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PLP RESEARCH PAPER

Financial Barriers to Accessing Judicial Review: An Initial Assessment

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Executive summary

In England and Wales, questions of money and finance have become more important in the discussion around judicial review in recent years. On the claimant side, there are widespread access to justice concerns relating to the costs of bringing a judicial review. On the government side, there has been a view taken—which has informed various reforms—that judicial review is costly to the general taxpayer, and ought to be controlled. Despite the centrality of this discussion, little systematic research has been undertaken about the financial barriers to accessing judicial review and their effects. This report provides a high-level overview of the current debate and what evidence is available at present. It examines four key areas, providing a snapshot of each:

- court fees and system costs;
- party funding;
- lawyers' fees; and
- costs between parties and the debate about costs reform.

Examining each of these areas, we find a densely complex system of rules underscored by a lack of robust evidence to underpin viewpoints. Implicit in almost all views on this subject is that the present arrangements can and do serve as a barrier to accessing judicial review. What is contested is the extent to which present arrangements do in fact serve as a barrier, and the extent to which barriers are justified. While the available evidence suggests concerns relating to access to justice may be well-founded, there are clear gaps in the evidence base. The absence of systematic evidence, as well as the absence of serious modelling of the impact of alternative mechanisms, means that the debate around this issue is often polarised between, what we label, “constitutionalist” and “managerialist” perspectives. To move beyond this, we suggest there is clear case for a thorough and even-handed inquiry concerning financial barriers to accessing judicial review. We further suggest specific questions where further data is required. As such, this report is an “initial assessment” of the evidence base which PLP is working towards filling key gaps in.

About this report

This report was produced by Ravi Low-Beer and Dr Joe Tomlinson, working with the Public Law Project and University College London, as part of a wider project on financial barriers to accessing judicial review. Those involved in that wider project and/or have been part of discussions include:

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Contents

Introduction	6
Court fees and system costs	10
Court fees	10
System costs.....	11
Rises in judicial review fees since 2000	12
Funding	18
Paying from own pocket	18
Conditional fee agreements	19
Legal aid.....	19
Crowdfunding	22
Lawyers' fees	25
Fees generally	25
Legal aid fees.....	26
Costs between parties	32
The general principles of costs	32
Costs recoverable from claimants where permission to apply for judicial review is refused.....	32
Costs Capping Orders made pursuant to section 88 of the Criminal Justice and Courts Act 2015.....	33
Costs recoverable from the parties in environmental judicial review claims.....	35
Financial disclosure requirements for judicial review applicants and third party costs orders.....	37
Costs where judicial review claims are settled	38
Costs rules applicable to interveners	38
Costs reform	40
The Jackson Review.....	40
Fordham, Boyd, and Maurici.....	42
Jackson's final report.....	43
The Government's response to Jackson.....	44
Jackson's further review, the Westgate review, and Public Law's disgrace.....	45
Conclusions and recommendations	49

Introduction

Questions of money and finance have become more important in the discussion around judicial review in recent years. In this respect, there have been two broad and competing narratives. First, that the cost of bringing a judicial review claim, including the cost of covering the claimant's costs exposure is a barrier to access to justice, and impedes the judiciary's ability to uphold the Rule of Law and prevent abuse of power by the Executive. Second, that the cost of defending judicial review claims—particularly those that are not meritorious—diverts scarce public resources away from defendant public bodies' primary function, governing in the public interest. These narratives have been put under the spotlight by the general programme of austerity implemented by the government from 2010 onwards (including restrictions on legal aid),¹ as well as recent reforms concerning judicial review specifically.²

A number of reforms to judicial review were promoted by the Coalition Government of 2010–2015. Many of them were controversial and many of them were premised on the second of the above narratives. For instance, when the Government proposed changes to the judicial review system in 2012, the consultation process cited the growing number of “weak or ill-founded [claims]” that were taking up “large amounts of judicial time and costing the court system money.”³ The reforms to judicial review undertaken by the Coalition Government included:

- the introduction of a new court fee payable on application for an oral permission hearing, and a series of increases in the court fees payable in judicial review cases;⁴
- changes to legal aid in judicial review cases so that payment to claimant lawyers has become conditional on the grant of permission (with some exceptions);⁵
- the introduction of a lower threshold test (“highly likely” rather than the previous test of inevitability) for when relief can be refused on the basis that a defect in procedure would have made no difference to the original outcome;⁶
- the introduction of Costs Capping Orders which cannot be granted before permission;⁷

¹ The effects of austerity have affected many parts of the administrative justice system, not just the judicial review system. For an overview and analysis, see R. Thomas and J. Tomlinson, “Mapping current issues in administrative justice: austerity and the ‘more bureaucratic rationality’ approach” (2017) 39(3) *Journal of Social Welfare and Family Law* 380.

² For example, see the proposals consulted on by the Ministry of Justice in *Judicial Review: Proposals for further reform* (London: Cm 8703, 2014).

³ Ministry of Justice, “Judicial review consultation – Press Release” (13 December 2012), available at <<https://www.gov.uk/government/news/judicial-review-consultation>>.

⁴ Civil Proceedings Fees (Amendment) Order 2014 (SI 2014/874).

⁵ See the Civil Legal Aid (Remuneration) (Amendment) Regulations 2015 (SI 2015/898).

⁶ Section 84, Criminal Justice and Courts Act 2015.

⁷ Sections 88–90, Criminal Justice and Courts Act 2015.

- the introduction of a requirement for judicial review claimants to disclose at the outset information about the financial resources available, or likely to be available to them to meet their litigation liabilities, such information to be considered by the trial judge to determine where costs of the case should fall;⁸
- the introduction of a similar financial disclosure requirement for applicants for costs capping orders;⁹ and
- the introduction of new and potentially punitive costs rules for third party interveners.¹⁰

These and other changes—along with the associated political rhetoric—have led to growing concern in some quarters that access to judicial review is being unduly restricted, often through the use of financial barriers.¹¹

Though concerns about the cost of judicial review have been articulated with greater frequency in recent years, the notion that legal procedures cost significant amounts of money and that there should be practical means of managing such expenses is not new, nor is it particular to public law.¹² The concern that judicial review is too expensive for ordinary citizens has long been discussed too. Despite the discussion, the issue has not been squarely confronted by public law researchers. The position now is that the “economic” dimensions of judicial review have been largely neglected from empirical study even as those same issues have become more central to the shaping of government policy—and the public debate—on judicial review.¹³

This report provides a broad overview of the current debate on financial barriers to accessing judicial review and sets out the key evidence available at present.¹⁴ It examines four key areas:

- court fees and system costs;
- party funding;
- lawyers' fees; and
- costs between parties and the debate about costs reform.

⁸ Sections 85–86, Criminal Justice and Courts Act 2015 (not yet in force).

⁹ Sections 88–89, Criminal Justice and Courts Act 2015.

¹⁰ Section 87, Criminal Justice and Courts Act 2015.

¹¹ This issue was recently raised again in a prominent blog, see: T. Hickman, “Public Law’s Disgrace” (February 9 2017, *UK Constitutional Law Blog*) available at <<https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace/>>.

¹² See, for example, the historical debate in civil justice traced in J. Sorbaji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge: CUP, 2014).

¹³ There are some rare exceptions, e.g. V. Bondy, L. Platt, and M. Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences* (London: The Public Law Project, 2015), p.47 *et seq.*

¹⁴ Our analysis focuses on judicial review in the Administrative Court in particular. The Upper Tribunal now has responsibility for most immigration-related judicial reviews.

Examining each of these areas, we find a densely complex system of rules, and a policy environment characterised by a lack of robust evidence underpinning competing viewpoints.¹⁵ Implicit in almost all views on this subject is that the present arrangements can and do serve as a barrier to accessing judicial review. What is contested is the extent to which present arrangements do in fact serve as a barrier: many argue that judicial review is widely inaccessible due to financial barriers, while the government suggests that, although more needs to be done to ensure the right cases get access to judicial review, judicial review is done at proportionate overall cost. There is also disagreement about the extent to which such barriers are justified.

The absence of systematic evidence, as well as the absence of serious modelling of the impact of alternative options, means that the debate around this issue is often polarised between, what we label, “constitutionalist” and “managerialist” perspectives. From a managerialist perspective, the priority when considering how the judicial review system ought to work is placed upon managing the entire volume of cases that must be processed and the government-side impacts of that process. There is a focus upon providing adequate redress, but it is considered within the limits of available resources and what is considered to be timely and proportionate. Managerialists often emphasise factors such as timeliness, cost-efficiency, cost to the taxpayer, and the effective management of judicial resource. By contrast, a constitutionalist perspective prioritises justice and fairness in the individual case. From this perspective, considerations of justice and fairness naturally predominate over resource and system-wide considerations. There is also emphasis placed on the constitutional and social “goods” that judicial review can provide. To be clear, there is no bold-line distinction that can be drawn between these two perspectives; they are best understood as sitting at different ends of a spectrum. The tensions between the constitutionalist and managerialist approaches are unavoidable. However, the dearth of systematic evidence and an absence of serious modelling of the impact of alternatives within the debate exacerbates the polarised nature of the debate. Relevant data can inform the trade-offs that are involved in system-design. To move the debate forward we, therefore, suggest there is a clear case for a thorough and even-handed inquiry concerning financial barriers to accessing judicial review, and the costs and benefits of the judicial review process. We further suggest specific areas where data is required. As such, this report is an “initial assessment” of the evidence base which PLP is working towards filling key gaps in.

A preliminary point about calculating the “value” in judicial review must be addressed. In the analysis in this report, we focus largely on financial and quantitative information, e.g. how

¹⁵ See, for example, V. Bondy and M. Sunkin, “Judicial Review Reform: Who is afraid of judicial review? Debunking the myths of growth and abuse” (10 January 2013, *UK Constitutional Law Association Blog*) available at < <https://ukconstitutionallaw.org/2013/01/10/var-da-bondy-and-maurice-sunkin-judicial-review-reform-who-is-afraid-of-judicial-review-debunking-the-myths-of-growth-and-abuse/>>.

much judicial review costs parties etc. As is clear from our research and this report, we see merit in that endeavour. However, we would resist any suggestion that the social and constitutional value of judicial review should be overlooked. All courts ultimately serve a constitutional and social function.¹⁶ Judicial review cases, in particular, may serve a number of functions beyond providing individual remedies.¹⁷ In conducting the analysis in this report we do not hope to exclude, or encourage the exclusion of, considerations of the social and constitutional value of judicial review. Indeed, our case for a thorough and even-handed inquiry concerning financial barriers to accessing judicial review should be read as being a case for an inquiry into these aspects of judicial review also. We return to this point in our conclusion.

¹⁶ See the discussion in T. Farrow *Civil Justice, Privatization and Democracy* (Toronto: University of Toronto Press, 2014). See also *R (Unison) v Lord Chancellor* [2017] UKSC 51 [68–69].

¹⁷ For a discussion of the many functions of judicial review, see: C. Harlow and R. Rawlings, *Law and Administration* (London: Sweet & Maxwell, 3rd edn, 2009), p.668 *et seq.*

Court fees and system costs

The judicial review process itself costs money. There is a need for a judge, a venue, court staff *etc.* Understanding this aspect of overall “costs” of judicial review is an essential part of the formulation of policy, and a central concern from the managerialist perspective. In this respect, there are two important components to consider: system costs and court fees.

Court fees

A claimant must pay court fees in order to bring a judicial review claim, unless they are exempt or are granted legal aid. Table 1 outlines the relevant fees that are charged in judicial review proceedings at present.

