CONSULTATION ON PROPOSED EXTENSION OF A FIXED COSTS REGIME

RESPONSE OF BLACKSTONE CHAMBERS
PUBLIC LAW GROUP

---

27 January 2017

I. INTRODUCTION

1. This submission addresses the issue of whether a regime of fixed recoverable costs ("**FRC**") should be applied to public law claims. This submission is made on behalf of public law practitioners at Blackstone Chambers and has been approved by the public law practice group. All communications about this submission should please be sent to Tom Hickman at th@blackstonechambers.com.[1]

2. The principal focus of this submission is on judicial review claims, although we also refer in paragraph 44 below to cases raising questions of the legality of public authority conduct in the context of private law proceedings. It draws on the experience of members of Blackstone chambers in litigating public law claims across a wide variety of areas, such as commercial judicial review, pharmaceuticals, advertising standards, immigration, community care, housing, terrorism, and many others.

3. For reasons set out in detail below, our submissions are as follows:

    a) Reform to the costs regime should be based on the principle of improving access to justice. The "*common law has clearly given special weight to the citizen's right of access to the courts*", which has been described as a "*constitutional right*".[2] Judicial review exists to protect individuals from unlawful and unfair actions of public authorities and to ensure that public authorities act according to law. That jurisdiction, which, as the courts have held, is central to the protection of the rule of law in this country, is only meaningful if individuals are in practice able to bring claims before the courts. It is especially important that this right is practical and effective.

    b) There is a real and serious problem of access to justice in judicial review. In particular there is a "*justice gap*" in to which many individuals and many grievances fall between the discrete and limited areas in which claimants can obtain protection against adverse costs. The result is that, outside these defined areas, judicial review is prohibitively expensive, or prohibitively risky, for individuals affected by decisions of public authorities as well as for many small and medium sized enterprises ("**SMEs**") and other organisations.

---

[1] The report was prepared by Tom Hickman, Jessica Boyd and Ravi Mehta with input from a number of members of Blackstone Chambers.

[2] *R. v Lord Chancellor Ex p. Witham* [1998] QB 575, p.585G per Laws J (as he then was).

c) The best solution to this problem is a modified form of the proposal made by Lord Justice Jackson in the Review of Civil Litigation Costs Final Report, 2010 ("**Final Report**") which proposed the application of qualified one way cost shifting ("**QOCS**") to judicial review claims. We set out in paragraph 4 below what in our view would constitute an appropriate costs regime in judicial review cases.

d) There are serious problems with the adoption of the form of FRC understood by us to be in contemplation in the context of judicial review, in particular because, (i) it does not squarely address the principal access to justice issue in judicial review which is the unaffordability of pursuing proceedings because of the risk of being ordered to pay adverse costs; (ii) the rationale for the adoption of FRC would not justify its application to legally aided cases and the application of FRC to such cases would be likely to have very serious detrimental consequences for access to justice given that the levels of legal aid fees and the non-availability of legal aid unless permission is granted means that lawyers are dependent on full costs recovery in successful cases; and (iii) it is vital that in cases of wider public importance, which usually involve extensive and complex work, can be brought on the basis of a costs cap and full costs recovery: this has proved an effective way of litigating cases of wider importance. Without both the potential in an appropriate case for a costs cap and un-capped *inter partes* costs, many such claims would probably not be financially viable.

e) This does not mean that we consider that there is no potentially valuable role for FRC. Our concern relates to the extension to judicial review of a model that is applied to ordinary civil litigation which, without significant modification, would make access to justice worse in legally aided judicial reviews and cases of wider public interest. That cannot be right. However, in the context of claims brought by individuals who do not qualify for legal aid, or SMEs, where there is no wider public interest, and which are not brought to vindicate substantial commercial interests, a regime of fixed costs could have a role to play. These are cases within the existing access to justice "*gap*".

f) An extension of the current Aarhus regime to all judicial review claims provides a further possible model which could increase access to justice. However, this would also require exceptions to that regime being made for it to be appropriately applied outside the context of environmental judicial review claims.

g) In sum, a one-size-fits-all approach to costs across judicial review proceedings would be unworkable, unfair and would risk reducing rather than improving access to justice. This submission is not able to canvass all of

the complexities and difficulties that arise. It is, however, our clear view that the application to judicial review of the same FCR that is proposed to be adopted in all other areas of civil litigation would be inappropriate. The concern to avoid "*Balkanisation*" – i.e. to maintain simplicity and not to grant special status to particular subject matter areas - is not convincing in this context. Judicial review is a special area of civil litigation, it fulfils different objectives and its procedures and practices are very different. The importance of protecting access to justice and having a fair costs regime are paramount in this context. There is an access to justice "*gap*" in judicial review. It is one that should be addressed. But it is a complex problem that requires a bespoke solution.

4. Taking all of these considerations into account, our preferred solution is a regime along the following lines, which we consider would be capable of meeting the access to justice "*gap*" in judicial review, while permitting flexibility:

   a) QOCS should be the default costs principle in judicial review proceedings.

   b) If the defendant considers that one way costs shifting should not apply because of the financial resources of the parties or given the nature of the case,[3] it must raise the issue in pre—action correspondence, and the parties must attempt to agree an order specifying a sum that it is reasonable for the claimant to pay if the claim proceeds beyond the permission stage and is lost.

   c) If an order cannot be agreed, the defendant may apply to the court at the time of lodging its Acknowledgement of Service and the matter should be determined on the papers at the permission stage.

   d) After the court has made such an order (subject to revision or appeal), a claimant should only be subject to a further costs risk on the basis of unreasonable conduct of the proceedings.

   e) If permission is refused, there should be no order for costs unless the claim is certified as being totally without merit and in that case the level of costs should be addressed in a practice direction so that the permission stage costs risk is transparent and certain.[4]

[3] Jackson LJ proposed that one way costs shifting should be "qualified" by reference to the rule that a losing Claimant should be ordered to pay a sum which it is a reasonable for him or her to pay having regard to (a) the financial resources of all the parties to the proceedings, and (b) their conduct in connection with the dispute to which the proceedings will relate.

[4] A further exception could be made for claimants that are seeking to vindicate commercial interests.

