APPENDIX 16: 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 CASES

Aarhus model working group

Introduction

1. This is the report of a Working Group convened following the seminar on London on 13 March 2017. The members were Martin Westgate QC (Doughty St Chambers, Chair), Nick Armstrong (Matrix), Stephen Clark (Garden Court Chambers), John Halford (Bindman & Partners), Tom Hickman (Blackstone Chambers), Polly Glynn (Deighton Peirce Glynn), Shu Shin Liu (Garden Court Chambers), Angela Patrick (Doughty St Chambers), Alison Pickup (Public Law Project). Most members of the group work predominantly for claimants and a general request to the ALBA committee for a practitioner with significant defendant experience produced no response. James Maurici QC (Landmark Chambers) kindly agreed to assist the group in this capacity. James provided input into the proposals but is not supportive of the proposals made below which he considers go too far towards protecting claimants. His view is that it is not appropriate to seek to apply the Aarhus model generally to judicial review. References to the Group, and to views expressed by it do not include him. Similarly, although the Group was convened by Martin Westgate as Chair of ALBA, this report has not been seen or approved by the Committee or membership and cannot be taken as representing the views of ALBA.

2. We were asked to work up the detail of a model based on the current regime for Aarhus claims that could be applicable to judicial review claims more generally. The Aarhus regime has itself recently undergone significant change and Annex 1 to this note sets out a summary of the position. In this note the rules applicable prior to 28 February 2017 are referred to as the "old model" and the rules in force since then are the "new model". The detailed provisions of those models are explained in the annex.

3. All members of the group recognised that the application of the old or new model to judicial review generally raises some serious issues and some members felt that this was a reason not to seek to do so. Despite these concerns most members of the Group considered that some form of Aarhus based model would be an advance on the current position and that it could promote access to justice for some claimants.

4. All were agreed that the only reason for reform would be to improve access to judicial review for claimants[1]. No one expressed any concern that costs in judicial review proceedings were otherwise problematic, outside of the deterrent effect of costs risk for claimants without significant resources. However, all agreed that the deterrent effect of costs risk was a significant one, and a problem which should if, possible, be ameliorated. The difficulty in the Aarhus model from the Claimant's point of view is twofold:

    a. Firstly, a cap on a claimant's liability of £5,000[2] is still one that will be prohibitive for many potential litigants who do not qualify for legal aid but cannot contemplate this level of risk. At the same time we recognise that it may be politically unpalatable for a wealthy litigant to be able to take advantage of the cap. We come back to this below.

    b. Secondly a cap on a defendant's liability of £35,000 is insufficient to meet the full costs of bringing many claims even without taking account of the unpredictability of costs – which we address below. Many potential litigants will not be able to secure representation within this cap and will not be able to afford to top up the costs themselves, particularly as there is no fund to meet costs if they succeed.

5. Both of these issues might be addressed by a provision for flexibility under which the caps could be increased or reduced but that introduces uncertainty that is a barrier to access to justice in itself. For this reason a majority of the working group strongly favour a QOCS model along the lines recommended in the Jackson Final report on civil costs subject to the modifications recommended by the PLP in its response to the present review[3]. We refer to that response for an explanation as to why it is fair and just for costs shifting rules to work in this way given the constitutional importance of judicial review and the public interest in ensuring that public bodies act lawfully. The points that we make about any potential Aarhus-based model are subject to this[4].

[1] The lack of evidence showing whether or not the Aarhus provisions have actually increased access to justice for environmental cases was noted.

[2] The Aarhus amount is £10,000 in certain other cases but we refer to the lower figure here because that is the one most likely to apply to an individual Claimant.

[3] We do not repeat this here but in very general terms PLP recommended no cap on a defendant's liability to pay but that a claimant's liability would be limited to the amount that it was reasonable for them to pay, subject to a cap of £5,000 (£3,000 on permission) but with a proviso to vary this amount where the claimant was significantly wealthy.