Section 92(1) of the Courts Act 2003, empowers the Lord Chancellor “with the consent of the Treasury,” by order, to prescribe fees payable in respect of anything dealt with by the Senior Courts (which include the Administrative Court). Section 92(5) and (6) require the Lord Chancellor to consult the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division, and (in relation to fees for civil proceedings) the Civil Justice Council, before making such an order. Section 92(3) requires the Lord Chancellor, when considering any provision in an order, to “have regard to the principle that access to the courts must not be denied.” This last duty is not a formality. Fee rises have been shown to have demonstrable effects on the number of claims brought in other areas. For instance, in 2013 Chris Grayling, the then Lord Chancellor and Secretary of State for Justice, implemented new fees in Employment Tribunals.¹⁸ The effect of that Order was—broadly speaking—that most people who wished to make use of the Employment Tribunals had to pay substantial fees where, previously, no such fees had been payable. This led to a dramatic and sustained drop in the number of claims lodged in Employment Tribunals. There are three ways to measure demand for employment tribunals: volume of cases, volume of claims, and volume of jurisdictional complaints.¹⁹ Demand fell significantly upon the introduction of the fees whichever of these metrics was used.²⁰ Ultimately, claims dropped by nearly 80% with the introduction of the new fees, which were ruled unlawful by the Supreme Court on the basis that they prevented access to justice.²¹ While the contexts in which employment and judicial review claims are brought

¹⁸ Using his power under Section 42 of the Tribunals, Courts and Enforcement Act 2007 to make the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (SI 2013/1893).

¹⁹ For data and analysis, see: A. Adams and J. Prassl, “Vexatious Claims: Challenging the Case for Employment Tribunal Fees” (2017) 3 *Modern Law Review* 412, p.416.

²⁰ *Ibid.*

²¹ *R (Unison) v Lord Chancellor* [2017] UKSC 51.

differ,²² such experiences support the need for further research into the extent to which, if at all, court fees in judicial review might impede access to justice.

Table 1: Current court fees for judicial review in the Administrative Court²³

For permission to apply for judicial review	£154
On applying for a request to reconsider at a hearing a decision on permission (Fee A)	£385
Where the court has made an order giving permission to proceed with a claim for judicial review, there is payable by the claimant within 7 days of service on the claimant of that order:	
If the proceedings have been started by an application for permission to apply for judicial review (Fee B) [But where Fee A has been paid and permission has been granted at a hearing, the amount payable under Fee B is £385]	£770 [£385]
Application for urgent consideration (unless made when lodging the claim in which case no fee is payable)	£255
Interim application	£255
Consent order	£100

An application for fee remission can be made by a claimant under the Courts and Tribunals Fee Remissions Order 2013, which sets out tests of disposable capital and gross monthly income. Provided the applicant satisfies the disposable capital test, the disposable income test will determine whether fees are remitted in full, in part, or not at all. Where a claimant has been granted legal aid, court fees are paid by the claimant's solicitor on the claimant's behalf, and then claimed back at the end of the case from the Legal Aid Agency or the opponent (depending who is found liable to pay the claimant's costs). More data is needed on the effect of the fee remission scheme.

System costs

The level of court fees is closely related to the cost to the government of running the court system, e.g. providing hearing rooms and court administration, and paying judicial and court staff salaries. However, there is remarkably little data available on judicial review system costs, despite multiple concerns being stated by the government in recent years about the cost of judicial review to the taxpayer.

²² e.g. in the circumstances in which the benefits of a successful claim might accrue to individuals other than the claimant.

²³ The same fees are payable for judicial reviews in the Upper Tribunal, albeit on a different statutory basis.

Information about court running costs is published every year in the HMCTS Annual Report and Accounts, but this information does not include a detailed breakdown of costs for specific courts or legal procedures. The 2008-09 HMCTS Annual Report and Accounts explain that “HMCS reports on the civil business segment against its four constituent business streams: family; civil (higher courts) (including Court of Protection); civil (magistrates’ courts); and non-contentious probate.” Judicial review cases would at that time have been included in the Annual Report and Accounts under “Civil (higher courts).” In 2013, there was a change in accounting practice, which was reflected in the 2012-13 accounts.²⁴ Under the new system, which appears to apply to date, Civil business has been divided into two constituent business streams: family (including non-contentious probate and Court of Protection); and county, higher and magistrates courts (collectively referred to in the accounts as “Civil,” which includes judicial review). Costs recovery through fee income has been a governmental policy objective since at least the Comprehensive Spending Review of 2007, in which the following objectives were agreed for the recovery of fees within each of the existing business streams: maintain 100% recovery of the cost for the civil (higher courts) and probate business; aim to achieve 100% recovery for civil (magistrates’ courts) business; and aim to achieve 100% recovery for the family business.²⁵ Table 2 sets out the data that can be gleaned from the HMCTS Annual Reports and Accounts about costs recovery in the civil higher courts, including the Administrative Court.

Rises in judicial review fees since 2000

While civil (higher courts) fees overall were achieving 100% recovery as long ago as the 2007 *Comprehensive Spending Review*, this was not the case for judicial review business. In the December 2013 consultation exercise on a proposal to increase court fees,²⁶ the accompanying impact assessment made reference to judicial review and stated that:

Current fees for the [sic] judicial review are below cost. Financial modelling has calculated that these fees do not recover the full cost of these processes. The government therefore proposes to increase fees for judicial review to their full cost prices, involving an increase from £60 to £135 for an application and £215 to £680 for a hearing or an oral renewal, with the hearing fee waived if an oral renewal is successful.²⁷

²⁴ The 2013 change in accounting practice was explained in a December 2013 consultation on increasing court fees, see: *Court fees: proposals for reform* (Ministry of Justice, December 2013) available at <https://consult.justice.gov.uk/digital-communications/court-fees-proposals-for-reform/supporting_documents/courtfeesconsultation.pdf>.

²⁵ HMCTS Annual Report and Accounts 2008-09, p. 70.

²⁶ Ministry of Justice, above n 25.

²⁷ Although the focus of this report is on judicial review in the Administrative Court, it should be noted that the 2013 consultation took place less than 4 months after the transfer of most immigration-related judicial reviews to the Upper Tribunal. It is not clear whether the financial modelling referred to in the Ministry of

In April 2014, judicial review fees were increased to achieve full costs recovery pursuant to the December 2013 consultation proposal.

In August 2015, the government consulted on further fee increases, including a general 10% rise in civil fees.²⁸ The August 2015 consultation document explained that the government's longstanding aim "has been to cover the entire cost of the court service, less the cost of the remissions system (fee waivers), through fee income," and that although the April 2014 fee increase achieved "near to full cost recovery across the civil court system," the surplus income generated by the proposed further fee increases would "finance the costs of HMCTS as a whole, and specifically, those parts of HMCTS such as the criminal courts and the tribunals which are otherwise funded through general Government expenditure rather than fee income."²⁹ The purpose of the proposed fee increases was stated to be to offset the net operating cost of HMCTS to the taxpayer of around £1 billion in 2014/15. Judicial review fees were stated in the consultation document to have been set, following the April 2014 increase, "at full cost."³⁰ In July 2016, judicial review fees were further increased by 10% pursuant to the consultation proposals. Table 3 charts the rise in fees since 2 October 2000. There is a need for further evidence on the effects of court fee rises in judicial review, and whether this is the optimum way to recover system costs.

Justice's impact assessment covered first instance judicial review in the Upper Tribunal as well as the Administrative Court.

²⁸ Ministry of Justice, Court and Tribunal Fees: The Government response to consultation on enhanced fees for divorce proceedings, possession claims, and general applications in civil proceedings and Consultation on further fees proposals, Ministry of Justice (August 2015) available at <https://consult.justice.gov.uk/digital-communications/further-fees-proposal-consultation/supporting_documents/Government%20response%20to%20consultation%20on%20enhanced%20fees%20and%20consultation%20on%20further%20fees%20proposals%20print.pdf>.

²⁹ Ibid, [47-53].

³⁰ Ibid, [78].

Table 2 Fee income for civil business (including judicial review) in the Administrative Court

Financial year	Business stream (£000)	Fee income (£000)	Fees remitted (£000)	Net fee income (£000)	Expenditure (£000)	Net surplus (deficit) (£000)	Costs recovery rate (calculated using gross - not net - fee income against expenditure ³¹)
2008-09	Civil (higher courts)	371,415	9,455	361,960	361,971	(11)	103%
2009-10	Civil (higher courts)	363,876	(12,550)	351,326	(363,719)	(12,393)	100%
2010-11	Civil (higher courts)	338,564	(11,000)	327,564	(342,129)	(14,565)	99%
2011-12	Civil (higher courts)	346,296	(10,004)	336,292	(323,247)	13,045	107%
2012-13	Civil	336,312	(6,514)	329,798	(337,807)	(8,009)	100%
2013-14	Civil	348,354	(5,453)	342,901	(413,981)	(71,080)	84%
2014-15	Civil	426,817	(7,762)	419,055	(454,248)	(35,193)	94%
2015-16	Civil	521,847	(22,756)	499,091	(404,024)	95,063	129% ³²
2016-17	Civil	602,224	(49,170)	553,054	(436,765)	116,289	138% ³³

³¹ This practice was stated in the 2008-09 accounts to be in accordance with the HM Treasury's Managing Public Money guidance of setting fees "at cost."

³² This figure was extrapolated from, but was not published in, the Annual Report and Accounts.

³³ Ibid.

Table 3: Increasing court fees for judicial review from 2 October 2000

Date in force/governing and amending instrument	The application for which a fee is charged	Fee payable (£)	Increase in fee (£)
02.10.00, Supreme Court Fees Order 1999, Schedule 1 amended by Supreme Court Fees (Amendment No. 4) Order 2000	For permission to apply for judicial review	30	
	Where the court has made an order giving permission to proceed with a claim for judicial review, there is payable by the claimant within 7 days of service on the claimant of that order:		
	if the judicial review procedure has been started	120	
	if the claim for judicial review was started otherwise than by using the judicial review procedure	30	
01.04.03, Supreme Court Fees Order 1999, Schedule 1, amended by Supreme Court Fees (Amendment) Order 2003	For permission to apply for judicial review	30	
	Where the court has made an order giving permission to proceed with a claim for judicial review, there is payable by the claimant within 7 days of service on the claimant of that order:		
	if the judicial review procedure has been started	180	+60
	if the claim for judicial review was started otherwise than by using the judicial review procedure	30	
04.01.05, Civil Proceedings Fees Order 2004, Schedule 1	For permission to apply for judicial review	50	+20
	Where the court has made an order giving permission to proceed with a claim for judicial review, there is payable by the claimant within 7 days of service on the claimant of that order:		

	if the judicial review procedure has been started	180	
	if the claim for judicial review was started otherwise than by using the judicial review procedure	50	+20
01.05.08, Civil Proceedings Fees Order 2008, Schedule 1	For permission to apply for judicial review	50	
	Where the court has made an order giving permission to proceed with a claim for judicial review, there is payable by the claimant within 7 days of service on the claimant of that order:		
	if the judicial review procedure has been started	180	
	if the claim for judicial review was started otherwise than by using the judicial review procedure	50	
04.04.11, Civil Proceedings Fees Order 2008, Schedule 1 amended by Civil Proceedings Fees (Amendment) Order 2011	For permission to apply for judicial review	60	+10
	Where the court has made an order giving permission to proceed with a claim for judicial review, there is payable by the claimant within 7 days of service on the claimant of that order:		
	if the judicial review procedure has been started	215	+35
	if the claim for judicial review was started otherwise than by using the judicial review procedure	60	+10
22.04.14, Civil Proceedings Fees Order 2008, Schedule 1 amended by Civil Proceedings Fees (Amendment) Order 2014	For permission to apply for judicial review	140	+80
	On a request to reconsider at a hearing a decision on permission (Fee A)	350	+350
	Where the court has made an order giving permission to proceed with a claim for judicial review, there is payable by the claimant within 7 days of service on the claimant of that order:		
	if the judicial review procedure has been started (Fee B). [But where Fee A has been paid and permission has been granted at a hearing, the amount payable under Fee B is £350]	700 [350]	+700 [+350]
	if the claim for judicial review was started otherwise than by using the judicial review procedure	140	+80

25.07.16, Civil Proceedings Fees Order 2008, Schedule 1 amended by Civil Proceedings, First-tier Tribunal, Upper Tribunal and Employment Tribunals Fees (Amendment) Order 2016	For permission to apply for judicial review	154	+14
	On a request to reconsider at a hearing a decision on permission (Fee A)	385	+35
	Where the court has made an order giving permission to proceed with a claim for judicial review, there is payable by the claimant within 7 days of service on the claimant of that order:		
	if the judicial review procedure has been started (Fee B). [But where Fee A has been paid and permission has been granted at a hearing, the amount payable under Fee B is £385]	770 [385]	+70 [+35]
	if the claim for judicial review was started otherwise than by using the judicial review procedure	154	+14

Funding

Another key component to the understanding of financial barriers to judicial review is how parties fund their cases. For the government, in its capacity as a party to judicial review, it is rather simple: it uses taxpayer money.³⁴ For non-governmental claimants, however, the situation is much more complex. Two issues need to be considered by any prospective judicial review claimant at the outset: paying their own lawyer costs and expenses, and budgeting to pay the other side's costs if the claim fails. There are three main ways for claimants to pay their own lawyer costs: paying from existing funds; entering into a conditional fee agreement (a "CFA") with solicitors and/or counsel; or obtaining a grant of legal aid.³⁵ There is now also the possibility of crowdfunding a case. In this section of the report, each of these types of funding is considered.

