JUDICIAL REVIEW AND THE RULE OF LAW:

AN INTRODUCTION TO THE CRIMINAL JUSTICE AND COURTS ACT 2015, PART 4

THE AUTHORS

The authors are leading civil society organisations dedicated to the rule of law, the improvement of the justice system and the accessibility of public law.

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Responsibility for the text and its contents remains with the authors, the Bingham Centre for the Rule of Law, JUSTICE and the Public Law Project.

FOREWORD

The objective of Part 4 of the Criminal Justice & Courts Act 2015 is to deter proceedings being brought in the courts of England and Wales that are either wholly or in part abusive. Abusive in the sense that the proceedings constitute an abuse of the processes of the Court and therefore should not have been brought at all, or at least should not have been brought in the manner that they were brought.

During the passage of the Bill through Parliament, particularly in the House of Lords, a number of Members of Parliament (including myself) strongly contended that the Bill was unnecessary and, even if it was necessary, it went too far. Some concessions were made by the Government, but even in its amended form there remained opposition. The opposition was both on the grounds that the Bill remained unnecessary and it provided greater deterrence than was necessary. However the Bill, has now been passed into law so there will have to be compliance with the provisions of the Act.

However, as is pointed out in the Introduction to this publication, during the passage of the Act through Parliament Ministers stressed that the Act, apart from preventing abuse, was not intended to undermine the current function of judicial review and as far as possible, the duties and discretions created by the Act should be interpreted in this way.

Some of the provisions of the Act are in absolute terms and do not give the court any discretion if they apply. Others give the court a residual discretion as to the manner to which they are to be given effect. In addition some of the language of the Act is not clear as to how it is to be applied and this will give rise to issues of interpretation.

It is a general principle of interpretation that where legislation could interfere with the rule of law it should be applied in a manner which either avoids that interference or, if this is not practical, it should be interpreted in the manner which while giving effect to the language of the Act will involve the least interference with the rule of law. It is in accord with this principle that Part 4 of the Act should be interpreted.

In these circumstances (especially because of the restrictions in the availability of legal aid) it is important that all those affected by the Act should have available authoritative expert assistance as to how the Act should be applied. Here this publication happily provides that assistance. It deals with Part 4 of the Act in an exemplary manner. It sets out in clear terms what should be the approach. Its authors are to be congratulated for what they have achieved. It is helpful that its guidance is the product of three bodies, the Bingham Centre for the Rule of Law, JUSTICE and the Public Law Project, whose record demonstrates their commitment to justice. Their involvement means that this publication can be expected to be treated with the greatest of respect. This is particularly the case as the authors have performed their important but difficult task with praiseworthy clarity and in a manner which means the publication is admirably reader-friendly.

In the result, I commend its contents without qualification and very much hope that judges, lawyers and anyone else who is involved with Part 4 of the Act will have the benefit of being assisted by its contents. If this the result, then my fears for damage to the rule of law will be substantially reduced.

The Rt. Hon Lord Woolf CH
September 2015

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SUMMARY

Introduction

Judicial review is the primary means by which individuals may challenge the lawfulness of public decision making. In a country without a written constitution, it plays a particularly important role. Part 4 of the Criminal Justice and Courts Act 2015 ('the CJCA 2015') makes a number of changes to judicial review practice and procedure in England and Wales.

During Parliament's consideration of the Act, Ministers keenly stressed that nothing in the Act should undermine the function of judicial review, and identified the particular mischief which each section was intended to address. In so far as possible, the duties, powers and discretions created by the Act should be interpreted in a manner consistent with its limited purpose (paragraphs 7 – 10).

Each of the Act's provisions should be interpreted and applied in a manner consistent with the proper constitutional function of judicial review, as well as respect for the fundamental rights guaranteed by the common law, including access to the courts, the separation of powers and the rule of law (paragraphs 8 – 10, below).

As the provisions in the Act are being considered anew by claimants, respondents and judges alike, this publication is not designed to be comprehensive. It provides an introduction to the Act and its constitutional context, which we hope will help inform understanding of its scope and its interpretation in practice.

Chapter 1: Materiality and the "highly likely" test (Section 84)

Section 84 of the CJCA 2015 introduces a new 'materiality' threshold for judicial review applications. This requires the High Court to refuse to grant permission or relief "if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred".

The new standard changes the threshold at which the court can refuse permission or relief, from inevitability to a high degree of likelihood. It imposes a new duty to refuse permission or a remedy, but preserves the court's discretion to waive that duty in cases of "exceptional public interest".

The new materiality standard must be interpreted consistently with the proper institutional and constitutional function of the judiciary in conducting a judicial review, with the intention of the reform to maintain the discretion of the court and with an appreciation of the impact of the changes on access to justice and the rule of law.

Common law guidance on the proper constitutional roles of public authorities and the courts in the exercise and review of public functions will remain relevant to the court's consideration of the new "highly likely" test. It recognises the vital role that respect for the law plays in promoting good administrative decision-making within public authorities and fostering a sense of justice among those whom they serve:

- It was clear during the Act's passage that "highly likely" was intended to remain a high standard. Before refusing permission or relief, therefore, in practice, the court will need to be satisfied that the possibility of a different outcome is very remote, i.e. so unlikely that it does not warrant the court's intervention (paragraphs 1.23, 1.25 – 1.28).

- At permission stage, the need to ensure that the claimant is not put at a substantial disadvantage, so as to be shut out altogether, points towards the adoption of a highly cautious approach to the "highly likely" test should it arise. An application for permission should only be refused if the court can confidently conclude, without detailed inquiry, that the "highly likely" test is a 'knock-out blow'. If the court is unable to conclusively resolve the "highly likely" test in favour of the defendant without detailed consideration of the substantive case, it should conclude that the question of outcome is arguable and grant permission (paragraphs 1.37 – 1.40).

- The court should be particularly cautious when applying the "highly likely" test to substantive rather than procedural errors. Section 84 was designed primarily to meet the mischief of some procedural technicalities. Importantly, it will usually be easier for the court to judge the effect of procedural errors on the outcome of a case without stepping outside its proper reviewing role (paragraphs 1.22 - 23).

- "Substantially different" requires a change in circumstances material enough to make a noticeable impact. The court should assess whether the flaw made a difference of substance, or rather, a difference that was material in nature so as to affect the outcome. Section 84 was not intended to effect any substantive change in this aspect of the existing materiality test (paragraph 1.25 – 1.28).

- Where a case does not involve the mischief that the statutory provision was designed to remedy – i.e. judicial review cases based on minor procedural defects – the public interest in hearing the case should be considered as exceptional. It should remain open to the court to hear a matter, including those involving minor procedural defects, where it would be in the public interest for that case to be heard despite the application of the "highly likely" standard (paragraphs 1.28 – 1.36).

Chapter 2: Financial disclosure (Sections 85-86)

Sections 85 – 86 introduce a new requirement for claimants to disclose information about sources of funding available for litigation or "likely to be available". The information provided must be taken into consideration by courts when deciding whether to make a costs order. Section 88 introduces a similar requirement for the disclosure of information by applicants for a costs-capping order. The detail of the information to be disclosed will be provided in new rules of court. However, where the relevant body is a corporate body unable to fund the litigation independently, the disclosure duty may include information about its members and their ability to fund the claim.

The stated purpose of both of these disclosure provisions is to provide information to the court and not to alter the court's approach to third-party costs orders or costs-capping.

In order for these measures to be applied in a manner which is consistent with the constitutional purpose of judicial review, the protection of the right of access to courts protected by the common law and Article 6 of the European Convention on Human Rights (ECHR) and the right to respect for private life protected by Article 8 ECHR, these measures must be interpreted and applied in a manner consistent with their purpose, proportionate to that legitimate aim:

- Broadly, no information should be required to be provided that is not necessary to meet the purpose for which it is sought. In this connection, for example, setting a broad requirement to provide information unrelated to the likelihood that a third party costs order might be made against the relevant person or organisation would be inappropriate (paragraphs 2.27 – 2.36, 2.39 – 2.40).

- Information about members of corporate bodies should similarly be circumscribed. Piercing the corporate veil raises its own concerns, but requesting untargeted information about individuals simply by virtue of their membership of a body is likely to be disproportionate and subject to legal challenge (paragraphs 2.41 – 2.44).

- Safeguards which provide for non-disclosure to other parties and to the trial judge are welcome, but not determinative (paragraphs 2.46 – 2.47).

- The legislation is unclear and ill-defined; further legal uncertainty in the rules of court which govern the extent of the information to be disclosed by applicants will compound the likelihood that these measures will have a chilling effect and will act as a deterrent to those seeking legitimately to challenge unlawful public action (paragraph 2.45).

Chapter 3: Interveners and costs (Section 87)

Section 87 introduces a new statutory framework for the treatment of costs and third party interventions. These new provisions reflect existing practice by creating a presumption that third party interveners will not generally recover their own costs in any case except in exceptional circumstances. More importantly, in a change from existing practice, the CJCA 2015 creates a new duty to award costs against the intervener in cases where any one of a specific list of conditions is satisfied. These conditions are:

a) the intervener has acted, in substance, as the sole or principal applicant, defendant, appellant or respondent;

b) the intervener's evidence and representations, taken as a whole, have not been of significant assistance to the court;

c) 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

d) the intervener has behaved unreasonably.

The duty will be set aside in "exceptional circumstances". Exceptional circumstances may be defined in new rules of court. The duty will not generally apply to:

- Interventions in the Supreme Court;
- Actions by third parties in litigation short of intervention, including the provision of witness or expert evidence;
- Cases where interveners are invited to participate by the court;
- Cases in which the parties give undertakings not to seek costs;
- Any case where the court makes a prospective costs order.

Any ambiguity in the broad statutory language should be determined in accordance with the purpose of these provisions. The provisions are not intended to deter interveners from offering their expertise and assistance to the court in appropriate cases. Instead, these provisions target abuse of process or unreasonable behaviour by interveners, such that they are not properly able to assist the court or further the public interest (paragraphs 3.10 – 3.14).

In practice, this may mean that it will continue to be rare for costs orders to be made against interveners who remain reasonably within the bounds of the permission granted by the court (paragraphs 3.18 – 3.33). This may create greater impetus for clarity in applications for permission to intervene (paragraphs 3.34 – 3.36).

If the conditions identified in Section 87 are applied in a manner consistent with their purpose, the court may have little recourse to the residual "exceptional circumstances" discretion in Section 87(7). However, if the conditions are applied more broadly to create a more significant range of circumstances in which costs might be considered, this discretion may be crucial to ensuring that interveners are not entirely deterred from proceeding with interventions below the Supreme Court. Any rules promulgated to better define the court's exceptional circumstances jurisdiction should also reflect the limited purpose of the duty.

The new statutory presumption against costs recovery by interveners may reflect the existing practice that costs are only recoverable where an individual has, properly, acted as if it were an interested party. However, if interveners become liable for costs in a significantly expanded range of circumstances, there may be a proportionately greater case that costs should also be recoverable when an intervener proceeds to put helpful material before the court, notwithstanding the significant costs risk potentially associated with them doing so (paragraphs 3.40 – 3.43).

The deterrent impact of a new costs risk will affect some interveners more than others. These measures could change the number and type of interventions which the courts hear. The resources and expertise of an intervener may continue to be relevant both to the courts' consideration of costs attribution, the question of permission in any application to intervene and the decision of the court on whether to invite an individual or organisation to intervene (paragraphs 3.44 – 3.45).

Chapter 4: Costs capping orders (Sections 88-90)

The stated purpose of Sections 88-90 is to place the mechanism for costs protection in public interest cases, developed following the guidance of the Court of Appeal in *Corner House*, on a statutory footing. The protective costs order ('PCO') and the new statutory costs capping

framework in the CJCA 2015 serve the same purpose; that is, ensuring that public interest cases which would otherwise not be considered by the courts are heard. The interpretation of the new statutory tests will be informed by the courts' previous consideration of the public interest in PCOs. It is unlikely that the statutory tests were intended to have a more restrictive effect in practice than those used previously (paragraphs 4.1, 4.10 – 4.13).

The new statutory framework will broadly apply to applications for costs protection in judicial review claims (including appeals). There are circumstances where the new statutory framework will not – or may not – apply:

- In any claims outside judicial review. Thus, claims for other civil wrongs, including negligence or misfeasance in public office, for example, may continue to benefit from the protection of a PCO pursuant to the *Corner House* guidance.

- In environmental cases, where claimants are likely to rely on the fixed costs regime in CPR 45 or where they are expected to be exempted by regulations pursuant to Section 90 CJCA 2015;

- Costs protection for third parties, including for Interested Parties and interveners, is outside the scope of Sections 88-90, which apply only to applicants for judicial review. The treatment of prospective costs orders for interveners is considered in Chapter 3;

- Finally, it is unclear whether recently introduced costs protection for claimants in closed material proceedings will extend to judicial reviews in future, continuing as a new, distinct common law provision for the protection of access to justice, or whether these protections will be subject to the new statutory framework (paragraph 4.7).

A new delegated power for Ministers to further define the circumstances in which costs protection will be available must be exercised consistently with the stated purpose of these provisions. Any new criteria which operate to fundamentally undermine the ability of the court to provide costs protection in public interest cases will be subject to question. These criteria will be subject both to the approval of Parliament and oversight in the courts by way of judicial review (paragraph 4.29 – 4.32).

A new statutory limit restricting the power of the court to make costs capping orders until after permission has been granted could be applied in a manner which fundamentally limits the purpose of these provisions (paragraphs 4.43 – 4.44). To respect both the language of the CJCA 2015 and its underlying purpose, the court's approach to permission and to case management may need to be sensitive to the claimant's stated need for costs protection. In cases where an application for a costs capping order has been made:

- The application for permission and that for costs capping should be considered early and alongside each other;

- The flexible "arguability" test for permission is inevitably fact sensitive. That the claim will not be pursued without costs protection may inform the court's approach to the permission stage;

- In many cases, the consideration of whether the case involves "public interest proceedings" might be determinative of whether a claim is in fact arguable;

- The existence of a costs capping application might inform both the court's approach to permission and to case management. For example, a rolled-up hearing is unlikely to be appropriate in cases involving an application for costs protection.

Chapter 5: Access to justice, the public interest and judicial review reform

Despite the constitutional significance of judicial review, the remedy cannot be cast in stone and changes may be necessary to ensure its effectiveness as a tool for individuals to hold public bodies to account and secure redress when public decision making goes wrong. The appetite in Government for reform in the past 5 years has been unprecedented. The pace of change has been such that the cumulative and individual impact of specific reforms have as yet been impossible to measure. However, many of the changes made have been designed to deter claims and to introduce new procedural hurdles for claimants, including by restricting access to legal aid and sources of third party funding.

Any further reform should be evidence based and sensitive to the important constitutional function of judicial review. If further efficiencies are deemed necessary, these should have a proportionate impact on both claimants and respondents.

For example, the deterrent impact of disproportionate pre-permission costs is significant for all applicants for judicial review, not only those who might qualify for costs protection (paragraph 5.4).

Serious consideration may be given to the recommendation made by Lord Justice Jackson, in his review of civil litigation costs, that a fixed costs regime should be introduced for judicial review (paragraphs 5.5 – 5.8). Increases in the efficiency and fairness of judicial review could be achieved by implementing the recommendations made by the Bingham Centre for the Rule of Law in *Streamlining Judicial Review in a Manner Consistent with the Rule of Law*. Many of these changes could be made without primary legislation and could operate to encourage defendants to adopt a more proportionate approach to permission stage and trial costs (paragraph 5.9).

INTRODUCTION

1 Judicial review is the mechanism which allows people to challenge unlawful actions by public authorities before an independent and impartial tribunal. In a country with no written constitution to regulate the relationship between the citizen and the State, this function takes on a particular constitutional significance. It is a crucial check on the abuse of power, working to ensure that Ministers and other public authorities act within the rules set by Parliament and in accordance with their common law duties. Access to judicial review is a key element of our unwritten constitutional arrangements for the protection of the rule of law.

2 The CJCA 2015 received Royal Assent in January 2015. Part 4 of that Act gives effect to the latest in a series of Government reforms to judicial review practice and procedure. The Act follows the introduction of reduced time limits in planning cases and the increase, in 2013, of judges' discretion to refuse to hear cases certified "totally without merit". In the same year, immigration cases were transferred to the Upper Tribunal, substantially reducing the workload of the Administrative Court. In 2014 and 2015, increased fees for judicial review and new restrictions on remuneration for solicitors in legal aid claims were introduced. Against this background of rapid reform, the announcement of new substantive changes to judicial review practice and procedure was controversial. After substantial debate and compromise by Government, Parliament accepted four distinct changes in practice, codified in Sections 84-89 of the CJCA 2015:

- **"Highly likely"**: The Act introduces a duty on the court to refuse permission for judicial review or relief where the outcome would be "highly likely" to make no substantial difference for the applicant in the claim (Section 84);
- **Financial disclosure**: The Act introduces a new financial disclosure obligation on judicial review claimants to disclose how their claim is being funded before their application can proceed (Sections 85-86);
- **Costs and third party interventions:** The Act creates a new duty on the court to award costs against interveners in any case where specified criteria are satisfied (Section 87);
- **Protective costs orders**: Finally, the Act places the framework for the operation of PCOs on a statutory footing (Sections 88-89).

3 Some of these changes already apply to judicial review claims started after 13 April 2015. Provisions on financial disclosure and on costs-capping await the conclusion of new rules of court and are expected to come into force in autumn 2015, after the conclusion of a Government consultation (see below, Chapter 2).

4 As the provisions in the Act are being considered anew by claimants, respondents and judges alike, this Report is not designed to be comprehensive. It provides an introduction to the Act and its constitutional context, which we hope will help inform understanding of its scope and its interpretation in practice.