[4] We also note that the model we outline below differs from that in the Final Report in a critical respect, namely that any variation to the costs limit can only operate prospectively and not retrospectively. We deal with this further below.

6. These concerns among others lead us to suggest that if any such model is to be introduced then it should be on a pilot or trial basis so that the impact on the volume of cases brought and on the market for these services can be properly evaluated. A regional pilot would make it easy to evaluate whether claimants sought to issue in the pilot area to take advantage of the new costs rule.

7. The group also notes that it is likely that any change allowing for variation in the level of a cap will require primary legislation given the terms of the Criminal Justice and Courts Act 2015. Sections 88-90 of that Act codify the circumstances in which costs capping orders (formerly protective costs orders) can be made. Section 88(1) provides: "a costs capping order may not be made by the High Court or the Court of Appeal in connection with judicial review proceedings except in accordance with this section and sections 89 and 90"[5]. S. 90 permits Regulations to be made excluding ss 88-89 in cases that relate entirely or partly to the environment[6].

8. Primary legislation may not be necessary if the cap in invariable (i.e. based on the old Aarhus model) because in that case the costs cap is an automatic consequence of the Rules. It does not therefore fall within the definition of a costs cap in s. 88 which controls orders made by the court on the facts of an individual case. This model would leave claimants with a choice between 3 options i.e:

    a. Accept the mutual cap established by the rules with no variation.

    b. Opt out and face the ordinary costs consequences.

    c. Opt out and apply for a "bespoke" costs capping order under ss 88-9 if the criteria under those sections are met.

Report

9. As already noted we considered that some form of Arhus based model would be an advance on the current position. We could not reach agreement on all aspects of such a scheme and in what follows we identify what appeared to us to be the main options with our explanations for differences of view. In light of the disagreement over the scope of a workable model, there was no consensus within the group that the benefits of an Aarhus

[5] Defined in s. 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".
[6] This power has been exercised for Aarhus Convention claims by the Criminal Justice and Courts Act 2015 (Disapplication of Sections 88 and 89) Regulations 2017/100, coming into force on 28 February 2017.

based model would justify its introduction without a fuller understanding of its impact upon access to judicial review and public law advice and representation.

Scope of the rule and opting out

10. Both the old and new models only apply to certain kinds of environmental claim [45.41] and they are optional [45.41].

11. If the model is to apply more generally then it should apply to any claim for judicial review brought under CPR Part 54. Public law issues can be litigated in a number of other forums including private law actions and statutory appeals. There may be strong arguments as to why the same approach should apply by analogy in those cases but we do not consider any such extension at this stage. We do not consider that any Aarhus model should apply to appeals against decisions made on judicial review but instead those cases should be dealt with on a case by case basis.

12. The group was unanimous that:

    a. Any comparable model applicable to judicial review claims should also be optional.

    b. There should be an express exclusion for legally aided cases. Such cases are already subject to a statutory costs-capping regime and their special position is addressed in the second Annex to this report. An express exclusion would avoid any suggestion that legally aided litigants ought to be required to opt-in to the scheme in order to protect the fund. This could be achieved by the inclusion of wording along these lines:

    > "This section does not apply where the Claimant in judicial review proceedings is an assisted person or LSC funded client or who is a person for whom civil legal services (within the meaning of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012) are provided under arrangements made for the purposes of that Part of that Act".

The cap level

13. The present CPR 45.43(1) – (4) can be adapted without modification, including the provision made there for multiple parties. For these purposes, where costs are (exceptionally) awarded in favour of or against an interested party then that party should be treated as a defendant and in this report references to a defendant include an interested party.

14. The Caps should be exclusive of court fees. Otherwise they will be eroded when fee rates change. There will also need to be a provision for periodic revision of the caps to take account of inflation whether by some form of index-linking or periodical review.