Paying from own pocket

For those paying from their own pockets, solicitors typically bill their time at hourly rates depending on the seniority of the fee earner, at a fixed fee (for the whole case or for stages of it), or a combination of both. The level of funds needed for lawyer fees and disbursements varies widely per case. It is clear, however, that the cost of bringing a judicial review claim is considerable for those of modest means. A 2007 estimate placed it in the region of £10,000 to £20,000 for a straightforward case, possibly much higher for a more complex matter.³⁶ This has likely increased in the decade since the estimate was made. Hickman, writing in 2017, estimates that a "very simple two hour judicial review against a government department" would cost around £8,000 to £10,000.³⁷ A "moderately complex claim lasting a day and not brought against a central government department" would run in excess of £40,000, plus VAT. For a "substantial two day judicial review," Hickman estimates that costs will run to between £80,000 and £200,000. Claimants who lose their cases are likely to be made liable for the defendant's costs as well as their own. They are therefore looking at a legal bill of upwards of £30,000 if they lose, and they must be prepared for this eventuality, while all the time bearing in mind the general unpredictability of judicial review proceedings, adjudication, and costs orders.

³⁴ Though some departmental budgets are, of course, more affected than others. For example, the Home Office is particularly affected by funding judicial review defences.

³⁵ Before the event insurance policies (typically included in home and motor insurance policies) fund various types of litigation, but are ill-suited to non-monetary claims where remedies are discretionary, and so are not generally available to cover judicial review proceedings.

³⁶ The Public Law Project, *How to fund a judicial review claim when public funding is not available* (London: The Public Law Project, 2007), which was informed by discussion with practitioners. Further and similar estimates are available in the government response to a Ministry of Justice consultation, made available via a Freedom of Information Act 2000 request, see FOIA Request No. 171204020.

³⁷ Hickman, above n 11.

A fixed or reduced rate fee can be agreed with lawyers to perhaps get around some of the difficulties faced with high fees. However, agreeing fixed or reduced rate fees at the outset is risky for lawyers since they will not generally have had an opportunity to fully engage with the case papers, and judicial review litigation is often unpredictable even if well prepared. Accordingly, fixed or reduced rate fees are often charged in conjunction with a CFA, as a means of reducing the lawyers' exposure, with full fees payable in the event that an inter partes costs order is obtained—this is commonly called a Discounted Conditional Fee Agreement.

The evidence we have on the level of costs in judicial review cases needs updating. There is also a need to develop a clearer picture of what factors drive costs up.

Conditional fee agreements

CFAs are sometimes referred to as “no win no fee agreements.” In judicial review cases, they are agreements between claimants and their lawyers that require the lawyers to agree to act in a case on the basis that they will only be paid if the case is successful. Lawyers are able to charge a success fee of up to 100% if the case is won to compensate them for the risk of being paid nothing. However, since April 2013, success fees are no longer recoverable from the defendant, but must instead be paid by the claimant. Given the non-monetary nature of judicial review, the prospect of paying a success fee often makes a CFA expensive and unattractive. For this reason, many judicial review claimants will only be able to proceed if they can agree a particular type of CFA commonly known as a “CFA-Lite”. This is an agreement which limits the costs payable to the solicitor to the amount of costs that may be recovered from the other side (which the claimant has to agree to pursue), and does not require the claimant to pay the lawyers a success fee. If the case is successful and an inter partes costs order is obtained, the claimant's lawyers can recover their full fees. CFA-Lites may be used in conjunction with fixed fees. The drawback of CFA-Lites for lawyers is that the absence of a success fee means that the lawyers are not compensated for their bet that the court will grant an inter partes costs order in favour of their client. This may make lawyers reluctant to act on this basis. There is no substantive research on the use of CFAs in judicial review.

Legal aid

Legal aid is the other key source of traditional funding. Broadly speaking, there are two types of legal aid relevant to judicial review. There is Legal Help, which covers initial advice and assistance, and Legal Representation, which covers litigation. Legal Help is a type of “controlled work,” which solicitors have contractual rights to self-grant. Lawyers are paid a fixed fee, currently £259, regardless of the amount of work carried out, unless actual costs

exceed the fixed fee by a factor of three or more, in which case, an hourly rate can be claimed in the full amount (which is assessed on a case by case basis by the Legal Aid Agency). The Legal Representation category itself involves two types of legal aid: Investigative Representation, which typically covers work to be done to establish the merits of a potential claim; and Full Representation, which covers work to be done from the issuing of proceedings. Investigative and Full Representation are categories of work known as “licensed work” for which, save in certain prescribed exceptional circumstances, permission needs to be sought in advance from the Legal Aid Agency. Lawyers are paid per hour, at rates fixed by regulation.³⁸

Solicitors prepare a bill at the end of a case, including all the disbursements incurred such as counsels’, experts’, and court fees. Each bill is assessed either by the Legal Aid Agency (if either the bill is less than £2,500, or if proceedings were not issued), or by the court. If an order is obtained that another party must pay the legally aided person’s costs, the solicitors send the bill to the paying party for payment. If agreement on the size of the bill cannot be reached, the solicitors for the receiving party can commence assessment proceedings to get the bill assessed by the court.

Eligibility for legal aid is governed by legislation, the provisions and applications of which determines: whether a claim is of a kind that is ‘within scope’ and eligible for legal aid,³⁹ whether the applicant for legal aid satisfies the ‘means test’;⁴⁰ and whether the merits of the claim are sufficient to satisfy the merits test.⁴¹

The reforms to legal aid have caused very widespread concern.⁴² In the context of judicial review, Hickman has argued powerfully that it is part of an access to justice crisis.⁴³ He argues that the most important component of legal aid, at least as it applies in the field of public law, is not that it provides a source of funding for a person’s lawyers but because it comes with protection against an adverse costs order. However, he observed that “today very few people now qualify for legal aid.”⁴⁴ This is, in large part, because of substantial restrictions on the scope of legal aid and the application of the means test.⁴⁵ For Hickman, the ground-level reality is that “people who have £169.15 or more per week for themselves and their family to live off, or who have any significant assets, do not qualify for

³⁸ Paragraph 3 of Schedule 1 to the Civil Legal Aid (Remuneration) Regulations 2013 (SI 2013/422).

³⁹ The tests for scope are contained in sections 9 and 10 of the Legal Aid Sentencing and Punishment of Offenders Act 2012.

⁴⁰ Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (SI 2013/480) (as amended).

⁴¹ Civil Legal Aid (Merits Criteria) Regulations 2013 (SI 2013/104) (as amended).

⁴² This was clear in the discussion around the Bach Commission, see The Bach Commission, *The Right to Justice* (London: Fabian Society, 2017). See also, The Law Society, *Priced out of Justice? Means testing legal aid and making ends meet* (London: 2018).

⁴³ Hickman, above n 11.

⁴⁴ *Ibid.*

⁴⁵ Legal Aid Agency, *Means Assessment Guidance* (April 2015).

legal aid.”⁴⁶ This analysis—and its characterisation of access to judicial review as a “disgrace”—struck a chord with some commentators, both in portraying the role of legal aid in judicial review and highlighting the wider issue of costs. Assessing the precise size of the problem is difficult without clear empirical data.⁴⁷ A limited amount of data is, however, available. Figure 1 shows the amount of cases registered as being supported by legal aid on the Administrative Courts COINS database from 2000–2016.⁴⁸ Though immigration judicial reviews were transferred to the Upper Tribunal in recent years, there is a clear decrease in cases funded in recent years and the number of granted applications is only a small portion of all judicial reviews. Figure 2 shows the percentage rate of judicial reviews with legal aid.

Figure 1: Judicial review cases with legal aid by volume

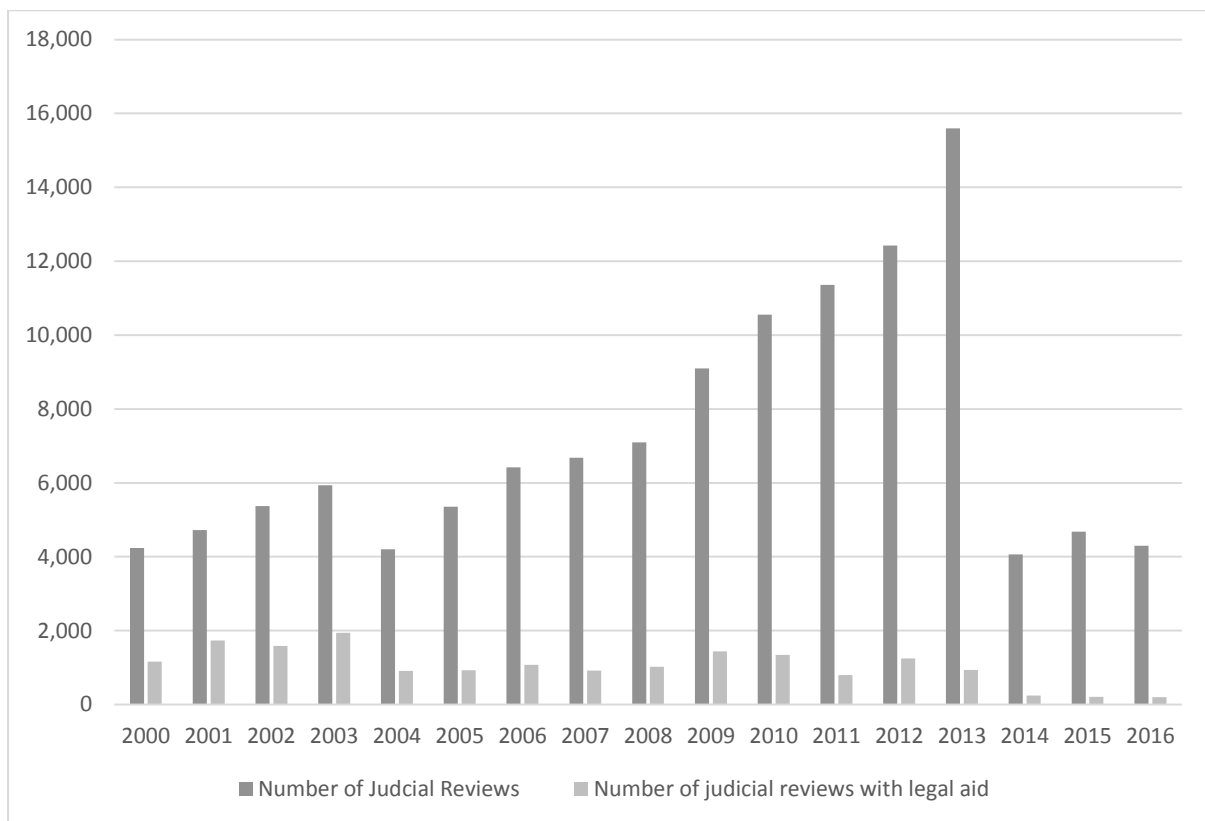
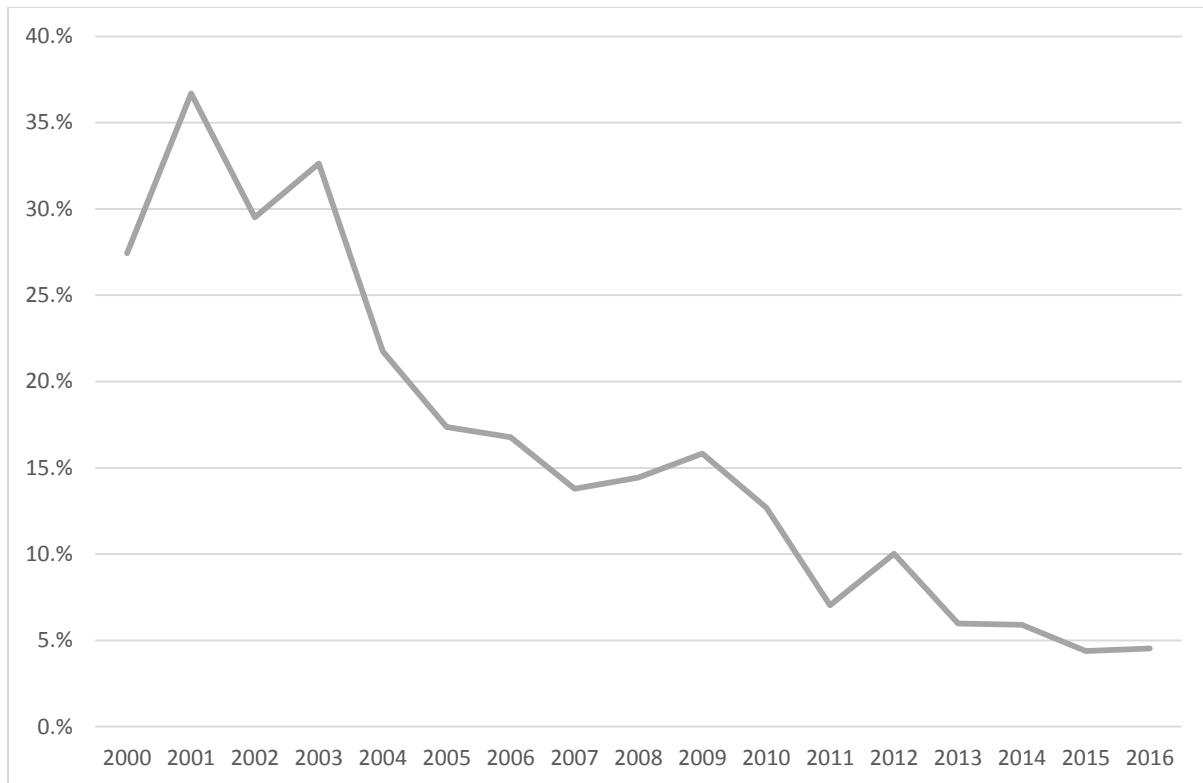


