ALBA response to the consultation on Fixed Recoverable Costs

This is the response of the Constitutional and Administrative Law Bar Association (ALBA). ALBA is the professional association for practitioners of public law. It exists to further knowledge about constitutional and administrative law amongst its members and to promote the observance of its principles. It is predominantly an association of members of the Bar, but amongst its members are also judges, solicitors, lawyers in public (including Government) service, academics and students. It currently has over 1,000 members, including barristers who act for claimants and defendants in judicial review proceedings and in statutory appeals including in immigration, public procurement and planning cases.

In its response, ALBA addresses chapter 6 of the consultation paper concerning judicial review, as this is its members' main area of practice and its special expertise. It does not comment on the other parts of the consultation paper.

4. Do you agree with the proposal for costs budgeting in JRs with a criterion of 'whether the costs of a party are likely to exceed £100,000'? If not, what alternative do you propose?

Please state your reasons.

ALBA disagrees with the proposal to effectively introduce default costs budgeting at £100,000 or any other level. While we recognise that the parties may, in an appropriate case, wish to opt into costs budgeting so as to achieve certainty in their individual case, we do not think that this should be imposed on them. This is for the following five reasons:

First, the proposal is insufficiently supported by evidence in the following respects:

(a) No evidence is cited in the Impact Assessment or otherwise as to a general problem having been identified regarding costs in JRs exceeding £100,000. Although Sir Rupert recommended discretionary costs budgeting at this level, this was in a context where he also recommended extension of an adapted Aarhus model. This part of his recommendation cannot be treated in isolation.

(b) Still less is there any evidence of a specific problem that disproportionate costs are incurred generally in judicial review claims. The Impact Assessment notes that the number of cases where costs of a party exceeds £100,000 is "very small", and that in 2017 / 2018 there were only 16 cases where total costs (excluding VAT) exceeded £100K.

(c) There is no evidence or basis for suggesting that any problem which exists is not better addressed by assessment rather than through imposing the structures of prospective costs management. If the proposal is to be taken any further there needs to be sufficient evidence that any likely benefits of controlling costs (if and to the extent such a problem exists) by means of the proposal outweigh any disadvantages of introducing such a scheme.

(d) There is no sufficiently-sound evidence base to support the proposed threshold of £100,000 in any event. ALBA understands that the information used to produce such a figure is data from GLD alone. This does not take account of data from other public authorities such as local authorities, commercial regulators (e.g. the CMA, OFCOM, or OFGEM), or contracting authorities. The number of cases said to be affected in the Impact Assessment (16) is likely therefore to be too low.

(e) Nor is there any adequate explanation as to why the government favours this threshold. £100,000 is self-evidently a significant amount, but it is not unusual where a High Court claim has been litigated to a full hearing. When assessed against the factors in CPR 44.3(5) or 44.4 the costs may well be disproportionate and so the £100,000 threshold is likely to be inappropriately low. Sir Rupert had in his sights JR cases that can "last for several days and generate huge costs" [Chap 10 para 4.1], but these are exceptional cases, where the costs are likely to be significantly higher than £100,000.

Second, the case management lifecycle of judicial review claims makes costs budgeting inappropriate. This is important – the philosophy of costs budgeting is that it goes hand in hand with close case management to ensure that the case can be delivered at proportionate cost. Dealing with costs budgeting, as suggested in the proposal, at the permission stage is likely to be problematic for both claimants and defendants:

(a) The claimant will by this point *already* have undertaken significant steps and incurred considerable costs. It will have filed a statement of facts and grounds, the evidence upon which it relies, and a bundle containing all relevant (evidence and statutory) materials. In such circumstances, it is unclear how costs budgeting at this stage will assist controlling – rather than adding to – claimants' costs. Further, it is unclear whether a judge would be expected to approve costs in a claimant's budget already incurred prior to the permission hearing. This would potentially create difficulties for a judge at an early stage in the proceedings, and would be unlike in civil proceedings where a judge would not usually approve costs incurred prior to the CMC, rather than approving a forward-looking costs budget. Moreover, this could create an imbalance between the treatment of the claimants' and defendants' costs budgets.

(b) From the defendant perspective, if permission is granted, it will usually have 35 days to file and serve detailed grounds of defence and any evidence upon which it wishes to rely. This means that the proposal (requiring cost budgets 21 days after permission) would require additional cost budgeting work – and any potential costs management hearing to be held – during a busy period. Further, by the time any budgets are agreed, or a costs management hearing held, a large amount of the costs in the proceedings would already have been incurred. Again, it is unclear whether costs budgeting at this stage will assist controlling – rather than adding to – defendants' future costs.

It is therefore unclear to ALBA what benefits the additional costs budgeting step at the permission stage would add to the pre-existing mechanisms of judicial comment and/or detailed assessment. From both sides' perspective, costs budgeting at the permission stage has the potential to cause difficulties and extra workload, for little – if any – benefit in terms of controlling costs.