II. THE ISSUE

5. In November 2016, the Senior Judiciary announced a review of the use of fixed costs and in particular a review of the "*types and areas of litigation in which such costs should be extended*". Judicial review claims are mentioned in the consultation.[5]

6. The review was foreshadowed in a lecture delivered by Lord Justice Jackson on 28 January 2016 entitled "*Fixed Costs - the Time Has Come*" ("**The Time Has Come**"), in which his Lordship suggested that the time had come to adopt an extensive regime of FRC for civil litigation as proposed in chapters 15 and 16 of the Final Report. The lecture sets out a grid of proposed recoverable costs for different stages of litigation. This has four bands, each band relating to a different "*sum in issue or the value of the property or rights claimed*" in the case. In Band 1, which would apply to £25,000-£50,000 claims, the total recoverable costs would be £18,700, with Band 4 (£175,001-£250,000) resulting in proposed total recoverable costs of £70,250. These are proposed maximum amounts and if no costs were incurred for a relevant stage of the proceedings no amount would be recoverable for that stage, such that in most cases the total recoverable costs would be considerably less than these figures.

7. Furthermore, Lord Justice Jackson has made it clear that he has a very strong preference to "*avoid Balkanisation*", i.e. "*separate grids for different types of cases*." The concern appears to be to maintain simplicity and to avoid different subject matter areas being granted special status within the regime of civil proceedings; and to avoid satellite litigation.

8. Although it now appears that the possibility of applying FCR to judicial review claims is under consideration, Lord Justice Jackson's January 2016 lecture referred to the extension of FCR proposed in chapters 15 and 16 of the Final Report, which concerned fast-track and multi-track cases but not judicial review claims. The Final Report made separate proposals for the application of QOCS to judicial review claims (Chapter 30). It is therefore unclear whether it is being proposed that FRC would be extended to judicial review claims.

9. Quite apart from the main issues of principle which are addressed in the following section, it is submitted that the costs recovery grid would, on its face, not be apt to be applied to judicial review claims, for three reasons:

---

[5] Senior Judiciary Announces Review of Fixed Recoverable Costs, 11 November 2016, available at https://www.judiciary.gov.uk/announcements/senior-judiciary-announces-review-of-fixed-recoverable-costs/.

(1) Most judicial review claims do not constitute money claims or damages claims. It is an extremely complex matter to seek to attribute a monetary value to judicial review claims, including the value of upholding the law, and unlike in the case of attributing a monetary value to personal injury (also a complex matter) there is no body of principles or law for doing so.

(2) Many judicial reviews that do include damages claims would not even meet the value threshold for the first band: a challenge to the legality of removal directions, for example, which might include a low value claim for a short period of false imprisonment.

(3) The various stages in the grid replicate Precedent H used for cost budgeting purposes. However, these stages are not replicated in judicial review procedure and costs budgeting is not applied to judicial review partly because such claims depart from the characteristic stages of civil litigation. The costs of judicial review proceedings are to a considerable extent "*front loaded*" into the pre-issue stage and there are usually relatively few further costs until the trial.

III. IS THERE AN ACCESS TO JUSTICE PROBLEM IN PUBLIC LAW?

10. Reform to the costs regime should be guided by a single overriding objective: the promotion of access to justice. In our view, there is a serious access to justice problem that affects judicial review and considerably undermines the jurisdiction which the courts have developed.

i. Judicial review is a special and distinct form of civil litigation

11. The purpose of judicial review is to protect individuals from abuses of power and ensure that the decisions of public officials that affect individuals are made according to the law. It is recognised that judicial review is a central aspect of the rule of law in the UK. It is also recognised as being a special category of civil litigation. Authorities for these propositions are numerous but they include:

a) Lord Griffiths in *R v Horseferry Road Magistrates Court, ex p. Bennett* [1994] 1 AC 42 at p.62B-C, who stated that:

"The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended."

b) In *R v IRC ex p. National Federation of Self Employed Business*, [1982] AC 617, at p.644E-F, Lord Diplock stated:

"It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The Attorney-General, although he occasionally applies for prerogative orders against public authorities that do not form part of central government, in practice never does so against government departments."

c) In *R (G) v Immigration Appeal Tribunal* [2005] 1 WLR 1445, p.1453F at [13], Lord Phillips of Worth Matravers MR recorded that:

"The common law power of the judges to review the legality of administrative action is a cornerstone of the rule of law in this country and one that the judges guard jealously."

d) In *R v SS ex parte Hackney* [1984] 1 WLR 592, at p.602A-B, Dunn LJ endorsed the view of Sir William Wade and of the Divisional Court (May LJ and McNeil J) in that case that judicial review represents, *"a special class of remedies designed to maintain due order in the legal system, nominally at the suit of the Crown"*. He referred to,

"the special nature of judicial review under RSC Ord. 53 which makes it different from ordinary civil litigation inter partes and from criminal proceedings."

ii. The claimant justice gap in judicial review claims

12. There are three features of the basic costs principle of "*winner pays*", or two-way costs shifting, which threaten access to justice generally in all areas of civil litigation, (1) the fact that costs can be disproportionate to the issues at stake in the case, which provides a powerful disincentive to pursue a judicial determination of a dispute; (2) the uncertainty as to the amount of an adverse costs risk, which will provide a disincentive even if measures are in place to seek to ensure that the recoverable costs are proportionate; and (3) the very fact of an adverse costs risk, even if capped at a level proportionate to the case, can be simply unaffordable to many litigants.

13. Disproportionality, uncertainty and unaffordability all present problems for access to justice in judicial review cases, but uncertainty and, particularly, unaffordability represent the most pressing impediments to access to justice.

14. There are several regimes in place which serve to remove or mitigate the fact that costs of judicial review are unaffordable and/or the risk associated with adverse costs. But, as we explain below, these only apply in discrete areas. In situations not falling within any one of these discrete areas, there is an access to justice "*gap*".

15. The access to justice "*gap*" for claimants in judicial review is probably the most serious problem for the efficacy of judicial review as a jurisdiction which seeks to uphold the rule of law. The reality is that commencing judicial review proceedings is simply not a viable option for most people who are adversely affected by a decision of a public body. Even if lawyers are prepared to act on low rates or on a no-win: no-fee basis, the risk of an adverse costs order will in most cases be intolerable.

16. As Lord Diplock stated in the *NFSEB* case (para. 11(b) above), it would represent a "*grave lacuna in our system of public law*" if an organisation or private individual were not able to challenge government illegality. He was there speaking of the rules of standing, but his comments are equally apt to the rules on costs where these effectively prohibit organisations and individuals from challenging government illegality.