5 Judicial review is not a process which should be free from scrutiny, nor one which cannot be improved or streamlined consistent with the rule of law.[1] However, in implementing any policy-based reforms, and in interpreting and applying each of these new changes to judicial review practice and procedure, its important constitutional function must be key. The significance of judicial review to the operation of the rule of law is without question. As the courts have explained: "there is no principle more basic to our system of law than the maintenance of the rule of law itself and the constitutional protection afforded by judicial review."[2]

6 More recently, the new Lord Chancellor and Secretary of State for Justice, The Rt. Hon. Michael Gove MP, has stressed the importance of both the rule of law and the function of judicial review:

> Without the rule of law power can be abused. Judicial review is an essential foundation of the rule of law, ensuring that what may be unlawful administration can be challenged, potentially found wanting and where necessary be remedied by the courts.[3]

7 During the passage of the Act, Ministers were careful to emphasise that these reforms should not undermine the function of judicial review, but increase its effectiveness, by targeting specific concerns and leaving judges the discretion to do justice in individual cases. For example, the then Lord Chancellor explained to the House of Commons: "Judicial review must continue in its role as a check on the powers that be. It is an important tool for our society which allows people to challenge genuinely wrong decisions by public authorities."[4] Ministers in the House of Lords echoed that these changes would not be expected to fundamentally change the constitutional function of the judiciary or significantly limit the discretion of individual judges:

> [T]he Government absolutely understand the importance of judicial review and do not wish inappropriately to interfere with the exercise of the discretion by the courts, nor substantially to disturb the approach that the courts have taken in this very important area of the law.[5]

8 The implications for the rule of law and its constitutional context must inform the exercise of judicial discretion under the Act, and the interpretation of its individual provisions. Any ambiguity in the provisions of the CJCA 2015 should be resolved in a manner consistent with its limited purpose. Without an express, crystal clear direction, the courts should be slow to adopt any change in process which undermines constitutional rights guaranteed by

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[1] M. Fordham, M. Chamberlain, I. Steele & Z. Al-Rikabi, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law* (*Bingham Centre report 2014/01*), Bingham Centre for the Rule of Law, BIICL, London, February 2014: http://www.biicl.org/files/6813_bingham_jr_report_web.pdf.
[2] *R (Cart) v Upper Tribunal* [2011] UKSC 28, [122] (Lord Dyson).
[3] Ministry of Justice Consultation Paper, *Reform of Judicial Review: Proposals for the provision and use of financial information*, July 2015, Ministerial Foreword. See also the Lord Chancellor's speech to the Legatum Institute *"What Does a One Nation Justice System Look Like?"* (June 2015): "The belief in the rule of law, and the commitment to its traditions, which enables this country to succeed so handsomely in providing legal services is rooted in a fundamental commitment to equality for all before the law."
[4] HC Deb, 24 Feb 2014, Col 58.
[5] HL Deb, 28 July 2014, Col 1466.

the common law, including effective access to judicial review and the proper separation of powers.[6] As Lord Rodger explained in *Watkins v Home Office:*

> [I]t is in the sphere of interpretation of statutes that the expression "constitutional right" has tended to be used, more or less interchangeably with other expressions. In *R v Home Secretary, Ex p Simms* [2000] 2 AC 115, 130D-E, in the general context of the power of the Home Secretary to make rules about prisoners' contacts with journalists who might investigate the safety of their convictions, Lord Steyn said that there was a "fundamental or basic right" at stake and that, in interpreting the rule-making power in the Prison Act, the principle of legality operated as a "constitutional principle". In the well-known passage in his speech in the same case, [2000] 2 AC 115, 131E-G, Lord Hoffmann spoke of legislation "contrary to fundamental principles of human rights" and of "the basic rights of the individual". Fluctuations in terminology are only to be expected, since the operation of the canon of construction does not depend on attaching a particular label, "constitutional" or "fundamental" or "basic", to the legal rule in question. Rather, the courts interpret the particular provision in this way because the substance of the rule is perceived to be so important that Parliament must squarely confront what it is doing when it interferes with it and must accept the political cost.[7]

9 More recently, in *R (Evans) v Attorney General*, the Supreme Court explained that for a provision of the Freedom of Information Act 2000 to have the effect of creating a Ministerial power to set aside a judicial decision, the relevant statutory language must be "crystal clear" in order to have such an effect.[8] Lord Neuberger, in that case, cited Lord Steyn in *R v Secretary of State for the Home Department, Ex p Pierson*:

> [u]nless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law.[9]

10 Constitutional protections "are not to be overridden by the general words of a statute since the presumption is against the impairment of such basic rights."[10] In exercising any discretion under the Act, or in interpreting and applying its provisions, the court will be "astute to perform its constitutional role as guardian of the rule of law".[11]

11 We consider each of the four reforms in the Act in turn, before briefly considering the implications of the recent changes and the future of judicial review:

- Chapter 1 considers the change to the materiality standard and a new duty on judges to refuse to hear any judicial review if it appears to be "highly likely that the outcome for

[6] *R (Evans) v Attorney General* [2015] UKSC 21, [56]-[59]. See also *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, 152, and *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539, [575] and [591].
[7] [2006] UKHL 17 at [58] – [61]
[8] Fn 5, at [56] – [59]
[9] [1998] AC 539, at [591].
[10] *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539, at [575]. See also *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46 and *HM Treasury v Ahmed* [2010] UKSC in further support of this proposition.
[11] *R (Core Issues Trust) v Transport for London* [2014] EWCA Civ 34, [42] – [44].

the applicant would not have been substantially different if the conduct complained of had not occurred" (Section 84);

- Chapter 2 looks at new financial disclosure requirements for all applicants for judicial review (Sections 85-86);

- Chapter 3 analyses the new statutory framework for costs orders and third party interventions (Section 87);

- Chapter 4 reviews the new statutory provision for costs capping orders (Sections 88-89);

- Chapter 5 briefly considers the future of judicial review reform and the public interest.

CHAPTER 1: MATERIALITY AND THE "HIGHLY LIKELY" TEST

A) INTRODUCTION

1.1 Section 84 of the CJCA 2015 introduces a new 'materiality' threshold for judicial review applications. This requires the High Court to refuse to grant relief "if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred".[12] This requires that the court apply its mind to the question what the decision would have been had the conduct complained of not occurred. The court can consider this issue at permission stage, and must do so if the issue is raised by the defendant.[13] If the "highly likely" test is satisfied, the court must refuse permission or a remedy unless it considers that it would not be appropriate to do so for reasons of "exceptional public interest".[14]

1.2 In general, where a person has successfully established that his or her rights have been infringed, a remedy should be forthcoming. However, the common law has always recognised the courts' discretion to limit access to judicial review in cases where a challenge could have made no material difference to the outcome in an individual case. Historically, an 'inevitability' standard was applied. If the outcome would inevitably have been the same without the error at issue, the court had discretion to deny relief, or permission, if the issues were clear at that stage. The court could always exercise its discretion to proceed, if there was a public interest in doing so.

1.3 On the other hand, as has often been pointed out, there is a great danger in the court's prejudging what the decision-makers would have done had they acted lawfully without conducting a full trial on that point. For example, in *John v Rees*, Megarry J held:

> As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.[15]

1.4 The new standard changes the threshold at which the court can refuse permission or relief, from inevitability to a high degree of likelihood. It imposes a new duty to refuse permission or a remedy, but preserves the court's discretion to waive that duty in cases of "exceptional public interest".

1.5 The Government explained that this new test was about "time and money wasted in dealing with unmeritorious cases which may be brought simply to generate publicity or to delay implementation of a decision that was properly made" and cases viewed as aiming to "delay

[12] Criminal Justice and Courts Act 2015, s 84(1)(2A). The amendment to Section 31 of the Senior Courts Act 1981 came into force on 13 April 2015 – see the Criminal Justice and Courts Act 2015 (Commencement No 1, Saving and Transitional Provisions) Order 2015 SI No 778, sch 1, para. 69.
[13] CJCA 2015, s 84(2)(3C).
[14] CJCA 2015, s 84(1)(2B).
[15] [1970] Ch 345 at [402]. See also Rt Hon Lord Harry Woolf, Sir Jeffrey Jowell & Andrew Le Sueur (Eds), *De Smith's Judicial Review* (7th edn, Sweet & Maxwell 2013) para. 8-056: "It is not for the courts to substitute their own opinion for that of the authority constituted by law to decide the matters in question"; at para. 18-056: "…in assuming inevitability of outcome the court is prejudging the decision and thus may be in danger of overstepping the bounds of its reviewing functions by entering into the merits of the decision itself."

[…] matters which the Government regards as important and to which a swift resolution would clearly be desirable".[16]

1.6 Section 84 applies to any conduct by the defendant upon which the claimant bases his or her claim for relief.[17] It is not expressly limited to procedural claims, but applies to all applications for judicial review, including those based on allegations of irrationality and illegality. However, the then Lord Chancellor and Secretary of State for Justice, Chris Grayling MP, explained during the Act's passage that this clause was intended to target cases where it was highly likely that a procedural defect would not have affected the decision made, as in some public consultation cases, for example.[18]

1.7 To determine whether any materiality standard is met, the courts must examine the relationship between an alleged error and the outcome, and this may involve an examination of the facts of any case.[19] Yet the courts have repeatedly asserted the impropriety of substituting their view of the substantive merits of the case for that of the body which has the responsibility in law for making the decision.[20] For example, the High Court has held that it is not the role of the court in a judicial review hearing to "employ [their] imagination to postulate facts which might or might not have occurred or arguments which might or might not have succeeded".[21] The Court of Appeal has deemed such behaviour an "inappropriate encroachment" into the substantive evaluation of the merits of a decision,[22] and the House of Lords has noted that "it is vital that procedure and the merits should be kept strictly apart otherwise the merits may be judged unfairly".[23] The Law Commission has stressed "that it is normally incompatible with the court's reviewing function for the merits of a case to be taken into account in exercising discretion whether to grant relief or not".[24]

1.8 Caution against second-guessing the primary decision-maker derives from considerations of both institutional competence and respect for the division of the judicial and executive functions. A more flexible materiality test could test these boundaries, challenging the constitutional principle of separation of powers.[25] Yet Ministers rejected suggestions that these proposals might alter or expand the function of judges conducting judicial review.[26]

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[16] Ministry of Justice Consultation Paper, *Judicial Review: Proposals for Further Reform* (September 2013) pp. 3, 5, 48, 91-105.
[17] CJCA 2015 s 84(3).
[18] HC Deb, 13 Jan 2015, Col 812.
[19] HC Deb, 21 Jan 2015, Col 1343 (Lord Faulks QC).
[20] See, for example, *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (QB) 74 (Hallett LJ).
[21] *R v Ealing Magistrates Court, ex p Fanneran* (1995) 8 Ad LR 351, [349E] (Rougier J).
[22] *R (Shoesmith) v OFSTED* [2011] EWCA Civ 642, [74] (Maurice Kay LJ).
[23] *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [52] (Lord Steyn). In that case, the House of Lords allowed an appeal against a Court of Appeal decision denying judicial review permission. The Court of Appeal had held that although there had been a failure to conduct a proper inquiry under Article 2 ECHR, a new inquiry was not warranted as it was unlikely that anything useful would be uncovered. The House of Lords ruled that it was impossible to come to that conclusion without conducting the requisite inquiry.
[24] Law Commission, *Administrative Law: Judicial Review and Statutory Appeals* (1994) HC 669 para. 8.19, citing *John v Rees*.
[25] "Restraint and deference are not the same: the first is about knowing your job, the second about knowing your place." Gearty, *Are Judges Now Out of Their Depth?*, revised text of the JUSTICE Tom Sargant memorial annual lecture (October 2007): http://www.conorgearty.co.uk/pdfs/JUSTICEfinal.pdf.
[26] See, for example, HL Deb, 28 July 2014, Col 1461 (Lord Faulks QC).

1.9 The interpretation and application of the new test must be informed by the constitutional function of judicial review and fundamental constitutional standards guaranteed by the common law.

1.10 This chapter will examine the purpose and nature of both the current inevitability test and the new "highly likely" standard; consider how the new test should be interpreted in light of its statutory purpose and the constitutional implications of its application; and address some practical implications Section 84 may have for judicial review practice and procedure.

B) BACKGROUND

i) Inevitability and the safeguards of the common law

1.11 Applying the common law materiality test, the key question was whether a flaw made a difference to the outcome, or whether the decision would have inevitably been the same, even without the flaw. Where a court determined that the result would inevitably have been the same (and therefore that the flaw is immaterial), it had the discretion to withhold relief (or permission if it was clear at that stage).[27] To satisfy this test, "probability [was] not enough."[28] It was insufficient "to suspect that the answer might be the same, because that plainly leaves open a reasonable possibility that it might not be."[29]

1.12 A standard of inevitability meant that "the court does not ask whether the decision-maker would, or probably would, have come to a different conclusion. It only has to exclude the contrary contention, that the decision-maker necessarily would still have made the same decision."[30] It is rare that matters are so clear that a court can confidently say that the outcome would inevitably have been the same.[31]

1.13 The inevitability standard was considered by the courts in a spectrum of factual and legal circumstances and in different kinds of cases, including examples of both substantive and procedural errors. These included failures to comply with statutory consultation requirements and other errors, such as a failure to calculate the support owed to an individual correctly or the placement of a disabled child in the wrong school.[32] However, inevitability is a high standard

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[27] *R v Chief Constable of the Thames Valley Police, ex p Cotton* [1990] IRLR 344, [352].
[28] *R (Smith) v North East Derbyshire Primary Care Trust* [2006] EWCA Civ 1291, [10] (May LJ). See also *Minster Care Management Ltd v The Secretary of State for the Home Department* [2015] EWHC 1593 (Admin) 106 (Cameron QC).
[29] *S v Northampton Crown Court* [2010] EWHC 723 (Admin) [29] (Langstaff J).
[30] *R (Mavalon Care Ltd) v Pembrokeshire County Council* [2011] EWHC 3371 (Admin) [61] (Beatson J).
[31] [1970] Ch 345 at [402]: "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."
[32] Including a failure to engage in a public consultation process as required by law *(R (Smith) v North East Derbyshire Primary Care Trust* [2006] EWCA Civ 1291); a failure to include a specific option within a consultation document *(R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154); a failure to conduct an effective and fair consultation *(R (O'Callaghan) v The Charity Commission for England & Wales* [2007] EWHC 2491 (Admin)); review of a High Court decision denying judicial review on the basis that it had no jurisdiction over the issue *(BX v Secretary of State for the Home Department* [2010] EWCA Civ 481); errors made by a local council regarding the calculation of a weekly support rate per resident for care homes *(R (Mavalon Care Ltd) v Pembrokeshire County Council* [2011] EWHC 3371 (Admin)); a failure to follow published guidance regarding asylum policy *(R (Mlloja) v Secretary of State for the Home Department* [2005] EWHC 2833 (Admin)); a failure of a tribunal to alert advocates to a significant and relevant authority so that they might have an opportunity to respond *(Stanley Cole (Wainfleet) Ltd v*

that undoubtedly requires the court to engage in such a purposeful analysis and supports the courts' "careful calibration" of the concept of 'materiality'.[33] To ensure that they do not unjustifiably deny relief to the applicant, the courts engage in detailed analysis of the facts of the case to determine whether any other factors might lead to a finding that the decision would inevitably be the same, despite the error.

1.14 This might, in practice, involve the courts' consideration of a range of factors.[34] Such factors include: whether the decision-making body based its decision on additional considerations which would have supported the same outcome;[35] whether any real harm was done to the claimant;[36] any subsequent action that would have to be taken to remedy the situation were a quashing order to be granted;[37] the relative weight of the error(s) in relation to other aspects of the decision that were not in error;[38] or the presence of additional errors in the decision-making methodology or reasoning;[39] the availability and effectiveness of alternative remedies;[40] the relevance of omitted evidence and whether such omission was a source of unfairness;[41] the presence or absence of clear statutory criteria governing the decision-making process;[42] whether remedying the error could rationally lead to a different outcome.[43]

1.15 The courts were cautious in their application of the inevitability test, in recognition both of the fundamental common law protection for access to the courts – relief should rarely be denied when there has been an unlawful act[44] – and the proper constitutional and institutional competence of the courts. In the majority of cases, courts therefore have been disinclined to deny relief unless the same decision would undoubtedly be reached.[45]

1.16 Courts have always had the discretion to refuse permission for judicial review, and to deny relief, in appropriate circumstances. However, there are strong constitutional imperatives in favour of granting relief unless there are strong reasons against doing so, not least the interest in

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Sheridan [2003] EWCA Civ 1046); and a decision by the Secretary of State that an appeal under the Human Rights Act 1998 was manifestly unfounded *(R (Nadesu) v Secretary of State for the Home Department* [2003] EWHC 2839 (Admin) 34). Other circumstances include the revocation by the Home Secretary of a Tier 2 sponsor license (*Minster Care Management Ltd v Secretary of State for the Home Department* [2015] EWHC 1593); a no-fault omission of facts relevant to decision by Local Education Authority regarding the placement of a handicapped child into specialised schooling (*Ali v Kirklees Metropolitan Council* [2001] EWCA Civ 582); failure to take legislative criteria into account in making a decision regarding a reduction in the budget for welfare rights and advice services (*R (Meany) v Harlow District Council* [2009] EWHC 559 (Admin)); a failure to apply fair procedures in relation to an application for bail (*S v Northampton Crown Court* [2010] EWHC 723 (Admin)); and a deficiency in the summary of reasons in a decision letter granting planning permission (*R (Majed) v London Borough of Camden* [2009] EWCA Civ 1029).

[33] Bingham Centre for the Rule of Law (Fordham et al), *Streamlining Judicial Review in a Manner Consistent with the Rule of Law* (February 2014) para. 5.7.

[34] See, e.g., *Abbey Mine Ltd v Coal Authority* [2008] EWCA Civ 353, [44]: "There then is the question: did these considerations have a material effect on the application's outcome?" (Laws LJ).

[35] *Minster Care Management Ltd v The Secretary of State for the Home Department* [2015] EWHC 1593 (Admin); *R (Asian Music Circuit) v Arts Council England* [2012] EWHC 1538 (Admin).

[36] *R (Majed) v London Borough of Camden* [2009] EWCA Civ 1029.

[37] *R (Majed) v London Borough of Camden* [2009] EWCA Civ 1029.

[38] *Minster Care Management Ltd v The Secretary of State for the Home Department* [2015] EWHC 1593 (Admin).

[39] *R (Mavalon Care Ltd) v Pembrokeshire County Council* [2011] EWHC 3371 (Admin).

[40] *R (Smith) v North East Derbyshire Primary Care Trust* [2006] EWCA Civ 1291.

[41] *Ali v Kirklees Metropolitan Council* [2001] EWCA Civ 582.

[42] *R (Meany) v Harlow District Council* [2009] EWHC 559 (Admin).

[43] *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154.

[44] *R (Smith) v North East Derbyshire Primary Care Trust* [2006] EWCA Civ 1291, [16] (Keene LJ). See also *R (Mavalon Care Ltd) v Pembrokeshire County Council* [2011] EWHC 3371 (Admin) [52] (Beatson J); *R (Meany) v Harlow District Council* [2009] EWHC 559 (Admin) [86] (Mr Justice Davis commenting that it is only "occasionally" that the court will employ the inevitability test to refuse relief despite the presence of a flaw).

[45] Lewis, *Judicial Remedies in Public Law* (5th edn, Sweet & Maxwell 2015) 12-028.

ensuring that public bodies act lawfully.[46] Enforcing fair decision-making not only ensures that better decisions are reached in the future, but it also helps to avoid any sense of injustice on the part of the person subject to the decision.[47] As Bingham LJ stated in *R v Chief Constable of the Thames Valley Police, ex p Cotton*, the instances where a court would deny an individual the opportunity to put his or her case should be *"*of great rarity*"*.[48] At common law, the courts normally would be expected to grant a remedy if there is any doubt as to whether the same decision would have been reached absent the error.[49]

1.17 The court's approach to this materiality test was underpinned by an understanding that the proper constitutional role of the judiciary in judicial review is to examine the lawfulness of executive decision-making, not to substitute their own decision for that of the original decision maker. Members of the judiciary have recognised the perils of adopting such a broad approach to the no difference test, calling it a "slippery slope",[50] and cautioning against judicial forays into "the forbidden territory of evaluating the substantive merits" of a public decision.[51] In *R v Tandridge District Council ex p Al Fayed*,[52] Schiemann LJ explained: "Once it is apprised of a procedural impropriety the court will always be slow to say in effect, 'no harm has been done'. That usually would involve arrogating to itself a value judgement which Parliament has left to others."

B) THE NEW STANDARD

i) "Highly Likely"

1.18 The interpretation and application of Section 84 will be informed by the same respect for the constitutional principles of the rule of law, the separation of powers and access to justice which is reflected in the court's restrained use of its common law discretion to deny relief.