15. We recognise that subject to variation in an individual case, this will still leave a substantial group of people with no possibility of bringing a judicial review claim (i.e. those who do not qualify for legal aid but are of modest means and cannot afford the risk of being ordered to pay £5000 towards the Defendant's costs). It is for this reason that the majority favour a QOCS model (see above), or at least a lower cap on claimant's liability. However, this would be a substantial departure from the Aarhus model we have been asked to address.

16. If this model is pursued then we do not consider that there should be any different starting cap level for the permission stage. The costs of the permission stage ought to be dealt with within the overall cap unless it is varied under the procedures discussed below. The effect is:

    a. If the claimant is granted permission and the order is silent as to costs then the deemed order is applicant's costs in case, subject to any later variation (CPR 44.10[7]). If they succeed then they will recover their costs of this stage as part of their overall costs (up to the cap). If they fail at the full hearing and a costs order is made against them, then (subject to any variation of the deemed order) they will still not be liable to pay the Defendant's costs of the permission stage but the costs of the rest of the proceedings are likely to exceed the cap in any event.

    b. Where a Defendant complies with the pre-action protocol and the claimant is refused permission then the Defendant is ordinarily entitled to recover their costs of the acknowledgement of service. They are not normally awarded their costs of a renewed permission hearing where their attendance is optional - ***R (Mount Cook Land Ltd) v Westminster City Council*** [2004] 2 P & CR 405.

    c. There is little guidance as to the amount of costs to be awarded in respect of the permission stage. Defendant's submissions ought to be limited at this point to a "knock-out" points and ought not to be substantial (***R (Ewing) v Office of the Deputy Prime Minister and another*** [2006] 1 W.L.R. 1260).

    d. We consider that in an ordinary case, where the pre-action protocol has been followed, then the costs of an acknowledgement of service ought to be significantly

[7] This seems to supersede Practice Statement (QBD (Admin Ct): Judicial Review: Costs) [2004] 1 W.L.R. 1760 which provides for costs in case.

under £5,000. £5,000 would generally only be justified in a commercial judicial review. However, rather than alter the amount of the cap we consider a problem of excessive costs at this stage is better addressed by robust guidance, possibly in a revised practice direction giving indicative amounts. Guidance ought also to be given on the circumstances in which a second defendant or interested party can recover their costs at the permission stage. The general rule at a full hearing is that only one set of costs will be awarded but practice at the permission stage is more variable.

Variation of the cap

17. A minority of the group considered that the caps ought not to be subject to variation in any circumstances. This promotes certainty and reduces the adverse costs risk for would-be claimants. The disadvantages are that the defendant's costs cap may be inadequate to meet the costs of bringing the claim (in circumstances in which, despite being financially ineligible for legal aid[8], the claimant is unable to 'top up' their solicitor's fees over the cap); and there could be a perceived injustice in allowing a wealthy claimant to benefit from a cap, possibly against a poorly resourced public body. Against these points:

    a. If the defendant's costs cap is inadequate then that is mitigated to a degree by making the process optional and ensuring it is always open to a claimant to opt for the ordinary costs rules if they wish. However, this does not solve the problem in all, or even in many cases, because the effect of opting out is to expose the claimant to unlimited and potentially prohibitive, liability.

    b. The problems caused by the second point are exaggerated. A truly wealthy claimant is unlikely to be deterred by the current adverse costs risk and so the introduction of a claimant's cap is unlikely to expose authorities to claims that would not otherwise be brought. However, if a claimant opts into a costs cap then that will have the effect of reducing the defendant's potential liability – no matter what resources are deployed by the claimant. So the effect overall may well be protective of the defendant authority.

18. The majority considered that any caps should be variable but subject to strict conditions and safeguards. These safeguards are indispensable and without them any capping regime will still create unacceptable and prohibitive risk and will fail to improve access to judicial review remedies.

[8] As explained in, for example, PLP's submissions to the review, the financial eligibility criteria for legal aid are extremely restrictive.