Figure 2: Judicial review cases with legal aid as a %

⁴⁶ Hickman, above n 11.

⁴⁷ Much helpful data is kept by the government. Much of it is published, but much of what is available on government systems may be outside the provisions of FOIA. The conclusion of this report discusses this issue in more detail.

⁴⁸ This was made available via an FOIA request by the authors, see FOIA Request No. 107687. It should be noted that the COINS system has no quality assurance process for data collection.



Crowdfunding

A relatively recent phenomenon is the possibility of raising money for litigation via online crowdfunding platforms. In the litigation context, crowdfunding is, in essence, a form of third party funding arrangement. This was defined by Jackson LJ as funding by a “party who has no pre-existing interest in the litigation, usually on the basis that (i) the funder will be paid out of the proceeds of any amounts recovered as a consequence of the litigation, often as a percentage of the recovery sum; and (ii) the funder is not entitled to payment should the claim fail.”⁴⁹ Jackson LJ considered that third party funding is in principle “beneficial and should be supported,” because, amongst other benefits, it “provides an additional means of funding litigation and, for some parties, the only means of funding litigation [and thus] promotes access to justice.”⁵⁰ In a crowdfunding arrangement, online donations are made to a collective pot. The pot of funds then essentially is the third-party funder. A distinction can be drawn between “investment-based” crowdfunding models, where investors have a financial stake in a monetary claim, and “non-investment based” crowdfunding models, where the investors’ reward is non-monetary or non-existent.⁵¹

At least two organisations in the UK currently offer bespoke crowdfunding services for judicial review claims: CrowdJustice and the Good Law Project. CrowdJustice offers a

⁴⁹ Lord Justice Jackson, *Review of Civil Costs: Final Report* (2009), p.xv.

⁵⁰ *Ibid*, Ch.11, [1.2]. However, Jackson LJ recognised that third party funding is “not usually feasible where non-monetary relief, such as an injunction or declaration, is the main remedy sought.”

⁵¹ R. Perry, “Crowdfunding Civil Justice” (2017) *Boston College Law Review* (forthcoming).

platform for case owners (those seeking funding) to publicise and fundraise for a prospective case. Case owners, with support from CrowdJustice, develop a webpage setting out details of the case for which funding is sought, a target amount, and a deadline for raising it. The page is typically publicised through social media and online donations are accepted. If the target is met, then funds are transferred into the case owner's solicitors' client account. CrowdJustice takes a 6% "platform fee," plus VAT, from the overall total raised. The payment process also has a charge of 1.7% plus 20p per pledge. If the case owner's target is not met, CrowdJustice do not take a fee, pledges are cancelled, and backers' cards are not charged. If the case proceeds, any funds that are unused at the conclusion of the case are returned by the solicitors to CrowdJustice. The case owner can elect to put such unused funds towards another case on CrowdJustice, or failing that, they are donated to the Access to Justice Foundation. Those who donate over £1,000 are given the option of a pro rata refund. CrowdJustice does not offer any legal advice. All information about the case comes from the case owners and their lawyers.

The Good Law Project was founded by its Director, Jolyon Maugham QC—a successful and progressive tax barrister. It is not itself a crowdfunding platform—it uses CrowdJustice—but crowdfunding is a key part of its operation. It is an expressly political project—its aims are to use litigation to drive the demand for change. It has particular areas of interest, including tax, workers' rights, and Brexit. The general way in which the Good Law Project works was set out in a lecture by its Director.⁵² In essence, the Director seeks potential cases that meet the Project's case selection criteria, secures a pro bono advice from counsel, and seeks solicitors and counsel willing to act on terms consistent with the crowdfunding exercise at Government lawyer rates, and then crowdfunds at the letter before claim stage. The first case the Good Law Project took on was what became the famous *Miller* case.⁵³ After the argument in that case regarding Article 50 and the Brexit process was floated online, Maugham crowdfunded initial advice.⁵⁴ Since then, it has crowdfunded a challenge to Uber's alleged VAT avoidance (valued at around £1bn) and a challenge to the Electoral Commission's investigation into Vote Leave's spending returns, the latter arguing that the Electoral Commission's investigation applied the wrong test of law and was inadequate on the facts.

Both CrowdJustice and the Good Law Project have taken a different approach to vetting prospective claims to ensure that they are meritorious. CrowdJustice requires that every individual or group taking a case either have a qualified solicitor or barrister who has been instructed, or that the case is being taken by a non-profit, and then leaves it to "campaign"

⁵² J. Maugham QC, "The Lawyer as Political Actor" (Annual Queen Mary University of London Law and Society Lecture, 2017).

⁵³ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

⁵⁴ The legal argument was outlined in N. Barber, T. Hickman and J. King, "Pulling the Article 50 'Trigger': Parliament's Indispensable Role" (June 27 2016, *UK Constitutional Law Blog*) available at <<https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/>>.

to persuade donors of the merit of the case. The Good Law Project uses the resources of its Director for this purpose, which places a limit on the number of cases it can support.

Crowdfunding is a relatively new mode of funding claims, and it holds lots of potential for judicial review claims, particularly those with a clear public interest dimension. However, the size of the impact it can have and how much it can be seen as a substitute for other types of funding is far from clear. The wider implications of crowdfunding as a method in the judicial review context have also yet to be grappled with.

Lawyers' fees

Claimant and government lawyers' work is the major part of what actually costs money in a judicial review and it is, therefore, essential that it is interrogated as part of examining financial barriers to judicial review. In this section of the report, we consider what is known about both fees generally and fees in the context of legal aid.

Fees generally

Solicitors are free to charge whatever fees they agree with their clients, subject to the provisions of Part III of the Solicitors Act 1974, which regulate a solicitor's profit costs and disbursements.

Section 70 of the Act provides a right for a client to have their solicitor's bill (including disbursements) assessed by the court for reasonableness. Where litigation occurs and that litigation results in an order that a party's costs are payable by another party, the paying party has the right to apply to the court for a detailed assessment of the costs order. This assessment looks both at the reasonableness of the work done, and also at whether it was proportionate to the dispute.

Guideline Hourly Rates are issued by the Master of the Rolls, in the light of advice given by the Civil Justice Council. The Guideline Hourly Rates provide suggested hourly rates that can be recovered by solicitors on assessment. The rates are determined by geographic area and seniority of the solicitor concerned. They are not binding on the court, which will also take into account factors such as the specialist skill required to undertake each item of the work, the conduct of the parties, and efforts to settle. The existing Guideline Hourly Rates were issued in 2010. In May 2014, the Civil Justice Council's Costs Advisory Committee recommended new guidelines in a report to the Master of the Rolls.⁵⁵ However, the Master of the Rolls refused to accept the Committee's recommendations, with minor exceptions, on the basis that they were insufficiently evidence-based.⁵⁶ The 2010 guidelines continue in force with minor amendments to judicial review cases at first instance and in the Court of Appeal.⁵⁷

There are no guidelines similar to the Guideline Hourly Rates governing counsels' fees. However, some rough estimates have been made, and some were referred to in Jackson

⁵⁵ *CJC Costs Committee Report to the Master of the Rolls: Recommendations On Guideline Hourly Rates For 2014* (May 2014).

⁵⁶ *Decision of the Master of the Rolls* (28.07.14), available at <<https://www.judiciary.gov.uk/wp-content/uploads/2014/07/ghr-mor-decision-july2104.pdf>>.

⁵⁷ HMCTS, *Solicitors' guideline hourly rates* (2010) available at <<https://www.gov.uk/guidance/solicitors-guideline-hourly-rates#guideline-hourly-rates>>.

LJ's 2009 *Preliminary Report on Civil Costs*.⁵⁸ That report observed that, as a general rule, barristers employed in solicitors' firms or in-house are paid similar amounts to solicitors occupying equivalent positions. However, the vast majority of practising barristers (approximately 12,000 out of 15,000) are self-employed and their incomes are more difficult to ascertain. Further, income figures for self-employed barristers, where they are available, need to be adjusted to account for overheads such as rent, chambers' contributions, insurance, furniture, computer equipment, and books, as well as the fact that self-employed barristers do not receive benefits such as paid leave, an employer pension scheme or health insurance. Jackson LJ's report observed that, generally, barristers' earnings will vary according to their level of experience (year of Call), practice area, and geographical location. The Bar Council's rough guide to barristers' income suggests income (before the above-mentioned expenses are deducted) for public law barristers is £20,000 – £40,000 in year one of practice, and £40,000 – £90,000 after five years of practice.⁵⁹ Table 6 sets out this estimated amount compared to other areas of practice at the Bar. It is important to note that public body claimants and defendants to judicial review proceedings will often be represented by in-house lawyers who tend to earn less than their peers employed in the private sector (or in the case of barristers, their self-employed peers).⁶⁰

Table 4: The Bar Council's Guide to Barristers' Income

Practice area	Earning in year one	Earnings in year five
Chancery / Commercial	40,000 – 90,000	70,000 – 200,000
Public	20,000 – 40,000	40,000 – 90,000
Crime	10,000 – 30,000	40,000 – 90,000
Family	20,000 – 40,000	40,000 – 90,000
General Civil	20,000 – 50,000	40,000 – 120,000

Legal aid fees

Special remuneration arrangements are made in legal aid cases. The rates that solicitors can claim from the Legal Aid Agency are set out in Paragraph 3 of Schedule 1 to the Civil Legal Aid (Remuneration) Regulations 2013. Table 1 in Schedule 1 to the Regulations sets out a fixed fee payable for solicitors' pre-litigation advice and assistance in relation to contemplated judicial review proceedings, and the threshold above which the fixed fee is disappplied and the hourly rates set out in Tables 7(a)-(e) in Schedule 1 can be claimed. These two tables are reproduced here as Table 7 and Table 8 respectively.