1.19 While the courts are bound to apply the new statutory test, statutory provisions derogating from constitutional rights (of which access to the courts is one) "should receive a strict and narrow rather than a broad construction".[53]

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[46] See, e.g., *R v General Medical Council ex p Toth* [2000] EWHC Admin 361.
[47] *Osborn v The Parole Board* [2013] UKSC 61, [67] – [68] (Lord Reed); *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [63].
[48] [1990] IRLR 344, [352]. His reasons were clearly elaborated: (a) unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance; (b) experience shows that that which is confidently expected is by no means always that which happens; (c) it is generally desirable that decision-makers should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed; (d) in considering whether the complainant's representations would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision; (e) this is a field in which appearances are generally thought to matter; and, finally, (f) where a decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard, and rights are not to be lightly denied.
[49] See, e.g., *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51 (Lord Bingham at [39]; Lord Slynn at [52]). See also, C Lewis, *Judicial Remedies in Public Law* (5th edn, Sweet & Maxwell 2015) 12-027 and fn 79.
[50] *R v Ealing Magistrates Court ex p Fanneran* (1996) 8 Admin LR 351 at [365].
[51] *R (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] 1 WLR 3315.
[52] [2000] 1 PLR 58, [63C-D].
[53] [2003] UKPC 6, [19]. See also See, e.g., *R v Secretary of State for the Home Department No 2* [1993] EWCA Civ 12 (Lord Steyn); *R v Lord Chancellor, ex parte John Witham* [1997] EWHC Admin 237, [24] (Laws LJ): "The common law has clearly given special weight to the citizens' right of access to the courts."; *R v Secretary of State for the Home Department, ex p Saleem* [2000] 4 All ER 814, [821] (Roch LJ): "It follows that infringement of such a right [access to courts of law] must be either expressly authorised by a provision in an Act of Parliament or arise by necessary

1.20 There are clear reasons – familiar to the common law – why the interpretation of the new standard should be approached with caution. First, it may require the court to refuse a remedy even where a public authority has or may have acted unlawfully. In so doing, it may prevent the court from fulfilling its function as guardian of the rule of law. Second, by permitting or requiring consideration of the issue at the permission stage, it may act as a bar to access to the court (in the face of what may be an accepted procedural failure by the primary decision-maker). Third, it might require the court to step into the role of the primary decision-maker and prejudge the substantive merits of the underlying decision.[54] For each of these reasons, the "highly likely" test must remain a high hurdle.[55]

1.21 To meet the inevitability test there must be, effectively, *no* possibility that the outcome might have been different. The "highly likely" test supposes that there must be *some* possibility of a different outcome. However, the scope of the test remains within the discretion of the courts, to be interpreted consistent with the constitutional function of judicial review and their own institutional competence. As the Minister, Lord Faulks QC explained during the Act's passage, nothing in this reform was designed to disturb the important constitutional function of judicial review:

> [A] significant judicial discretion […] will remain under the clause. Crucially and properly, this discretion will extend to whether it is highly likely that the procedural defect would have resulted in a different outcome for the applicant in any given case and whether any difference would have been substantial […] (emphasis added).
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> The Government absolutely understand the importance of judicial review and do not wish inappropriately to interfere with the exercise of the discretion by the courts, nor substantially to disturb the approach that the courts have taken in this very important area of the law. [56]

1.22 In practice, the court will need to be satisfied to a high standard that the possibility of a different outcome was very remote, i.e. so unlikely that it does not warrant the court's intervention.[57] Particular care may be warranted at the permission stage, if the court is to avoid a dress rehearsal of the substantive issues in the claim (see paragraph 1.40 below).

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implication. Even where it can be said that the making of a rule under powers to make rules by subordinate legislation arise by necessary implication, it will still be in question whether the rule formulated is reasonable." In *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539. At p. 575, Lord Browne-Wilkinson expressly declined to agree with the suggestion in *Saleem* that necessary implication could be sufficient in statutory language to effectively curtail a constitutional, basic or fundamental right: "A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament." See also, Lord Rodger at p. 591.

[54] Indeed, the judiciary expressed these concerns in its response to the consultation, see para. 1.39 below.

[55] As the Minister explained during the passage of the Act: "The threshold is still high. If the court considered there was doubt, it would grant permission, as it does now. It would be for the court to consider if the threshold is met." HC Deb, 27 March 2014, Col 437.

[56] HL Deb, 28 July 2014, Col 1466.

[57] For examples of highly unlikely events on which bookmakers are nonetheless prepared to offer odds: http://www.mirror.co.uk/news/uk-news/david-kathleen-long-euromillions-lottery-5440841. (In this article, the Mirror newspaper considered the likelihood of winning the lottery twice "While there are rumours that other people have won big sums of money twice but opted to remain anonymous, winning £1 million twice is highly unlikely".) They include Simon Cowell becoming Prime Minister at any time (10,000/1), Elvis being found alive this year (50,000/1), England to win the next three World Cups (2,500/1), and the royal baby being called Wayne (500/1).

1.23 Particular caution should be applied when applying the "highly likely" test to substantive rather than procedural errors. Section 84 was primarily designed to address the mischief of procedural technicalities ("perfectly reasonable decisions or actions" challenged on the basis of "technicalities").[58] During debate on the Bill, the then Lord Chancellor gave examples of the kinds of cases which would fall foul of Section 84, including (a) cases, for example, where a consultation was planned for four weeks, but lasted just three, and (b) cases where a consultation did not follow a form promised by a relevant official.[59]

1.24 It will usually be easier for the court to judge the effect of procedural errors on the outcome of a decision without stepping outside its institutional competence. This approach would be entirely consistent with the purpose of the new test. As the Lord Chancellor explained to Parliament during the Act's last stages:

> [For] our proposal on procedural defects ["highly likely" test] we are trying to ensure that where a judicial review concerns a slight error - so slight that it is highly unlikely to have made a difference to the applicant and where the decision would have been the same regardless of that procedural defect - it will be deemed not to be a good use of court time for that judicial review to continue.[60]

1.25 It appears that he was not inviting Parliament to accept the political cost of inhibiting the efficacy of the rule of law in any case where the identified error (and its consequences) was anything other than slight.[61] Given that the consequence of its application will be to deprive the court of its jurisdiction and the applicant of a remedy, in circumstances where unlawful conduct may go uncorrected, only the clearest of evidence should satisfy the "highly likely" test.[62]

ii) 'Substantially Different'

1.26 Section 84 requires the court to determine whether the flaw has led to a "substantially different" outcome for the applicant, and if not, the court must refuse permission or relief. The common law 'materiality' test asked whether the conduct was material in such a way that it would have affected the outcome of the case and led to a different result.

1.27 There is no indication that the new statutory language was intended to effect any additional change in the materiality test. Case law supports an interpretation limited to a change in circumstances material enough to make a noticeable impact, having regard to its degree, amount, or extent. The courts have used the phrase "substantially different" or "substantial difference" in other contexts, most notably with regard to family law and the setting aside of orders for financial relief.[63]

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[58] Ministry of Justice Consultation paper, *Judicial Review: Proposals for Further Reform* (September 2013), para. 99.
[59] HC Deb, 13 January 2015, Col 819.
[60] HC Deb, 13 January 2015, Col 810. See also Lord Faulks QC, Minister for State: "The clause ["highly likely"] is designed for the most part to bite on errors in procedure that are highly unlikely to have changed the end result […] Clause 64 would mean that the court, in the absence of other grounds of challenge, would not give permission or grant a remedy so that the original decision would stand. This clause will help to ensure that judicial review focuses on matters of importance, not on mere technicalities." HL Deb 28 July 2014, Col 1461.
[61] See *Watkins v Home Office* [2006] UKHL 17 at [61] (Lord Rodger).
[62] For an example of the need for careful scrutiny of the 'no difference' argument, see *R (London Criminal Courts Solicitors Association) v The Lord Chancellor* [2014] EWHC 3020 (Admin).
[63] In *Livesey v Jenkins*, the House of Lords considered the issue of when it is appropriate to set aside such orders, concluding: "It will only be in cases when the absence of full and frank disclosure has led to the court making…an

1.28 The statutory language is designed to reflect the earlier common law position, and the development of the new statutory framework should be informed by the courts' existing approach to considerations of materiality. The use of this expression in Section 84 of the CJCA 2015 suggests that the court should assess whether the flaw made no difference of substance, or rather, no difference material in nature so as to affect the outcome in the case.

iii) Exceptional Public Interest

1.29 The court can disregard the new duty to refuse permission or relief if it considers that it is appropriate to do so for reasons of "exceptional public interest".[64] The courts have long recognised that the public interest may require a case to be considered even though the claimant has not suffered any harm as a result of the decision in question:

> A decision to refuse [a remedy] as a matter of discretion on the footing that the claim is academic ought not … to be made without some appreciation of the force of the argument. In a public law case … [a claimant] may have an important point to bring to the court's attention, whose resolution might be required in the public interest, even if the [claimant] himself has suffered no perceptible prejudice as a result of the decision in question.[65]

Such public interest may include, for example, avoiding unnecessary litigation through an early determination of an issue that is likely to affect a significant number of applicants in the future,[66] or a need to clarify the scope of certain powers of a state agency.[67] It may also include a desire on the part of courts to address an important question that might otherwise come before them in the future.[68]

1.30 The courts have also used a 'public interest' criterion to conclude that civil society groups have a 'sufficient interest' to meet the standing requirement in section 31(3) of the Senior Courts Act 1981. In the *Pergau Dam Case*[69] Rose LJ proposed a number of factors to consider when

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order which is substantially different from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good." [1984] UKHL 3, [16] (Lord Brandon). This standard has been repeated on numerous occasions by the High Court and the Court of Appeal. See, e.g., *Sharland v Sharland* [2014] EWCA Civ 95; *S v S (Rev 2)* [2013] EWHC 991 (Fam); *N v N (Rev 1)* [2014] EWCA Civ 314; *Gohil v Gohil* [2014] EWCA Civ 274; *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195. See also for example, in *S v S (Rev 2)*, the High Court cited *Livesey v Jenkins* in considering the issue of materiality in relation to the impact of the non-disclosure of marital assets. The Court of Appeal in *N v N (Rev 1)* considered whether a non-disclosure had been "material" and whether it had made a "significant difference" to the financial order in divorce proceedings. In *R (L) v Cumbria Constabulary*, the High Court's interpretation of "substantially different" can be understood as material in such a way so as to influence the weight of the remaining evidence. In *FG Wilson (Engineering) Ltd v John Holt & Company (Liverpool) Ltd* the court clarified that substantial differences are more than "minor discrepancies" in relation to a contractual dispute.

[64] CJCA 2015, s 84(1)(2B).

[65] *R v Oxfordshire County Council, ex p P* [1996] ELR 153. See also, e.g., *Johnatty v Attorney-General* [2008] UKPC 55, [19] (whether there is "a point of real substance that is required to be addressed"); *R v Secretary of State for the Home Department, ex p Salem* [1999] UKHL 8. See also Fordham, *Judicial Review Handbook* (6th edn, Hart Publishing 2012) 4.6.4-4.6.5, and Anthony, *Public Interest and Judicial Review*, paper presented at NICEM Conference, February 2010.

[66] See, e.g., *R (Williams) v Secretary of State for the Home Department* [2015] EWHC 1268 (Admin).

[67] *R (Jones) v Chief Constable of Cheshire* [2005] EWHC 2457 (Admin) (on police powers).

[68] *R v Horseferry Road Magistrates' Court, ex p Bennett (No 2)* [1994] 1 All ER 289, [297h].

[69] *R v Secretary of State for Foreign and Commonwealth Affairs ex p World Development Movement Ltd* [1994] EWHC Admin 1. See also, Law Commission, 'Administrative Law: Judicial Review and Statutory Appeals' (1994) HC 669

assessing whether there is a public interest in granting standing: (1) upholding the rule of law; (2) the importance of the issue raised; (3) the possibility that there will be another responsible challenger; (4) the nature of the breach of duty against which relief is sought; and (5) the role of the applicants (in that particular case) in giving advice, guidance and assistance regarding the matters at hand. Similarly, the Supreme Court has emphasised that a rights-based approach to standing should give way to an interest-based approach because the former is "incompatible with the performance of the courts' function of preserving the rule of law…in particular, so far as it requires the courts to exercise a supervisory jurisdiction."[70]

1.31 In *R (Williams) v Secretary of State for the Home Department,* the High Court discussed the issue of public interest when continuing to consider an issue which had since become hypothetical in nature.[71] In deciding whether to exercise its common law discretion to hear the claim, the court considered:

> (i) [W]hether there was any relief that could be granted 'which would be of value to those who have to decide matters such as this', and (ii) whether the particular case was an appropriate vehicle for providing that guidance.[72]

Finding that there was a public interest in proceeding with the case, the court considered seven factors: (1) the fact that the people affected by the issue could be considered as a discrete category; (2) the issue raised was not academic because many people could be affected by the decision at issue; (3) the case was not completely fact sensitive; (4) the claimant had standing and was directly affected by the administrative decision at the time they challenged it; (5) permission had been granted and therefore the claim was clearly arguable; (6) the issue had only become hypothetical because of a change in circumstances since the claim was lodged; and (7) the issue was likely to require a judicial determination in the future.[73]

1.32 Section 88 of the CJCA 2015 considers the 'public interest' with regard to costs capping orders. It specifies factors to which the court must have regard when making a determination regarding whether proceedings are in the public interest, which reflect the jurisprudence, including: (a) the number of people likely to be affected if relief is granted to the applicant; (b) the significance of the effect on those people; and (c) whether the case involves consideration of a point of law that is of general public importance (See Chapter 4).

1.33 The public interest served by judicial review is considered elsewhere in this paper, including the general public interest in ensuring that public authorities obey the law. In interpreting the new discretion, the courts will have to consider what "exceptional" public interest means and what difference this qualifier may make in practice.

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para. 5.22. The Law Commission has also provided guidance as to factors that should be taken into account in relation to standing in public interest challenges, some of which mirror those identified by Rose LJ, above.[69] These factors include: (1) the importance of the legal issue; (2) the likelihood that such issue will be raised in other proceedings; and (3) the availability of judicial resources.[69]

[70] *AXA General Insurance Ltd v Lord Advocate (Scotland)* [2011] UKSC 46, [169] (Lord Reed).

[71] Despite an acknowledgment by the court that Section 84 of the CJCA 2015 would introduce the concept of "exceptional" public interest, the court did not specifically address its meaning.

[72] *R (Williams) v Secretary of State for the Home Department* [2015] EWHC 1268 (Admin), [55], quoting *R v BBC ex parte Quintavalle* (1998) 10 Admin LR 425.

[73] *R (Williams) v Secretary of State for the Home Department* [2015] EWHC 1268 (Admin), [57].

1.34 During debate, the then Lord Chancellor and Secretary of State for Justice suggested that the public interest exception is intended to go beyond the general interest in good administrative decision-making. He suggested that the purpose of the "exceptional" hurdle may be to elevate the public interest exception.[74] However, this exceptionality would not be over-rigorous in its application.[75] Importantly, in some cases, the public interest would be served by allowing the courts to consider even procedural breaches which otherwise would satisfy the test. These would include "major, fundamental and worrying breach[es] of procedure by a public body"[76] and cases where a public body "blatantly flouted the way in which consultations should be managed and procedure handled, but it is likely that the ultimate decision would have been the same".[77]

1.35 In the last stages of the Act's passage, Lord Pannick explained his understanding that the courts should approach the meaning of "exceptional" in Section 84 in a way similar to that adopted by Lord Woolf CJ in *R v Offen*.[78] In that case, Lord Woolf examined the meaning of "exceptional" in relation to Section 2 of the Crime (Sentences) Act 1997, explaining that:

> [The] rationale of the section should be highly relevant in deciding whether or not exceptional circumstances exist. The question of whether circumstances are appropriately regarded as exceptional must surely be influenced by the context in which the question is being asked. The policy and intention of Parliament was to protect the public against a person who had committed two serious offences. It therefore can be assumed the section was not intended to apply to someone in relation to whom it was established there would be no need for protection in the future. In other words, if the facts showed the statutory assumption was misplaced, then this, in the statutory context, was not the normal situation and in consequence, for the purposes of the section, the position was exceptional.[79]

1.36 Where a case does not involve the 'mischief' that the statutory provision was designed to remedy, the case should be considered as exceptional. Given that the statutory purpose of Section 84 is to eliminate those judicial review cases which are based on minor procedural defects, Lord Pannick posited that all other types of cases should be considered within the scope of the court's "exceptional public interest" discretion.[80]

1.37 On this approach, it would remain open to the court to hear a matter involving minor procedural defects if there were additional reasons of public interest – of the sort identified above – that justified such a course. It would also leave the broad discretion of the court intact in cases where there may be a wider public interest in the case being determined, but where an issue may have become academic or hypothetical. This approach would address the mischief which Section 84 was designed to meet, while respecting the constitutional purpose of judicial review and the fundamental common law rights which protect access to the courts and to a remedy.

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[74] HC Deb, 13 January 2015, Cols 821-22.
[75] HC Deb, 21 January 2015, Col 1343.
[76] HC Deb, 13 January 2015, Col 819.
[77] HC Deb, 13 January 2015, Col 821.
[78] [2000] EWCA Crim 96, 79-81.
[79] [2000] EWCA Crim 96, 79-81.
[80] HC Deb, 21 January 2015, Col 1345.

D) IMPACT ON PROCEDURE

1.38 Section 84 could have a substantial impact on judicial review proceedings, especially at the permission stage. If this issue arises at permission, the court will be under a statutory duty to consider it. The unavoidable result is that the court will have to conduct some early inquiry into the facts of the claim. However, there is nothing on the face of the statute that indicates the degree of scrutiny which the court must apply at any particular stage in the proceedings. It would be consistent with the intention of the measures – to target technical errors while preserving judicial discretion and the underlying purpose of judicial review – to expect the courts to tailor their approach to materiality according to the circumstances of the case and the stage at which the issue is being considered.

1.39 The senior judiciary warned about the risk of a 'dress rehearsal' permission stage, focused principally on materiality: "an obligation to focus further on the no difference principle at the permission stage would necessarily entail greater consideration of the facts, greater (early) work for defendants, and the prospect of dress rehearsal permission hearings."[81] This concern was shared by the Joint Committee on Human Rights, which cautioned that a full consideration of the facts at permission stage would undoubtedly lead to greater cost and delay,[82] and by the Bingham Centre for the Rule of Law in its own judicial review inquiry.[83] This would, of course, undermine the purpose of the reform.

1.40 The additional work associated with litigating the "highly likely" standard at the permission stage must be considered in the light of further changes made by the CJCA 2015, and changes to legal aid remuneration for judicial review claims. The permission stage is likely to represent quite an onerous prospect for claimants and their representatives. In determining how to deal with the "highly likely" argument at the permission stage, the court should take account of the following factors:

- Under the legal aid changes, the claimant's solicitors will be subject to a 'no permission, no pay' rule and will not normally be paid for by legal aid unless permission is granted, unless the court orders a permission hearing or a rolled-up hearing.[84] As a result, the increased work involved in responding to a "highly likely" argument may be undertaken 'at risk'.