19. The suggested conditions are:

    a. The cap on a claimant's liability to pay can be decreased or increased on the basis that it does not represent an amount that it is reasonable for them to be required to pay having regard to all the circumstances.

    b. The cap on a defendant's liability to pay can be increased where, having regard to all the circumstances, it would be unreasonable for the claimant to proceed with or pursue the claim if the defendant's liability was not increased.

    c. The cap on a defendant's liability to pay can be decreased where, having regard to all the circumstances, it would be unreasonable to require the Defendant to pay any higher amount if the claim succeeds.

    d. The circumstances for these purposes include the nature of the case, the extent to which other members of the public may benefit from the claim, the extent to which it raises a point of law of general public importance, the payment arrangements between the claimant and his or her advisers, the parties' conduct in connection with the dispute, the parties' means.

20. The test in these paragraphs is derived from that currently in s. 26 of LASPO and that was initially proposed by Jackson LJ in his QOCS proposal in his Final Report. As we understand it this formulation was not adopted when QOCS was applied to personal injury cases for what are essentially pragmatic reasons as it would be cumbersome to conduct an individual assessment where there were such a large number of claims. This concern does not apply here since the overall number of judicial review claims is small and an individual evaluation would only be needed where one party made an application for the default rules to be disapplied.

21. We have not followed the language of the test in the current CPR and applicable to Aarhus cases. This is for the following reasons:

    a. The *Aarhus* test applies in the specific context of environmental law and some of the elements of it do not easily translate to other kinds of claim.

    b. The test is developed by the ECJ with a view to being applicable in all member states and some of the language that it uses cannot be taken literally – for example the

reference to not exceeding the financial resources of the claimant cannot mean that *all* of their resources must be exhausted before the proceedings are prohibitively expensive. The reasonableness test is well established in domestic law and is easier to understand.

22. If a rule on these lines is introduced then we consider that there should be some sanction to discourage misguided applications for the claimant's cap to be increased. Otherwise there is a real risk that such applications will become routine, which will increase both uncertainty and the costs of proceedings. We suggest that the simplest solution would be that if a defendant applies unsuccessfully for a variation then they must pay the claimant's of opposing the application in addition to any capped costs. We do not consider that it is necessary to have a mutual provision that an unsuccessful claimant should pay the costs of the application because the parties are not on an equal footing particularly where a claimant is seeking to reduce the £5,000 or £10,000 cap. If a claimant in that positon faced the possibility of a still greater costs liability then that would be so discouraging as to make the power to vary meaningless.

23. We deal with procedure for making an application to vary below.

24. We also consider that any application to vary should be subject to limits as to timing:

    a. The court should be able to reduce but not increase the amount of costs payable by a claimant for a defendant's costs incurred prior to a decision on permission to apply for judicial review (including any oral hearing) above the initial limits of £5,000 or £10,000 respectively.

    b. It should be possible to apply to reduce the claimant's cap prior to the grant of permission or even in advance of issue so that the claimant could know where he/or she stands at an early stage. Any such reduction could be reconsidered at the permission stage but subject to (e) below.

    c. Subject to this (and potentially to sub-paragraph (e) below) any application to vary the amount of any cap must be made before the court makes a decision on permission and will be dealt with at the same time as the court decides permission or in accordance with directions given by the court. This is not a feature of the Aarhus regime but is, in our view, crucial in order to provide certainty to the parties in judicial review. Without it then claimants would be faced with uncertain liability

that could be varied at any stage, diminishing the ability of the model to serve the purpose for which it would be introduced. This suggestion is linked to the following paragraph.

d. If the court varies the amount of a claimant's liability to pay then the claimant can, within 14 days, discontinue in which case their liability will be limited to the amount that they would have been liable to pay immediately before the order to vary was made. We consider that this is an important feature of any workable regime and we would not support any variable cap proposal without this. It is of little benefit to a claimant to know that their liability is £5,000 (or £10,000) but that it can be increased with retrospective effect in the middle of the case so that they will in fact be liable in a greater amount.

e. A majority of the group considers that there should be a power to apply to increase the Defendant's cap where, following the grant of permission 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[9].

