**INTRODUCTION TO JUDICIAL REVIEW**

**PREPARATION FOR THE SUBSTANTIVE HEARING**

**10 NOVEMBER 2011**

*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). Note the criticism of late an 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. 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."

*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. 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”.
2. Disclosure may be ordered to make the decision under challenge intelligible. For example, in *R (Firstgroup Plc) v Straegic 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.
3. 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. The Court can order disclosure of the gist of sensitive information. In *A (a Child) v CC Dorset* [2010] EWHC 1748 (Admin) the Claimant had been taken to a safe centre because he had allegedly been seen with an “inappropriate adult”. The police did not give any further information and Claimant started a claim for a declaration and damages. The interested party applied to prevent the police serving sensitive information on C to justify their actions. Blake J directed that a gist should be given of the nature of the harm that the police considered C might be subject to but not the grounds for that belief. He invited the parties to agree that C’s legal team should have access to the material without disclosing it.
2. 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 the where it is inconsistent with undisputed objective evidence S v Airedale NHS Trust [2002] All ER (D) 79 , Stanley Burnton J) or 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. If necessary then court has power to transfer a case for trial under CPR 54.20 where this would be more appropriate or, in some cases such as age dispute cases, to transfer to the Upper Tribunal – see *BA v Home Office* [2011] EWHC 1446 (QB) at 9-16.
4. 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. 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.
		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”[[1]](#footnote-1).

* 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 ay have been an issue for cross examination.

*Manner of application*

1. CPR Part 23[[2]](#footnote-2) applies so that where a specific application to the Court is necessary it should be by Notice of Application.

*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”.
2. This rule is not excluded by either Part 8 or 54.
3. Even in the absence of a formal part 18 request parties should liaise to clarify the issues in dispute.

*Listing for the Full Hearing*

1. This is set out at <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/administrative-court/listing-policy.htm>. 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 days notice from the warned date.
2. 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).

*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 procedure is often adopted in costs disputes. 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 (e.g. on costs) can be unreasonable conduct meriting an adverse costs order – *R (J) v LB Hackney* 25 Oct 2010.

*Timetable and content of skeleton arguments*

1. This is contained in the Practice Direction at para 15. 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 result in “disagreeable” costs orders – *Haggis v DPP* [2003] EWHC 2481.
2. The Claimant must file a bundle of documents with the court at the same time as the Claimant’s skeleton argument - PD54A para 16.
3. Skeleton arguments may now be filed by email. Each regions has its own email address. These are listed at: <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/administrative-court/>. This also contains a template prompting advocates to include the date of the hearing and time estimate for the hearing and pre-reading.

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. 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.
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. This is not a requirement of a skeleton argument but it is helpful to have a draft of the Orders that the Court might be invited to make and to identify the relief sought in the skeleton.
	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. There is no requirement to provide bundles of authorities but it is good practice to agree one and lodge it.
2. Obtain a receipt for the skeleton when lodged (if done by email then you should receive an automated confirmation) and at the hearing take copies and check that the court has received it.

*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).
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 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 if not based on new material not available at the time of the application for permission – *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. Examples are *Tshikangu* (above) and *R v Kensington General Commissioners ex p Polignac* [1917] 1 KB 486).

*Orders and appeals*

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. Often 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. 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.
3. Counsel will usually be asked to agree a draft minute of Order to be lodged with the Court.
4. 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[[5]](#footnote-5), with permission of either the Administrative 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 52.3(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 52.4].
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.
5. The Appeal Court or the lower court may order a stay but the appeal does not operate as such in the absence of any such order [CPR 52.7].

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. Either the Administrative Court or the Supreme Court grants leave to appeal. In practice it is very rare for the Administrative 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.

*Settlement and discontinuance*

1. Parties are encouraged to use ADR *R (Cowl) v Plymouth City Council (Practice Note)* [2001] EWCA Civ 1935, [2002] 1 WLR 803 – see Practice Statement 1st February 2002. See Varda Bondy Mediation and Judicial Review – Mind the Research Gap for a more sceptical approach.
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.
3. PD 54 Para 17 appears to require the consent of the Court for all settlements except those that relate to costs only. It reads:

“17.1 If the parties agree about the final order to be made in a claim for judicial review, the claimant must file at the court a document (with 2 copies) signed by all the parties setting out the terms of the proposed agreed order together with a short statement of the matters relied on as justifying the proposed agreed order and copies of any authorities or statutory provisions relied on.