- The CJCA 2015 provides that costs capping orders may not be made before the grant of permission. This means that a non-publicly funded claimant's financial risk will be increased.[85]

- In many cases, clear evidence will be required from the defendant before the court can reach a conclusion on a submission that the error was not material.[86] Such inquiry is not normally appropriate at the permission stage.[87]

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[81] Response of the senior judiciary to the Ministry of Justice's consultation paper *Judicial Review: Proposals for Further Reform* (November 2013) paras. 21-22.
[82] Joint Committee on Human Rights, *The Implications for Access to Justice of the Government's Proposals to Reform Judicial Review*, Thirteenth Report of Session 2013-14, HL Paper 174; HC 868 (2014) para. 46.
[83] Bingham Centre for the Rule of Law (Fordham et al), *Streamlining Judicial Review in a Manner Consistent with the Rule of Law* (2014) para. 5.8.
[84] Civil Legal Aid (Remuneration) Regulations 2013/422, regulation 5A.
[85] Section 88(3) CJCA 2015.

1.41 Cumulatively, these factors may severely handicap the judicial review claimant. Regardless of which test is adopted at the substantive hearing stage, it is important that the claimant is not put at a substantial disadvantage so as to be shut out altogether at the permission stage. This supports a cautious approach to the "highly likely" test if it arises at the preliminary stage. Such need for caution was expressed by Ministers, who emphasised the importance of judicial discretion in the interpretation and application of this new test:

> If the court considered there was doubt, it would grant permission, as it does now. It would be for the court to consider if the threshold is met.[88]

1.42 At permission stage, an application should only be refused if the court can confidently conclude, without detailed inquiry, that the "highly likely" test is a 'knock-out blow'.[89] If the court is unable to conclusively resolve the highly likely test in favour of the defendant, then it should conclude that the question of outcome is arguable and grant permission.

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[86] *R (London Criminal Courts Solicitors Association) v The Lord Chancellor* [2014] EWHC 3020 (Admin).
[87] *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 716, 644A: "on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case" (Diplock LJ); *R v Secretary of State for Trade and Industry, ex p Greenpeace Ltd* [1998] Env LR 415, [418] (Laws J, referring to the Diplock test in *Greenpeace* as "most certainly the general rule").
[88] HC Deb, 27 March 2014, Col 437.
[89] See, e.g., *R (Mencap) v Parliamentary & Health Service* Ombudsman [2010] EWCA Civ 875, [15]; *R (Ewing) v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583, [43].

CHAPTER 2: Financial disclosure and judicial review

A) INTRODUCTION

2.1 Sections 85 and 86 of the CJCA 2015 introduce a new duty on judicial review claimants to disclose information about the funding of their claim before proceedings are begun. This may include information about third parties funding or "likely to" fund the litigation. The court will then be required to take this information into account in considering whether to make any costs orders. These provisions will be supplemented by rules of court which will provide more detailed information on the kind of information to be disclosed, the means of disclosure and the use of the material provided to the court ("the Rules").

2.2 In July 2015, the Government opened a consultation: *Reform of Judicial Review: proposals for the provision and use of financial information* on the rules of court that will govern the financial information to be disclosed by judicial review claimants and applicants for costs capping orders pursuant to sections 85 and 88(5) of the CJCA 2015 ("the Consultation Document").[90] The Consultation Document proposes that disclosure, including disclosure in respect of third party information, will be by way of a statement of truth by the claimant in any proposed judicial review. It provides limited additional guidance on the kind of information which might be required and might suggest that claimants are under a duty to disclose financial information about third parties even in circumstances where there is no likelihood that the court may make a third party costs order against them.

2.3 The application of these measures in a manner consistent with the fundamental common law right of access to justice, the right to a fair hearing and the right to respect for private life guaranteed by Articles 6 and 8 ECHR (and the Human Rights Act 1998) will be important to ensure that these measures do not operate as a disproportionate deterrent to claimants seeking to challenge the unlawful behaviour of public authorities.

2.4 Measures designed to improve recovery of costs should not ultimately be used to limit access to judicial review only to those with substantial independent means by deterring others from pursuing litigation even where their claims are strong. As access to legal aid is restricted and the CJCA 2015 introduces new limits on costs protection, it is likely that individuals and groups without significant funds will explore other avenues of support for litigation, including public interest litigation. If the mechanism for the handling of information in connection with the recovery of costs, including against third parties, is overly broad or unclear, these avenues are likely to be similarly constrained. As explained below, we are concerned that uncertainty about the application of these measures may have an unintended chilling effect on the funding of charities and not for profit organisations who conduct litigation and on their ability to bring public interest cases in practice.

2.5 This Chapter provides an introduction to the new financial disclosure provisions in Section 85 – 86, which may inform the drafting of the Rules by the Rules Committee and the interpretation of

[90] Cm 9117, *Reform of Judicial Review: Proposals for the provision and use of financial information*, July 2015: https://consult.justice.gov.uk/digital-communications/reform-of-judicial-review-proposals-for-the-provis. A full consultation response has been prepared by JUSTICE and the Public Law Project: http://justice.org.uk/judicial-review-claimants-and-financial-disclosure-cm-9117/.

these provisions.

B) BACKGROUND

2.6 Section 85(1) amends section 31(3) of the Senior Courts Act 1981 ("SCA 1981"), to provide that no application for judicial review will be granted leave unless the applicant has sufficient interest and has "provided the court with any information about the financing of the application that is specified in rules of court for the purposes of this paragraph". This information will be specified in the Rules and may include:

a) 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

b) 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.[91]

2.7 The Rules may set a level of financial support below which disclosure of financial information about third parties will not be required.[92] This provision was introduced at a late stage during the Act's passage and was intended to address concerns about the disproportionate impact of these provisions in practice.[93] The consultation proposes that this threshold should be set at £1500.[94]

2.8 The effect of these measures is to remove the discretion of the High Court (and of the Upper Tribunal) to grant permission to apply for judicial review unless certain financial information, to be specified in rules of court, has been provided by the claimant.

2.9 The precise information that may be specified in the Rules includes "information about the source, nature and extent of financial resources available, or **likely to be available**, to the applicant" to meet its litigation liabilities[95] (emphasis added). Information may be sought where the applicant is a corporate body that cannot demonstrate it is able to meet its own litigation liabilities "about [the corporate body's] members and about their ability to provide financial support for the purposes of the application".[96] The Rules are not required to set a threshold level of financial support beneath which members need not be identified (although there is nothing to prevent the rules committee specifying such a threshold, for example if it considered one necessary to meet the overriding objective of the rules).

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[91] Sections 31(3A) and 31(3B) SCA 1981.
[92] Section 31(3B).
[93] HL Deb, 21 Jan 2015, Col 1343. The Minister, Lord Faulks QC, reported to Parliament that the Government had "listened to concerns raised about this provision, particularly on the potential for a chilling effect on small contributors".
[94] The £1500 threshold was included in the Government's promised consultation, opened in July 2015: *Reform of Judicial Review: proposals for the provision and use of financial information*. See pp. 16-17. Subsections 85(3) and (4) make equivalent amendments to section 16(3) of the Tribunals Courts and Enforcement Act 2007, to achieve the same result in respect of judicial review applications brought in the Upper Tribunal.
[95] Section 31(3A)(a).
[96] Section 31(3A)(b).

2.10 Section 86 requires the court or tribunal to have regard to the information filed pursuant to section 85 of the CJC Act, "[w]hen the High Court, the Upper Tribunal or the Court of Appeal is determining by whom and to what extent costs of and incidental to judicial review proceedings are to be paid".[97] The court must "consider whether to order costs to be paid by a person, other than a party to the proceedings, who is identified in [the information referred to in section 86(3)] as someone who is providing financial support for the purposes of the proceedings or is likely or able to do so".

2.11 Section 88(5) is concerned with financial disclosure by applicants for costs capping orders (see Chapter 4, below). The information disclosed pursuant to Section 88 will be used by the courts to determine whether (a) in the absence of a costs capping order, the applicant would withdraw the application for judicial review or cease to participate in the proceedings, and would be acting reasonably in so doing;[98] and (b) whether to make a costs capping order and if so what the terms of the order should be.[99] Applicants for costs protection under the common law are expected to provide financial information about their resources. However, Section 88 mirrors the provision in Sections 85-86, permitting rules of court to make provision for the disclosure of information about sources of funding available from third parties – or "likely to be available" – including information about members of corporate bodies.

2.12 These new statutory provisions for disclosure are potentially very broad and could have an intrusive impact on potential claimants and their access to judicial review. Importantly, both introduce a procedural requirement which attaches to personal information not only about the litigant, but about third parties. The Rules may require some degree of speculation about future sources of funding (likely to be available); a broad reading of this requirement may create an inappropriate degree of uncertainty and could create a disproportionate deterrent to litigation in practice.

C) INTERPRETING THE NEW RULES

2.13 Against this background, it is important that the interpretation and application of these statutory provisions and the drafting of the associated rules of court on financial disclosure are interpreted in a manner consistent with the limited purpose of the legislation, the right to respect for private life (Article 8 ECHR) and the right to a fair hearing as protected by Article 6 ECHR and the common law.

i) Purpose of disclosure

2.14 The rationale for the provision of financial information pursuant to sections 85 and 86(1) was clearly articulated by the Government during the passage of the Bill. For example, the Minister, Lord Faulks QC, explained:

[97] Section 86(1).
[98] Section 88(6)(b)and(c).
[99] Section 89(1)(a).

These clauses do not introduce any new principles concerning the costs liability of non-parties. Their purpose is to increase transparency, so as to allow the courts to exercise their existing powers and discretion more effectively.[100]

These clauses should not cause anyone to pay costs who would not do so under the current law, except those who should but of whom the court is unaware.[101]

2.15 The purpose of the provisions is merely to increase the information available to the courts to enable them to use their existing powers to make non-party costs orders, not to increase the class of people against whom such orders should in principle be made.

2.16 The purpose of disclosure accompanying an application for a costs capping order is to provide the court with information on whether the litigation might be funded sufficiently by a third party in order to allow it to proceed without costs protection.

ii) Disclosure and the right to private life

2.17 The provision of personal financial information as a condition for accessing the judicial review court (either as a pre-condition to permission pursuant to section 85, or as a pre-condition to a costs capping order pursuant to section 88(5) will engage Article 8 ECHR.

2.18 Article 8 of the ECHR protects the right to private life, including the protection of personal information. Interference with that right is permitted by Article 8(2) but only to the extent that such interference (a) is in accordance with the law; (b) pursues a legitimate aim; and (c) is necessary in a democratic society. The compulsory provision of financial information to tax authorities has been held to be an interference with the Article 8(1) rights, only justified if the information is needed for tax purposes, and its collection is in accordance with law and is not disproportionate.[102]

2.19 The aim of these measures – to ensure that information is available to support the court's capacity to make third party costs orders, where appropriate – may be legitimate (in so far as it protects the rights of others by permitting the recovery of litigation costs against those who have instigated a claim). However, the disclosure requirements imposed on claimants must be tailored to meet that aim in order to be proportionate to the interference with individual rights which they pose. We consider the application of these measures, and proportionality, in some detail, below.

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[100] HL Deb, 30 July 2014, Col 1606: http://www.publications.parliament.uk/pa/ld201415/ldhansrd/text/140730-0001.htm#14073046000328.
[101] HL Deb, 30 July 2014, Col 1612.
[102] *X (Hardy-Spirlet) v Belgium* (Application no. 8904/82) European Commission. For a summary of the case law on the collection and retention of information by the state, see *S & Marper v United Kingdom* (Applications nos. 30562/04 and 30566/04), [66] – [125].

iii) Disclosure, access to the courts and the right to a fair hearing

2.20 As a procedural barrier to access to justice, the new disclosure requirements will engage the right to access the courts protected by the common law and the right to a fair hearing protected by Article 6 ECHR.[103]

2.21 The fundamental right of access to the courts at common law is long recognised.[104] Restrictions on access to a court must be compatible with the essence of that right. This principle will underpin the court's interpretation of these new statutory restrictions and the application of any rules designed to implement them. Only express – crystal clear – statutory provision will displace the common law right, which is a fundamental aspect of the rule of law safeguarded by the common law.[105]

2.22 In *Fayed v United Kingdom* (Application No: 17101/90), the European Court of Human Rights emphasised that the right to a fair hearing protected by Article 6 ECHR includes a right of access to court:

a) The right of access to the courts is not absolute but may be subject to limitations which are permitted by implication since the right of access "by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals".

b) In laying down such regulation, the Contracting States enjoy a certain margin of appreciation, but the final decision as to observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.

c) A limitation will not be compatible with Article 6 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

2.23 The requirement to disclose personal financial information in order to secure access to the court has been expressly recognised by the Court of Appeal as having a chilling effect on claimants' willingness to bring judicial review proceedings, precisely because it is so invasive of privacy. In *R(Garner) v Elmbridge Borough Council and another*, the Court of Appeal considered an appeal against the refusal of the Administrative Court to grant a Protective Costs Order.[106] The issue resulted from the claimant's evident reluctance to provide evidence about his means:

> The more intrusive the investigation into the means of those who seek PCOs and the more detail that is required of them, the more likely it is that there will be a chilling effect on

[103] Article 6(1) of the European Convention on Human Rights provides that: "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."
[104] *Raymond v Honey* [1983] 1 AC 1; *R v Lord Chancellor, ex p. Witham* [1998] QB 575.
[105] See for example, *The Queen (on the application of) The Children's Rights Alliance for England v Secretary of State for Justice* [2013] EWCA Civ 34.
[106] [2010] EWCA Civ 1006. See Chapter 4 on costs capping orders.

the willingness of ordinary members of the public (who need the protection that a PCO would afford) to challenge the lawfulness of environmental decisions.[107]

2.24 The phenomenon that the Court was considering in *Garner*, and which it decided would have a chilling effect on the willingness of members of the public to bring judicial review proceedings, was the forced disclosure of a claimant's financial circumstances, even though such information was only going to be disclosed in private to the Legal Services Commission, and could be considered by the court sitting in closed session. Yet, subject to the rules to be promulgated by the Civil Procedure Rules Committee, the features that caused the Court of Appeal to observe a chilling effect will apply, pursuant to section 85, in every judicial review case.

2.25 Section 85(1) CJCA 2015 creates a new barrier to the grant of permission to apply for judicial review. It is by its very nature a barrier to the determination of a claim, and so engages Article 6(1). Disclosure pursuant to both sections 85 and 88(5) may constitute interference with the right of access to the court protected by Article 6(1) of the European Convention on Human Rights and by the common law. The implementation of these measures must address the chilling effect identified by the Court of Appeal in *Garner*, which may deter both claimants for judicial review, and applicants for costs capping applications (which are required only where the judicial review claimant could not otherwise access the court).

D) APPLYING THE NEW DISCLOSURE RULES

2.26 While the disclosure of financial information prior to permission and for the purposes of securing costs protection serves different purposes, there are a number of factors which will be relevant to the making of rules pursuant to Sections 85 – 86 and to the interpretation and application of these provisions in a manner consistent with the right of access to the court and the right to respect for private life.

i) Proportionality and the legitimate aim of disclosure

2.27 Any ambiguity in these broad statutory measures, including in the exercise of any discretion in setting the scope of the Rules and by the court in their application, should be interpreted to tailor disclosure to the purpose served by each of the relevant measures, in so far as that purpose serves a legitimate aim. In respect of Section 85 this must mean that the disclosure duty is limited to such information as might enable the court – at the time it is considering making an order for costs in judicial review proceedings – to identify those against whom a third party costs order might be made.

2.28 The case law on non-party costs orders makes it clear that such orders will generally only be made against those who control litigation and those who stand to benefit substantially from it. "Pure" or philanthropic funders should not be deterred by the chilling effect of having their

[107] The case was an environmental challenge to which Article 9(4) of the Aarhus Convention applied. This provided that the proceedings must not be "prohibitively expensive". On appeal, Sullivan LJ considered whether, in determining what would be "prohibitively expensive" in that case, the court should apply a subjective test (which would be based on the resources available to that particular claimant), or an objective test, which could be applied to all claimants, regardless of their financial circumstances. He concluded that a purely subjective test would have a deterrent effect.

personal details provided to the court.[108] This is particularly important given the crucial role of judicial review in the maintenance of the rule of law.

2.29 Ministers stressed that the new disclosure duty was not, in any way, designed to change the court's approach to third party costs orders. This is repeated in the Consultation Document:

> The 2015 Act neither affects the law on when costs should be awarded against a third party nor creates any requirement for a particular level of funding to have been secured before permission can be granted.[109]

2.30 In so far as these measures can be applied consistently with the common law and the ECHR, they must be limited to such disclosure as might realistically inform the court's assessment of costs. Rules that fail to distinguish between funders who have a direct financial interest in the proceedings, and funders who have no such interest, and between those who exercise control over the litigation and those who do not will be disproportionate, and will go beyond what is required to fulfil the legislative purpose. This approach appears consistent with the purpose of the provisions. As Ministers explained:

> To be clear, our intention is to ensure that when a weak claim is brought, those who control and fund it should not be able to hide from proper cost liability.[110]
>
> As the courts have made clear, [costs] awards against a non-party would be exceptional and require a strong degree of control and funding of, and potential to benefit from, a judicial review...These clauses should not cause anyone to pay costs who would not do so under the current law.[111]

2.31 The Rules should take into account the specific characteristics of judicial review litigation: unlike the private law cases in which the case law on non-party costs orders has been developed, every citizen has an interest in judicial review proceedings, insofar as the proceedings may vindicate the rule of law. If any interest in the outcome, however remote, were capable of attracting a third party costs order, it would have the consequence of deterring challenges to unlawful public action which might serve the greater public interest. As Lord Diplock – considering restrictive rules on standing – explained:

> It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules […] from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.[112]

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[108] See for example, *Hamilton v Al Fayed (No 2)* [2003] QB 1175.
[109] Consultation Document, para. 19. See also HL Deb, 30 July 2014, Col 1608, "these clauses…do not introduce any new principles concerning the costs liability of non-parties. Their purpose is to increase transparency, so as to allow the courts to exercise their existing powers and discretion more effectively" (Lord Faulks QC).
[110] HC Deb, 27 March 2014, Col 453 (Shailesh Vara MP, Minister for State). He further emphasised this connection between the new disclosure provision and the existing power of the courts to make costs orders against third parties: "Our changes will ensure that judicial reviews cannot be brought in a way that circumvents the court's powers to make claimants liable for the defendant's costs if they lose" HC Deb, 27 March 2014, Col 449.
[111] HL Deb, 30 July 2014, Col 1612 (Lord Faulks QC).
[112] [1982] AC 617, [644].

2.32 For example, judicial review proceedings to challenge the closure of a hospital may attract funders with different degrees of interests in the outcome, from a funder who might wish to ensure the continuity of their own treatment or that of a family member, to a concerned member of the local community or a concerned member of the wider public. All could be said to have an interest in the outcome. Yet none should be deterred from seeking to uphold the rule of law. The Rules should limit disclosure to information about those acting to control or direct the litigation, or with a high level of personal interest, properly expressed as a financial interest in the proceedings. Any more intrusive approach would not serve the stated purpose of the CJCA 2015 and could be damaging to the rule of law.

2.33 Unfortunately, the proposed approach in the Consultation Document eschews this approach. It provides little further information for claimants or possible funders of litigation on the kinds of information required and echoes the broad language of the underlying primary legislation. Quite aside from the question whether this kind of ill-defined duty might appropriately attach to a statement of truth, the breadth of this potential requirement will have a significant deterrent, chilling effect on potential judicial review claimants and may be unlawful.