f. There are two related reasons behind this proposal:

    i. Firstly, some members of the group drew attention to the fact that claims can, and often do, expand in scope at the point of evidence and detailed grounds – or at some later point when the defendant changes tack or where a fresh decision is made or the decision under challenge is reconsidered. Since this can be hard to predict at the permission stage, provision should be made to take it into account at a later stage.

    ii. Secondly, without a provision of this kind there is no incentive for a defendant not to add to the claimant's costs burden in the hope that they will give up or be unable effectively to pursue the claim. Even if they do not succeed in knocking out the particular case they may succeed in discouraging others. Judicial review proceedings are not subject to case management as to the issues or evidence that defendants may raise and without some possibility of a costs incentive there is no means of preventing conduct of this kind.

[9] A precedent for such a provision can be found in the costs budgeting rules in PD3E 7.9 where budgets can be increased where an interim application is made that was reasonably not included in the budget.

iii. The majority does not consider that any comparable rule is needed for additional material adduced by the claimant. This is because a claimant will have put their case forward at the permission stage at which point any need to adjust the costs cap will already have been considered. A claimant needs permission to amend the claim or adduce any additional evidence and so is subject to case management at that stage. If the costs will be materially increased then that will be a reason to refuse permission to amend, or only to grant it on terms.

g. Notwithstanding the points above the parties can at any stage vary the amount of the cap applicable to any party by written agreement.

25. The costs caps do not prevent the court from making an order for wasted costs in any amount higher than the caps.

Procedure

26. In any pre-action correspondence:

a. The claimant should:

i. Indicate whether they intend to rely on the capping scheme.

ii. State whether they intend to apply to vary any applicable limit and if so give details of the variation they propose and the reasons for it including details of their means – subject to the matters below.

b. The Defendant should:

i. State whether they intend to object to any proposed variation suggested by the Claimant and if so explain the reason for their objection and any counter-proposal.

ii. State whether they intend to apply to vary any applicable limit and if so give details of the variation they propose and the reasons for it.

iii. State whether they are aware of any matters, including, but not limited to, extensive or contested disclosure or live evidence that may cause the claimants costs of pursuing the claim to exceed £35,000 if so giving brief details.

Financial disclosure at the point of issue

27. In order to enable a defendant to decide whether or not to make an application to vary the default caps it may be necessary for there to be some standard financial disclosure at the point of issuing a claim, in cases where the claimant proposes to opt into the scheme. If an Aarhus model is to be workable, then any disclosure regime should be simple to operate, proportionate and should not be one that will encourage routine applications to vary. Applicants seeking to opt-in should be required to disclose details of capital assets and any taxable income above a defined level set at a point where it could reasonably be said that they might be expected to make some further contribution to the costs of the litigation above £5,000, bearing in mind of course that they will also be liable for their own costs if they lose. Any requirement to provide disclosure of financial resources involves an intrusion into a claimant's private life and must be proportionate to the aim pursued. Where there is no realistic prospect of an application to vary the claimant's cap succeeding, claimants should not be required to provide any disclosure of their financial resources beyond a statement that their resources do not exceed a defined level.

Application to vary

28. Any application to vary any applicable limit:

    a. Must include details of the applicant's significant assets, liabilities, income and expenditure, including the total amount of any financial support given to them for the purpose of bringing the proceedings by a third party or parties. .

    b. In the case of an application to vary the amount of a defendant's liability to pay costs must include details of the claimant's costs incurred to date and an estimate of the future costs to be incurred in the proceedings.

29. The court may require the applicant to provide further details of their means or any other matter relevant to the application.