17.2 The court will consider the documents referred to in paragraph 17.1 and will make the order if satisfied that the order should be made.

17.3 If the court is not satisfied that the order should be made, a hearing date will be set.

17.4 Where the agreement relates to an order for costs only, the parties need only file a document signed by all the parties setting out the terms of the proposed order”.

1. The intention behind this is to ensure that where the agreement involves the doing of a judicial act (for example a quashing or mandatory order) the court should be satisfied that it has power to make the order concerned. Many agreements do not involve this type of act on the part of the court, for example where the parties simply agree that the Defendant should take a fresh decision. It is doubtful that paragraph 17.2 is intended to enable to court to veto an agreement like that and the requirements of 17.1 should be satisfied simply by reciting that the parties have agreed those terms.
2. It often happens that the parties agree all issues with the exception of costs. The incidence of costs when a judicial review claim is settled are the subject of specific rules noted below. It is often disproportionate for there to be a hearing to decide where the costs should fall. This issue is now commonly dealt with by written submissions only – a procedure approved by Collins J in *R (Jones) v Nottingham CC –* above .

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.

*Costs*

1. 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.
2. Costs are in the discretion of the Court (s. 52 of the Senior Courts Act 1981). Guidance is given in CPR Part 44.3 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 13. 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 has led to the development of protective costs 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.

*Partial success*

1. Orders the Court may make include those listed in CPR 44.6. 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[[6]](#footnote-6).
	2. Where there is partial success then the Court generally makes a rough and ready assessment of the relevant proportions[[7]](#footnote-7). 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.
2. Costs can be awarded on an indemnity basis[[8]](#footnote-8) 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. The principles are set out in R (Boxall) v The Mayor and Burgesses of Waltham Forest LBC (2000) 4 CCLR 258 at para [22][[10]](#footnote-10):

“(i) The court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs.

(ii) It will ordinarily be irrelevant that the Claimant is legally aided.

(iii) The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost.

(iv) At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear. How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties.

(v) In the absence of a good reason to make any other order the fall back is to make no order as to costs.

(vi) The court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage”

1. These guidelines were followed in *R (Scott) v LB Hackney* [2009] EWCA Civ 217 where it was said that the court should not be too ready to resort to no order[[11]](#footnote-11).
2. The Final Report of the Review of Civil Litigation Costs conducted by Sir Rupert Jackson recommends that where the Claimant has complied with the protocol the if the Defendant settles after issue by conceding any material part of the claim then the normal order should be that the Defendant pays the Claimant’s costs. The government conspicuously did not adopt this proposal in its response but the Court of Appeal has gone some of the way. The following propositions are supported by *R (Bahta) v SSHD* [2011] EWCA Civ 895:
	1. Where a claimant sends an adequately formulated letter of claim then in the absence of an adequately reasoned letter of response they are entitled to issue proceedings [59].
	2. If the C then obtains the relief sought or substantially similar relief then they may expect to recover their costs [59].
	3. When relief is granted then the D bears the burden of justifying a departure from the general rule that they should pay costs. The burden is a heavy one if they have not followed the pre-action protocol [65].
	4. If the D has not followed the protocol then it cannot rely on Boxall principle (vi) to resist an order for costs. The concessions there contemplated should normally be made at the pre-action stage [64].
	5. The Court will scrutinize carefully a claim that relief has been granted for purely pragmatic reasons to see that it is not a device to avoid payment of costs. Such a claim should be clearly explained [63].

*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[[12]](#footnote-12). 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 Supreme Court 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].

***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 22 of the Access to Justice Act 1999.
2. There is sometimes a suggestion that there should be no order for costs where a publicly funded litigant is successful against another public body because costs will in each case be met out of the public purse. This is wrong (confirmed in *Bahta*)for two reasons:
	1. It is inconsistent with s. 22 of the AJA 1999.
	2. In fact an *inter partes* costs order makes a substantial difference to the costs payable to solicitors. Where costs are recovered from the opposing party then legal aid solicitors 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. The discrepancy is particularly important in Very High Cost Cases and can make the difference between a practice being viable and non-viable.

