**INTRODUCTION TO JUDICIAL REVIEW**

**PREPARATION FOR THE SUBSTANTIVE HEARING**

**16 November 2016**

*Interim Applications*

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

1. Part 54 contemplates that the evidence and issues will crystallise at the time of the Defendant’s detailed grounds and evidence. The rules do not provide for the Claimant to serve evidence in response and normally this will be unnecessary. Permission may be given for further evidence under Part 54.16.
2. 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 still applies: “no party may call an expert or put in evidence an expert’s report without the court’s permission” - *R ota Kemp v Denbighshire Local Health Board* [2006] EWHC 181 (Admin), *R (HK Bulgaria) v SSHD*  [2016] EWHC 857 (Admin), Garnham J §§10-18. *BY Development Ltd v Covent Garden Market Authority* [2012] EWHC 2546 (TCC) explains that expert evidence is rarely needed or relevant in judicial review claim where the court is not the primary decision-maker. Note the criticism of late and inappropriate expert evidence in *JG v Lancashire CC* [2011] EWHC 2295 (Admin) at para 59.
3. 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. They may be under a duty to do so to comply with the duty of candour.
4. It may be necessary to change the focus of the Claimant’s case following receipt of the Defendant’s evidence or subsequently as the case develops (for example where a decision or further decision is made in a community care case).
5. If the Claimant wishes to rely on grounds other than those for which permission was granted then they require permission and must (Part 54.15 and PD para 11) give not less than 7 clear days notice before the hearing date (or warned date).
6. 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 para 35 of the Essex case Munby J 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. But see *R (Bhatti) v Bury MBC* [2013] EWHC 3093 (Admin) and ACG (Administrative Court Guide Judicial Review) 9.2.4 for a discussion of the circumstances in which a challenge to a fresh decision can be included in the original claim form at all. This is permitted if the new decision is in response to evidence filed by the claimant and to the same effect (applying *R v SSHD ex p Turgut*  [2001] 1 All ER 719) but not where the Defendant has withdrawn the original decision and embarked on a different decision making process (*Bhatti* at para 17 and *R (Asif) v SSHD* [2015] EWHC 1007 (Admin)). IN *Yousuf v SSHD* [2016] EWHC 663 (Admin) Holman J approval was not given to a consent order for a stay pending a fresh decision. The proceedings ought to be withdrawn and a new claim brought if the second decision was to be challenged.

*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”.
2. Formerly very restrictive criteria applied 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 the Defendant’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. –

Para 32 per Lord Carswell and see Lord Brown at para 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”[[1]](#footnote-1). Normally applications raise an issue of law and disclosure is unnecessary – See Lord Bingham at para 2/3. 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 [para 56]. In *R (Hoppr Entertainment Ltd v Office of Communications* [2011] EWHC 3693 (Admin) *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* para11.
3. Disclosure may be ordered despite the fact that documents are confidential and 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” – para 27.

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

*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 W.L.R. 1401. This does not apply where the evidence is manifestly wrong such as where it is inconsistent with undisputed objective evidence (S v *Airedale NHS Trust* [2002] All ER (D) 79 Stanley Burnton J) or where the documents show that the Defendant’s evidence “cannot be correct” (*Silber J* in *R (Mc Vey) v Secretary of State for Health* [2010] CP Rep 38 at para 35 and *R (Westech College) v SSHD* [2011] EWHC 1484 (Admin) at 22-7).
2. Parties and the court should always consider carefully of 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 – *R (Al Sweady) v Secretary of State* [2010] HRLR 2 at 27-8. They must consider at an early stage whether cross examination may be necessary and seek appropriate directions – *ibid* para 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 disputed allegation of a human rights breach raising a hard edged question of fact. In *Al Sweady* (above) at para 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 Art 2 depended on this.
* Had the Claimant’s been subjected to ill treatment in a way that infringed their Art 3 rights.
* Was detention of some of the Claimant’s 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 relaxed approach to ordering cross examination is not confined to fundamental human rights cases.
   1. *R (MH) v SSHD* [2009] EWHC 2506 (Admin) Sales J:

“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”[[2]](#footnote-2).

* 1. *R (Mc Vey) 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 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 (see ACG: 9.2, 12.7) 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 (ACG 12.4.4. gives examples). 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 days before the hearing [ACG 17].

*Listing for the Full Hearing*

1. Listing policy is set out at <http://www.justice.gov.uk/courts/rcj-rolls-building/administrative-court/listing-policy> and ACG 13.2. 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.
2. Once listed a hearing will not generally be adjourned, even if the parties agree (ACG 13.4.2).
3. 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).

*Settlement and discontinuance* (ACG 22)

1. Parties are required to consider settlement throughout the case (ACG 12.2.1) and encouraged to use ADR *R (Cowl) v Plymouth City Council (Practice Note)* [2001] EWCA Civ 1935, [2002] 1 WLR 803. 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).
2. 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 – *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*  17 Jul 2013 Leggatt J.
3. 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 22.4). The court has to approve the order but the information that has to be given to the court depends on the order being sought. If the parties ask the court to do a judicial act such as quashing the decision then they must include a statement of reasons why that order is merited (PD 54 Para 17, ACG 24.4.2.3.2, and Practice Direction (Administrative Court: Uncontested Proceedings) [2008] 1 W.L.R. 1377).
4. 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.

*Skeleton arguments and 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[[3]](#footnote-3) 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[[4]](#footnote-4). 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.