30. The details suggested here are modelled on the information required to be provided under CPR PD 46 in the case of costs capping orders under the CJCA 2015. We do not consider that it is necessary for the information given to disclose the identity of an third parties who providing support because the object of the exercise here is to assess the funds actually available to the claimant to meet the costs. We have also not included amounts that are "likely" to be provided. This is because the regime we are considering is a simple one under which the application can be made once only and it is not anticipated that a cap will be

subject to repeated variation if a claimants means change over the course of the litigation. In those circumstances it would be wrong to take into account a chance of funding that might not come about. Where there has been a binding commitment to provide funding then that will be part of the claimant's assets in any event. Where a claim is likely to benefit others then it might be reasonable to take account of contributions that they might make but it would be confusing to require disclosure of this in the first instance. It is not necessary because the court can order further disclosure and in this type of case the resources of third parties will be part of the circumstances that can be taken into account.

31. Any application to vary should be dealt with by a judge. .

32. If there is a hearing then it should be in private because it will involve the disclosure of confidential financial information.

Summary and Conclusion

A majority of the working group was in favour of extending a model based on the current rules for Aarhus cases as they consider that it will increase access to the Administrative Court for some claimants who are deterred by the costs risk of bringing a claim. It will not help all, or even a majority of would be claimants but is, in the view of the majority, preferable to no action. The model discussed in this paper differs from the Aarhus Rules in the CPR in some respects, most notably in the test for when the costs caps can be varied and the imposition of time limits for making an application to vary.

MARTIN WESTGATE QC

31 March 2017

Annex 1

Introduction

1. Article 9 of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (colloquially referred to by where it was signed – the city of Aarhus in Denmark) imposes an obligation on its signatories to lay down procedures which "provide adequate and effective remedies" and are "fair, equitable, timely and not prohibitively expensive." (added emphasis)
2. In 2010, the United Kingdom was under investigation by both the Aarhus Convention's Compliance Committee and the European Commission for breaching the requirements of Article 9. The complaint was that proceedings in England and Wales were all too often "prohibitively expensive" and generated levels of costs that deterred access to justice.
3. In the Final Report at 30.2.12, Sir Rupert Jackson recorded a discussion at a judicial review costs seminar on the topic and a potential solution to the problem: "the default position is that C's liability for adverse costs is £3,000 up to permission and (if permission is granted) £5,000 up to the end of the proceedings." The solution was welcomed by Sullivan LJ and a practitioner. The anonymous practitioner also said there should be a uniform regime for all judicial review cases, not just environmental cases.
4. Ultimately, Sir Rupert recommended qualified one-way costs shifting as the best way forward for all judicial reviews.
5. The Government rejected that recommendation, but in 2013 adopted a form of the proposal recorded at 30.2.12 of the FR.

The "old" model of Aarhus costs protection

6. By way of amendment to the CPR, new rules 45.41 to 45.44 inserted a new section.
7. By CPR 45.41, they were only applicable to judicial reviews of decisions, acts or omissions which fell under the provisions of the Aarhus Convention. Civil claims were not included.
8. The section did not apply where the claimant either:
    a. did not state on the claim form whether it was an Aarhus Convention claim;
    b. stated that the claim was not an Aarhus Convention claim; or
    c. indicated in the claim form that despite the judicial review falling under the Aarhus Convention regime, the claimant did not want those rules to apply.
9. CPR 45.43 then provided that the adverse costs liability of each party would be capped at rates to be set out in the Practice Direction. For the duration of the scheme, those figures

were £5,000 if the claimant was an individual, £10,000 for all other claimants and £35,000 for a defendant.

10. CPR 45.44 set out detailed controls on the ability of defendants to dispute whether a claim was, in fact, an Aarhus Convention claim so as to trigger the application of the section. If they wished to raise this issue, then they were required to say so in the Acknowledgement of Service and provide particulars.
11. The court would then determine the matter at the earliest possible opportunity. If the court agreed with the defendant, there would be no order for costs for the losing claimant. However, if the court disagreed, the normal order would be for the defendant to pay the claimant's costs on the indemnity basis. Those indemnity costs would not count towards the defendant's overall adverse costs liability, as prescribed by the Practice Direction.