17. Judicial review claims, even those with no financial value, are litigated in the High Court irrespective of the size or value of the claim. Whilst the likely adverse costs will usually be substantially less than in commercial litigation, they are still likely to be well in excess of £10,000 for a contested judicial review lasting more than half a day. The Defendant's costs in most judicial review claims that raise substantial issues will be several times that sum. In complex judicial review cases, including many cases raising novel points of law of wider public interest, judicial review claims costs will run into hundreds of thousands of pounds particularly when the costs of appellate stages are included.

18. Most private individuals simply cannot afford to spend such sums on litigation and therefore cannot rationally be expected to assume such a cost risk. Unless they fall within one of the specific costs protection categories, judicial review is of no practical value to such people as a means of protecting them against the unlawful action of public bodies. The same can be said of many organisations and charities which cannot afford to assume such litigation risks. In the case of individuals, there is a powerful analogy with personal injury cases, where the most immediate problem is, as explained in the Final Report, that the risk of

adverse costs makes vindicating rights through the courts "*prohibitively expensive*":

> "***There are two important features of personal injuries litigation. First and self-evidently, the claimant is an individual. For the vast majority of individuals it would be prohibitively expensive to meet an adverse costs order in fully-contested litigation. The most recent Social Trends report shows that 73% of all households have savings (made up of securities, shares, currency and deposits) of less than £10,000. Defence costs can easily be many times higher than £10,000 in fully-contested litigation. This would mean that for three quarters of households their other financial assets (their own home in most cases) would be at risk from an adverse costs order***." Final Report, Ch. 19 §1.2.[6]

19. Precisely the same can be said of judicial review: for most people in society the prospect of an adverse costs order makes resort to judicial review simply untenable.

20. Uncertainty as to the level of costs is a connected problem. Whilst the costs incurred by public authority defendants are rarely disproportionate,[7] the range of proportionate levels of costs is wide and it is extremely difficult to predict in advance what level of costs a claim is likely to generate. Even if clients can be advised in very small judicial reviews that adverse costs are unlikely to exceed, say, £10,000, the risk of costs even at that level is liable to be a disincentive in a significant number of cases, and the existence of even a small risk of a significantly higher exposure is likely to make judicial review untenable even for claimants who could afford an £10,000 costs risk (and most people would not be able to afford such a risk).

21. The absence of costs budgeting and the front-loading of work and costs in judicial review into the preliminary stages of a claim mean that claimants have

---

[6] See also the reasoning of Edis J in *Parker v Butler* [2016] EWHC 1251 (QB); [2016] 3 Costs L.R. 435, where he emphasised that *"[t]he risk that a failure in litigation may result in the loss of existing assets is a substantial inhibition on access to justice and that is an important part of the reason why QOCS was established"* (p.437 at [3]).

[7] This is largely because most judicial review claims are brought against public bodies or central government which, due to their limited resources and publicly funded character, generally do not incur disproportionate legal costs. Central Government uses GLD solicitors for most judicial review litigation and barristers are instructed on AG Panel rates. Local authorities also use in-house solicitors and usually pay Counsel at less than commercial rates, although their costs are usually higher than those of central government. In cases in which the parties have revealed their respective costs positions, the costs incurred by defendants in judicial review proceedings are invariably vastly less than those incurred by commercial claimants. It cannot be said, however, that this is a universal rule. There are statutory bodies and quasi-public bodies which use external commercial solicitors and instruct Counsel at commercial rates, and interested commercial parties might also participate and attempt to recover their costs, and in such cases concerns about disproportionate costs can and do arise.

no visibility over the amount of work being done by a defendant and the level of costs being incurred until a schedule of costs is presented.[8]

22. Uncertainty is a particular problem for SMEs that contemplate judicial review proceedings, for example, following a failed procurement process or concerning access to grants, subsidies or licences. SMEs might well be able to afford a reasonable level of costs. But bringing judicial proceedings exposes them to an adverse costs liability that could vary considerably. For example, the potential adverse costs risk could range in a small to moderate sized procurement case from c. £60,000 to, c. £350,000 particularly given the uncertainty created by the potential involvement of interested parties,[9] and the potential use of expert evidence in cases raising technical issues. This represents a serious obstacle to judicial review and there are many cases where such uncertainty has led to claims not being pursued.

23. There is essentially no market for ATE insurance against an adverse costs risk in a judicial review claim as far as we are aware.

24. It is for these reasons that judicial review proceedings are usually only commenced in the following circumstances:

    a) The claimant benefits from one of the three regimes which afford costs protection:
        i. The claimant has legal aid.
        ii. The claimant obtains a costs capping order ("**CCO**") (previously, protective costs order or "**PCO**").
        iii. The claim is an environmental claim benefitting from costs protection under the rules governing Aarhus Convention claims.

    b) The claimant is a company or an especially wealthy individual.

    c) The claimant is a public authority.

    d) The claimant has litigation insurance, e.g. a professional suing a professional regulatory body in a matter arising out of disciplinary proceedings, such as a doctor, accountant or financial adviser.

---

[8] Defendants will often present schedules of costs at the permission stage including non-pre-permission work up to that stage. They will usually be no further disclosure or discussion of costs until after the final judgment.

[9] We note that although the ordinary rule is that only one set of costs will be awarded in judicial review proceedings (see *Bolton MDC v Secretary of State for the Environment (Practice Note)* [1995] 1 W.L.R. 1176 at pp.1178F-1179A per Lord Lloyd of Berwick), costs in favour of third parties have been awarded in substantial sums in a range of cases (see, e.g. the extensive examples in the Judicial Review Handbook, Fordham, Bloomsbury Publishing, 6th edition, 2012 at §§18.1.7-18.1.8).

25. There is, however, no study of which we are aware which seeks to identify how large the justice "*gap*" in judicial review claims is, or the extent to which the volume of judicial review claims is dominated by these categories of cases. Attempts by the principal author of this paper (Tom Hickman) together with the Public Law Project (PLP) and the University of Essex to obtain useful statistics from the Ministry of Justice under FOIA have not met with success, though not, we understand, because such information does not exist.[10]

26. It is significant that in the context of the three situations in which costs protection is available – legal aid, CCOs/PCOs and Aarhus claims – the Government and Parliament have recognised that the adverse costs risk is an effective bar to access to justice. However, each of these contexts in which costs protection is available is very limited in scope, particularly since the cuts to legal aid have meant that far fewer people qualify for legal aid than in the past. We address each costs situation in turn.

(a) Legal Aid

27. As recognised in the Final Report in Ch. 19, p.189, §4.4, the grant of legal aid provides effectively complete costs protection from adverse costs for individuals (not legal persons[11]).