*Bundles* (PD 54A.16, ACG 18)

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.
2. The bundle should:
   1. Present documents chronologically.
   2. Be numbered sequentially and indexed.
   3. Be doublesided 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 of preparing the bundle or make a different adverse costs order” – ACG 18.3.7.

*Timetable and content of skeleton arguments* (CPD 54A 15 & ACG 17, 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. Failure to observe these time limits may mean the case being adjourned and/or a costs sanction [ACG 17.5.5]. ACG 17.6.1 also states:

“If the skeleton argument does not comply with this guidance, or is served late, the Court may refuse to permit the party in default to rely on the skeleton; alternatively, the Court make an adverse costs order against the party in default (see paragraph 23.1 of this Guide on costs)”.

1. The Claimant must file a bundle of documents with the court at the same time as the Claimant’s skeleton argument - PD54A para 16.
2. Skeleton arguments may be filed by email. Each region has its own email address. These are listed at ACG annex 1.

1. PD 54A para 15.3 requires that skeleton arguments must contain:
   1. a time estimate for the complete hearing, including delivery of judgment.
   2. a list of issues;
   3. a list of the legal points to be taken (together with any relevant authorities with page references to the passages relied on);
   4. a chronology of events (with page references to the bundle of documents).
   5. a list of essential documents for the advance reading of the court (with page references to the passages relied on) (if different from that filed with the claim form) **and a time estimate for that reading**;
   6. a list of persons referred to.
2. The ACG at 17.2.2 recommends[[5]](#footnote-5):
   1. “The decision under challenge should be clearly identified, or the relevant failure to make a decision if that is what is under challenge.
   2. The relevant facts should be summarised including any relevant change of facts or circumstances since the claim form and supporting documentation were lodged.
   3. The grounds for seeking judicial review (or interim relief, or any other order) should be set out under numbered headings.
   4. Relevant legal principles should be set out. Lengthy extracts from EU Directives, international Conventions, statutes, case law and other sources should be avoided if possible. It is much more helpful to the Court if the skeleton states the proposition of law which the party contends for, and then refers to the source of or authority for that proposition, with short extracts quoted if that is appropriate. It is not usually necessary or helpful to cite more than one case in support of each proposition of law.
   5. The remedy sought should be identified.
   6. Any urgency, other matter relevant to the timing of the case, and any other relevant point, such as alternative remedy, should be identified”.
3. State who you act for. The document should be at least 1.5 spaced and not less than 11 point. It should be paginated and the ACG states it is “rarely necessary” for a skeleton to be more than 20 pages.
4. Citation of authorities should follow the Practice Direction of 9 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
5. 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”.

1. The parties should agree a bundle of authorities which are “really necessary”. ACG 19 suggests that in most case there will be no need for more than 10 and some case will require fewer, if any, authorities.

*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, para 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 (ota Lichfield Securities Ltd) v Lichfield* DC [2001] EWCA Civ 304 the CA 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: CPR Part 54.15 (above) 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 (ota 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. Views differ as to how far this prevents the court from giving a declaratory judgment (*Logan* below and R. (Hawke) v Secretary of State for Justice (2015) EWHC 3599 (Admin)). In deciding whether the outcome would have been substantially different the court should normally focus on the information available at the time the decision was made - *R (Logan) v Havering LBC* [2016] PTSR 603 Blake J.

*Orders and appeals* (ACG 10.6)

1. 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.
2. 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.
3. Counsel will usually be asked to agree a draft minute of Order to be lodged with the Court.
4. 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).
5. 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.
6. 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.
7. 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[[6]](#footnote-6), 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.

***Costs*** (ACG 23)

1. The CPR do 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.
2. 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.
3. 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 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 para 18[[7]](#footnote-7).
   2. Where there is partial success then the Court generally makes a rough and ready assessment of the relevant proportions[[8]](#footnote-8). 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”[[9]](#footnote-9). 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 para 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 para 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 para 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 para 51, 63[[10]](#footnote-10)). 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.
   4. The fact that one party is in receipt of legal aid is irrelevant either way– *Bahta* atpara 61-2.
   5. The burden lies on the paying party to show that there should be a departure from the general rule [*Bahta* para 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 para 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 para 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 para 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 para 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 at <https://www.justice.gov.uk/downloads/courts/administrative-court/aco-costs-guidance-dec-13.pdf>. and see ACG 23.5. Note in particular:
   1. The 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[[11]](#footnote-11). 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.
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 Part 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” [Para 63]. An Order was made against a laboratory in *X Local Authority v Trimega Laboratorites* 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).
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 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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25 October 2015

1. See *R (Bredenkamp) v FCO* [2013] EWHC Admin 2480 for a recent example. [↑](#footnote-ref-1)
2. 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-2)
3. 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-3)
4. 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-4)
5. See also a (2004 but still helpful) guide at <http://www.biicl.org/files/2223_skeleton_arguments_guide.pdf> [↑](#footnote-ref-5)
6. Subject to the possibility of a leapfrog appeal to the Supreme Court. [↑](#footnote-ref-6)
7. 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-7)
8. *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-8)
9. *Terry v LB Tower Hamlets* 15 Dec 2003 QBD. Mismanagement of the proceedings including repeated failure to meet time limits. [↑](#footnote-ref-9)
10. 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-10)
11. *Bolton Metropolitan District Council v Secretary of State for the Environment* [1996] 1 All ER 184, [1995] 1 WLR 1176, HL. [↑](#footnote-ref-11)