*Assessment of publicly funded costs.*

1. After much variation a commonly used formula now is that there be “detailed assessment of the Claimant’s [or other assisted party’s] publicly funded costs”. The SCCO costs guide suggests “there be detailed assessment of the costs of the Claimant which are payable out of the Community Legal Service Fund” [annex to the SCCO Costs Guide 2006].

*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 (Access to Justice Act 1999 s.11).
2. The procedure for determining what is a reasonable amount to pay is specified in the Community Legal Service (Cost Protection) Regulations 2000, discussed in detail in *Wyatt v Portsmouth NHS Trust* [2006] EWCA Civ 529 and in the SCCO Guide 2006 Section 25.
3. 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 9(1).
4. 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 9(2) or (3). In Wyatt the Court specified that the amount payable was nil.
5. Otherwise the determination of the assisted person’s liability to pay is to be determined by a costs judge. The trial court may state the amount that would otherwise have been ordered (i.e. a summary assessment) make findings of fact relevant to that assessment (for example about the funded party’s conduct).
6. 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.

*Costs against the LSC*

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 LSC 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 severe 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.

MARTIN WESTGATE QC

4 November 2010

Appendix A6 to the Supreme Court Costs Office Guide 2006

**A-6 Standard orders made against Legal Services Commission**

**funded clients**

(a) Award of costs against a Claimant who is a Legal Services

Commission funded client

[Heading and opening words as in A-4(a) above]

IT IS ORDERED THAT:

1. The claim is dismissed.

2. The full costs of this claim which have been incurred by the defendant are

[summarily assessed at £ ] [to be determined by a Costs

Judge or District Judge].

3. The claimant (a party who was in receipt of services funded by the Legal

Services Commission) do pay to the Defendant [nil] [£ ] [an amount to be

determined by a Costs Judge or District Judge]. [When determining such costs the Costs

Judge or District Judge should take into account the following facts:

[Here list any findings as to the party’s conduct in the proceedings or

otherwise which are relevant to the determination of the costs payable

by the LSC funded client]

4. On or before (date) the claimant must pay into court £ on

account of the costs payable under paragraph 2, above.

5. There be a detailed assessment of the costs of the claimant which are payable

out of the Community Legal Service Fund.

(b) Order specifying the amounts payable, for use by a costs judge

[Heading and opening words as in A-4(a) above with

(if relevant) the addition of the words “sitting in private”]

IT IS ORDERED THAT:

1. The full costs of the [defendant] herein, [including the costs of this

application] are assessed at £

2. The amount of costs which it is reasonable for the [claimant] to pay to the

[defendant] is [nil] [£ which sum is payable to the [defendant] on or

before (date)].

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3. The sum of £ paid into court on account of the costs specified

in paragraph 2 above and any interest accruing thereon shall be paid out to the [defendant in

part satisfaction] [claimant] as specified in the payment schedule to this Order.

4. The amount of costs payable by the Legal Services Commission to the

[defendant] [including the costs of this application] is £ which sum is

payable to the [defendant] on or before (date).

[Schedule in Form 200 (see Court Funds Rules 1987)]

1. 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-1)
2. See the Administrative Court Office reminder as to fees being enforced from 1st October 2009 <http://www.hmcourts-service.gov.uk/>. [↑](#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. Subject to the possibility of a leapfrog appeal to the Supreme Court. [↑](#footnote-ref-5)
6. 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-6)
7. *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-7)
8. The difference between this and the standard basis is in CPR 44.5. Costs on an indemnity basis do not have to be proportionate. [↑](#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. *R (SOSHD) v E* [2009] EWHC 597 (Admin) where Mitting J held that a closer scrutiny of the likelihood of success was necessary in a human rights case (there a Control Order). [↑](#footnote-ref-10)
11. Distinguished in *R (SOSHD) v E* [2009] EWHC 597 (Admin) where Mitting J held that a closer scrutiny of the likelihood of success was necessary in a human rights case (there a Control Order). [↑](#footnote-ref-11)
12. *Bolton Metropolitan District Council v Secretary of State for the Environment* [1996] 1 All ER 184, [1995] 1 WLR 1176, HL. [↑](#footnote-ref-12)