28. The reduction of the availability of legal aid, both in terms of its scope and in terms of the tightening of the means test, means that only a small fraction of the population today could benefit from legal aid, essentially persons who are not in work and have no assets.

29. Those who have savings or other capital of over £8,000 (or £3,000 in immigration cases) are not eligible for legal aid, whilst those whose "*disposable income*" is over £733 per month are also not eligible for any legal aid.[12] "*Disposable income*" means income after tax, NI and rent and therefore does not take into account council tax, bills and travel expenses,[13] as well as all of a person's personal expenses or mortgage contributions, for both that person and their family. In other words, people who have £169.15 or more per week to live off, or who have

---

[10] Letter to Lord Justice Jackson dated 23 December 2016 from PLP.

[11] See the terms of s.26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("**LASPO**"), and its predecessor, s.11(1) of the Access to Justice Act 1999 ("**AJA**").

[12] Unless the individual is in receipt of Income Support, JSA, Guarantee Credit, Universal Credit or Income-Related Employment and Support Allowance. See generally: Keycard 52 – Issued April 2016, LAA, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/528095/eligibility-keycard.pdf.

[13] Beyond a £45 flat rate for work related expenses.

any significant assets, do not qualify for legal aid. To put this in perspective, £165 is the rate for a single hour of a solicitor's time of a Grade C fee earner in a London Grade 3 (outer London) solicitors firm.[14]

30. The reality is that legal aid has become a safety net that helps protect the rights of the most vulnerable and impoverished people in our society; it bears no resemblance to a form of state protection of access to justice.

(b) CCOs

31. The jurisdiction for the court to grant CCOs does represent an important safeguard for access to justice. The very existence of this regime represents a recognition – now a recognition by Parliament in the Criminal Justice and Courts Act 2015 ("**CJCA**") - that without costs protection, access to judicial review proceedings will often be precluded by the adverse costs risk, as one of the conditions for the grant of a CCO is that the individual would not pursue his or her claim if costs protection was not conferred and it would be "*reasonable*" for the claimant to abandon the claim in light of the adverse costs risk: s.88(6).

32. Examples of PCOs that have been granted by the courts are: [15]

a) A £4,000 costs cap on recoverable costs with no reciprocal cap against the claimant, in a claim brought against Bristol City Council by a person of "*very limited means*" but where the claim received some financial support from the Parish Council.[16]

b) An order precluding the defendant from recovering any costs in a claim brought against the same Council by a victim of human trafficking who was seeking accommodation and financial assistance from the Council. The claimant's recoverable costs were limited to £150 per hour.[17]

c) An order placing reciprocal caps of £5,000 on the claimant's recoverable costs and £35,000 on the Defendant's recoverable costs in a case concerning a challenge to planning permission for a development opposite Hampton Court Palace granted by a local authority.[18]

---

[14] White Book 2016, p.1575.

[15] We seek to illustrate and supplement the helpful summary of the practice in relation to PCOs at §48GP.76 of the White Book 2016 (pp.1600-1608).

[16] CO/1836/2012, 30.05.12, Mrs Justice Thirwall.

[17] CO/1574/2015, Mr Justice Nicol.

[18] Case No: C1/2010/1272, C1/2010/0592, Lloyd, Richards and Sullivan LJJ, *Garner v Elmbridge Borough Council* [2010] EWCA Civ 1006.

d) An order capping the Defendants' recoverable costs at £10,000 and limiting the claimant's recoverable costs to £66,000 in relation to a claim alleging breaches of public international law by HMRC and the Secretary of State for Food, Environment and Rural Affairs, concerning association and fisheries agreements signed with Morocco.[19]

e) An order preventing the defendant from recovering any costs from the claimants in proceedings brought against the Director of Public Prosecutions concerning her decision not to bring a prosecution in respect of offences of incitement to stir up racial or religious hatred. There was no reciprocal costs cap.[20]

f) An order capping the Defendant's recoverable costs at £70,000 in a claim challenging the decision as to the location of the re-burial of King Richard III. The claimant, a company set up to bring the litigation, was limited to recovering costs at GLD and AG Panel rates.[21]

g) Orders at each level of proceedings in a case concerning a challenge to the proposed "*residence test*" for legal aid, brought by a public interest charity limiting the Defendant's recoverable costs to £6,175.00 (High Court), £10,000 (Court of Appeal) and then £15,000 (Supreme Court); and limiting the claimant's recoverable costs to reasonable solicitors' fees and fees for leading counsel and two junior counsel at AG panel rates, reduced to one junior counsel before the Court of Appeal and Supreme Court. [22]

h) An order capping the adverse costs risks of the claimants in proceedings before the High Court at £20,000, in a case concerning the compatibility of the Data Retention and Investigatory Powers Act 2014 with EU law and the ECHR, brought by two MPs.[23]

i) An order capping the Defendant's costs recovery at £15,000, with a reciprocal cap of £20,000 on the claimant's costs recovery, in proceedings concerning

---

[19] CO/1032/2015; CO/134/2015, Mr Justice Walker.

[20] CO/1566/2016, Mr Justice Haddon-Cave.

[21] CO/5313/2013, 30.10.13 Mr Justice Haddon-Cave, and see *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2013] EWHC 3164 (Admin), [2014] ACD 26.

[22] CO/17247/2013, Mr Justice Turner; C1/2014/2621 (A), Lord Justice Underhill; Order of 26.02.2016 before Lady Hale, Lord Wilson and Lord Reed JJSC – and see *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39; [2016] AC 1531.

[23] CO/3665/2014, CO/3667/2014, CO/3794/2014, Lord Justice Bean and Mr Justice Collins.

whether the legal aid agency has the power to fund applications to the European Court of Human Rights.[24]

33. This jurisdiction is an effective tool for enabling access to justice in the right sort of case. However, it has limitations. A CCO is only available if an issue in the claim is of "*general public importance*": s.88(7). There were issues of general public importance in each of the cases referred to above. However, most abuses of executive power will not raise issues of general public importance. A situation in which the law is clear but a public official flouts it in a decision affecting a particular individual would, certainly, not benefit from any CCO protection, however egregious the conduct of the public official.