The rates payable for work done by solicitors on judicial review litigation are set out in Tables 10(a)-(b) in Schedule 1. The fees that barristers can claim from the Legal Aid

⁵⁸ Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report (Vol. 1)* (2009), Chapter 8, [2.39-2.43].

⁵⁹ *Ibid* Chapter 8 [2.41].

⁶⁰ *Ibid* Chapter 8 [2.34-2.38]; table 8.14.

Agency for judicial review work are set out in Schedule 2 of the 2013 Regulations. Legal aid rates have been steadily reduced over the last 25 years, and are widely recognised to be low. Table 9 in this report sets out the fees that solicitors can claim from the Legal Aid Agency for judicial review litigation work, and illustrates the reduction over time.

Where it is anticipated that the final costs of a legal aid case are likely to exceed £25,000, the case is managed by the Legal Aid Agency under a case-specific contract, with even lower rates applicable above that threshold. In any legal aid case, if the court orders that the non-legally aided opponent (in a judicial review context, usually the defendant) pays their costs, then those costs can be claimed at rates (often referred to as “commercial rates”) that are higher than the legal aid rates referred to above, and which reflect the fees that the solicitor and counsel could have charged their client if the client was privately-paying. As legal aid rates have declined, the courts have recognised that many legal aid practitioners rely on recovering their costs at commercial (rather than legal aid) rates in order to maintain a viable business.⁶¹

Overall, the funding landscape is changing quickly and there is little detailed evidence on the effects of these changes to judicial review. There is a clear need to bring together existing data—such as that held by the LAA—with further research to build a clear picture of the present funding landscape. Research would also need to address who is not able to access judicial review under present arrangements. For this, there is scope to do more work drawing together existing data on wealth and income with data on judicial review.

⁶¹ *R (E) v Governing Body of JFS* [2009] UKSC 1 [25].

Table 5: Fixed fee payable for solicitors’ pre-litigation advice and assistance in relation to contemplated judicial review proceedings

Category Definition	Schedule Authorisation Standard Fee	Schedule Authorisation Escape Fee Threshold ⁶²
Actions Against the Police	£239	£717
Clinical Negligence	£195	£585
Community Care	£266	£798
Debt	£180	£540
Education	£272	£816
Housing	£157	£471
Miscellaneous	£159 (consumer general contract) £207 (employment) £203 (personal injury) £79 (all other matters)	£477 (consumer general contract) £621 (employment) £609 (personal injury) £237 (all other matters)
Public Law	£259	£777
Welfare Benefits	£150	£450

⁶² This is the threshold (calculated using the rates in Table 8), above which costs can be claimed at the rates shown in Table 8 rather than as a fixed fee. The amount of the fixed fee is shown in the column headed “Schedule Authorisation Standard Fee”.

Table 6: Hourly rates when fixed fee is disapplied

Immigration and Asylum Escape Fee cases, Mental Health, Actions Against the Police, Public Law, Education and Community Care

Legal help, help at court and family help (lower)

Activity	London Rate	Non-London Rate
Preparation, Attendance and Advocacy	£52.65 per hour	£48.24 per hour
Travel and Waiting Time	£27.81 per hour	£27.00 per hour
Routine Letters Out and Telephone Calls	£4.05 per item	£3.78 per item

Immigration and Asylum hourly rates cases

Activity	London Rate	Non-London Rate
Preparation, Attendance and Advocacy	£51.62 per hour	£47.30 per hour
Travel and Waiting Time	£27.27 per hour	£26.51 per hour
Routine Letters Out and Telephone Calls	£3.96 per item	£3.69 per item

All other categories

Activity	London Rate	Non-London Rate
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Preparation, Attendance and Advocacy	£46.53 per hour	£43.88 per hour
Travel and Waiting Time	£24.62 per hour	£24.62 per hour
Routine Letters Out and Telephone Calls	£3.60 per item	£3.47 per item

Table 7: Fees that solicitors can claim from the Legal Aid Agency for judicial review litigation

Year	Instrument	Preparation and attendance (per hour)	Attendance at court or conference with counsel (per hour)	Advocacy (per hour)	Travelling and waiting (per hour)	Routine letters out (per item)	Routine phone calls (per item)
1994	The Legal Aid in Civil Proceedings (Remuneration) Regulations 1994	£78.50 (London) £74.00 (outside London)	£36.40	£74.00	£32.70	£7.40	£4.10
2007	The Community Legal Service (Funding) Order 2007	£79.50 (London) £75 (outside London)	£37.00	£75.00	£33.25	£7.50	£4.15
2010	The Community Legal Service (Funding) (Amendment No.2) Order 2011	£71.55 (London) £67.50 (outside London)	£33.30	£67.50	£29.93	£6.75	£3.74
2013	The Civil Legal Aid (Remuneration) Regulations 2013	£71.55 (London) £67.50 (outside London)	£33.30	£67.50	£29.93	£6.75	£3.74
2015	The Civil Legal Aid	Rates unchanged, but payment for claimant's solicitor and barrister conditional (with exceptions) on grant of permission to apply for judicial review					

	(Remuneration) (Amendment) Regulations 2015 ⁶³	
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⁶³ Introduced after provisions of the Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014, which introduced remuneration conditional on the grant of permission, were quashed by the Divisional Court in *R (Ben Hoare Bell and Others) v the Lord Chancellor* [2015] EWHC 523 (Admin). In consequence, the 2015 Regulations provide that a legally aided claimant's lawyers will be remunerated in the following circumstances: (1) when the court gives permission to bring judicial review proceedings; (2) when the defendant withdraws the decision to which the application for judicial review relates and the withdrawal results in the court: (a) refusing permission to bring judicial review proceedings, or (b) neither refusing nor giving permission; (3) the court orders an oral hearing to consider: (a) whether to give permission to bring judicial review proceedings, (b) whether to give permission to bring a relevant appeal, or (c) a relevant appeal; or (4) the court orders a rolled-up hearing. If a case concludes prior to a decision on permission, the Lord Chancellor also has a discretion (in practice exercised by the Legal Aid Agency) to pay for this work. When exercising this discretion, the Lord Chancellor must consider whether it is reasonable to pay remuneration, taking into account the circumstances of the case and the factors stipulated in regulations.

Costs between parties

How the costs of a case are divided between the parties in judicial review is an important and controversial issue. This section outlines the costs rules and what data we have about the effect of these rules in practice.

The general principles of costs

Section 51 of the Senior Courts Act 1981 provides that costs in the civil division of the Court of Appeal, the High Court, any county court, shall be “in the discretion of the court.” This discretion is stated to be “[s]ubject to the provisions of this or any other enactment and to rules of court.” The rules to which the court’s discretion is subject are contained in the Civil Procedure Rules (CPR) Parts 44-46.

CPR 44.2 sets out the general rule in civil litigation that costs will follow the event (*i.e.* the loser pays), although the court has a discretion to make a different order as to costs (including to make no order). CPR 44.2 requires the court, in exercising its discretion on costs, to have regard to all the circumstances of the case including:

- the conduct of all the parties (including the reasonableness of the issues pursued, the manner in which the litigation was conducted, and compliance with any relevant pre-action protocol);
- whether the losing party succeeded on part of its case; and
- any admissible offer to settle which is drawn to the court’s attention.

This rule, like all other parts of the CPR, must be applied and interpreted in accordance with the overriding objective in CPR 1.1, “to enable[e] the court to deal with cases justly and at proportionate cost.”

The general rule in CPR 44.2 that the loser pays the winners costs – although the starting point for the Administrative Court in considering what costs order to make in a judicial review claim is subject to certain modifications, considered below. These modifications arise from statutory, procedural, and judge-made rules that are, in the main, specific to judicial review, and are often said to reflect judicial review’s constitutionally important role in enabling the Judiciary to supervise the conduct of the Executive, and the consequent public interest in enabling certain claims to be brought before the court.

Costs recoverable from claimants where permission to apply for judicial review is refused

The judges have imposed restrictions on the amount of costs a defendant can recover from a claimant whose application for permission to apply for judicial review is refused.⁶⁴ Since the *Mount Cook* case, the practice of the Administrative Court has been that, save in exceptional circumstances, a successful defendant or interested party at the permission stage can recover the costs of filing an acknowledgment of service pursuant to CPR 54.8 from the claimant, but not the additional costs of attending, and successfully resisting the grant of permission at an oral permission hearing.

Costs Capping Orders made pursuant to section 88 of the Criminal Justice and Courts Act 2015

A consequence of the general rule that costs follow the event, is that the court's discretion as to costs generally falls to be exercised at the end of a case, when the outcome is known. Costs Capping Orders (and their judge-made predecessors, Protective Costs Orders) represent a departure from the general rule in CPR 44.2(2) since: they are sought and made at an early stage in the proceedings; and they confer costs protection on a party regardless of the outcome of the proceedings, therefore limiting the discretion as to costs of the trial judge.

The rationale for Protective Costs Orders was considered by the Court of Appeal in the 2005 *Corner House* case.⁶⁵ The Court noted that rules of standing had been liberalised to permit judicial review claims to proceed so as to vindicate the Rule of Law and stop the unlawful exercise of public power, but concluded that this liberalisation was sometimes insufficient in cases where there was a public interest in resolving a dispute by litigation that could not reasonably be brought without conferring on the claimant some costs protection.

The law on Protective Costs Orders, as explained in *Corner House*, and developed in subsequent litigation, was codified—with some changes—in sections 88–90 of the Criminal Justice and Courts Act 2015, which introduced Costs Capping Orders. A Costs Capping Order is defined in section 88(2) as “an order limiting or removing the liability of a party to judicial review proceedings to pay another party's costs in connection with any stage of the proceedings.” Since the coming into force of the 2015 Act, Costs Capping Orders have replaced Protective Costs Orders for parties to judicial review proceedings.

The conditions that have to be met before the court can make a Costs Capping Order are set out in section 88. They are that:

⁶⁴ *R (Mount Cook Land Ltd) v Westminster City Council* [2004] 1 PLR 29 [76].

⁶⁵ *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 W.L.R. 2600.

- permission to apply for judicial review has been granted; and
- the court is satisfied that the proceedings are public interest proceedings; and
- the court is satisfied that, without a Costs Capping Order, the applicant would be acting reasonably by withdrawing or ceasing to participate in the proceedings.⁶⁶

Proceedings are considered “public interest proceedings” only if:

- an issue that is the subject of the proceedings is of general public importance;
- the public interest requires the issue to be resolved; and
- the proceedings are likely to provide an appropriate means of resolving it.⁶⁷

Section 88(8) requires the court to consider a number of matters when determining whether proceedings are “public interest proceedings.” These include:

- the number of people likely to be directly affected if relief is granted to the applicant for judicial review;
- how significant the effect on those people is likely to be; and
- whether the proceedings involve consideration of a point of law of general public importance.

Assuming the conditions for making a Costs Capping Order are met, s89(1) sets out a (non-exhaustive) list of matters that the court must take into account when considering whether to make a Costs Capping Order, and what the terms of an order should be. These matters are drawn from the guidance in *Corner House*, and are stated to include:

- the financial resources of the parties to the proceedings, including the financial resources of any person who provides, or may provide, financial support to the parties;
- the extent to which the applicant for the order is likely to benefit if relief is granted to the applicant for judicial review;
- the extent to which any person who has provided, or may provide, the applicant with financial support is likely to benefit if relief is granted to the applicant for judicial review;
- whether legal representatives for the applicant for the order are acting free of charge; and
- whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally.

If a Costs Capping Order is made, section 89(2) provides that a reciprocal cap must also be imposed, restricting the costs the beneficiary of the Costs Capping Order is able to recover.

⁶⁶ Section 88(6), Criminal Justice and Courts Act 2015.

⁶⁷ Section 88(7), Criminal Justice and Courts Act 2015.

Sections 89(3) and (6) of the Criminal Justice and Courts Act 2015 confer on the Lord Chancellor the power to make regulations amending the list of matters to which the court must have regard in determining whether proceedings are public interest proceedings and whether a Costs Capping Order should be made. Section 90 enables the Lord Chancellor to make regulations disapplying sections 88 and 89 to environmental judicial review proceedings, for which separate provision is made in CPR 45 (considered further below).