2.34 The Rules should similarly link the disclosure related to costs capping application to the purpose for which it is to be used. In the case of Section 88, that information is provided for the purposes of identifying whether any third party might be funding or likely to fund the litigation. Only information about individuals committed to funding the litigation should be subject to disclosure.

2.35 The Consultation Document suggests that the court "wishes to consider whether the claimant might seek further capital from its members if [it] were to face costs at the end of the proceedings".[113] There is no precedent for the court to take such an approach to third party costs, nor arguably would it be permissible for the court to go behind the corporate veil where members are not controlling the litigation and do not stand to benefit from it. It would not be appropriate for the Rules to propose this approach without clear parliamentary direction. Parliamentary authority to make new Rules for the purposes of disclosing information about funds available or "likely to be available" to a litigant creates an extremely broad discretion, but it does not require such a step.

2.36 Any broader, or more speculative approach could have a deterrent effect inconsistent with the purpose of the costs capping provisions. There are two particular aspects of both Section 85 and 88 which require close consideration.

a) "Likely to be available"

i) Section 85: Pre-application disclosure

2.37 In relation to Section 85(2), while it may be proportionate to require information about existing or committed funders of judicial review claims to be provided to the court, it would in our view not be proportionate to identify an individual as being "likely to" contribute to the funding of a case, or a resource as "likely to be available" unless there is a very cogent basis for believing that such a contribution would be "likely" to be made. In any circumstances where an individual or organisation is not controlling or directing the litigation, it is difficult to envisage circumstances in which funds that have not already been committed to funding litigation (albeit perhaps

[113] Consultation Document, para. 99.

contingently) could be relevant to the court's discretion to make a non-party costs order. As the Minister emphasised during the passage of the Act that this duty should not be overly onerous or speculative:

> An applicant will not be required to provide a forensic breakdown of their financial position, but will be expected to provide sufficient information for the court to know the actual or intended sources of funding for a claim.[114]

2.38 It should not be necessary to require the claimant to speculate about financial resources that may or may not accrue in the future. Not least, if the duty of disclosure is discharged through a statement of truth, any claimant would be well advised to inform the court of any material change of circumstances. Similarly, this duty should not extend to funders who provide resources to a claimant for another purpose, such as a charitable donor who provides funds to a charity claimant for unrestricted use. Only a commitment to support a particular claim should attach to the requirement to disclose. A broader, speculative obligation could provide not only a disproportionate deterrent to litigation but also a deterrent to donations to organisations which might pursue judicial review claims.

ii) Section 88: Disclosure and costs protection

2.39 A similar approach should be adopted in respect of information provided in any application for a costs capping order pursuant to Section 88. In line with current practice in relation to Protective Costs Orders, applicants should be required to give an accurate picture of their assets and liabilities, and those contingencies of which the applicant is aware. As with any other judicial review claimant, an applicant for a costs capping order has a duty of full disclosure, which will require him or her to update the court with any relevant changes to the financial information lodged with the application. To require more speculative information than this to be provided would be unnecessary, unclear and unduly onerous.

2.40 Any other construction would require the provision of information irrelevant to the making of an order, beyond the scope of the purpose of the statute and disproportionate to the legitimate aim which it serves.

b) Corporate bodies, third parties and members

2.41 The requirement to disclose information about the members of corporate bodies is broadly cast. In practice, if this measure is not similarly linked to the statutory purpose for which the disclosure is required, there is a real danger that the measure will be disproportionate and open to challenge. By requiring information about members and their ability to be provided without any clear link to the likelihood that members might be willing to pay for the litigation, or reasonably liable to be subject to a third party costs order, or relevant for purposes of a costs-capping order, this disclosures goes beyond the statutory purpose of the Act and its legitimate aim. In respect of both Section 85 and 88 disclosure; it would be disproportionate to require the disclosure of information about members who are not already committed personally to funding the claim, controlling the litigation (beyond their ordinary duties to the organisation) or directly benefiting from it.

[114] HC Deb, 27 March 2014, Col 447.

2.42 The broad power to require information to be disclosed in these circumstances departs from the ordinary respect accorded to the corporate veil. While the Rules may provide for members' information to be disclosed, this departure provides another reason why disclosure should be limited to information necessary to meet the statutory purpose. Corporate governance structures vary significantly from on organisation to another. A corporate body may be a single shareholder entity, where the only member is itself a company, or a charity or a not for profit entity where the members are the Trustees or the Board of the organisation (i.e. volunteers who have no financial interest in the corporation or the litigation). Equally some membership organisations treat all of their subscribers as "members" of the corporate body for the purpose of its governance. While the information which the Government proposes should be disclosed may relate to Trustees and may be held by Companies House or the Charities Commission, it might equally relate to thousands of individual subscribers.

2.43 A broad application of the requirement to provide members information may have a particularly chilling effect on charities and not for profit organisations who litigate in public interest cases, their trustees and donors. Without certainty about the degree of disclosure required about the organisation's members and how this information may affect the court's consideration of third party costs orders, Boards may find the litigation risk for the organisation, its members and donors untenable.

2.44 The Consultation Document queries whether charities should be treated differently for the purposes of disclosure of members' information.[115] While there are strong reasons for these provisions to be applied with caution to all applications for judicial review, if there is no direct link in the Rules between the information to be provided and the power of the court to make a third party costs order, there are arguably strong policy reasons for charities and not for profit organisations to be treated differently. The effect of introducing an ill-defined risk that personal financial information might be disclosed, or a new potential liability for third party costs, might act as an unwarranted deterrent to those seeking to volunteer their time to charities and not for profit organisations who might litigate. Charities, in addition, are regulated by charities law, which binds the members and trustees of any charity. These obligations create a particular incentive on members of charities to act responsibly and in accordance with the charity's objectives and reduce the likelihood that the members might act unconscionably in their conduct of litigation.

ii) Uncertainty and the chilling effect

2.45 In order for any interference with the right of access to court or the right of privacy to be justified, the relevant measures must be "in accordance with law". The deterrent effect of the financial disclosure provisions is aggravated by lack of clarity on the face of sections 85(2) and 88(5) about precisely what is required of claimants and applicants for costs capping orders in judicial review proceedings. We consider that any rules that are made pursuant to the provisions should provide judicial review claimants with certainty about what is required of them to minimise this chilling factor. If the Rules are so unclear as if to ensure that the disclosure duty effectively operates as a broad discretion on the court to seek information, it may not be sufficiently proscribed as to be 'in accordance with law'. The Consultation Document does not propose that the rules will provide

[115] Consultation Document, para. 56.

any detail on precisely the kind of information that should be provided to the court.[116] If the Rules are uncertain or broadly drawn, they may compound the deterrent effect of these measures.

iii) Processing information and proportionality

2.46 The Consultation Document provides that the material will be held by the court and not published or provided to the other parties in a claim. While the extent of a disclosure's publication will be relevant, it cannot be determinative. As the court in *Gardner* explained:

> The possibility that the judge might, as an exercise of judicial discretion, order that the public should be excluded while such details were considered would not provide the requisite degree of assurance that an individual's private financial affairs would not be exposed to public gaze if he dared to challenge an environmental decision.[117]

2.47 It is yet far from clear how the financial information disclosed will be processed when it is provided to the court. The mechanics of disclosure will be highly relevant to its legality.

[116] Consultation Document, paras. 51 – 52.
[117] [2010] EWCA Civ 1006, [51]

CHAPTER 3: INTERVENERS AND COSTS

A) INTRODUCTION

3.1 Section 87 of the CJCA 2015 creates new statutory rules for interveners' costs in the High Court and the Court of Appeal. There are two key features. First, broadly replicating existing practice, the Act makes clear that interveners will not generally be able to recover their own costs except in exceptional circumstances.[118] Secondly, it creates a new duty on courts to order costs against interveners in any court lower than the Supreme Court if any of four conditions are satisfied. This is a significant shift away from existing practice, where the court retains a discretion to award costs, but orders against third parties granted permission to intervene by the court are rare. The court will retain the discretion to waive the duty to order costs in "exceptional circumstances". In determining whether there are exceptional circumstances, the court must have regard to such criteria as may be specified in rules of court. The interpretation and application of the new statutory costs regime is the subject of this section.

B) BACKGROUND

i) Interventions and the public interest

3.2 The ability of third parties to the litigation to place material before the court without being joined in the dispute is well recognised. In proceedings for judicial review, "any person" may apply to the court for permission to either file evidence or make representations at a hearing.[119]

3.3 It is exceptionally rare that individuals who have a direct interest in a case will be granted permission to participate as an intervener. In these cases, it is more likely that the person or organisation will be joined as an interested party.[120] Instead, interveners generally seek permission to place material before the court in the public interest, thereby assisting the court in determining a legal issue with significance beyond the narrow dispute between the parties. These include public authorities and Government departments, regulatory bodies and public agencies, and charities and non-governmental bodies with particular expertise and understanding of the issue before the court. In *E (A Child) v Chief Constable of the Royal Ulster Constabulary*, Lord Hoffmann explained that interveners are granted permission "in the expectation that their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain."[121]

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[118] Section 87(3)-(4).

[119] CPR 54.17(1). See also Practice Direction 54A. In the High Court, this application is by way of a letter to the court, identifying the applicant and their reasons for seeking to intervene (See Practice Direction 54A, 13.3). In the Court of Appeal, the application is pursued by letter or, more frequently in recent practice, in an application notice (CPR 52 makes no clear provision for third party intervention. Practice on the initiation of interventions remains unclear. In practice, interventions are sought by way of a letter, following the practice in Part 54 applications, or by way of a formal application under Part 23). The Supreme Court rules make express provision for the consideration of intervention applications, including by Government bodies and non-governmental organisations acting in the public interest, and other bodies with an interest in the proceedings (Rules 15 and 26, Rules of the Supreme Court 2009).

[120] CPR 19. Cases where individuals with a direct, personal interest in the proceedings have been permitted to act as an intervener have been very rare. In *Inntrepreneur Pub Company and Others v Crehan* [2006] UKHL 38, Visa was permitted to intervene in a dispute about a conflict between decisions of the European Commission and the Court of Appeal. In *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, the court permitted representations to be made by intervention by the 12 year old son of a person due to be removed from the UK.

[121] [2008] UKHL 66, [2009] 1 AC 536, 1. In 1996, JUSTICE and the Public Law Project explained: "[I]n the case of a public interest intervener those interests will not be like those of a directly affected party who ought to be brought into

3.4 Whether an intervention is permitted is entirely within the discretion of the judge. Interveners may apply for permission to appear at the hearing and make oral submissions, or might limit their application to written submissions alone. The judge can set conditions on the scope of the intervention, and may also consider any objections to the application raised by the parties or any submissions in support. Limitations can include restricting the length of submissions from interveners or directing that permission is given only for written material to be produced. This material can also be limited by the terms of the permission granted, and, for example, an intervener might be permitted to produce evidence but not empowered to make legal submissions on its relevance.

3.5 Interventions have proved valuable to senior judges: "[It is] the experience of the court that, not uncommonly, it benefits from hearing from third parties".[122] Speaking extra-judicially, Baroness Hale has said:

> Once a matter is in court, the more important the subject, the more difficult the issues, the more help we need to try and get the right answer […] [F]rom our - or at least my - point of view, provided they stick to the rules, interventions are enormously helpful.[123]

ii) Costs and interventions

3.6 Courts have always had the power to make an order as to costs against any intervener. Historically, the general approach of courts in England and Wales has been to treat the costs of an intervention as costs in the case (in practice, the losing party pays their own and the other party's costs of preparation and representation). The court did however retain the discretion to order costs, particularly where an intervener effectively steps into the shoes of one or other of the parties. For example, in *R (Barker) v London Borough of Bromley* a costs order was made against the Secretary of State. His intervention joined an appeal which sought to argue against a defect in regulations which bound the respondent local authority, but for which the Minister had been responsible. The Secretary of State had run his intervention as if he had been joined as a party to the case and it was proper that the costs of the appeal should be met jointly with the local authority.[124] This practice was reflected in the Rules of the Supreme Court in 2009.[125]

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the proceedings under one or other [procedural rules]. Rather the interests in question are likely to consist of a defined, and no doubt emphatic, policy stance as regards the subject matter of the issue being considered. We would once again emphasise that it is of the greatest importance to differentiate an interest of this kind from the personal interest of a party whose pocket or liberty is affected by a decision taken by a public body" (see JUSTICE and the Public Law Project, *A Matter of Public Interest,* 1996, p. 22).

[122] Response of the senior judiciary to the Ministry of Justice's consultation paper, *Judicial Review: Proposals for Further Reform*, November 2013, para. 37.

[123] Baroness Hale, *Who Guards the Guardians?* Public Law Project Conference: Judicial Review Trends and Forecasts (October 2013): http://www.publiclawproject.org.uk/resources/144/who-guards-the-guardians. See also Sir Henry Brooke, *Interventions in the Court of Appeal,* [2007] PL 402. Judges have not been slow to criticise interveners whose contribution to a case has been of limited value. See for example *R (Burke) v General Medical Council* [2005] EWCA Civ 1003, [82]. In that case, the issues in the claim had expanded before the High Court, in a broad judgment by the then Mr Justice Munby, and those broader issues were addressed by a wide range of interveners (there were 10 interventions in the case). The Court of Appeal decided that the appeal could be determined on a limited basis, and the court indicated its regret that the case had expanded inappropriately.

[124] [2006] UKHL 52, [32] – [33] (Lord Hope). See also, *R (E) v The Governing Body of JFS and others* [2009] EWCA Civ 681, [4]. In that case, the United Synagogue was granted permission to intervene, but in practice played the primary role in opposing the claim. The Court of Appeal determined accordingly that it should meet the costs of the case.

[125] Rule 46(3), Rules of the Supreme Court 2009.

The courts' treatment of interveners' costs is informed by the nature of an interveners' role, their contribution to the public interest and their conduct during the litigation. The common law approach to costs reflects the value of reasonable intervention to the court by requiring that interveners must be in a position to support the costs of their own contribution (in the presumption against costs recovery). The presumption that interveners will not generally be responsible for others' costs has ensured that public bodies and civil society organisations with limited funds have been able to offer their expertise in cases in which they have no direct financial or personal interest without the deterrent risk of significant, undefined litigation costs. That the court retained discretion to act where an intervener imposes an unreasonable burden on the parties to the case – or acts as if they were a party – created a further incentive towards reasonable, constrained behaviour.

C) THE NEW COSTS DUTY

i) The scope and purpose of the changes

3.7 Section 87(5) provides the operative section of the new, limited, duty to award costs against an intervener. It provides that where an application is made by a party, and certain criteria are satisfied, the court "must 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". The CJCA 2015 specifies four conditions which may trigger the new costs regime:

a) The intervener has acted, in substance, **as the sole or principal applicant, defendant, appellant or respondent**;

b) The intervener's evidence and representations, **taken as a whole, have not been of significant assistance to the court;**

c) 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

d) The intervener has **behaved unreasonably** (emphasis added).

3.8 These conditions were settled at a late stage in the Act's passage, after the House of Lords refused to support a more wide-ranging costs duty.[126] None of the conditions are further specified. The relevant Minister emphasised that the interpretation and application of Section 87(5) would remain within the discretion of the court.

3.9 Any ambiguity in the broad statutory language should be determined in accordance with the purpose of these provisions. First, the Minister emphasised that the purpose of these provisions was not to deter interveners from offering their expertise and assistance to the court in appropriate cases:

[126] HL Deb, 27 Oct 2014, Col 1000.

> Nobody doubts that interveners can and do make a valuable contribution in a number of cases. […] We encourage focused interventions, but we do not wish to deprive judges of the interventions that are appropriate, nor do we wish to deprive them of the discretion which they have.[127]

3.10 Second, the purposes for which the new costs regime was introduced were limited, and targeted at abuse of process by interveners or unreasonable behaviour not properly able to assist the court or further the public interest. In the House of Commons, the then Lord Chancellor explained the Government's intention to:

> [S]top third parties using people with no means as human shields…by acting as interveners behind and alongside them, while being immune to financial risk if they lose.[128]

3.11 This explanation sits alongside an expressed intention that the costs risk faced by interveners should be "proportionate":

> The Government wants to ensure that those who choose to become involved in judicial review proceedings face a proportionate exposure to financial liability.[129]

3.12 Lord Faulks QC, the Minister in the House of Lords, clarified:

> [W]ith this clause we hope to deter inappropriate interventions and also to make interveners think about the scale of their intervention so as to reduce the costs for all parties, whether applicants or respondents, and to ensure that those interventions are relevant and genuinely assist the court.[130]

3.13 Commending the final text of Section 87 to Parliament, he reiterated the limited impact of these measures:

> [Interveners] should pause long and hard to think about whether they can truly add anything to a case and to make sure what they add is proportionate and sensible and provides assistance to the court. They should not act simply as a cheer-leader because it is an issue about which they feel strongly, and repeat all of the arguments that have already been made by one party; they should not expand the scope of the case beyond that which is before the court; and they should not, as a matter of routine, simply join in the case because it is the sort of thing that they feel strongly about.
>
> Judges are best placed to decide whether they have been given assistance, and we do not seek to usurp that discretion. We think that interventions can be useful; they can also be overlengthy and expensive. This is a moderate compromise, and a reflection of the anxiety which has been expressed by a number of noble Lords, and indeed, some

[127] HL Deb, 9 Dec 2014, Col 1781 (Lord Faulks QC).
[128] HC Deb, 1 Dec 2014, Col 73 (Chris Grayling MP, Lord Chancellor and Secretary of State for Justice).
[129] Government Response to the Joint Committee on Human Rights Report – Judicial Review, July 2014, Cm 8896, 71.
[130] HL Deb, 27 Oct 2014, Col 998.

Members of the other House, and I ask that the House accepts the amendments of the Government.[131]

3.14 This section considers the circumstances in which the duty may apply, how it might be interpreted and when exceptional circumstances might justify setting it aside.

ii) Is the duty relevant to all interventions?

3.15 In common with the rest of Part 4 of the Act, the impact of Section 87 is limited to interventions in judicial review proceedings.[132] While, historically, many interventions have focused on judicial review claims, a significant number of public interest interventions have focused on claims outside the Part 54 procedure. An intervention in any case based on an ordinary common law cause of action, for example, in habeas corpus,[133] or negligence,[134] would continue to be subject to the ordinary common law rules.

3.16 There are a number of circumstances in which Section 87 may not apply, or its effects may be limited:

- **The Supreme Court:** Section 87(3)-(5) applies to applications in the High Court and the Court of Appeal. Interventions before the Supreme Court remain subject to the Rules of the Supreme Court. Rule 46(3) provides that a costs order "will not normally be made either in favour of or against interveners but such orders may be made if the Court considers it just to do so (in particular if an intervener has in substance acted as the sole or principal appellant or respondent)".

- **Invitations to intervene:** Section 87 will only apply in cases where an individual or a body has made an application for, and been granted, permission to intervene.[135] That is, after a formal application to proceed with an intervention. By way of contrast, Ministers confirmed during the passage of the Bill that in cases in which individuals were invited to intervene by the court, Section 87 will not apply:

  > Clause 67 [now Section 87] quite purposefully would not affect the court's discretion to invite an intervener to participate in a judicial review, which would take the intervener outside the ambit of the clause.[136]

  In correspondence with the court, third parties may wish to clearly explain whether they are seeking permission to intervene, or indicating their expertise and interest, subject to an invitation from the court. There appears to be no express limit on the court's capacity to invite a third party to participate, nor is there any indication in the debates on the Act that the court's power of invitation might be restricted to particular types of intervention or to particular kinds of intervener.