34. The PCO/CCO jurisdiction has also been applied in a highly variable manner, as the examples set out above illustrate.[25] Moreover, the determination of a CCO application requires a detailed assessment of a claimant's assets – which may itself have a chilling effect.[26]

35. In addition, since August 2016, CCOs can only be granted after permission has been granted and therefore they do not provide protection for the permission cost risk. This costs risk can itself be substantial. For example, a challenge to a decision of the Advertising Standards Authority raising no points of wider importance resulted in an adverse costs award of £10,000 at the paper permission stage[27] and a challenge to an investigation into a complaint made against a public authority resulted in an adverse paper permission costs order in a straightforward case of £5,280.[28] In the experience of members of the Blackstone Public Law Group, costs of £1,500-£3,500 are routinely awarded against claimants on the refusal of permission, which, together with permission costs and the need for solicitors and Counsel in High Court litigation, makes commencing judicial review proceedings expensive, especially for people of low means and cases with little or no monetary value.

---

[24] CO/2313/2016, Mr Justice Blake.

[25] In our view, courts and parties alike would be assisted by a Practice Direction setting out the proper approach.

[26] See, e.g. the analysis of Sullivan LJ in R (Garner) v Elmbridge Borough Council [2010] EWCA Civ 1006; [2011] 3 All E.R. 418 (at [52]) "[t]*he more intrusive the investigation into the means of those who seek PCOs and the more detail that is required of them, the more likely it is that there will be a chilling effect on the willingness of ordinary members of the public (who need the protection that a PCO would afford) to challenge the lawfulness of environmental decisions*".

[27] CO/4780/2015, 19.11.15, Mr Justice Wilkie.

[28] CO/3316/2016, 05.10.16, Karen Steyn QC.

(c) Aarhus claims

36. CPR 45.43 provides an optional costs cap regime for claimants in environmental cases. The rules cap costs exposure at £5,000 for an individual and £10,000 for other cases, with a reciprocal costs cap of £35,000 (CPR, PD 45, §§5.1-5.2). In order to trigger application of the regime, a claimant must identify the claim as an "*environmental claim*" and set out the grounds for this characterisation (CPR rr.45. 42 and 54.6(1)(d))[29]. The regime only applies to judicial review proceedings; it thus extends to some – but not all – environmental law claims.[30]

37. The rationale behind the introduction of such rules was to implement the UK's obligations under the Aarhus Convention, as well as the EU Public Participation Directive (2003/35/EC).[31] In particular, in a series of cases before the Supreme Court[32] and the Court of Justice of the European Union ("**CJEU**")[33] concerns have been raised about the compatibility of the costs regime in England & Wales and the requirement in Article 9(3) of the Aarhus Convention that environmental law claimants not face "*prohibitive expense*".

38. The Aarhus costs regime provides certainty for claimants and defendants alike, and currently adopts caps which limit the potential costs exposure of parties compared to other judicial review claims (as set out above). However, this regime only applies to about 1% of judicial review claims.[34]

(d) The justice gap for claimants between cost protection regimes

---

[29] We note that this section of our submissions relates to the current system. The government is proposing to introduce variable caps and other changes to the present Aarhus costs regime – see its response to the consultation in 2015, dated November 2016 - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/569588/costs-protection-in-environmental-claims-govt-response.pdf.

[30] Cf. *Secretary of State for Communities and Local Government v Venn* [2014] EWCA Civ 1539; [2015] 1 WLR. 2328, in which the Court of Appeal concluded that the regime did not apply to statutory appeals under section 288 of the Town and Country Planning Act 1990. The government is currently considering proposals to amend the CCO regime to account for this wider range of procedures, in order to give effect to the prohibition of "*prohibitive expense*" in Article 9(3).

[31] See, for instance, §5 of the Ministry of Justice's 2015 Consultation on the Aarhus costs capping regime: *Costs Protection in Environmental Claims Proposals to revise the costs capping scheme for eligible environmental challenges*, available at https://consult.justice.gov.uk/digital-communications/costs-protection-in-environmental-claims/supporting_documents/costprotectioninenvironmentalclaimsonsultationpaper.pdf.

[32] *R (Edwards) v. Environment Agency (No.2)* [2014] 1 WLR 55.

[33] See Case C-260/11 *R (Edwards & Pallikaropoulos) v. Environment Agency et al* [2013] 1 WLR 2914; Case C-530/11 *European Commission v. UK* [2014] 3 WLR 853.

[34] As reported by Leigh Day solicitors, "[d]*ata obtained from the Ministry of Justice in 2015 confirms there were 118 Aarhus claims in March 2013-April 2014 and 153 in March 2014-April 2015. This represents a very small (less than 1%) percentage of the total number of JRs lodged on an annual basis (some 20,000)*" – see https://www.leighday.co.uk/News/News-2016/November-2016/Lawyers-accuse-MoJ-of-undermining-peoples-rights-t.

39. Given the rationale for judicial review, there is no proper basis for ameliorating the effective bar on access to the Court's supervisory function only in cases in which an individual qualifies for legal aid, in cases of wider public interest or in environmental claims. Judicial review exists to protect individuals from abuses of power by public authorities and to ensure that public bodies act according to the law. However, that is an empty protection in the vast majority of cases concerning individuals, and many cases involving SMEs, given the risk of adverse costs.

40. An indication of the size and importance of this justice "*gap*" is provided by the following examples (based on real scenarios):

    a) In the human trafficking case referred to in paragraph 32(b) above, the claimant, who had no assets other than a bag of clothes and a few personal possessions and was able to avoid destitution only through prostitution, was initially granted legal aid. However, following an interim injunction ordering the defendant to arrange accommodation for the claimant, she managed to obtain a few weeks' work as a cleaner which was deemed by the legal aid agency to take her "*disposable income*" over the legal aid means test threshold and her legal aid was therefore cancelled shortly before the judicial review hearing. The court granted a PCO but had that claim not raised issues of wider public importance because of the legal issues involved, the claimant would have been prevented from pursuing the claim to trial.

    b) Take the case of a parent with a disabled child who works part-time and part owns their own home. The parent wishes to challenge the decision of a local authority restricting the support services that the parent and child are able to access. The parent will not qualify for legal aid and the case will not qualify for a CCO. For such a person, judicial review is not a realistic remedy.

    c) Another example is provided by the young professional who lives in rented accommodation above a row of shops. One of the shops causes a persistent nuisance, as a result of breaches of planning restrictions by the developer, and the local authority unlawfully refuses to enforce a planning condition against the developer. Given the adverse costs risk (including third party costs of the developer and the shop owner), the professional cannot risk commencing judicial review proceedings, even if advised that there would be strong chances of success. The same would likely be true of a residents' association seeking to challenge a local authority.