Subsequent developments

12. The House of Lords in *R (on the application of Edwards & Pallikaropoulos) v. Environment Agency* [2008] UKHL 22 referred the question as to what was "prohibitively expensive" To the CJEU. The judgment is at *[2013] 1 WLR 2914 and at paragraph 40 that court held that the proceedings must neither* "exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable". The court did not define what was meant by financial resources or how far they had to be depleted before they could be said to be "exceeded" for these purposes. At paragraph 42 it set out certain features to be taken into account and these have now been transposed directly into the post February 2017 Rules[10].
13. The Court of Appeal indicated in *SSCLG v. Venn* [2014] EWCA Civ 1539 that the new provisions in CPR 45 was insufficient to comply with the United Kingdom's obligations under the Aarhus Convention because it was confined to applications for judicial review.

The "new" model of Aarhus costs protection

14. From 28 February 2017, rules 45.41 to 45.44 were amended. The previous version of CPR 45.44 was shifted to CPR 45.45 and a new rule CPR 45.44 inserted in its place.
15. The first change was the expansion of Aarhus costs protection from judicial review to two forms of statutory review – appeals brought under s.289(1) of the Town and Country Planning Act 1990 and those brought under s.65(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990. Private nuisance claims remain excluded.

[10] These were further discussed considered whether the matter returned to the Supreme Court in *R (Edwards) v Environment Agency & Anor* [2014] 1 WLR 55.

16. The second set of changes was a series of amendments to CPR 45.42. The first was to introduce a requirement that the person seeking Aarhus costs protection was a "member of the public" within the meaning of the Aarhus Convention and the second was to make costs protection conditional on the claimant filing and serving a schedule of their financial resources, evidenced by a statement of truth. Those financial resources also have to take into account "any financial support which any person has provided or is likely to provide to the claimant" [emphasis added].
17. The third and most substantial change was a power under the new CPR 45.44 to vary the maximum costs liability of any party to proceedings where they fall under the Aarhus costs regime. The court can only vary the costs liability if it is satisfied that either the variance would not make it "prohibitively expensive" for the claimant or that the variance was necessary to ensure proceedings were not prohibitively expensive
18. CPR 45.44(3) sets out the conditions in which proceedings are to be considered as prohibitively expensive. The threshold is met where the likely costs (including any court fees which are payable by the claimant) either (a) exceed the financial resources of the claimant; or (b) are objectively unreasonable having regard to—

    (i) the situation of the parties;

    (ii) whether the claimant has a reasonable prospect of success;

    (iii) the importance of what is at stake for the claimant;

    (iv) the importance of what is at stake for the environment;

    (v) the complexity of the relevant law and procedure; and

    (vi) whether the claim is frivolous.

19. Unlike the provisions for disputing whether a claim is an Aarhus Convention claim or not, CPR 45.44 does not set any time limits, procedures or costs consequences for making applications to vary the maximum costs liability. A claimant or defendant may do so at any time by way of an application to the court.

Annex 2 : Why legal aid cases should be excluded

1. The main objective of any proposed reforms is understood to be to promote access to justice and exercise control over the costs of proceedings.

2. Where legal aid is available and granted, it is unlikely that the prospect of an adverse costs order would deter the prospective claimant from bringing their claim. That is because of the costs protection afforded to legally aided litigants by s. 26 of the Legal Aid Sentencing and Punishment of Offenders Act 2012.11 Adverse costs can only be recovered to the extent the unsuccessful claimant can afford to pay them. Superimposing a fixed costs regime based on the Aarhus Convention would not enhance the protection such legally aided claimants already have.

3. Imposing a cap on the ability of successful legally aided claimants to recover their costs from defendants would, however, have a serious detrimental effect on access to justice because it would result in legal aid lawyers having to do very significant amounts of work for which they would have no possibility of being paid, making legal aid practice financially unsustainable. This point has been made in a number of submissions to the Fixed Cost Review. What follows is a summary of the position, but not a substitute for those submissions.