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[131] HL Deb, 9 Dec 2014, Col 1759.
[132] Section 87(1).
[133] See, for example, *Secretary of State for Foreign and Commonwealth Affairs and another (Appellants) v Yunus Rahmatullah (Respondent)* [2012] UKSC 48.
[134] See, for example, *Smith v Ministry of Defence* [2012] EWCA 1365.
[135] Section 87(1)(a).
[136] Lord Faulks QC, HL Deb, 9 Dec 2014, Col 1781.

- **Other forms of third-party participation:** Witness evidence sought from civil society organisations or experts by individual parties, if admissible, might be used in order to place expertise or information relevant to a claim before the court without costs implications for the third party. The costs risk associated with preparing this material and responding to it will be borne by the parties and subject to the ordinary rules, with costs following the event.

  However, this kind of contribution by a third party may not necessarily assist the court in the same way as an intervention. Importantly, it is subject to the control of a party to the claim. Any contribution will not be presented as the independent and objective contribution of a third party organisation, but will instead form part of the case put by one party or the other. Any public interest points which may not be in the best interests of that party may not be pursued, for example.

- **Undertakings:** Costs orders will only be made after an application for costs by one of the parties to the case. It will remain open to would-be interveners to seek undertakings from the parties that they will not pursue costs arising as a result of any intervention. In the case that a party decides to make an application inconsistent with its undertaking, it would be open to the court to exercise its "exceptional circumstances" discretion and decline to make any order on costs. As the Minister, Lord Faulks QC, explained:

  > In suitable matters of high policy there may be an agreement between the parties and a potential intervener that costs will not be applied for. Even if the parties make an application, the court can decide not to make an award against the interveners.[137]

  In practice, the costs risk may be significantly limited by securing undertakings from one or both of the parties.[138] The likelihood of securing an undertaking, particularly from public authority and central Government respondents may be influenced by uncertainty surrounding the application of the new statutory duty. On the other hand, the public interest contribution of an intervener and the value of the material they may place before the court may make an undertaking an attractive option for many parties. The conduct of both the intervener *and* the parties in the consideration of any request for an undertaking may be relevant to the court's consideration of whether an order for costs ought to be made.

- **Prospective costs orders:** Historically, it has been routinely accepted that interveners may seek prospective costs protection in respect of an intervention in judicial review claims. This is expressly recognised in Practice Direction 54A, which instructs any intervener to indicate in its application whether prospective costs protection is sought.[139] While Sections 88-89 of the CJCA 2015 places the regime for protective costs orders, or costs capping, on a statutory footing for parties to a judicial review, it does not deal expressly with the question of prospective costs orders and interventions.[140]

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[137] HL Deb 30 July 2014, Col 1628.
[138] JUSTICE, *To Assist the Court*, para. 73.
[139] CPR 54A (17), 13.4.
[140] Section 88(2) and Chapter 4, below. Similarly, to make an order, the court must be satisfied that without one, the applicant for judicial review would withdraw his or her claim. The purpose of these statutory provisions seems far

Section 87 makes no statutory provision for prospective costs orders to be made, nor does it expressly remove the court's existing discretionary power to make prospective provision. Instead, it creates statutory criteria designed to trigger a duty to award costs in some defined cases, subject to an overriding discretion for the court to apply a waiver in exceptional circumstances. A literal reading of the statutory framework might suggest that the court must always be able to consider an application for costs associated with an intervention, along with the application of the statutory duty to order costs, and that a prospective order might be inconsistent with that statutory intention. However, the framework continues to hinge on the judge's "exceptional circumstances" discretion to ensure that the purposes of the legislation are met, securing justice in individual cases and ensuring that reasonable interventions are not subject to a disproportionate deterrent. If judges are able to extend an invitation to individual interveners to make submissions on a case outside the statutory costs regime, their substantial residual discretion might reasonably have been intended to preserve the existing power to make a prospective order in a relevant case.

It arguably remains open to the court to make a prospective costs order in favour of a would-be intervener. If so, the degree of importance of any intervention to the public interest, the scope of the intervention and its implications for the parties (including in respect of any estimated additional costs), and the financial capacity of the intervener are likely to be crucial to the court's consideration.

iii) Interpreting the Section 87 conditions

3.17 Very little statutory direction has been provided to the court on the interpretation of the four conditions in Section 87(6). The conditions under which costs must be awarded are defined broadly, with each subject to a considerable degree of judicial discretion. The nature of the "exceptional circumstances" in which a costs order may be "inappropriate" are left entirely to the court. Taking into consideration the stated purpose of the reform, there are a number of principles which may provide a helpful starting point for interpretation of the conditions:

a) They are designed to target abuse, inappropriate or unnecessary interventions and unreasonable behaviour by interveners;[141]

b) They should not be applied in a manner which deters appropriate interventions which may assist the court;[142]

c) They should not unduly restrict the discretion of the court to either (i) determine whether an intervention is helpful or appropriate; or (ii) to determine when an order for costs is justified and in the public interest;[143] and

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removed from the ability of the court to deal with interveners' costs beyond the application of the duty in Section 87. The statutory language in Section 89 should not be read as extinguishing the discretion of the court to make a prospective costs order in favour of an intervener when such an order would serve the public interest (in ensuring that the court has access to the material which may assist it in deciding the claim) in a manner compatible with the overriding objective.

[141] HC Deb, 1 Dec 2014, Col 73 (Chris Grayling MP, Lord Chancellor and Secretary of State for Justice).

[142] HL Deb, 27 Oct 2014, Col 998. See Lord Faulks QC, HL Deb, 9 Dec 2014, Col 1781.

[143] HL Deb, 9 Dec 2014, Col 1759.

d) The consideration of any costs order should take into account the principle of proportionality.[144]

Importantly, the Government brought forward these changes in response to amendments in the House of Lords, designed to maintain the discretion of the court and to broadly reflect the Rules of the Supreme Court. The introduction of the duty triggered by the four conditions was described as a "moderate compromise".[145] A stark shift from current practice on costs - and from the accepted practice of the Supreme Court - would be out of step with the intention and purpose of these measures.

a) Section 87(6)(a): Acting as a party

3.18 Section 87(6)(a) provides that an application for costs may be considered where an intervener acts "in substance, as the sole or principal applicant, defendant, appellant or respondent". This is perhaps the most straightforward of the criteria. It replicates existing common law practice and the continuing provision in the Rules of the Supreme Court. Where an individual intervener steps into the shoes of one of the parties and effectively runs the litigation, it is appropriate for the court to consider making a costs order.

3.19 This provision answers the concern of the Government that interveners might be able to manipulate claimants, using them as "human shields" to avoid costs liabilities in a case essentially controlled by the intervener.[146] Existing case law provides guidance to the effect that where an intervener essentially acts *as* the claimant in a case, they should expect to be liable for a proportion of the costs incurred. This includes where:

- "[They] took a principal role";[147]
- "[They] joined forces [with one party]";[148]
- "[They choose] to take on the burden of contesting a part of the appeal which the principal party does not actively pursue";[149]
- "[It is their] responsibility that the litigation was mounted in the first place";[150]

3.20 There is nothing in the statutory language to encourage a wider interpretation of this provision. On the contrary, the requirement that the intervener act as a "sole or principal" party emphasises that the intervener must play a controlling part in the litigation for the costs duty to apply.

b) Section 87(6)(b): Assisting the court

3.21 Section 87(6)(b) provides that the "intervener's evidence and representations, taken as a whole, have not been of significant assistance to the court". This is open to a range of interpretations.

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[144] Government Response to the Joint Committee on Human Rights Report – Judicial Review, July 2014, Cm 8896, 71.
[145] HL Deb, 9 Dec 2014, Col 1759.
[146] HC Deb, 1 Dec 2014, Col 73 (Chris Grayling MP, Lord Chancellor and Secretary of State for Justice).
[147] *R (E) v The Governing Body of JFS and others* [2009], [4].
[148] *R (Barker) v London Borough of Bromley* [2006].
[149] *British Telecommunications plc and others v Office of Communications* [2014], [44]-[46].
[150] *R v Minister of Agriculture Fisheries and Food and another, ex parte Monsato plc and another*, CO/380/97 (Unreported) 30 June 1997, p 5 (Popplewell J).

On the one hand, a literal meaning could suggest that all of the material placed before the court must assist it significantly for the intervener to avoid a costs order. This interpretation would not only be strained, but also entirely inconsistent with the stated purpose of the new costs regime. It would operate to deter all but the most determined of interveners from proceeding with any submission.

3.22 An interpretation more consistent with the stated purpose of the new costs regime is that this condition will only be satisfied where the bulk of the material placed before the court (i.e. taken as a whole) has created a disproportionate burden while failing to address the public interest issues identified in their application for permission. This reflects the example given by the Minister: "perhaps the intervener has argued at length, placing the parties at considerable expense, without advancing the court's understanding of the issues."[151]

c) Section 87(6)(c): Relevance

3.23 Section 87(6)(c) provides for circumstances where 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". This provision has created significant trepidation amongst those familiar with public law litigation. Submissions made in good faith during the progress of a trial and on issues clearly determined by the parties as relevant to the dispute between them may, during the course of a hearing and consideration by a judge, be deemed irrelevant after the event. The court might hear arguments on a number of issues which the parties agree are relevant, but which the judge might ultimately decide are superfluous to his decision on the facts of the case. A similar development of the arguments in the case might affect the ability of an intervener to assist the court (engaging condition (b)). Even in those cases where submissions may have informed a judge's thinking, those submissions are not always mentioned expressly.

3.24 An interpretation of these clauses with broad effect – applying hindsight – would be unconscionable in circumstances where an intervener has not strayed beyond the bounds of its permission or otherwise made submissions entirely irrelevant to the case. Importantly, it would also be inconsistent with the purpose of the provision, as it would act as a significant deterrent to good faith and reasonable interveners, as they would be incapable of predicting with confidence how a case might develop during the course of a hearing, or after a judge has retired to consider his or her judgment.

3.25 Both of these provisions – conditions (b) and (c) – must be applied in a way which reflects the purpose and intention of the changes in the Act. This must include consideration of the need to avoid creating a disproportionate deterrent for reasonable interveners. Taking the Minister's example as a starting point may help:

> The intervener will meet a party's reasonable costs of dealing with the intervention where a significant part of their arguments are not germane to the court's consideration of the case. They may, for example, spend much of their time in court pressing the importance

[151] HL Deb, 9 Dec 2014, Col 1780.

> of a cause in which they are expert, or indeed their own importance, with only a small amount of time spent focusing on the issues really at hand.[152]

3.26 Context will be key and the application of this provision can be informed by existing good practice by reasonable interveners. Interventions should be relevant to the issues to be decided by the court, should not repeat the submissions of the parties and should add value to the court's consideration of the case. Clear guidance can be found in the consideration of Lord Hoffmann in *E (A Child) v Chief Constable of the Royal Ulster Constabulary*:

> An intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything. It is not the role of an intervener to be an additional counsel for one of the parties. This is particularly important in the case of an oral intervention.[153]

d) Section 87(6)(d): Unreasonableness

3.27 There is no guidance given on this additional catch-all provision. All of the Government's concerns which the reform is designed to address are covered by the other conditions in Section 87(6)(a)–(c). One intention may be to allow the court to control costs in circumstances where interveners' submissions are ultimately disproportionate to the scope of the submissions they were granted permission to make.

3.28 Generally, most interveners are cautious to limit the material which they put before the court to that which might help inform its consideration, acting in accordance with conditions imposed by the court, including as to the length of written or oral submissions. In some circumstances, this material might be considerable, but proportionate. For example, an intervener may be granted permission to introduce comparative and international material to inform the court's judgment. This material may be lengthy but also relevant, balanced and proportionate. However, where an intervener has a limited but relevant submission, but introduces irrelevant or unnecessary authorities or speaks for significantly longer than their time allocation on an issue which forms only part of the case, and does so to the detriment of the parties, this behaviour might be considered unreasonable. While such conduct could be resolved with active case management by the court, there might also be circumstances in which it would be proper to create an incentive for interveners to remain reasonably within the bounds of their permission in their contribution to the case.

3.29 However, the costs consequences of such conduct by an intervener must be proportionate and consistent with the purposes of the new statutory framework. There is a real difference between a requirement to account for the production of 400 pages of largely repetitive or unhelpful material and a punishment in costs for a relevant and helpful submission running to a page over a guideline page count. Applied arbitrarily, this kind of bar could encourage disproportionate applications for costs and could operate as a significant deterrent to appropriate and helpful interventions.

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[152] HL Deb, 9 Dec 2014, Col 1781.
[153] [2008] UKHL 66, paras. [1] – [3] (Lord Hoffmann).

iv) Exceptional circumstances

3.30 Section 87(7) makes clear that the court will not be required to make any order as to costs "if it considers that there are exceptional circumstances which make it inappropriate to do so". If the conditions identified in Section 87(6) are applied in a manner consistent with their purpose, the court may have little recourse to the residual discretion in Section 87(7). However, if the conditions are applied more broadly so as to create a more significant range of circumstances in which costs might be considered, this discretion may be crucial to ensuring that interveners are not entirely deterred from proceeding with interventions below the Supreme Court.

3.31 Importantly, this clause was included in earlier proposals for a new, broader, statutory costs duty, which would have created a default duty to award costs against any intervener, in any case, except in "exceptional circumstances". Even then, the Government argued that this residual discretion was intended to give power to the court to make orders only in those circumstances where they considered an order justified. For example, the Government response to criticism by the Joint Committee on Human Rights explains the Government's intention that: "It remains a matter for the court in an individual case to decide whether to make or not an order if it is in the interests of justice to do so."[154] This provision is intended to ensure that the courts exercise their discretion on costs to protect the interests of justice and the purpose of the new statutory scheme. The passage of the Act illustrates that this discretion was not intended to be narrowly construed. A costs order would arguably only be appropriate if it would present a proportionate deterrent to unreasonable interventions.

3.32 Any "exceptional circumstances" criteria specified in rules of court to accompany section 87 must be informed by the broad discretion which Parliament intended the courts to exercise under this provision.

v) Permission and costs

3.33 Identification of the broad submissions which an intervener intends to make during an application for permission is already standard practice. Attention to the grounds for intervention may be more important following the commencement of Part 4 of the CJCA 2015. The permission stage is an opportunity for interveners to explain to the court their intentions and expertise, and to illustrate why the evidence or submissions they wish to place before the court will be (a) of significant assistance to the court, and (b) relevant to the issues to be decided in the case. If an intervener is granted permission to intervene on this basis and they stick to the bounds of their permission, it is difficult to see that a party should be able to succeed on any argument that it would be appropriate for a costs order to be made.

3.34 In the absence of any express statement to the contrary, it cannot have been the intention of Parliament to punish a public interest intervener, granted permission by a judge to prepare submissions on defined issues, who then expends their own resources to produce material helpful to the court and consistent with the scope of the permission granted. It is difficult to imagine of circumstances more likely to deter a reasonable public interest intervener with limited means and no self-interest.

[154] See Government Response to the Joint Committee on Human Rights Report, July 2014, Cm 8896, para. 71.

3.35 Any reasonable intervener will proactively manage the scope of their application for permission and may wish to define, as clearly as is possible, the issues on which they wish to intervene, the relevance of their intervention and its potential to assist the court in its consideration of the case.[155]

D) CALCULATING COSTS RISK

3.36 During the passage of the Act, very little attention was paid to the calculation or attribution of costs under Section 87. The assessment and division of costs remains, beyond the limited instruction in Section 87, in the discretion of the judge. There are some clear indicators in the statutory language which may help inform the assessment of costs risk:

- **Whose costs?** Section 87(5) makes clear that if the relevant conditions are satisfied, any party may benefit from a costs order.

  This means that both the losing and winning sides might attempt to recover costs from an intervener. In practice, some parties might be bound by an earlier undertaking on costs (see above). While there is no express provision made in the statutory language, there is no clear bar on the court treating the parties differently for the purposes of determining whether there are exceptional circumstances which mean that a costs order would be inappropriate. For example, if a short intervention has added value to the court's consideration of a claim and a losing party has expended considerable costs attempting to rebut it, would it be appropriate for those costs to be recoverable?

- **What costs?** Section 87(5) provides that the court must 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". This means:

  a) The onus will be on the applicant to specify the costs sought in any application made;

  b) However, the discretion to determine whether those costs have been properly incurred as a result of the intervener's involvement will remain with the court.

This gives rise to a number of additional questions:

a) Are all the costs of an intervention recoverable if the Section 87 conditions are satisfied?

[155] There will be circumstances in which an intervener may have to be responsive to changes in the scope of the parties' cases as pleaded. If these changes are significant and relevant to the scope of an intervener's permission, it may be prudent of that intervener to outline how the changes to the case have affected the shape of their intervention, in correspondence with the court and the parties, in order to clarify that their permission is extant and that their contribution remains both in the public interest and relevant to the issues before the court.

Section 87(5) attaches to costs which the court considers have been incurred by a party as a result of an intervener's involvement in that stage of the proceedings. On a literal reading, this might suggest that all costs commensurate with the intervener's involvement might be recoverable. However, Section 87(5) is only triggered in circumstances where a condition specified in Section 87(6) is satisfied. It is arguable that the only costs properly recoverable are those incurred as a result of the behaviour to which the duty to award costs attaches.

This approach would be consistent with the intention of Ministers that these measures do not act as a deterrent to reasonable interveners. The alternative would lead to the perverse result that an intervener who makes a detailed contribution which is helpful, except in so far as it falls foul of the conditions, could be treated more harshly than an intervener who makes a short but completely irrelevant submission.

b) Must those costs have been reasonably incurred?

While Section 87(5) defines the circumstances in which an order for costs may be made and the kind of costs which may be recovered, the assessment of those costs will be subject to the application of the ordinary civil procedure rules. Rule 44 CPR expressly excludes the recovery of costs which are unreasonably incurred or which are unreasonable in amount.

This process means that the court may have to conduct a difficult assessment of how reasonable the applicant's response to an intervener's submission has been. In cases where the statutory duty to award costs is triggered by an assessment that an intervener's contribution has been irrelevant or unhelpful, this may be an important proportionality assessment in practice both for the costs judge and for counsel responding to an intervention with a view to making an application for costs in due course.

3.37 The question of how the costs of an intervention are to be fairly attributed remains a real problem which the courts will have to face in the application of these provisions. In circumstances where an intervention is a small part of a much larger case, there may be some difficulty in fairly attributing costs in the trial to the intervention. If costs are attributed to the time taken to read new material or authorities introduced by the intervener, this might be straightforward. However, how should costs be attributed in respect of meeting arguments made by an intervener where its submissions substantially overlap with one of the parties? If the first condition is satisfied – an intervener has stepped into the shoes of a party – this may need careful consideration in order to avoid double costs recovery. In past practice, the courts have taken steps to divide the contribution of the costs incurred between the intervener and the losing party in circumstances where that was appropriate because the intervener had taken over, or shared the burden, of running the case.[156]

3.38 Unfortunately, as and until the scope of the new duty is clarified, the uncertainty of the costs risk and how it might be calculated by the court will continue to act as a significant deterrent to

[156] *R (E) v The Governing Body of JFS and others* [2009] EWCA Civ 626, [4].

intervention by bodies with limited resources, including public agencies and not for profit organisations.