Whilst a Costs Capping Order imposes upper limit on the applicant's liability in costs, it does not impede the trial judge's discretion to order that the beneficiary of a Costs Capping Order who is unsuccessful at trial should pay less than the costs cap, or even that there should be no order as to costs.⁶⁸

Section 88(5) of the Criminal Justice and Courts Act 2015 states that rule of the court may "specify information that must be contained in [an application for a Costs Capping Order]." Such information can include:

- information about the source, nature and extent of financial resources available, or likely to be available, to the applicant to meet liabilities arising in connection with the application; and
- if the applicant is a body corporate that is unable to demonstrate that it is likely to have financial resources available to meet such liabilities, information about its members and about their ability to provide financial support for the purposes of the application.

Made under the Section 88(5) power, the Civil Procedure (Amendment No2) Rules 2016 amended CPR 46.17 to require any application for a Costs Capping Order to be supported by evidence of the applicant's financial resources. Section 89(1)(a) of the Criminal Justice and Courts Act 2015 provides that the terms of any Costs Capping Order must reflect "the financial resources of the parties to the proceedings, including the financial resources of any person who provides, or may provide, financial support to the parties."

Costs recoverable from the parties in environmental judicial review claims

Claims related to the environment have special status in terms of costs. Article 9 of the Aarhus Convention⁶⁹ confers rights of access to justice on the following:

- on any person whose request for environmental information has been ignored, refused or inadequately answered;⁷⁰

⁶⁸ See, for example, the judgment on costs in *R (Citizens UK) v Secretary of State for the Home Department* [2017] EWCA 2854 (Admin) (Soole J).

⁶⁹ The full title of the Convention is the *UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark* on 25 June 1998.

- on members of the public deemed to have standing to challenge the legality of decisions, acts or omissions subject to the public participation provisions of Article 6; and⁷¹
- on members of the public deemed to have standing to challenge other acts or omissions by private persons and public authorities which contravene provisions of national law relating to the environment.⁷²

By virtue of Article 9(4), the access to justice rights under Article 9(1)-(3) must “be fair, equitable, timely and not prohibitively expensive.”

CPR 45.41-45.45 limits the costs exposure of members of the public bringing certain environmental challenges, to meet the “not prohibitively expensive” criterion. CPR 45.41 defines an “Aarhus Convention claim” as a claim brought by one or more members of the public either:

- by judicial review or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions, and which is within the scope of Article 9(1) or 9(2) of the Aarhus Convention; or
- by judicial review which challenges the legality of any such decision, act or omission and which is within the scope of Article 9(3) of the Aarhus Convention.

CPR 45.43 to 45.45 apply to a case if a claimant (a) is a member of the public, (b) has stated in the claim form that the claim is an Aarhus Convention claim, and (c) has filed and served with the claim form a schedule of the claimant’s financial resources which takes into account any financial support which any person has provided or is likely to provide to the claimant and which is verified by a statement of truth.

CPR 45.43 provides that the amount of costs that can be recovered from the parties in an Aarhus Convention claim is limited to:

- £5,000 for each claimant (provided the claimant is claiming only as an individual and not as, or on behalf of, a business or other legal person, in which case the limit is £10,000); and
- £35,000 for each defendant.

These limits are subject to: (a) a defendant’s right to challenge, pursuant to CPR 45.45, whether the claim has been properly described by the claimant as an Aarhus Convention claim (which must be pleaded in the Acknowledgement of Service), (b) a claimant’s right to

⁷⁰ Article 9(1), *Aarhus Convention* (1998).

⁷¹ Article 9(2), *Aarhus Convention* (1998).

⁷² Article 9(3), *Aarhus Convention* (1998).

opt out of the costs limits pursuant to CPR 45.43, and (c) the right of either party to apply to vary the default caps, pursuant to CPR 45.44.

On an application under CPR 45.44 to vary the default costs caps, the court will consider whether the likely costs of the case (including own lawyers' costs, court fees and the potential costs of the other side) "exceed the financial resources of the claimant", or "are objectively unreasonable" in light of a number of specified factors, including the financial resources available to the claimant. For these purposes, "financial resources" are treated as including "any financial support which any person has provided or is likely to provide to the claimant."

Financial disclosure requirements for judicial review applicants and third party costs orders

Sections 85 and 86 of the Criminal Justice and Courts Act 2015 will—when in force—require specified financial information to be lodged in support of each claim, and considered by the court in relation to costs liability. Section 85(1) will amend section 31 of the Senior Courts Act 1981 to prevent permission to apply for judicial review being granted unless the financial information has been filed.

What financial information will be required will be specified by rules to be made under section 85(1). These rules may specify disclosure of information including:

- information about the source, nature and extent of financial resources available, or likely to be available, to the applicant to meet liabilities arising in connection with the application; and
- if the applicant is a body corporate that is unable to demonstrate that it is likely to have financial resources available to meet such liabilities, information about its members and about their ability to provide financial support for the purposes of the application.

The use to which this information will be put is specified in section 86. Section 86(1) and (3) state that in "determining by whom and to what extent costs of or incidental to judicial review proceedings are to be paid," "the court or tribunal must consider whether to order costs to be paid by a person, other than a party to the proceedings, who is identified in that information as someone who is providing financial support for the purposes of the proceedings or likely or able to do so."

In a response published on 7 July 2016, the Government concluded that the threshold above which third party funding of judicial review claims must be declared will be £3000.⁷³

⁷³ Ministry of Justice, *Reform of judicial review Proposals for the provision and use of financial information Government response and Request for further views on the provision of financial information to other parties*

The paper opened a further consultation on the circumstances in which the financial information is to be filed.⁷⁴ The Government has not yet followed up on that consultation exercise.

Costs where judicial review claims are settled

The evidence suggests that the majority of judicial review cases are settled before trial, often on terms favourable to the claimant.⁷⁵ However, the vast majority of judicial review claims are not purely financial in nature, and disputes can (and in judicial review cases, frequently do) arise about liability for costs. The court is naturally reluctant to expend its resources on resolving such disputes, which are essentially a form of satellite litigation.

The court's current approach, following the recommendation of Jackson LJ, is that where claims settle following the issue of proceedings, judicial review claimants should normally be awarded their costs if they have complied with the Judicial Review Pre-Action Protocol, and have obtained the relief sought in their pre-action letter of claim, or substantially similar relief.⁷⁶ Where a claimant is only partially successful, the court will tend to make no order as to costs, unless it is "tolerably clear" who would have won had the matter proceeded to trial.⁷⁷

Where judicial review claims brought with the benefit of legal aid settle before permission to apply for judicial review has been granted, no payment of legal aid will be made to the claimant's lawyers unless:

- the defendant withdraws the decision under challenge;
- the court directs that there should be an oral permission hearing;
- the court orders a rolled up permission/final hearing; or
- no decision has been made on permission, and "the Lord Chancellor considers that it is reasonable to pay remuneration in the circumstances of the case."⁷⁸

Costs rules applicable to interveners

Interventions in judicial review proceedings may be brought with permission of the court by non-parties to the litigation, including individuals, by charities and NGOs, by companies and

(7 July 2016), [70], available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/535560/reform-of-judicial-review-consultatio-response.pdf>.

⁷⁴ Ibid, [87 *et seq*].

⁷⁵ V. Bondy and M. Sunkin, *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* (Public Law Project: London, 2009), p.39.

⁷⁶ *R (Bahta) v Secretary of State for the Home Department* [2011] EWCA Civ 895.

⁷⁷ *R (M) v London Borough of Croydon* [2012] EWCA Civ 595.

⁷⁸ Regulation 5A(1)(b), Civil Legal Aid (Remuneration) (Amendment) Regulations 2015 (SI 2015/898).

by public bodies, including Government ministers.⁷⁹ Permission may be granted where the court considers that an intervention might assist the court by providing a perspective and knowledge base that adds to the materials provided to the court by the parties. Permission will be granted on conditions, most commonly as to mode (oral and/or written) and length of intervention (in terms of the time allowed for oral intervention or the length of any written submissions). Conditions providing that the intervener will bear its own costs have also been common.

Section 87 of the Criminal Justice and Courts Act 2015 provides that no party can be ordered to pay an intervener's costs, save in exceptional circumstances. Further, the court can, on application by a party to the proceedings, order "the intervener to pay any costs specified in the application that the court considers have been incurred by the relevant party as a result of the intervener's involvement in that stage of the proceedings."⁸⁰ The conditions stipulated for this order are where:

- the intervener has acted, in substance, as the sole or principal applicant, defendant, appellant or respondent; or
- the intervener's evidence and representations, taken as a whole, have not been of significant assistance to the court; or
- a significant part of the intervener's evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of the stage in the proceedings; or
- the intervener has behaved unreasonably.

Overall, there is a clear absence of detailed evidence on all aspects of the costs regime in judicial review. Much of the available evidence about the effects of the cost rule is anecdotal only.

⁷⁹ See generally: Public Law Project, *A practical guide to third party interventions* (London: 2008); Public Law Project, *Third Party Interventions in Judicial Review: An action research study* (London: 2001).

⁸⁰ Sections 87(5) and 87(6), Criminal Justice and Courts Act 2015.

Costs reform

There has been an active debate about costs rules in judicial review recently. There are a number of different principles that can be applied to the allocation of costs. These include:

- the general cost-shifting rule encompassed by CPR 42.2(a) that the losing party to litigation pays the winner's costs;
- what has been called "the US rule" where both parties bear their own costs regardless of the outcome of the case;
- one-way costs shifting (OCS), where one party will never be required to pay the other's costs, regardless of the outcome (but costs may be awarded in that party's favour);
- qualified one-way costs shifting (QOCS), where one party will not normally be required to pay the other's costs regardless of the outcome, but where that general rule is qualified, so that costs may be awarded against the party if certain conditions are met; and
- a system of fixed costs, where the costs that can be recovered from the opponent are limited, or fixed by reference, to the type of claim and stage reached in the proceedings.

This part of the report outlines the development of the recent debate around costs. The tensions between managerialist and constitutionalist viewpoints are clear throughout. What is also clear is the lack of hard evidence that was available throughout various stages of debate, and throughout the Jackson Review.

The Jackson Review

Concerns about the effect of the current costs system on the ability of the court to deliver justice led to the appointment of Jackson LJ to lead a review of civil litigation costs. Jackson LJ's preliminary report was published in May 2009, his final report in December 2009, and a supplementary report on fixed costs, in July 2017.

Jackson LJ considered the rationale behind the general costs-shifting rule, and the extent to which it was apt to deliver justice, in Chapter 46 of his Preliminary Report.⁸¹ He noted the rationale for costs shifting given in Lord Woolf's Interim Report on Access to Justice in 1995. He observed that Lord Woolf identified two arguments in favour of retaining the rule: (i) it is fairer that a party who succeeds in litigation should at least recover the major proportion of his own costs from his opponent; and (ii) the rule deters unmeritorious litigation and encourages earlier settlement. He also identified three arguments for

⁸¹ Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report (Vol 2)* (May 2009), chapter 46, [1.2].

abandoning the rule: (i) the rule can deter meritorious claims as, because of the uncertainty of litigation, even the meritorious litigant may be deterred from proceeding by the costs risk; (ii) the costs shifting rule favours wealthy litigants over the less wealthy; and (iii) once litigation is under way, the costs at stake may be so great that the parties feel impelled to press on.