Third, experience in civil litigation has demonstrated that costs budgeting can be a time-consuming process and can generate satellite disputes and costs. The transaction costs of introducing budgeting would be excessive and themselves disproportionate given the limited nature of the problem (if any) needing to be addressed. This operates at a general level, because precedent H would have to be re-written to apply to judicial review, and at an individual level with additional and unnecessary procedural steps in what is otherwise a fairly stream-lined process. It is also noticeable that the proposal does not provide for an upper range limit where costs-budgeting does not apply by default, such as the £10 million limit in Part 3 CPR. Indeed, the proposal seems at odds with the general position in civil litigation where costs budgeting is a default for *lower*-value, as opposed to "heavy", litigation.

Fourth, the proposal may produce conflicts with the costs budgeting provisions in Part 3 CPR in cases where there are concurrent Part 54 and Part 7 or 8 proceedings, such as in procurement cases (see, for example, section 5.7 of the Administrative Court Guide). If the proposal is implemented, then the Civil Procedure Rules Committee should be asked to prepare and consult on the draft rules so that any issues surrounding the workability of such proposals in concurrent cases does not create inconsistencies between the rules.

Fifth, the volume of cases likely to be affected will be small and this creates difficulties in applying consistent and fair costs budgets. Budgeting has been a learning process for all involved, and its success depends on judges being able to benchmark what is an appropriate sum for particular stages informed by feedback from cases that have actually gone to assessment. Wherever the threshold is set, the volume of cases going through the whole process is simply not large enough for judges to acquire that experience.

Conclusion

For the reasons above, ALBA is doubtful as to whether there is the evidence base to support the proposed introduction of cost budgeting as a means for controlling costs in JRs.

5. We seek your views on the proposals in this report otherwise not covered in the previous questions throughout the document.

ALBA is concerned by the decision not to consult on Sir Rupert Jackson's proposal to extend the 'Aarhus' rules across all judicial review cases and urges the MOJ to rethink this decision. This decision is of particular concern against a context in which, as the consultation paper acknowledges, "The government, as the principal defendant in JRs, has a particular interest in this issue" (Chapter 6, para 1.1). As a result of its particular interest in this issue, it is particularly important that the Government consult as widely as possible on the appropriate costs regime for judicial review, and carefully weighs the evidence and competing views. It is striking that the only views which the Government appears to have taken into account in deciding not to consult on the proposal are those of its own lawyers in the Government Legal Department.

Moreover, the decision not to consult has to be seen against the background that Sir Rupert Jackson recommended the introduction of a form of Qualified One Way Costs Shifting ('QOCS') for judicial review in his 2010 Final Report[1]. His proposal was that claimants in judicial review cases should benefit from a "shield" equivalent to that available to legally aided claimants, so that "Costs ordered against the claimant in any claim for … judicial review shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances", including the financial resources of the parties and their conduct in the proceedings. In so recommending, he gave six reasons, which included the following:

> -"The permission requirement is an effective filter to weed out unmeritorious cases. Therefore two way costs shifting is not generally necessary to deter frivolous claims "
> - "it is not in the public interest that potential claimants should be deterred from bringing properly arguable judicial review proceedings by the very considerable financial risks involved"[2]
> -"The PCO regime is not effective to protect claimants against excessive costs liability. It is expensive to operate and uncertain in its outcome. In many instances the PCO decision comes too late in the proceedings to be of value."

[1] Chapter 30, paragraph 4.1.
[2] In support of this reason, Sir Rupert referred to the 'FB paper' presented by Michael Fordham QC and Jessica Boyd to the judicial review seminar held during the 2009 review, which emphasised the special constitutional role of judicial review.

Chair: Martin Chamberlain QC
Brick Court Chambers
7-8 Essex Street
London WC2 3LD
DX 302 London Chancery Lane

Vice Chair: **Vikram Sachdeva QC**
39 Essex Chambers

Treasurer: **Tom Richards**
Blackstone Chambers

Secretary: **Malcolm Birdling**
Brick Court Chambers

Membership Secretary: **Emily MacKenzie**
Brick Court Chambers
7-8 Essex St
London WC2R 3LD
DX 302 London Chancery Lane

www.adminlaw.org.uk

The Government consulted on this proposal following the publication of the 2010 Final Report but despite the fact that the majority of respondents supported the introduction of QOCS for judicial review, the Government decided against it. The only explanation advanced was that at paragraph 27 of its Response to the Final Report in which it stated that:

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

Despite this, the Government has never further consulted on the introduction of QOCS and Jackson LJ assumed in his 2017 review that it was "probably realistic to proceed on the basis that QOCS in JR is not going to come".

Instead, he proposed the extension of a modified form of the Aarhus rules to all forms of judicial review. He prefaced his recommendations in chapter 10 of his Supplemental Report with a discussion of the important role played by judicial review in our constitutional arrangements (para 1.1-1.2); the importance of access to justice (para 1.3); the limited availability of legal aid (para 1.4); and an acknowledgement that while "The costs of JR proceedings are generally more manageable than the costs of private law litigation", they can nonetheless act as a deterrent for claimants of modest means, as well as imposing a financial burden on public authorities (para 1.5).