    d) A further example is the SME involved in a tender exercise for a public body contract worth in the region of £400,000 gross. The SME is unlawfully

excluded from the tender process, but the risk of substantial adverse costs over £100,000 (in addition to the company's own costs) makes judicial review proceedings unaffordable and uneconomic.

e) Recent litigation over the cancellation of passports provides another example. The Secretary of State for the Home Department has power to cancel a person's passport under royal prerogative powers. This power has been exercised in increasing numbers of cases in recent years. However where a passport is cancelled under the prerogative, an individual wishing to challenge the cancellation must bring a judicial review and ordinary legal aid principles apply. Individuals who are in employment or who have any significant assets will not qualify for legal aid and for this reason many passport deprivation decisions have gone unchallenged even where there are grounds of challenge, and despite their fundamental importance to the individual concerned and indefinite nature. (The unfairness of this position is demonstrated by the fact that a person subject to the analogous power by the Home Secretary under the Terrorism Investigation and Prevention Measures Act 2011 to seize a passport and prohibit a person from travelling overseas qualifies automatically for legal aid irrespective of means).[35]

f) A further example is a SME, looking for financial support for a particular business project, which applies for EU funding administered by an English public body. The funding sought is in the region of £200,000. The application is refused based on an error of EU law. The risk of substantial adverse costs makes judicial review proceedings unaffordable.

(e) The effect of costs on Defendants

41. While it is vital that claimants have access to justice, the Final Report recognised that it is equally important that defendants are not deterred from defending claims.[36] The risk of adverse costs, combined with the potential irrecoverability of their own costs, may impose pressure on defendants not to defend litigation that

---

[35] Paragraph 45 of Sch. 1 to LASPO (which confers the right to legal aid) and s. 21(2)(b) of LASPO, read with reg. 5(1)(l) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (SI 2013/480) (which exempts this form of legal aid from the requirement to assess means).

[36] In Chapter 4 of the Final Report at §2.9(ii) Lord Justice Jackson wrote:

> "***Recoverable costs represent a source of funding for the winning party and thus promote access to justice. From that point of view, there is an interest in narrowing the gap between actual and recoverable costs. On the other hand, recoverable costs represent a burden upon the losing party and thus inhibit access to justice. From that point of view, there is an interest in controlling recoverable costs below actual costs. From the point of view of someone who does not know whether he will be winner or loser, i.e. a litigant in the "original position" as defined by Rawls, there is also an interest in controlling recoverable costs below actual costs. This is because the total actual costs tend to rise when the stakes for winning are raised.***"

they would wish to defend. This is a particular concern for public bodies other than central government, such as local authorities and regulatory bodies whose legal expenses come out of the body's finite budget and thus are understandably viewed as diverting resources from front line services.

42. Take decisions of local authorities concerning the funding of services: the cost of providing the services will frequently be far less than the cost of defending a judicial review challenging decisions not to provide them. Heavy commercial judicial reviews provide another example. In such cases regulatory bodies may be subject to the threat of extremely high adverse costs.

43. This concern is not, however, as grave, in our view, as that which arises in respect of claimants' access to justice, for four reasons:

    a) The principal problem relates to the diversion of resources, rather than the absence of resources. These are not access to justice issues in the true sense: we are not aware of cases in which public bodies have not been able to afford to defend themselves. It is true that access to justice for persons affected by the decisions of public authorities does have costs for public bodies including on their other activities, but such costs have to be borne if and to the extent that it is necessary to ensure that individuals are able to protect themselves from unlawful decisions of public officials.

    b) The taxation principles operate considerably to reduce costs claimed by successful claimants, and are understood to do so by public bodies, even if costs can remain high by comparison with the financial value of the claim to the defendant.

    c) In many situations, public authority defendants will be advised that their decision is correct in law and therefore they will have no option but to defend the claim.

    d) As noted above, this issue does not have application to central government as well as many other public and quasi public bodies who are adequately insured or resourced.

(e) Non-judicial review cases

44. The complex picture set out above is further complicated by the fact that public law cases are not limited to paradigm judicial review claims. Access to justice issues arise in slightly different forms in different contexts:

    a) The Administrative Court also hears statutory appeals in many contexts and in each context the procedure differs, although the essential public law jurisdiction to correct abuses of power is the same. Appeals from planning decisions under s.288 of the Town and Country Planning Act 1990, appeals from compulsory purchase orders under the Acquisition of Land Act 181, appeals from interim orders imposed on doctors under section 41A(10) of the Medical Act 1983, and appeals from decisions of the Pensions Ombudsmen are some examples.[37] Such appeals are not subject to the permission hurdle.

    b) Where a decision taken by a public official results in detention, an individual has the option of bringing private law proceedings rather than judicial review proceedings, although the public law issues arising will be precisely the same: *Lumba v Secretary of State for the Home Department* [2012] 1 AC 245, e.g. pp.274E-275B at paragraphs [64]-[66] per Lord Dyson JSC. Where an individual has been released from detention before commencing proceedings, the individual will not be able to bring the claim by way of judicial review and yet the civil claim will raise essentially the same issues.

    c) There are also various other ways in which the court's judicial review jurisdiction can be triggered outside CPR 54 as collateral to private law proceedings. For example, in *Wandsworth LBC v Winder (No.1)* [1985] A.C. 461, a local council brought county court proceedings claiming arrears of rent and possession of a flat. The House of Lords held that the defendant was permitted to challenge the *vires* of the resolutions and notices of increase on which the council's claim was based, in those proceedings, without this being an abuse of process (see, e.g. pp.509E-510C per Lord Fraser of Tullybelton). In *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988, a student brought a claim for breach of contract against a university in relation to its decision to fail her in an examination for plagiarism. The Court of Appeal emphasised that a claim against a public body for breach of contract should not be struck out merely because an application for judicial review might have been more appropriate (pp.1994E at [18] per Sedley LJ as well as 1997A at [32] and 1998B at [38] per Lord Woolf MR).

[37] For other such examples see, e.g. Chapter 16 of *Disciplinary and Regulatory Proceedings*, Jones, Foster & Hanif, Jordan Publishing, 8th edition, 2015.