E) INTERVENERS AND COSTS RECOVERY

3.39 Section 87(3)-(4) provides that an intervener is liable for their own costs except in "exceptional circumstances". This broadly reflects earlier common law practice that "two sets of respondents' costs [i.e. the respondent and an intervener] are not awarded against an unsuccessful claimant for judicial review" but "costs may be awarded if justified in the special circumstances of the particular case".[157] New rules of court may set out matters for the court to consider in applying this test.

3.40 In *R (Smeaton) v Secretary of State for Health*, an intervener received their costs as they were in effect "the real defendant"[158] and they had "no practical option but to seek to intervene".[159] In *R (Secretary of State for the Home Department) v Mental Health Review Tribunal*, the intervener was granted their costs since "[he] was not merely an interested party, he was someone whose personal liberty was at issue in the case".[160]

3.41 This practice clearly mirrors the common law presumption that costs would not generally lie against interveners, except those who had, in effect, stepped into the shoes of the principal party to the litigation. If the interpretation and application of the Section 87 costs duty remains focused on circumstances where an intervener acts as a party, or otherwise unreasonably, it is arguable that eligibility to recover costs should remain similarly circumscribed.

3.42 If the costs risk for interveners is significantly expanded under the new statutory duty, the court's use of its discretion when interpreting "exceptional circumstances" costs recovery might also be revisited. In circumstances where an intervener bears a significant risk in order to put helpful material before the court not produced by the parties, and perhaps resisted by them, there may be a public interest argument in favour of a costs order. The Government's intention to ensure proportionality and fairness in the apportionment of costs connected with interventions may be relevant (as above). During consultation on reform, the senior judiciary suggested that an intervener might only be liable for associated costs when there was "a corresponding possibility of their [the intervener] seeking costs".[161] Interveners who proceed under the new costs regime in order to assist the court to reach a fair and sustainable conclusion which serves the public interest well, if expected to face an uncertain and potentially ill-defined costs risk, might arguably be better placed to argue for costs recovery.

F) INTERVENERS AND THE PUBLIC INTEREST

3.43 The impact of these measures may affect not only the number, but also the nature of interventions considered by the High Court and the Court of Appeal. Interventions are currently pursued by a variety of organisations for which different considerations might apply – from

[157] *R (on the application of Smeaton) v Secretary of State for Health (Costs)* [2002] EWHC 886, [32].
[158] *R (on the application of Smeaton) v Secretary of State for Health (Costs)* [2002] EWHC 886, [38].
[159] See para. 40.
[160] *R (on the application of Secretary of State for the Home Department) v Mental Health Review Tribunal* [2002] EWCA 3.
[161] Response of the senior judiciary to the Ministry of Justice's consultation paper *Judicial Review: Proposals for Further Reform* (November 2013) para. 37.

large corporate organisations representing an entire market or group of businesses, to Government departments; from statutory bodies to charities representing the interests of marginalised groups. Smaller organisations with more limited funds may be able to secure pro-bono representation to meet the bulk of their own costs, but they are significantly more likely to be deterred by the new statutory costs risk. Larger organisations and institutions with more resources may be willing to pay for their own representation and are more likely to proceed despite a costs risk. Equally, however, those organisations might be more interested in exploring the possibility of costs recovery.

3.44 As the courts grapple with the new statutory framework, judges may wish to consider how they might ensure that interventions are not precluded for all but the most secure of organisations and institutions. The substance of the submissions which an organisation wishes to make, and their relevance to the case and to the public interest, will be crucial to the question and scope of permission. However, in light of its purpose, the nature and resources of the would-be intervener must also be relevant to the development of the new statutory costs regime. To ignore the significantly higher deterrent effect of a potential costs order on the voluntary and not for profit sector would substantially limit the ability of the court to hear reasonable, helpful interventions, a result inconsistent with the intention of Parliament. The expertise and relative resources of an individual intervener (or a group of interveners) should be relevant to the court's consideration of its discretion to invite a body to make submissions at the invitation of the court (which lies outside the application of the statutory duty), to consider making a prospective costs order and in its consideration of the "exceptional circumstances" of any case.

CHAPTER 4: Costs capping orders

A) INTRODUCTION

4.1 Sections 88-90 are concerned with costs capping orders in judicial review cases. 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". During the passage of the CJCA 2015, Ministers emphasised that the primary purpose of these reforms was to place the existing costs protection offered by the common law PCOs on a statutory footing:

> [The provisions] would build on case law, particularly the Corner House case […] to establish a codified costs capping regime for judicial review proceedings, to govern what is ordinarily or alternatively referred to as a protective costs order. These provisions would put protective costs orders on a statutory footing.[162]

PCOs were developed in a series of cases culminating in the landmark *Corner House* guidelines.[163] PCOs are rare.[164] However, they have represented a significant common law safeguard for access to justice in those important cases, the hearing of which is in the public interest, and which, without costs protection, would not proceed.

B) BACKGROUND

4.2 The making of a costs capping order or a PCO is a departure from the court's ordinary discretion to consider costs, as well as from the general rule that costs will ordinarily follow the event.[165] However, as the Court of Appeal emphasised in *Corner House*, "access to justice is sometimes unjustly impeded if there is slavish adherence to the normal private law costs regime".[166] PCOs facilitate access to justice in public interest cases which could not, in practice, be brought without costs protection for the claimant. The development of the PCO sees the application of the court's discretion, consistent both with the overriding objective, and with the common law protection of the fundamental right of access to the courts consistent with the rule of law.

4.3 *Corner House* was not the first case in which a PCO was considered,[167] nor the first in which a PCO was actually made.[168] However, the guidance given by the Court in that case remains the legal foundation for common law costs protection, on which the new statutory framework for

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[162] Hansard, HL 30 July 2014, Col 1631.
[163] *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192.
[164] Research carried out by Bondy and Sunkin concluded that of 502 substantive judicial review hearings over a 20 month period between July 2010 and February 2012, only 7 cases were identified which had been brought with the benefit of a PCO. Of these, 4 were environmental challenges, to which different considerations apply. See V. Bondy and M. Sunkin, *How Many JRs are Too Many? An evidence based response to 'Judicial Review: Proposals for Further Reform'* UK Const. L. Blog (October 2013), http://ukconstitutionallaw.org/2013/10/25/varda-bondy-and-maurice-sunkin-how-many-jrs-are-too-many-an-evidence-based-response-to-judicial-review-proposals-for-further-reform/.
[165] Section 51, Senior Courts Act 1981, CPR 44.2(2).
[166] *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [28] et seq.
[167] See *R v Lord Chancellor ex parte CPAG* [1999] 1 WLR 347, in which Dyson J set out the test for what he referred to as "pre-emptive costs orders", but concluded that the test was not met by either of the cases before him.
[168] See *R (CND) v The Prime Minister and Others* [2002] EWHC 2712 (Admin), *R (RLC) v Secretary of State for the Home Department* [2004] EWCA Civ 1239 and 1296, and *King v Telegraph Group Limited* [2004] EWCA Civ 613 (although this was a private law case dealing with costs-capping powers introduced by the *Woolf* reforms, its analysis may yet be helpful).

costs capping orders is intended to build. The *Corner House* guidance and its subsequent application will closely inform the application of Sections 88-90 CJCA 2015. Broadly:

a) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:

- The issues raised are of general public importance;
- The public interest requires that those issues should be resolved;
- The applicant has no private interest in the outcome of the case;
- Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order;
- If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

b) If those acting for the applicant are doing so *pro bono* this will be likely to enhance the merits of the application for a PCO.

c) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.[169]

4.4 These broad principles were accompanied by practical guidance. The Court recognised that there were a range of circumstances in which an order might be sought, and that different orders might involve different forms of protection. For example, a claimant represented *pro bono* might seek absolute protection from costs recovery, or seek to set a prescribed limit on the costs recoverable. In the latter case, an individual might be represented subject to a Conditional Fee Agreement ('CFA'), which might raise additional questions about a defendant's costs liability. Generally, however:

- An applicant seeking an order for costs in its favour should expect the court to prescribe, by way of a reciprocal capping order, a total amount of the recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability;
- The liability of the defendant for the applicant's costs if the defendant loses will be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to recovery of solicitors' fees and a fee for a single advocate of junior counsel status, that are no more than modest;
- Thus, the beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation accordingly (when its lawyers are not willing to act *pro bono*).[170]

[169] See para. 74.

4.5 The principles set out in paragraph 74(1) of *Corner House* have been considered and refined by the courts in subsequent litigation. As the new statutory framework is designed to codify existing practice, this jurisprudence will continue to be relevant to the court's consideration of Sections 88-90 CJCA 2015.

C) THE NEW COSTS CAPPING RULES

i) Overview

4.6 Section 88 sets out the conditions which must apply before an applicant for judicial review might benefit from a statutory costs capping order. Section 89 sets out the matters to which the court must have regard when considering whether to make an order, and what the terms of any such order should be. Taken together, the provisions represent a codification of the *Corner House* criteria. There are, however, some relevant differences, described in the commentary below.

ii) Does the new costs capping framework apply?

4.7 The new costs capping framework in Part 4 of the CJCA 2015 applies to all applications for protection made by parties to judicial review.[171] However, this new statutory provision does not extinguish entirely the application of the court's discretion on PCOs pursuant to the *Corner House* guidance. There are a number of circumstances in which the statutory framework will not apply:

- **Applications for costs protection in judicial review cases by non-parties:** The statutory criteria apply to parties in judicial review proceedings. This leaves open the question of costs protection in respect of non-parties, including Interested Parties. The separate issue of prospective costs orders and third party interveners in judicial review is considered in Chapter 3, above.

- **PCOs and other civil litigation:** Part 4 CJCA 2015 is relevant only to proceedings for judicial review. In other civil claims, including in respect of statutory appeals, the common law will continue to govern any application for costs protection. This might include, for example, common law claims in negligence or misfeasance in public office against public authorities, or statutory appeals against the conduct of public authorities.[172]

- **Environmental litigation and the Aarhus Convention:** Section 90 empowers the Lord Chancellor by regulations to disapply Sections 88 and 89 "in relation to judicial review proceedings which, in the Lord Chancellor's opinion, have as their subject an issue relating entirely or partly to the environment". During the passage of the Act, Ministers explained that the purpose of this provision was to reflect the obligations of the UK under the Aarhus Convention and the various European directives which implement it,

[170] See para. 76.
[171] Including appeals from first instance decisions on judicial review applications, see Section 88(12).
[172] See for example, *Begg v HM Treasury* [2015] EWHC 1851 (Admin). In this case, the applicant sought a PCO in connection with a statutory appeal against an asset freezing order. The court accepted that, in principle, a PCO might be within the court's discretion.

which set out requirements for access to justice concerning environmental matters. This includes a stipulation that such procedures must be, "fair, equitable, timely and not prohibitively expensive".[173]

When regulations are made under Section 90, applications for costs protection in judicial review proceedings which raise environmental issues will be subject to the *Corner House* guidance, as modified for application in environmental cases.[174] Importantly, in *R (Garner) v Elmbridge Borough Council and Others*,[175] the Court of Appeal recognised that in environmental cases engaging the Aarhus Convention, the 'general public importance' and the 'public interest requiring resolution' criteria for costs protection, as identified in *Corner House*, are satisfied. The Court of Appeal also issued general guidance on the kinds of PCO to be made in environmental cases engaging the Convention.[176]

In any event, since April 2013, special provision has been made for fixed costs in environmental judicial reviews. A fixed costs regime will apply to any case identified as an Aarhus claim by the claimant. This will automatically limit the claimant's costs to £5,000 and their recovery to a maximum of £35,000. The fixed costs rules will not apply to any case where the court is not satisfied that the Aarhus Convention applies.[177] It is likely to be rare that an applicant would choose to make an application for any costs capping order or a PCO outside this fixed costs regime.

- **Costs protection and closed material procedures:** After the passage of the CJCA 2015, in *Begg v HM Treasury*, the High Court indicated that a PCO might be appropriate in terrorism cases where a claimant is placed at a disadvantage in assessing the merits of a claim because of an inability to see closed material.[178] Cranston J applied criteria distinct from that applicable in traditional *Corner House* applications, explaining that the justification for costs protection was different in these cases:

> First, the case must be of real benefit to the individual bringing it. Secondly, the individual must not be able to assess the prospects of success in the ordinary way. In other words, it must appear from the open material that the case is such that a reasonable person would litigate, but because of the closed material on which the defendant relies, reputable and competent legal representatives cannot advise whether the prospects are, in fact, good. Thirdly, having regard to the financial

[173] The Aarhus Convention is an international treaty which does not have direct effect in UK law. However Article 9 has been implemented by Directive 2003/35/EC (the Public Participation Directive or 'PPD'[173]) which amended Directives on Environmental Impact Assessment and Industrial Emissions, so as to require that there must be access to a procedure for review of decisions by public authorities on applicable environmental matters that is "fair, equitable, timely and not prohibitively expensive". One of the most important of these procedures is judicial review.
[174] At the time of writing, no such regulations have been laid before Parliament.
[175] [2010] EWCA Civ 1006.
[176] In *Garner*, the Court of Appeal approved a PCO of £5,000 for the applicants, with a reciprocal cap on costs recovery of £35,000: *"I would not for a moment suggest that the limit on the liability of each party must necessarily be the same. The limits should properly reflect the disparity of resources, but it does seem to me that the upper limit of £35,000, suggested for the respondent's liability if the appellant is successful, is fair and proportionate and, rather more importantly, it is consistent with a review process that must not be prohibitively expensive"* (para. 56, Sullivan LJ). Note that the effect of the Aarhus Convention on environmental litigation is wide-ranging and fast-moving. More than an introduction to the relevant features of PCOs in environmental judicial review claims is beyond the scope of this document.
[177] CPR 45.41 to 45.44.
[178] [2015] EWHC 1851 (Admin).

> resources of the individual and to the amount of costs likely to be involved it is fair and just to make the order. Fourthly, if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in doing so. Finally, the individual should not benefit from the order if his conduct is later judged to be unreasonable or abusive.[179]

Although the Court acknowledged that the new CJCA 2015 framework would shortly apply in judicial review claims, this case did not involve a judicial review claim, but an appeal subject to Section 26 Terrorist Asset-Freezing etc. Act 2010. The applicants in this case had argued that the justification for costs protection in these cases called for a "new category of costs protection".[180] This was not the first case where costs protection has been afforded in connection with closed material procedures. However, it is the first to afford guidance on the proper circumstances in which costs protection will be in the interests of justice in closed material claims.

It is unclear whether this costs protection will be available in judicial review claims subject to Section 6 Justice and Security Act 2012, involving closed material procedures, either as a distinct new category of common law protection or under the codified *Corner House* regime in Sections 88-90 CJCA (see below).

iii) When can the court make a costs capping order?

4.8 Section 88(6) provides that a court may only make a costs capping order if it is satisfied both that the proceedings are "public interest proceedings" and that without such an order, the applicant would be acting reasonably by withdrawing or ceasing to participate in the proceedings. Under Section 88(7), proceedings are "public interest proceedings" only if:

a) An issue that is the subject of the proceedings is of general public importance;

b) The public interest requires the issue to be resolved; and

c) The proceedings are likely to provide an appropriate means of resolving it.

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

a) The number of people likely to be directly affected if relief is granted to the applicant for judicial review;

b) How significant the effect on those people is likely to be; and

c) Whether the proceedings involve consideration of a point of law of general public importance.

[179] Para. 26.
[180] Para. 20.

These factors are not exhaustive, and do not mandate the court to attribute particular weight to any particular factor.[181]

4.10 This is consistent with the approach of the courts in applying the *Corner House* criteria. In *R (Compton) v. Wiltshire Primary Care Trust*,[182] the Court of Appeal explained that the governing principles in *Corner House* should not be read over-restrictively. This flexible, fact-sensitive approach to costs protection was subsequently endorsed by the Court of Appeal.[183] Importantly, "exceptionality" was not treated as a criterion additional to the express *Corner House* criteria, but as a "prediction" as to the outcome of those principles. A case which satisfied the criteria *was* exceptional, and did not have to satisfy an additional test of exceptionality.[184]

The statutory criteria should also be applied flexibly to meet the interests of justice in public interest proceedings. While the outcome may be – as in previous practice – that costs capping orders remain rare, no additional "exceptionality" test would be appropriate.

4.11 The effect of Section 88(6) is to codify the existing practice based on the *Corner House* criteria. During the passage of the Act, Ministers emphasised that the interpretation of these criteria will build on the application of the existing *Corner House* criteria and that the discretion to interpret the scope of "public interest proceedings" will remain with individual judges considering the facts of any particular application.[185]

4.12 The scope of this discretion may only be altered by an amendment to the CJCA 2015, including by the adoption of delegated legislation, which is provided for in new powers granted to the Lord Chancellor (considered below).

4.13 Without such amendment, the statutory criteria should not, in our view, result in a more restrictive approach in practice.[186] The consideration of the *Corner House* criteria by the courts may properly inform the courts' interpretation and application of the new statutory costs capping criteria.

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[181] Both of these points were conceded by the Government during the passage of the CJCA 2015 (HL Deb, 30 July 2014, Col 1647).

[182] [2008] EWCA Civ 749, Waller, Buxton and Smith LJJ, Buxton LJ dissenting.

[183] For example, in *Wilkinson v Kitzinger* [2006] EWHC 835 (Fam) and *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107. Cf: *Goodson v HM Coroner for Bedfordshire and Luton* [2005] EWCA 1172. So, for example, in *R (Buglife) v Thurrock Thames Gateway Development Corp and another* [2008] EWCA Civ 1209 it was expressly accepted that "there can be no absolute rule limiting costs to those of junior counsel because one can imagine cases in which it would be unjust to do so" (at [25]).

[184] *R (Compton) v. Wiltshire Primary Care Trust* [2008] EWCA Civ 749, *and R (Buglife) v Thurrock Thames Gateway Development Corp and another* [2008] EWCA Civ 1209.

[185] This approach is consistent with the consideration of the public interest test in *Corner House* in *Litigating the Public Interest* (2006), a Report of a Working Party chaired by Lord Justice Maurice Kay.[185] The Working Party included members of the Treasury Solicitor's office, The Department for Constitutional Affairs, the Legal Services Commission, the Law Society, Liberty and the Public Law Project. The report attempted to further define the public interest, consistent with the purpose of a protective costs order, but was unable to do so. It concluded: "After much discussion the Group came back to the first two criteria identified by the Court of Appeal in Corner House and agreed that these provided a definition that was both workable and sufficiently flexible. A public interest case is one where: (i) the issues raised are ones of general public importance, and (ii) the public interest requires that those issues should be resolved. The Group agreed that the definition should be given a broad, purposive interpretation. The definition should not be allowed to become unduly restrictive."

