. Note in particular:
   1. The ACO guidance suggests a timetable for submissions which ought to be incorporated in any order settling a case on terms. The D starts by showing cause as to why they ought not to pay costs within 28 days. C responds in 14 days and D has 7 days to reply. The submissions must address the following points:
   2. Submissions must:
      1. confirm that the parties have used reasonable endeavours to negotiate a costs settlement;
      2. identify what issues or reasons prevented the parties agreeing costs liability;
      3. state the approximate amount of costs likely to be involved in the case;
      4. identify the extent to which the parties complied with the pre-action protocol;
      5. state the relief the claimant (i) sought in the claim form and (ii) obtained;
      6. address specifically how the claim and the basis of its settlement fit the principles in *M v Croydon,* including the significance and effect of any action or offer by the defendant in relation to the claim.
   3. Submissions should not normally exceed 2 A4 pages *“of a normal print size”* and should attach the relevant correspondence.

*Multiple parties*

1. The normal rule is that the Claimant will not be required to pay more than one set of costs even where there are two or more Defendants[[14]](#footnote-15). However, the court may order 2 or more sets of costs where a second Defendant or the Interested Party attends in support of a special interest or where they have to defend particular allegations against them – *R v Secretary Of State For Health, Ex Parte John Smeaton (On Behalf Of The Society For The Protection Of Unborn Children & (1) Schering Health Care Ltd (2) Family Planning Association (Interested Parties)* [2002] EWHC 886 (Admin), [2002] 2 FLR 142, *R. (on the application of Stamford Chamber of Trade and Commerce) v Secretary of State for Communities and Local Government (Costs)* [2009] EWHC 1126 (Admin) (where there were two separate decisions under challenge)

*Particular Parties*

1. Costs will not generally be awarded against a Tribunal or similar neutral party who does not appear or otherwise play an active role in the proceedings *R (Gourlay) v Parole Board* [2020] UKSC 50.
2. The traditional approach is to treat such a party as neutral where they attend simply to “assist the court on questions of jurisdiction, procedure, specialist case law and the like” (But see *R (Davies) v Birmingham Coroner* [2004] EWCA Civ 207, [2004] 3 All ER 543 for exceptions where this is the only way to compensate a litigant who has succeed in showing an error of law).
3. If the Tribunal appears actively to defend the case then they are treated as an ordinary party subject to usual costs rules.
4. Even a non-appearing tribunal can be made to pay costs where there has been serious default, failure to follow elementary principles or an unreasonable failure to sign a consent order *e.g. R v Lincoln JJ ex p Count* (1996) 8 Admin LR 233, *R v Stafford JJ ex p Johnson* [1995] COD 352, *R v Stoke on Trent JJ ex p Booth* Independent 9 Feb 1996.

*Costs against Third Parties*

1. Under s. 51 of the Senior Courts Act 1981 the Court has power to award costs against a non-party. This is an exceptional power but will ordinarily be exercised where the third party has controlled the proceedings or hopes to benefit from them so as to be the real litigant *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39, [2004] 1 WLR 2807.
2. Can a third party costs orders be made against individual officers or employees of the Defendant?
   1. In *R v Lambeth LBC ex p Wilson* (1998) 30 HLR 64 QBD it was held that there was jurisdiction to make an order under s. 51 of the SCA but that absent fraud, it would be difficult to think of a case where that would be appropriate.
   2. But in *Phillips & Ors v Symes & Ors* [2004] EWHC 2330 (Ch), an expert witness was joined to proceedings for the purposes of considering a third party costs order (as required under CPR 48.2). Peter Smith J held that in an appropriate case *“a third party costs order can be brought against somebody who was a witness and as a result of the manner in which he gave evidence as a witness”:* [63]. An Order was made against a laboratory in *X Local Authority v Trimega Laboratories Ltd* [2014] 2 FLR 232.

*Costs and Legal Aid*

*Costs in favour of a successful publicly funded litigant*

1. The fact that a party is in receipt of public funding is not to be taken into account in deciding whether and what costs order to make – s. 30 LASPO (Legal Aid Sentencing and Punishment of Offenders Act 2012). But see *ZN (Afghanistan) v SSHD* [2018] 3 Costs LO for a discussion of the circumstances where this may be relevant paras 86-95 (Singh LJ) and 97-104 (Leggatt LJ).
2. However, an *inter partes* costs order makes a substantial difference to the amount of costs payable. Where costs are recovered from the opposing party then legal aid practitioners may recover at their ordinary private paying rates and are not restricted to non-commercial legal aid rates. The indemnity principle, which restricts the paying party’s liability to the amount that the receiving party is obliged to pay, does not apply (Civil Legal Aid (Costs) Regulations 2013 Reg 21).