Members of ALBA contributed to the working group chaired by Martin Westgate QC (then the chair of ALBA) whose report was influential in Jackson LJ's recommendations and appended to his Supplemental Report.

The reasons given by the Government in the consultation paper for not consulting on Jackson LJ's alternative proposal are, against that context, disappointing and inadequate.

First, it is noted that GLD "queried what the evidence base was that had given rise to" the concern about access to justice and "urged caution" when they met Jackson LJ during the review (para 2.3). Indeed, Jackson LJ records the concerns expressed by GLD lawyers at para 2.4 of Chapter 10 of his report. They did not dissuade him from making the recommendations he did, and their "queries" and note of caution could not provide a sufficient reason for departing from his conclusions based on a thorough review of the available evidence.

If there are concerns about the evidence base then the answer is to investigate the available evidence, including carrying out or commissioning further research if required, rather than simply not to consult.

Second, it is noted that costs capping orders ('CCOs') are available (para 2.4). However, Jackson LJ considered the evidence about the availability of CCOs and concluded that:

> CCOs are of little practical value, because the procedure for obtaining such orders is too cumbersome and too expensive. The criteria for granting CCOs are unacceptably wide and the outcome of any application must be uncertain. Also, that outcome will not be known until too late in the day. (para 2.7(ii)).

ALBA agrees with Jackson LJ that CCOs are an inadequate solution to the problem of access to justice in judicial review. They are only available in "public interest" proceedings; they can only be granted *after* permission has been granted so afford no protection against pre-permission costs; and the Court is required by s89(1)(b) of the Criminal Justice and Courts Act 2015 to take account of the extent to which the applicant is likely to benefit from the judicial review proceedings in deciding whether to grant an order, and if so at what level. Thus the less the claim is concerned with issues of wider public interest and the more it is likely to result in a benefit to the individual claimant, the less likely it is that a restrictive cap will be imposed on the defendant's ability to recover his costs.

Thirdly, it is noted that legal aid is still available for judicial reviews. However, as Jackson LJ noted, legal aid is subject to strict financial criteria and many claimants of modest means are not eligible for legal aid.[3] ALBA agrees and notes that further evidence as to the restrictive financial eligibility of criteria has since become available, including the report by Professor Donald Hirsch of Loughborough University commissioned by the Law Society, "Priced out of Justice" (March 2018).[4]

The availability of legal aid and costs capping orders is therefore of no assistance to individual claimants of modest means who are nonetheless not financially eligible for legal aid, and who either (a) cannot afford the costs risk of applying for permission and a costs capping order or (b) would not qualify for a costs capping order because they have too great an interest in the outcome of the claim, or it is not otherwise a 'public interest' claim.

Fourthly, the government suggests that 'Extending cost capping increases the risk of less meritorious JRs coming forward with increased costs' for defendants. However this argument ignores the role

[3] See further the submissions of the Public Law Project to Lord Justice Jackson's review available at https://publiclawproject.org.uk/wp-content/uploads/data/resources/253/170130-fixed-costs-recovery-review-PLP-submissions-FINAL_index.pdf

[4] https://www.lawsociety.org.uk/news/press-releases/struggling-families-disqualified-from-justice/

played by the permission test, which Jackson LJ considered provided an important protection against unmeritorious claims. Only claims which are arguable will be granted permission to proceed and public authority defendants should not need to incur significant costs in responding to unmeritorious claims at the pre-permission stage.

Finally, no reference is made to the constitutionally important role played by judicial review in ensuring that public authorities act within the boundaries of the law. As Jackson LJ acknowledged his Supplemental Report "It is a crucial means by which citizens can challenge the lawfulness of public authorities' decisions, actions and omissions" (para 1.1).

For all these reasons, ALBA considers that the Government should consult on Jackson LJ's proposal to extend Aarhus. As the Supplemental Report and the Westgate Report made clear, there are a range of views within the legal profession and a range of factors to be taken into account. However, the majority of respondents to both Jackson reviews and to the previous consultation on introducing QOCS considered that there is an access to justice issue in JR. If the Government considers there is a need for more evidence to understand the extent of that problem, and to identify the most effective means of resolving it, the Government should commission or undertake further research.

ALBA
June 2019

alba

constitutional and administrative law bar association

Chair: **Martin Chamberlain QC**
Brick Court Chambers
7-8 Essex Street
London WC2 3LD
DX 302 London Chancery Lane

Vice Chair: **Vikram Sachdeva QC**
39 Essex Chambers

Treasurer: **Tom Richards**
Blackstone Chambers

Secretary: **Malcolm Birdling**
Brick Court Chambers

Membership Secretary: **Emily MacKenzie**
Brick Court Chambers
7-8 Essex St
London WC2R 3LD
DX 302 London Chancery Lane