Jackson LJ noted that, having balanced the conflicting arguments, Lord Woolf favoured retaining the costs shifting rule but making it more effective in two ways: first, by the court making more focused costs orders rather than simply awarding to the winner all of his costs; secondly, by the court managing litigation so as to keep down costs.⁸² Jackson LJ concluded that the “existing cost shifting regime should not be regarded as a “sacred cow,” but on the other hand its complete abolition [did] not appear to be a realistic option for the foreseeable future.”⁸³

In relation to judicial review, Jackson LJ noted various features of judicial review that impact on the level of costs.⁸⁴ These features included: the requirement for permission before a judicial review claim can be pursued (which serves to filter out weak cases at an early stage of the proceedings); streamlined statements of case consisting essentially of the claim form and the acknowledgement of service; the lack in most cases of a discovery stage; the reliance on written evidence alone in most cases; and the potential for claims to be heard quickly. Jackson concluded that the above factors all “tend to show that the principal drivers of costs in “heavy” civil litigation are absent from judicial review proceedings. The consequence is that the costs of judicial review proceedings, although beyond the means of many litigants, are substantially reduced.”⁸⁵ That said, he also noted that “[p]roportionality of costs is more difficult to assess in judicial review claims, because the remedies sought cannot generally be quantified in money terms.”⁸⁶

Jackson LJ questioned whether Protective Costs Orders provided sufficient access to judicial review for those persons of modest means who were not eligible for legal aid but would not otherwise be able to afford to cover the costs risk of judicial review litigation. In relation to environmental judicial review claims, Jackson LJ questioned whether Protective Costs Orders met the access to justice requirements of the Aarhus Convention⁸⁷, and whether one way costs shifting might offer a better solution.⁸⁸ He also raised the possibility of harmonising the costs rules in Aarhus Convention judicial review claims and other judicial reviews.

⁸² Ibid.

⁸³ Ibid, chapter 46, [7.1].

⁸⁴ Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report (Vol 1)* (May 2009), chapter 35 [1.2].

⁸⁵ Ibid, [2.1–2.5].

⁸⁶ Ibid, [1.3].

⁸⁷ In the absence of the fixed costs provisions of CPR 45.41–45.45, which would not be introduced until 2013.

⁸⁸ Jackson LJ, above n 84, chapter 36 [4.3–4.9].

Fordham, Boyd, and Maurici

Responding to Jackson LJ's call for views on costs shifting, Fordham and Boyd called for a system of one-way costs shifting so that the default position would be that a claimant's costs are recoverable from the defendant public authority if the claimant wins (as at present), but the defendant public authority's costs are not recoverable from the claimant if the claimant loses (reversing the current presumption). This would mean that, other than in special categories of case ("at-risk cases"), or unless there is unreasonable conduct in the course of litigation, the claimant would not have to bear the defendant's or an interested party's costs.⁸⁹ The rationale behind this argument was that: judicial review is a constitutional protection, which operates in the public interest, to hold public authorities to the rule of law, and the general costs-shifting rule acts as a deterrent to claims being brought, which is not in the public interest, given judicial review's constitutional function.⁹⁰

Fordham and Boyd addressed the reasons given by Lord Woolf for retaining the costs-shifting rule, namely that it is fairer that the successful party recover at least some of their costs (which Fordham and Boyd labelled "the fairness rationale"), it deters unmeritorious litigation ("the deterrence rationale"), and it encourages earlier settlement ("the settlement rationale"). Each of these rationales, it was argued, failed to justify the general costs-shifting rule in the special context of judicial review.

In relation to the fairness rationale, Fordham and Boyd argued that the public law scrutiny engendered by judicial review was itself in the public interest, so that it was fair for the state to absorb the cost (by analogy with an ombudsman investigation, a public inquiry or an inquest, none of which are considered to represent an unfair burden for the state to shoulder). Similarly, the settlement rationale did not militate towards the costs-shifting rule in the context of judicial review, because it will always be open to a public body to reconsider when it is not functus (in which case the possibility of settlement is limited), and the court will not permit a purely academic claim to proceed. In relation to the deterrence rationale, it was argued first, that the permission stage served to weed out unmeritorious judicial review claims, and second, that the threat of an adverse costs order deterred meritorious claims as well as unmeritorious ones, and, given the role of the permission stage, was unnecessary and, so, disproportionate.

Fordham and Boyd pointed to shortcomings in the Protective Costs Orders regime, as laid out in *Corner House*, before concluding that "the costs rule that best suits, and acknowledges, the nature and purpose of public law proceedings" is one-way costs

⁸⁹ M. Fordham QC and Jessica Boyd, "Rethinking Costs in Judicial Review" [2009] *Judicial Review* 306 [3].

⁹⁰ *Ibid*, [5-6].

shifting.⁹¹ Finally, Fordham and Boyd referred to the need for costs rules that ensured that Aarhus Convention claims were not prohibitively expensive, and argued that whatever solution would be reached for environmental cases, there was an obvious case for applying it to judicial review in general also (as Jackson LJ had himself suggested in his Preliminary Report).

Opposition to Fordham and Boyd came in a response by Maurici, who observed that one-way costs shifting could not come at a worse time for the UK's recession-hit public authorities, and noted the pressure on the court list that would arise if the deterrent effect of the general costs-shifting rule resulted in more claims and a judge had in every case to determine at permission whether a case would be "at risk", potentially by reference to the financial means of the claimant.⁹² The difference in perspective can best be summarised by Maurici's observation on Fordham and Boyd's deterrence rationale, that "there is no question that the present rules act as a deterrent. The only question is whether it is right that they should."⁹³

Jackson's final report

Jackson LJ's final report was published in December 2009. He concluded that qualified one-way costs shifting is "the right way forward."⁹⁴ He suggested six reasons for this:

- it is the simplest and most obvious way to comply with the UK's obligations under the Aarhus Convention in respect of environmental judicial review cases;
- it is undesirable to have different costs rules for environmental judicial review and other judicial review cases;
- the permission requirement is an effective filter to weed out unmeritorious cases, therefore two way costs shifting is not generally necessary to deter frivolous claims;
- it is not in the public interest that potential claimants should be deterred from bringing properly arguable judicial review proceedings by the very considerable financial risks involved;
- one-way costs shifting in judicial review cases has proved satisfactory in Canada; and
- the PCO regime is not effective to protect claimants against excessive costs liability. It is expensive to operate and uncertain in its outcome. In many instances the PCO decision comes too late in the proceedings to be of value.⁹⁵

⁹¹ Ibid, [12–14].

⁹² J. Maurici, "Rethinking Costs in Judicial Review—A Response" [2009] *Judicial Review* 388 [8].

⁹³ Ibid, [13].

⁹⁴ Jackson LJ, *Review of Civil Litigation Costs: Final Report* (December 2009), chapter 30 [4.1].

⁹⁵ Ibid, [4.1(vi)].

He concluded, however, that a “more difficult question is how a one-way costs shifting rule should be formulated, in order to sift out cases where claimants do not merit costs protection.”⁹⁶

Jackson LJ proceeded to consider how his proposed qualified one-way costs shifting rule would apply in legal aid cases, where *de facto* costs protection already exists. He concluded that the “same ‘shield’ should be given to all claimants in judicial review cases, whether legally aided or not. The legal aid costs shield was skilfully designed, some sixty years ago so that it only avails claimants of modest means. Wealthy claimants or commercial claimants will inevitably, and quite rightly, be exposed to the full rigour of two way costs shifting.”⁹⁷ He ultimately suggests the following rule:

Costs ordered against the claimant in any claim for personal injuries, clinical negligence or judicial review shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:

- (a) the financial resources of all the parties to the proceedings, and
- (b) their conduct in connection with the dispute to which the proceedings relate.⁹⁸

Recognising that even qualified one-way costs shifting would add to the burden on public body defendants, Jackson LJ concluded that to “strike the right balance as between claimant and defendant in judicial review proceedings,” claimants should no longer be able to recover a success fee in claims funded by a Contingency Fee Agreement, and that any success fee must in future be a matter solely between the claimant and the claimant’s solicitor.⁹⁹

The Government’s response to Jackson

The Government response to Jackson LJ’s recommendations was published in March 2011.¹⁰⁰ Judicial review was not referred to in the Government’s position paper preceding its summary of consultation responses. Instead, the paper announced that Jackson LJ’s proposal for qualified one-way costs shifting had been accepted—but only for the time being in relation to Personal Injury cases—while a decision had been taken to end defendants’ liability for success fees in all CFA cases (including judicial reviews).¹⁰¹

⁹⁶ Ibid, [4.2].

⁹⁷ Ibid, [4.4].

⁹⁸ Ibid, [4.5].

⁹⁹ Ibid, [4.10].

¹⁰⁰ Ministry of Justice, *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson’s Recommendations: The Government Response* (March 2011) available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228974/8041.pdf>.

¹⁰¹ This is the case even though Jackson LJ’s recommendation that success fees should not be payable by defendants in judicial review cases was expressly justified by the introduction of QOCS to achieve “balance.”

The result was that the balance between judicial review claimants and defendants shifted in favour of the defendant, as the ending of defendants' liability for CFA success fees meant that claimants had to pay success fees themselves. This made funding cases by CFAs—and therefore accessing the court—more difficult for claimants who were not eligible for legal aid.

Jackson's further review, the Westgate review, and Public Law's disgrace

In November 2016, Jackson LJ announced a further review of Civil Litigation Costs to consider proposals for extending the use of Fixed Recoverable Costs. While Jackson LJ's review was proceeding, Tom Hickman published a widely-read blog entitled "Public Law's Disgrace" in which he highlighted the effect of the general costs-shifting rule on those with meritorious judicial review claims who: were not eligible for legal aid; could not show that their claims were of general public importance or otherwise meet the criteria for a CCO; and had claims that were not Aarhus Convention claims.¹⁰²

Hickman noted that even those who could apply for a Cost Capping Order would have no protection against having to pay the defendant's pre-permission costs, and even those with an Aarhus Convention claim would have to risk up to £5,000 on top of their own solicitor costs. He doubted whether Fixed Recoverable Costs could be a solution in judicial review proceedings, as even if the costs recoverable for each stage of a judicial review were fixed, they are still likely to be unaffordable for many claimants. Further, limiting the costs recoverable by claimants' lawyers would risk work on the claim being uneconomic. Hickman endorsed qualified one-way costs shifting, as Jackson LJ had recommended in his Final Report.

In response to Hickman, Adrian Zuckerman argued for the German system of Fixed Costs Recovery where recoverable costs are fixed at a reasonable percentage of a money claim or of the notional value of a non-money claim.¹⁰³ He argued that the main barrier to such a system being introduced here was opposition to capped fees from the legal profession arising from economic self-interest, and that this was not a problem restricted to judicial review (which was reflected in the title of his paper).

As part of the Jackson LJ review, a working group was set up under Martin Westgate QC. The group, which comprised claimant lawyers, was charged with "work[ing] up the detail of a model based on the current regime for Aarhus claims that could be applicable to judicial review claims more generally."¹⁰⁴ It had input from James Maurici QC, but he did not endorse group's findings, which he considered went too far towards protecting claimants.

¹⁰² Hickman, above n 11.

¹⁰³ A. Zuckerman, "The Law's Disgrace" (February 27, 2017, *UK Constitutional Law Blog*) available at <<https://ukconstitutionallaw.org/2017/02/27/adrian-zuckerman-the-laws-disgrace/>>.

¹⁰⁴ Aarhus Model Working Group, *Report of a Working Group Chaired by Martin Westgate QC on How the Aarhus Rules Might Be Developed For General Application Across The Whole Landscape Of Judicial Review*

The Westgate report was published together with Jackson LJ's *Supplementary Report* in July 2017. It identified two problems from the claimant's perspective, namely that the £5,000 costs limit on claimants was too high, and the £35,000 costs limit on defendants was too low. As a flexible approach to those costs limits would add uncertainty, itself a chilling factor, a majority of the group expressed a preference for qualified one-way costs shifting, rather than a version of the Aarhus model. That said, the Group agreed that a version of the Aarhus model would be an advance for general judicial review claimants on the current position. The group unanimously concluded that the caps should not apply to legally aided claims (so that legally aided claimants should retain *de facto* costs protection), and by a majority, that they should be capable of being varied on application, with any such application to be made before, and (subject to one exception) decided at the same time as, permission, or in accordance with directions. The exception relates to the situation where a defendant or interested party lodges evidence, or other material that significantly increases the work required to be done, on behalf of the claimant, beyond that which was reasonably anticipated at the permission stage. A majority of the group considered that in that situation, the claimant should be able to apply post-permission to increase the cap on the costs recoverable from the defendant.