IV. OPTIONS FOR REFORM

45. In this section we make two initial observations:

    a) First, although we have identified a serious access to justice "*gap*" in judicial review proceedings, the nature of public law proceedings means that there is no simple solution and a one-size-fits all approach, particularly one that is extended from other very different areas of civil litigation, will not work and risks having significant unintended consequences.

    b) Second, section 88(1) of the CJCA provides that any order made in judicial review proceedings which limits or caps the amount of costs recoverable by a party can only be imposed under that Act. Therefore any further regime of costs capping would require primary legislation.

i. QOCS

46. Chapter 30 of the Final Report proposed an extension of the cost protection enjoyed by legally aided claimants to all claimants in judicial review: "*the same "shield" should be given to all claimants in judicial review cases, whether legally aided or not*." (p. 311, §4.4).

47. This recommendation reflected the access to justice problem identified above. It also reflected the fact that the permission stage for judicial review proceedings represents a significant protection against frivolous and insubstantial claims.[38]

48. The essential rationale for this recommendation remains valid. With an important caveat, it remains the best basic model to address the access to justice issue in judicial review cases.

49. The caveat is this. The "*qualified*" nature of the one-way costs shifting proposed in the Final Report was that it should be subject to a rule equivalent to s.26 LASPO (formerly s.11(1) AJA), which states that a costs order could be enforced where, "*it is reasonable for the individual to pay having regard to all the circumstances*". It was envisaged in the Final Report that this would allow recovery only in the case of commercial or conspicuously wealthy claimants. However, s.26 is not so tightly constrained. As Lord Justice Jackson noted in another part of the Final Report in

[38] Permission grant rate was between 18% and 23% between 2012 and 2014: see T. Hickman and M. Sunkin, "*Success in Judicial Review: The Current Position*" U.K. Const. L. Blog (19th Mar 2014) (available at https://ukconstitutionallaw.org/). This is arguably reinforced by the introduction of s.84 of the 2015 Act which requires the High Court to refuse permission if "*it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different*".

relation to s.11(1) AJA, "*it appears to give the court a wide discretion to order costs to be paid*" although it is not "*in practice*" used in legal aid cases (Ch 19, p.189 §4.4).

50. In our view, this would involve significant uncertainty as to the possibility of costs recovery from individuals who are not legally aided. Individuals with any significant level of assets could be pursued for costs and this would be likely to prove a very serious disincentive to litigation which has the potential to undermine the objective of extending QOCS. For example, litigants who had capital in a house would need to be warned that if they lost the case the defendant could pursue them and ultimately potentially obtain a charging order over their house. There would need to be much more clarity about the type of situations in which costs could be recovered, or a determination as to the level of costs that it would be fair for a person or other claimant to pay at the permission stage, to reduce such a chilling effect.

51. One way of seeking to achieve such clarity would be as follows: Defendants wishing to argue that the claimant ought to bear some costs risk could be required to raise this in pre-action correspondence, and to seek to agree an order with the claimant. Failing such an agreement, the defendantcould be required to apply to the Court for an order specifying the post-permission costs risk to which it is reasonable for the claimant to be exposed, such application to be determined at the permission stage. If such an order were limited to post-permission costs (the default position being no order as to costs if permission is refused), the claimant would know the potential costs risk in advance of assuming that risk.

52. An adjustment to the legal aid rule is also required to ensure that full one-way costs shifting can be dis-applied against companies and organisations where their assets justify this, and is not limited to private individuals.

ii. Extension of the Aarhus regime

53. A second possibility would be the extension of the current Aarhus regime to all judicial review cases (subject to the possibility of obtaining legal aid, whose greater protections should continue to override the Aarhus provisions in qualifying cases). One of the justifications given in the Final Report for adopting QOCS in judicial review was that it would also satisfy the requirements of the Aarhus Convention and would maintain a consistent position across judicial review cases (Final Report, Ch. 30 p.310). This remains a strong argument for the general application of a single regime.

54. However, there are serious problems with applying the Aarhus principles to all judicial review claims:

a) The reciprocal costs cap of £35,000 would not allow for the recovery of the costs of even a moderately complex judicial review. Therefore, if a claimant wanted to recover full *inter partes* costs, the claimant would have to opt out of the cost protection regime, and accept the significant costs risks associated with such a choice[39].

b) Impecunious claimants would not be able to obtain full costs protection.

55. Both of these objections are compelling and would require significant modification to the regime for it to be suitably applied to all judicial review cases. We elaborate on each point.

56. ***The £35,000 cap***. Under the current regime of CCOs and the previous regime of PCOs, complex cases of wider importance can benefit from costs protection while preserving the ability of claimants to recover reasonably incurred *inter partes* costs in full. Without claimants being able to recover such costs in full, or at least to a far higher level than £35,000, complex judicial reviews raising issues of wider public interest will cease to be brought because the individual claimant will not be in a position to pay the lawyers for the substantial amount of work that they will be required to undertake and the costs of solicitors time will not be recoverable if the case succeeds. Such cases will become uneconomic. Of course, individuals will have the option of opting out of the cost protection regime, but, unless they qualify for legal aid, this will leave them exposed to adverse costs (and in a complex judicial review raising an important wider point of principle, such a cost risk might be very extensive). In our view, it would be necessary for the courts to have a discretion to raise the reciprocal costs cap upon application by a claimant, which application would have to be resolved at an early stage of the proceedings.

57. ***The £5,000 reciprocal cap.*** There should be a mechanism in our view for claimants to obtain complete costs protection where (although they do not qualify for legal aid) their means justify this. The human trafficking case referred to in paragraph 32(b) above is an example of a case where <u>any</u> cost risk would have been prohibitive and would have forced the claimant to withdraw the case. It would be retrogressive for a system to be adopted which precluded any possibility of absolute costs protection because it would prejudice some of the most vulnerable and impoverished persons in society.

[39] The government's proposals for a hybrid model to be introduced for Aarhus claims, in its consultation response from November 2016, would partly address this, although it would introduce substantial uncertainty and complexity to the existing procedure by allowing variation of the relevant caps throughout the proceedings, which is not the case for our suggestion in paragraph 51 above.

iii. FCR

58. As explained in paragraph 9 above, it is not possible sensibly to apply the proposed fixed cost grid to judicial review cases. It would, in principle, be possible to identify a scale of costs applicable to the various stages of judicial review proceedings. We are doubtful, however, that judicial review proceedings could sensibly or fairly be divided into a fixed number of "*bands*". Whilst it would probably be possible to identify Small, Medium and Large cases, the court would need discretion to impose a different regime at the permission stage in cases that do not properly fall within such a grid. This is because judicial review claims arise in a very wide variety of circumstances and take a number of different forms, with widely varying numbers of interested parties and interveners taking differing roles in the proceedings. Any fair system would have to leave discretion to a judge to depart from any such banding.