4. Legally aided claimants are by definition impecunious and will be unable to pay their legal fees save for modest contributions from capital or income already required under the legal aid scheme. The scheme expressly prohibits solicitors from charging any supplementary fee. It follows that the means of recovering reasonable and proportionate costs in a successfully litigated legal aid case is through an inter partes costs order. This also protects the legal aid fund, ensuring the funds that would otherwise be claimed in a successful case remain available for funding other cases and advice.

5. If claimants' recovery were limited to, for example, £35,000, in the overwhelming majority of legally aided cases the effect will be that claimants' lawyers will only be paid £35,000, irrespective of the level of costs which have been reasonably, necessarily and proportionately incurred. In cases where the legal aid certificate ceiling exceeded £35,000, there would be little incentive to seek inter partes costs as a claim against the fund would lead to a higher payment. This would undermine the scheme.

6. In addition, the standard rates of legal aid remuneration are not sufficient to cover the actual costs of providing specialist civil legal services.[12] This situation is exacerbated in judicial review proceedings by the "no permission no pay" rule in Regulation 5A of the Civil Legal Aid (Remuneration) Regulations 2013 (as amended) by which, as a general rule, providers do not receive any payment for work done in judicial review proceedings unless permission is granted.[13]

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[11] This provides that: "Costs ordered against an individual in relevant civil proceedings must not exceed the amount (if any) which it is reasonable for the individual to pay having regard to all the circumstances, including—
(a) the financial resources of all of the parties to the proceedings, and
(b) their conduct in connection with the dispute to which the proceedings relate."

[12] See the Civil Legal Aid (Remuneration) Regulations 2013/422, as amended.

[13] There are limited exceptions applicable where the court orders an oral hearing of the permission application, or a "rolled up" hearing; where the defendant withdraws the decision; or where permission is neither granted nor refused and the Lord Chancellor exercises her discretion to pay.

7. In consequence, firms and organisations providing civil legal services under a contract with the Legal Aid Agency, as well as barristers in independent practice of necessity cross-subsidise legal aid payments with recovered inter partes costs. For most non-commercial firms who act predominantly for legally aided individuals, this cross-subsidisation is achievable only because they are able[14] to recover their costs from their opponents at their normal charging rates when successful for all work that is reasonably progressive of the case and proportionate. As Lord Hope explained in *In re appeals by Governing Body of JFS & Others* [2009] UKSC 1, [2009] 1 WLR 2353 ('JFS'):

> It is one thing for solicitors who do a substantial amount of publicly funded work, and who have to fund the substantial overheads that sustaining a legal practice involves, to take the risk of being paid at lower rates if a publicly funded case turns out to be unsuccessful. It is quite another for them to be unable to recover remuneration at inter partes rates in the event that their case is successful. If that were to become the practice, their businesses would very soon become financially unsustainable. The system of public funding would be gravely disadvantaged in its turn, as it depends upon there being a pool of reputable solicitors who are willing to undertake this work. In *R (Boxall) v Waltham Forest London Borough Council* Scott Baker J said that the fact that the claimants were legally aided was immaterial when deciding what, if any, costs order to make between the parties in a case where they were successful and he declined to order that each side should bear its own costs. It is, of course, true that legally aided litigants should not be treated differently from those who are not. But the consequences for solicitors who do publicly funded work is a factor which must be taken into account. …

8. Although those comments were made in the context of a suggestion that there should be an order that each side bear its own costs whatever the outcome of the appeal, the points made by Lord Hope are just as important in considering the impact of fixed costs or a costs cap.

9. Legally aid cases are also cost controlled at the outset as well as by provisional and detailed assessment. In all cases, the Legal Aid Agency imposes costs and scope limitations on certificates of public funding which can be amended on application. Any case in which the costs (including counsel's fees and disbursements) are likely to exceed £25,000 is subject to additional controls and managed by the Exceptional and Complex Case Team. In such cases, solicitors are required to agree a High Cost Case Plan with the Legal Aid Agency setting out their anticipated costs for each stage of a case.

[14] Under Regulation 21 of the Civil Legal Aid (Costs) Regulations 2013