Jackson LJ's *Supplementary Report* emphasised judicial review's special constitutional role, and therefore the importance of ensuring access to judicial review. Jackson LJ's conclusions were that:

- Even though many judicial cases fall into a standard pattern, costs are too variable to permit the introduction of a grid of fixed recoverable costs;
- Cost Capping Orders are of little practical value, because the procedure for obtaining such orders is too cumbersome and too expensive. The criteria for granting Cost Capping Orders are unacceptably wide and the outcome of any application must be uncertain. Also, that outcome will not be known until too late in the day;
- There would be merit in extending the Aarhus Rules, suitably amended, to all JR claims. The fact that most judicial review cases fall into a standard pattern makes it possible to set default figures as caps, even though it is not practicable to draw up a grid of fixed recoverable costs; and
- The "discipline" of costs management should be available in larger judicial review claims, at the discretion of the court.

Jackson LJ commended the Westgate Report as it "neatly identifies the issues and the conflicting views within the profession."¹⁰⁵ He accepted the "general thrust of that report,

Cases (31 March 2017), available at <https://www.judiciary.gov.uk/wp-content/uploads/2017/07/Appendix_16_Review-of-Civ-Lit-Costs-Supp-Report-FRC.pdf>.

¹⁰⁵ Jackson LJ, *Review of Civil Litigation Costs: Supplemental Report on Fixed Recoverable Costs* (July 2017), chapter 10 [3.1].

although not all its specific recommendations.”¹⁰⁶ He suggested that “if QOCS in JR is not acceptable, the Aarhus Rules should be extended to all [judicial review] claims.”¹⁰⁷ This, it was said, is necessary in order to increase access to justice and to promote the public interest, while accepting that “it is both tiresome and expensive for hard pressed public authorities to face (as they do)... a stream of unmeritorious claims ... and a much smaller number of meritorious claims.”¹⁰⁸ As for the details of Jackson LJ’s proposal, he suggested that:

- The regime should be available in any case where the claimant is an individual (or an individual who is a representative of a number of natural persons with a similar interest) without legal aid;
- The regime should be optional. Any judicial review claimant should be able to opt in;
- There must be some form of means testing for those claimants who opt in. Any investigation of means should be in private and the claimant’s disclosure should be made only to specified individuals within a defined confidentiality ring;
- The default figures of £5,000/£10,000 for claimants and £35,000 for defendants should remain, but be subject to three yearly reviews;
- Any application to vary those figures should be made by the claimant in the claim form and by the defendant in the acknowledgement of service. Such applications should be dealt with at the permission stage. Such applications should only be entertained later in exceptional circumstances, for example a fundamental change in the case or the discovery of dishonesty in the claimant’s disclosure; and
- If the claimant’s costs liability is increased above the default figure, they should be permitted to discontinue within 21 days and (if they do) only be liable for adverse costs to the extent of the previous figure.

Jackson LJ further recommended that a “new and simpler form of precedent H¹⁰⁹ be developed for use in judicial review claims.”¹¹⁰ In any judicial review case where the costs of a party are likely to exceed £100,000 or the hearing length is likely to exceed two days, the court should have a discretion to make a costs management order at the stage of granting permission. The report further suggested that court could do so, either of its own motion or upon the application of either party. If the court makes such an order, then: the parties must (if they have not already done so) serve their budgets in the new form H within 21 days; the parties must discuss and seek to agree each other’s budgets; and in so far as the budgets are not agreed, the court will resolve any disputes at a costs management hearing.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid, [3.2].

¹⁰⁸ Ibid.

¹⁰⁹ Precedent H is a form on which parties to litigation set out their budget of anticipated costs for the purposes of costs budgeting, in accordance with CPR Part 3 and Practice Directions 3E and 3F.

¹¹⁰ Jackson LJ, above n 105, chapter 10 [4.4].

Throughout the whole recent debate around costs, there has been a dearth of systematic evidence and an absence of serious modelling of the impact of alternatives. This has served to exacerbate the polarisation between constitutionalist and managerialist perspectives, and it is difficult to suggest—despite all of the hard work and vigorous debate—that we are now in a more enlightened place in respect of the judicial review costs rules than we were a decade ago.

Conclusions and recommendations

It is clear from the initial assessment laid out in this report that the issue of financial barriers to judicial review is a densely complex one. Implicit in almost all views on this subject is that the present arrangements can and do serve as a barrier to accessing judicial review. What is contested is the extent to which present arrangements do in fact serve as a barrier: many argue that judicial review is widely inaccessible due to financial barriers, while the government suggests that more needs to be done to ensure the right cases get access to judicial review and that judicial review is done at proportionate overall cost. There is also disagreement about where the appropriate balance lies.

While some data is available and has been presented in this report, it is remarkable that, on some of the most basic and most important questions in this debate, there is such a poor evidence base. The absence of systematic evidence, as well as the absence of serious modelling of the impact of alternatives, means that the debate around this issue is often polarised between “managerialist” and “constitutionalist” perspectives.

The challenge now is to move beyond a polarised debate about financial barriers to accessing judicial review, characterised largely by assertions and anecdotal evidence, by developing a more extensive evidence base. To this end, we suggest that there is clear case for a thorough and even-handed inquiry concerning financial barriers to accessing judicial review.

Some key research questions

There is a wide range of issues where further evidence would be useful. Below we set out some broad research questions that it would be helpful to address:

- What is the cost to the government of the present level of access to judicial review?
- Will increased access to judicial review necessarily result in increased incidence of judicial review?
- What are the key drivers of costs in judicial review?
- What is the correct balance between (a) funding for oversight of governance to prevent abuse of power and address it after the event, and (b) funding for the substantive work of government?
- Would increased access to judicial review necessarily increase government’s costs? If so, by how much?
- How realistic is the current legal aid means test in relation to judicial review?

- To what extent is it reasonable and effective to require public interest judicial review litigation to be funded by members of the public who stand to benefit from the litigation to greatly varying degrees? In this regard, who would fund litigation without any prospect of benefiting from it financially, and why?
- What impact is crowdfunding having on judicial review? What are the limits and risks of crowdfunding, and how can the benefits of crowdfunding be optimised?
- How much does it cost claimants on average in terms of costs for a judicial review case to be: settled pre-issue; settled pre-permission; settled post-permission; and lost at first instance?
- Have the Aarhus costs rules, limiting costs recoverable from the parties in environmental cases, resulted in cases being brought which would not otherwise have been brought and, if so, how many?
- What is the impact of cost capping orders in practice?
- What is the impact of costs rules on third-party interveners?
- What would be the impact of the various different models of costs suggested in the course of debates about reform? For instance, what would be the impacts of Jackson LJ's proposed costs-shifting rule be?
- What effect does the rise in court fees have on access to judicial review?
- What is the impact of the court fees remission scheme?
- Who is unable to get funding, or is otherwise excluded, from judicial review? How large is this population?

Gathering further evidence

How can the evidence base in relation to the types of questions identified above be improved? The obvious answer is the collection of qualitative and quantitative data by researchers.¹¹¹ Where such data has been collected by independent researchers in the past, it has proved widely useful in deconstructing misconceptions in reform debates. For instance, Sunkin *et al's* extensive empirical work on judicial review created an evidence base that informed a wide range of policy debates.¹¹² The critical issue in respect of improving the evidence base on judicial review is, however, the position of the government—as both system-manager and the key system-designer—and the approach it takes to research and data in relation to judicial review.

In respect of data relating to judicial review, the government is in a privileged position (or is at least capable of being). The reason for this is that the government has a power to more easily generate and control access to systemic data about the judicial review system. As it

¹¹¹ For an account of the use of empirical legal research in UK public law, see: S. Halliday, "Public Law" in C. Hunter (ed), *Integrating Socio-Legal Studies into the Law Curriculum* (London: Palgrave Macmillan, 2012).

¹¹² e.g. M. Sunkin, K. Calvo, L. Platt, and T. Landman, "Mapping the use of judicial review to challenge local authorities in England and Wales" [2007] *Public Law* 545; M. Sunkin and V. Bondy, "Accessing Judicial Review" [2008] *Public Law* 647; M. Sunkin and V. Bondy, "Settlement in Judicial Review" [2009] *Public Law* 237.

manages the judicial review system, the government is capable of gathering systematic data with relative ease when compared with private citizens or researchers. In this sense, there is a profound data asymmetry between the government and everyone else.¹¹³ Government has, however, not always been proactive in collecting useful data on the public law system.¹¹⁴

What does the government do with the data it has currently? It is a fragmented picture. Sometimes data about judicial review is readily published on a quarterly basis. This data—though helpful and important—offers only general macro-level statistics (*i.e.* how many claims are lodged, how many claims get permission *etc.*). Civil servants can sometimes be facilitative in accessing data too.¹¹⁵ For other questions, data can be requested under the Freedom of Information Act (FOIA) request. The procedures under FOIA are broadly speaking fit-for-purpose to request judicial review data, insofar as they are accessible and low cost,¹¹⁶ but they are ultimately limited by a framework that allows departments to withhold information if the request fits one of 23 exemptions (stipulated in FOIA), if the cost for complying with the request exceeds £600, or if the request is deemed vexatious.¹¹⁷ The Ministry of Justice is among the most burdened but also among the least compliant departments in respect of FOIA requests.¹¹⁸ Occasionally, the government grants access for external researchers to collect data. Getting access is no easy process though; there are long forms with multiple layers of approval required.¹¹⁹ There is also the need to make sure the research benefits the government and that the department is not overly burdened by supporting the research. Such requirements restrict this route of access substantially. This is reflected in the UK Administrative Justice Institute's (UKAJI) conclusion, based on a consultation with researchers, that:

Access to research data is... an important and very real constraint. Although some government departments identify a need for better data, and while there remain examples of excellent cooperation between departments and academics, many independent researchers told us that they had experienced obstacles undertaking research involving government departments. Even where there is willingness to engage (and this is by no means universal), other obstacles arise, such as

¹¹³ The IEEE Global Initiative for Ethical Considerations in Artificial Intelligence and Autonomous Systems considers data asymmetry as a "key ethical dilemma regarding personal information," see: *Ethically Aligned Design: A Vision for Prioritizing Human Wellbeing with Artificial Intelligence and Autonomous Systems (AI/AS)* (2016).

¹¹⁴ See generally: Ministry of Justice, *Administrative Justice and Tribunals: A Strategic Work Programme 2013–16* (London: 2012) [57].

¹¹⁵ UK Administrative Justice Institute, *A Research Roadmap for Administrative Justice* (Essex: 2018), pp.29–30.

¹¹⁶ See generally, Independent Commission on Freedom of Information, *Report* (London: 2016).

¹¹⁷ £600 is the cost limit for central government departments, Parliament, and the armed forces. The cost limit is £450 for other public authorities.

¹¹⁸ For an overview and analysis of recent data, see: Institute for Government, "Freedom of Information" (*Institute for Government*, December 21 2017) available at: <https://www.instituteforgovernment.org.uk/explainers/freedom-of-information-explained-2017>.

¹¹⁹ UK Administrative Justice Institute, *A Research Roadmap for Administrative Justice* (2018), pp.28–31.

satisfying a 'business case' for access, obtaining judicial approval, and lack of coordination between various parts of the system.¹²⁰

UKAJI further found "a perception among veteran researchers that access to central government departments and to government-held data, as well as court-held data, has become more difficult over the past decade or so."¹²¹ There are also some cross-cutting issues with trying to get existing data from government, e.g. it is difficult to know what data is held and therefore what to request, data protection laws are naturally restrictive to some extent.¹²² There may be legitimate reasons for some or all of these arrangements but the data asymmetry is sizeable in the judicial review context. With the increasing use of technology in the courts system, the asymmetry is likely to grow increasingly in the government's favour.¹²³ In view of (a likely growing) data asymmetry, it becomes essential that the government—and particularly the Ministry of Justice and HMCTS—engage constructively in developing evidence-based policymaking in the judicial review sphere.

¹²⁰ Ibid, p.6

¹²¹ Ibid, p.23

¹²² These are wider challenges of administrative data held across government. For discussion on administrative data generally, see: The UK Administrative Data Research Network, *Improving Access for Research and Policy: Report from the Administrative Data Taskforce* (2012).

¹²³ For discussion and context, see R. Thomas and J. Tomlinson, *Online tribunals: what we know and what we need to know* (Public Law Project and UK Administrative Justice Institute: London, 2018); J. Rozenberg, *The Online Court: Will IT Work?* (2017).



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