*Costs against an unsuccessful publicly funded litigant*

1. An unsuccessful publicly funded litigant is entitled to costs protection in that they can only be required to pay more than the amount *“which is a reasonable one*” for them to pay having regard to their means and their conduct in relation to the dispute (LASPO s. 26).
2. The procedure for determining what is a reasonable amount to pay is specified in the Civil Legal Aid (Costs) Regulations 2013 and see *Wyatt v Portsmouth NHS Trust* [2006] EWCA Civ 529 and in the SCCO Guide 2006 Section 25 for a discussion of the predecessor Regulations.
   1. The Court first considers what order it would make in the absence of costs protection and whether that would have been for summary or detailed assessment – Reg 15(1).
   2. If the trial court considers that it has sufficient information to decide what is a reasonable amount to pay then it will specify the amount but only if satisfied that the actual costs that would be ordered would be at least that amount 15(2) or (3). In *Wyatt* the Court specified that the amount payable was nil.
   3. Otherwise the determination of the assisted person’s liability to pay is to be determined by a costs judge. The application must be made within 3 months unless there is a change in circumstances, new information is available or good reason for the delay. There is an outside time limit of 6 years.
3. The Court will often Order that it is reasonable for the Defendant to recover its costs by setting them off against any amounts payable by the Defendant – *Lockley v National Blood Transfusion Service* [1992] 1 WLR 492 and *R (Burkett v Hammersmith & Fulham LBC*. [2005] 1 Costs LR 104. The Court also has the power to stay an order against a public body pending the outcome of other litigation against the same claimant so that a set-off can be made later – *Maloba v LB Waltham Forest* [2007] EWCA Civ 1281; [2008] 1 WLR 2079 (although an order was not made in that case).

*Costs against the Lord Chancellor*

1. A successful Defendant or interested party defending a claim against a publicly funded client may in some circumstances apply to have their costs paid by the Lord Chancellor where they will not recover them against the client. It must be just and equitable for the Order to be made and at first instance the receiving party must show that they will suffer financial hardship if the order is not made (this does not apply on appeal). The application must be made within 3 months of the making of the relevant costs order (LASPO s. 26 and Civil Legal Aid (Costs) Regulations 2013 Reg 10).

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1. We are indebted to Caoilfhionn Gallagher QC for an earlier version of these notes. [↑](#footnote-ref-2)
2. For details of fees, see <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/540585/administrative-court-fee-increase.pdf>. The currently payable continuation fee is £770. [↑](#footnote-ref-3)
3. See e.g. *R (Bredenkamp) v FCO* [2013] EWHC Admin 2480. [↑](#footnote-ref-4)
4. This was a claim for false imprisonment but the remarks were general. In the event there was no live evidence and the Claimant’s statements were treated with a “measure of generosity” because they had not been challenged. [↑](#footnote-ref-5)
5. In *McVey* an issue about the entitlement of a person to be an interested party was dealt with on paper only - [2010] EWHC 1225 (Admin); [2010] C.P. Rep. 38. [↑](#footnote-ref-6)
6. Note that a decision given on the papers in this way is a final decision so that any challenge is by appeal and not to restore the matter for an oral hearing - *R (Jones) v Nottingham CC* [2009] EWHC 271 (Admin) Collins J. See also *Bahta* (below) confirming that an appeal does lie and the decision is not final. [↑](#footnote-ref-7)
7. See also a (2004 but still helpful) guide at <http://www.biicl.org/files/2223_skeleton_arguments_guide.pdf> [↑](#footnote-ref-8)
8. The decision was reversed in the Supreme Court but not so as to affect this point. [↑](#footnote-ref-9)
9. Subject to the possibility of a leapfrog appeal to the Supreme Court. [↑](#footnote-ref-10)
10. Compare in a private law context *Budgen v Andrew Gardner Partnership* [2002] EWCA Civ 1125 where the judge ordered only 75% of the successful Claimant’s costs because he had lost on one issue that took up a substantial amount of time at trial. [↑](#footnote-ref-11)
11. *R ota A, B, X, Y v East Sussex* CC 8 CCLR 228 for an example of this in a complex case – 50% costs awarded to reflect success on one issue and a “victory on points” on another. [↑](#footnote-ref-12)
12. *Terry v LB Tower Hamlets,* 15th December 2003 QBD. Mismanagement of the proceedings including repeated failure to meet time limits. [↑](#footnote-ref-13)
13. Contrast *R (HE) v SSHD* [2013] EWCA Civ 1846 where a detainee was released in response to an indication by the court with *R (Abraha) v SSHD* [2014] EWHC 3372 (Admin) where they were released the day before the hearing but without any compromise. Costs were ordered in the first case but not the second. [↑](#footnote-ref-14)
14. *Bolton Metropolitan District Council v Secretary of State for the Environment* [1996] 1 All ER 184, [1995] 1 WLR 1176, HL. [↑](#footnote-ref-15)