59. Assuming, for present purposes, that a banding or grid system could be devised, would the application of such a regime be acceptable in principle? There is no doubt that a FCR in judicial review has some attractions when tested against the access to justice issues identified here, in terms of increasing legal certainty of the costs of litigation and to some extent providing a proxy for a costs capping regime, thus enhancing access to justice for some claimants and defendants alike. However, there are a number of powerful objections to adopting a FCR in the form proposed for other areas of civil litigation:

    a) **Does not squarely address the central access to justice problem**. The proposed fixed costs regime represents a regime of costs that are proportionate to "*the value of the property or the right at stake*" (*The Time Has Come*, §5.3). In other-words it is a system of fixing costs at a proportionate level to the value of the claim, rather than an affordable level. However, this approach does not meet the core access to justice problem in judicial review, which is the unaffordability for individuals of even the proportionate costs of judicial review. A FCR would only address this issue if it took into account and provided costs protection for individuals unable to afford to pay for the cost of vindicating their rights. That is, it provided a measure of cost-capping as well as costs-fixing.

    b) **Serious detrimental impact on access to justice in legal aid cases.** It is not clear whether a FCR would apply to cases that are legally aided. In the Final Report, Lord Justice Jackson recognised legally-aided judicial reviews as the one area where access to justice worked in judicial review. Indeed, it was his recognition of this which led to the proposal to extend the legal aid model of

costs protection to all judicial claims. Therefore there is no access to justice problem for cases that receive legal aid and therefore the rationale for the extension of FCR to such cases is absent (other than a pure desire for uniformity).[40] The application of FCR to legally aided cases could have serious adverse consequences for access to justice. This is because the civil legal aid rates are set at very low levels and, moreover, legal aid is not paid for commencing judicial review proceedings unless permission is granted. Therefore, firms of solicitors which specialise in judicial review legal aid work are dependent on recovering their reasonable costs in full when a judicial review claim is successful or conceded by a defendant. This was recognised in *R(E) v Governing Body of JFS* [2009] UKSC 1; [2009] 1 WLR 2353, prior to the restriction of pre-permission legal aid, by Lord Hope of Craighead DPSC (with whom the other members of the Supreme Court agreed), p.2363G-H at [25]:

> ***"It is one thing for solicitors who do a substantial amount of publicly funded work, and who have to fund the substantial overheads that sustaining a legal practice involves, to take the risk of being paid at lower rates if a publicly funded case turns out to be unsuccessful. It is quite another for them to be unable to recover remuneration at inter partes rates in the event that their case is successful. If that were to become the practice, their businesses would very soon become financially unsustainable. The system of public funding would be gravely disadvantaged in its turn, as it depends upon there being a pool of reputable solicitors who are willing to undertake this work."***

c) **Should not apply to cases of wider public interest.** It is vital that in cases of wider public interest, (i) individual claimants should be able to obtain full costs protection or costs protection commensurate with their ability to pay, and (ii) solicitors should be able to recover their reasonable costs and should not be limited to costs set at a level determined by the value of the case to the individual claimant. It is only because these principles have been observed that many of the leading public law cases of recent years have been capable of being litigated.[41] Any regime of FRC would therefore need to make provision

---

[40] We note that the Aarhus regime is an example of a costs protection regime that operates alongside, rather than displacing, the greater protections of legal aid. In principle, therefore, a broadly applicable FCR could operate alongside the current legal aid protections.

[41] Recent examples include: *R. (on the application of Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 269; [2011] 1 WLR 2852 concerning the policy on notice of removal from the UK for children and persons who are at risk of suicide and self-harm; *R (Davis) v Secretary of State for the Home Department* [2015] EWCA Civ 1185; [2017] 1 All ER 62, concerning the lawfulness of the UK's data retention regime; and *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39; [2016] AC 1531, concerning the "*residence*" test for legal aid.

for cases of wider public interest. In such cases the normal default costs rule should apply.

d) **May not be appropriate to high value commercial judicial review.** There is no reason in terms of enhancing claimant access to justice for a FRC regime to be applied to high value commercial judicial reviews involving sophisticated and well resourced claimants acting in their own commercial interests, since there is no access to justice "*gap*" in respect of such claimants. The main access to justice issue in this context relates to pressure on defendants when faced with claims by one or more extremely well funded commercial party. It is to address such an issue that there is a basis for the court imposing some form of certainty as to the proportionate level of *inter partes* costs at an early stage. However, we are doubtful that this could be sensibly or fairly done by reference to the "*value*" of the claim (rather than, for instance, the nature of the claim, or the resources of the parties), given that not all cases may be easily categorised by reference to the amount of money at stake.

60. This analysis does not lead us to the conclusion that there is no potentially valuable role for FRC. Our concern is the extension to judicial review of a model that is applied to ordinary civil litigation which, without significant modification, would make access to justice worse in legally aided cases and cases of wider public interest. That cannot be right.

61. However, in particular in the context of claims brought by individuals who do not qualify for legal aid, or SMEs, where there is no wider public interest, and which are not brought to vindicate substantial commercial interests, a regime of fixed costs could have a role to play. These are cases within the existing access to justice "*gap*".

62. In such cases, a regime of FRC would provide greater certainty and a measure of costs protection. Litigation in IPEC – with which a number of members of Blackstone Chambers have direct experience - provides a model that has provided effective at vindicating the commercial and IP interests of individuals and companies engaged in SMEs. Whilst claimants rarely recover their actual costs, they are able to negotiate acceptable rates with their own solicitors and the certainty provided has enabled many claims to be vindicated that would not otherwise mot have been brought.

63. An added degree of costs control and costs certainty could also be justified in high value commercial cases, but we are doubtful that such cases could be fairly or adequately addressed by reference to a single band of high value cases.

V. CONCLUDING COMMENTS

64. For these reasons, we consider that it would not be appropriate to apply to judicial review the FCR model that is currently under consideration in relation to civil litigation generally. Nonetheless, there is a serious access to justice problem in judicial review cases that calls for a change to the current costs regime. In our view, a modified form of QOCS, such as the regime described at paragraph 4 above provides the best solution. But if this cannot be achieved, we also do not rule out some role for a more nuanced and bespoke FCR and/or greater costs control at an early stage of proceedings.

65. We have set out conclusions drawn from this analysis fully in paragraphs 3 and 4 above.