[186] While the courts have applied the criteria in para. 74(1) of *Corner House* "flexibly", that flexibility has not generally led to PCOs to be made where the general public importance and public interest criteria have not been met (subject to the distinct treatment of environmental and closed material cases, considered above).

a) "General public importance"

4.14 General public importance does not mean that the matter must be of interest to all of the public nationally. On the other hand, a local group may be so small that issues in which they alone might be interested would not be issues of "general public importance". The Court of Appeal has explained that:

> [A] case may raise issues of general public importance even though only a small group of people will be directly affected by the decision. A much larger section of the public may be indirectly affected by the outcome. Because it is impossible to define what amounts to an issue of general public importance, the question of importance must be left to the evaluation of the judge without restrictive rules as to what is important and what is general.[187]

b) "Public interest"

4.15 The public interest is not limited to a public interest in the outcome of the individual claim, but can involve a wider public interest in the clarity of the law. As the Court in *Corner House* explained, for example, a discrete issue of statutory construction which arises may affect many people, in which case, "there is a public interest in the elucidation of public law by the higher courts **in addition to** the interests of the individual parties" (emphasis added).[188] Thus, the *Refugee Legal Centre* case involved a challenge to the fairness of very streamlined new arrangements for processing asylum claims at Harmondsworth. The claimant alleged systemic unfairness in the determination procedure. Although the challenge failed, the Court in *Corner House* held that it had "served an important public purpose" because it had led the Court to emphasise the need for the determination procedure to be applied flexibly by reference to a written policy.[189]

4.16 While both of these criteria were disregarded by the courts applying the common law in some cases (most notably in environmental cases and the treatment of secret evidence, see above), ***each*** must be satisfied if the new statutory regime is to apply.[190] Environmental cases will enjoy protection by virtue of the fixed costs regime in CPR 45 and the Section 90 provides for distinct treatment (see above). Whether common law costs protection will remain available in judicial review cases involving closed material proceedings is far from clear.[191]

c) "Appropriate means to resolve the issue" – The right case?

4.17 The final condition in Section 88(6) provides that the court should consider whether the proceedings in question are the right ones in which to determine the relevant public interest issue. While this 'appropriate vehicle' test was not expressly set out in *Corner House*, the Court of Appeal was clear that no order would be made unless it was in the public interest for the

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[187] *R (Compton) v Wiltshire Primary Care Trust* [2009] 1 WLR 1436, [73] – [78].
[188] [2005] EWCA Civ 192, [70] (emphasis added).
[189] [2005] EWCA Civ 192, [51] (emphasis added). A PCO was granted by consent for a substantive appeal in the Refugee Legal Centre case. The judgment provides a helpful Appendix on the historical case-law on PCO [2004] EWCA Civ 1296.
[190] See *Garner* [2010] EWCA Civ 1006.
[191] *Begg v HM Treasury* [2015] EWHC 1851 (Admin).

particular case to proceed (the criteria included that a case would be withdrawn in the absence of an order and that it would be fair and just in the circumstances for an order to be made).

4.18 The court in *Corner House*, for example, explained that, in the *Refugee Legal Centre* case it was preferable for that sort of systemic unfairness challenge of that sort to proceed with an NGO claimant with the benefit of a PCO, than with 10 or 12 individual legally aided claimants (the alternative envisaged by the court).[192]

4.19 There was no indication by Ministers that this new criterion was intended to introduce an entirely new statutory hurdle for applicants for costs protection to satisfy. As is clear from the statutory language, this remains one aspect of the public interest test which the court is required to take into account.

iv) What kind of order?

4.20 Section 89(1) prescribes matters to which the court must have regard when considering whether to make a costs capping order, and what the terms of any such order should be. This non-exhaustive list includes:

a) 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;

b) The extent to which the applicant for the order is likely to benefit if relief is granted to the applicant for judicial review;

c) 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;

d) Whether legal representatives for the applicant for the order are acting free of charge; and

e) Whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally.

4.21 Again, these considerations broadly reflect the *Corner House* criteria. They are not exhaustive nor do they prescribe the weight which the court should attach to each factor. Guidance from earlier PCO cases will remain relevant to the court's consideration of the relationship between Sections 88 and 89, in determining the scope of any appropriate costs capping order:

> [A]s a matter of common sense, justice and proportionality […] when exercising his discretion as to whether to make an order and if so what order, the judge should take account of the fullness of the extent to which the applicant has satisfied the five Corner House requirements. Where the issues to be raised are of the first rank of general public importance and there are compelling public interest reasons for them to be resolved, it may well be appropriate for the judge to make the strongest of orders, if the financial

[192] *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [52].

circumstances of the parties warrant it. But where the issues are of a lower order of general public importance and/or the public interest in resolution is less than compelling, a more modest order may still be open to the judge and a proportionate response to the circumstances.[193]

4.22 The introduction of an express requirement to consider the appropriateness of the applicant to represent the interest of other persons or the public interest generally mirrors the 'appropriate vehicle' factor in Section 88(7)(c). It is likely that the public interest in a case continuing – central to the *Corner House* criteria – involves a consideration of the appropriateness of the claim proceeding in its current form as a means of resolving an issue (see the consideration of the *Refugee Legal Centre*, above).

4.23 Section 89(1)(c) now expressly requires the court to expressly consider the extent of the interest in the proceedings of the claimant's financial backers (not just the interest of the claimant). This criterion reflects the new financial disclosure provisions in Section 85-86, considered above. We consider the disclosure of information about third party funders and their interests in greater detail below.

a) "Benefit" and the private interests of the applicant

4.24 The consideration of any benefit from a case to be enjoyed by the applicant (or other financial backers) should not be determinative of the public interest in any case. The influence of a private interest on a costs protection order issued in the public interest was considered closely when the courts applied the *Corner House* criteria. In *Wilkinson v Kitzinger*, Sir Mark Potter P explained:

> I find the requirement that the Applicant should have 'no private interest in the outcome' a somewhat elusive concept to apply in any case in which the Applicant, either in private or public law proceedings is pursuing a personal remedy, albeit his or her purpose is essentially representative of a number of persons with a similar interest. In such a case, it is difficult to see why, if a PCO is otherwise appropriate, the existence of the Applicant's private or personal interest should disqualify him or her from the benefit of such an order. I consider that, the nature and extent of the 'private interest' and its weight or importance in the overall context should be treated as a flexible element in the court's consideration of the question whether it is fair and just to make the order. Were I to be persuaded that the remaining criteria are satisfied, I would not regard requirement 1(iii) as fatal to this application.[194]

b) Cross-capping and orders limiting costs recovery

4.25 Section 89(2) provides that if a costs capping order is granted, it must also restrict the other party's costs exposure. There is nothing in the Act which requires the cross-cap to mirror the

[193] *R(Buglife) v Thurrock Thames Gateway Development Corporation and Ors* [2008] EWCA Civ 1209.
[194] [2006] EWHC 835 (Fam), [2006] 2 FCR 537, [2006] 2 FLR 397 (Fam). The approach in *Wilkinson* was however subsequently endorsed by the Court of Appeal in *R (England) v London Borough of Tower Hamlets and others* [2006] EWCA Civ 1742, and *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107, and a flexible approach to this criterion is now settled law.

level of costs protection afforded to the applicants. As the Minister confirmed during the passage of the CJC Bill:

> The clause does not prescribe the levels of the caps; judges will be able to set the caps at levels tailored to the cases before them. The levels of the claimants' and defendants' caps may naturally be different, depending on their means. This, I believe, will address any imbalance between the financial positions of the parties. [195]

While the Minister expressly considers the distinct means of the applicant and respondent, the difference in treatment reflects the different purposes which a PCO, or a costs capping order made in order to allow a public interest case to proceed, and a reciprocal order, might serve.

c) Disclosure, applicants and third parties

4.26 By Section 88(5), rules of court may specify information that must be contained in the application including (a) information about the financial resources available or likely to be available to the applicant to meet liabilities arising in connection with the application; and (b) if the applicant is a body corporate that cannot demonstrate that it can meet its liabilities "information about its members and about their ability to provide financial support for the purposes of the application".

4.27 The courts have made it clear that an NGO applicant for a PCO can have no expectation that a PCO will be granted without full disclosure of the financial resources available and likely to become available to it. The position is different for individual applicants, however. As the Court of Appeal observed in *Garner*:

> The possibility that the judge might, as an exercise of judicial discretion, order that the public should be excluded while such details were considered would not provide the requisite degree of assurance that an individual's private financial affairs would not be exposed to public gaze if he dared to challenge an environmental decision. The more intrusive the investigation into the means of those who seek PCOs and the more detail that is required of them, the more likely it is that there will be a chilling effect on the willingness of ordinary members of the public (who need the protection that a PCO would afford) to challenge the lawfulness of environmental decisions.[196]

4.28 There is no obvious reason why the chilling effect identified by the Court of Appeal in *Garner* in relation to environmental challenges should not also apply in relation to other types of challenge. Section 88(5) mirrors the wording of Section 85(2). Our concerns about these provisions are explored in more detail in Chapter 2.

v) Delegated powers and the public interest

4.29 Section 88(9) empowers the Lord Chancellor to make regulations by affirmative resolution of each House of Parliament[197] to amend Section 88 CJCA 2015 "by adding, omitting or amending matters to which the court must have regard when determining whether proceedings are public

[195] HL Deb, 30 July 2014, Col 1649.
[196] *Garner* [2010] EWCA Civ 1006, [51]-[52].
[197] Section 88(11).

interest proceedings". Section 89(3) empowers the Lord Chancellor to make similar regulations amending Section 89 "by adding, omitting or amending the matters listed" in Section 89(1). [198]

4.30 Ministers have explained that there was no intention by the Government to use this power to immediately depart from the existing *Corner House* criteria. The inclusion of this delegated authority is intended only to permit a flexible response to any future need for further definition, subject to the scrutiny of Parliament:

> It may be the case that there are future developments which mean that it would be appropriate for the courts to consider different matters when deciding whether, for example, proceedings are public interest proceedings. These powers give us the ability to respond quickly should change be needed. While this is done through statutory instrument rather than primary legislation, it does not mean that Parliament will be unable to consider any changes. Both powers are subject to the affirmative resolution procedure, so any changes will be debated in both Houses before coming into force.[199]

4.31 These measures would remain subject to the purpose of the primary legislation and the Lord Chancellor's duties under the Constitutional Reform Act 2005:

> This is not a question of the Lord Chancellor, as it were, having a free opportunity simply to alter the whole burden or interpretation of the clause. [...] Section 1 of the Constitutional Reform Act 2005, […] expressly provides that its provisions do not affect the existing constitutional principle of the rule of law or the Lord Chancellor's existing constitutional role in relation to that principle. Furthermore, the Lord Chancellor's oath specifies that his role is to, "respect the rule of law".
>
> […] I do not think it would be appropriate for me to comment further except to say that, as I think the Lord Chancellor has said on a number of occasions, he is very mindful of his oath and his obligations in that regard.[200]

4.32 Any amendments to the new statutory costs capping regime will be subject to the affirmative resolution of both Houses of Parliament and must be exercised intra vires, subject to judicial review. Any regulations must be consistent with the purpose of the underlying legislation, notably to provide the court with the power to provide adequate protection for public interest proceedings to be heard in the interests of justice. The extent to which any regulations circumscribing the scope of the public interest or the terms in which an order can be made, might undermine the underlying purpose of the legislation in due course, will be subject both to parliamentary and judicial scrutiny.

vi) Permission stage, costs and the public interest

4.33 Section 88(3) CJCA 2015 provides that a costs capping order may only be made if permission to apply for judicial review has been granted. This is a significant change in practice. At present, PCOs can be sought at any stage in proceedings. Indeed, the costs associated with the

[198] Section 88(11).
[199] HL Deb, 30 July 2014, Col 1644-5.
[200] HL Deb, 30 July 2014, Col 1644-5.

permission stage may be substantial and could pose a significant deterrent to individuals with limited means who seek to challenge unlawful activities by Government and public agencies. Concern was expressed during the passage of the Act that this change could significantly restrict the ability of costs capping orders to serve the public interest in ensuring that public interest issues are considered by the courts.

4.34 The Minister offered the following justification for this new limit to costs protection:

> At present, a court can make a protective costs order before it has considered whether a claimant's case is suitable to be given permission to proceed to judicial review. Claimants with what may turn out to be weak cases can thus benefit from costs protection even if the court subsequently decides that their case should not be given permission for judicial review, thereby leaving the public body to pay its own costs of dealing with a case which had no merit. Effectively, a claimant would have had a risk-free process until then. [...] I am happy to assure your Lordships that under [the new provisions] a costs capping order may cover costs incurred prior to the grant of permission, as at present. The applicant can, as now, ask the court to make the order as part of the permission application. It is right, however, that until permission is granted the claimant should bear the financial risk of bringing a weak claim because, ex hypothesi, it will be weak. [201]

4.35 We do not accept the premise that a claim that is refused permission is necessarily weak. The flexibility of the permission test inevitably leads to unpredictability, making the assessment of the merits in any case particularly problematic.[202] As Lord Bingham observed, "arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application".[203] That flexibility is particularly apparent in sensitive or controversial cases and those where the outcome could affect a large number of people. In such cases, it is common for the court to choose to explore the merits of the case at some length at the permission stage, and sometimes refuse permission after lengthy hearings, frequently half a day or more. Many judicial review claims with a public interest element that are suitable for costs capping orders will fall into this category.

4.36 The court's approach to permission is informed by the factual circumstances of the case at the time permission falls to be considered by the court. This can include the degree of urgency (which may result in the court directing that there be a rolled-up permission/substantive hearing) and the defendant's approach to the case. The defendant's position will not be clear until after the Acknowledgement of Service and in some cases may remain opaque for some time thereafter. Research has shown striking variations in permission grant rates as between individual judges.[204] It is therefore extremely difficult for a claimant to predict with any

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[201] HL Deb, 30 July 2014, Col 1642.

[202] See Public Law Project, *The Dynamics of Judicial Review Litigation* (Sunkin and Bondy 2009), and in particular the section on public law practitioners' perceptions of the permission state, pp. 63-64: http://www.publiclawproject.org.uk/data/resources/9/TheDynamicsofJudicialReviewLitigation.pdf.

[203] *Sharma v Deputy Director of Public Prosecutions & Ors* (Trinidad and Tobago) [2006] UKPC 57, [14].

[204] Research has shown striking variations in permission grant rates as between judges: for example, in *The Dynamics of Judicial Review Litigation* (Sunkin and Bondy 2009), the Public Law Project found that paper grant rates amongst judges who had dealt with 25 or more paper permission applications from April to December 2005 ranged from 11% to 46%, and that this variation in grant rate could not be explained by the types of cases that each judge had determined.[204] Nor is variation in grant rates a recent phenomenon. It accords with earlier Public Law Project research: *Judicial Review in Perspective* (Sunkin, Bridges and Meszaros 1993),[204] in which the authors found "very wide variations in

certainty whether or when permission will be granted, and in cases involving public interest issues of the kind likely to be considered in costs capping cases, this difficulty may be insurmountable.

4.37 This flexibility, together with the combined risks of bearing the defendant's costs of the permission stage *and* the cost of the application for a costs capping order may be a sufficient deterrent to undermine the purpose of the new costs capping regime. By its nature, deferring the court's consideration of costs protection until after the permission stage will require the applicant to shoulder a substantial degree of risk before substantive costs protection will be considered by the court. Unfortunately, the degree of risk associated with these costs can be substantial.

a) The defendant's costs of the permission stage

4.38 A judicial review claimant's potential costs liability if permission is refused is generally limited (following the Court of Appeal's decision in *Mount Cook Land Ltd v Westminster City Council*) to the defendant's, and any Interested Parties', costs of preparing an Acknowledgement of Service.[205] However, these costs can, in practice, be disproportionately high. As the Bingham Centre explained in *Streamlining Judicial Review in a Manner Consistent with the Rule of Law*:

> Where permission is resisted for good reason, its refusal weeds out non-viable claims and saves time and public money overall. But permission is routinely resisted when defendants and interested parties – familiar with the claim – are well able to see that there is no knock-out blow. It is perceived that there is little to lose, in effectively taking a 'free shot' at striking the case out. Inappropriate routine resistance of permission leads to additional cost and delay, the drafting of unsuccessful grounds of resistance, unnecessary court time in assessing permission, inapt paper refusals and unnecessary oral renewal hearings.[206]

4.39 The deterrent effect of the scale of defendants' costs at the permission stage has been recognised by the courts in PCO cases. In *R (Garner) v Elmbridge Borough Council and Others*, the Court of Appeal expressed particular concern:

> In the present case there was evidence that without a PCO the liability and costs of an unsuccessful appellant was likely to be prohibitively expensive to anyone of "ordinary" means. [...] [T]he costs claimed by the respondent and the second interested party at that preliminary stage, when the matter was simply being considered on the papers and before there had been any hearing, had reached nearly £15,000.[207]

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leave grant rates as between individual judges", although the grant rate for individual judges was consistent year on year.

[205] [2003] EWCA Civ 1346.

[206] M. Fordham, M. Chamberlain, I. Steele & Z. Al-Rikabi, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law* (*Bingham Centre report 2014/01*), Bingham Centre for the Rule of Law, BIICL, London, February 2014: http://www.biicl.org/files/6813_bingham_jr_report_web.pdf. In Public Law Project, *The Dynamics of Judicial Review* (Sunkin and Bondy 2009), one defence solicitor explained the incentive towards resisting permission where the test is flexible and uncertain in its application: "[I]t is often difficult to tell what criteria are actually being applied. As a result of this uncertainty, we put quite a lot of work into the AOS to try and knock a case on its head at any early stage" (p. 64).

[207] [2010] EWCA Civ 1006.

4.40 Concern has been expressed that, in some cases, pre-permission costs might be as high as around £30,000.[208]

b) The defendant's costs of the costs capping application

4.41 The Court of Appeal in *Corner House* recognised that applicants for a PCO should be able to rely on guidance on the likely costs exposure they might face in connection with their application for costs protection. The Court's expectation was that an unsuccessful applicant would face a costs liability in relation to a failed PCO application not exceeding £1000 for a paper application, and £2500 if the position were renewed orally. The Court considered that an applicant's total liability in respect of the PCO application should not exceed £2000 for a paper PCO application in a multi-party case, and a further £5000 if the PCO application is renewed orally in a multi-party case. The Court recommended that these figures should be incorporated into the Civil Procedure Rules. Such assurance on the cost of the application may be of limited value if this risk must necessarily be accompanied by the full panoply of pre-permission costs.

4.42 We support the recommendation in *Corner House* that the costs exposure for applying for PCOs (and in future, for costs capping orders) should be limited by a fixed fee regime incorporated into rules of court or a Practice Direction, or an indicative fee regime. This would, of course, be of limited value without sufficient protection for applicants against the risk associated with unquantified pre-permission costs.

c) Permission and costs capping applications under Section 88

4.43 While the deterrent effect of disproportionate costs pre-permission is a problem which will affect all applications for judicial review, it must be particularly relevant to the court's consideration of costs protection in public interest cases, whether in the making of a PCO or in the court's consideration of applications pursuant to Section 88 CJCA 2015. Lord Justice Jackson explained the issue succinctly in his review of civil litigation costs:

> 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.[209]

4.44 By making any application subject to the risk not only of the costs of that process, but to all the potential costs pre-permission, this concern is clearly exacerbated. In cases where an application for a costs capping order is made, there is a particular incentive to minimise pre-permission costs, and so to minimise the claimant's costs exposure. In these circumstances, the claimant makes an open assertion that they are not in a position to proceed with a claim involving a substantial costs risk, but that it is in the public interest for the matter to be heard. In these circumstances, the court may wish to consider what procedural steps might best serve the public interest, both in saving unnecessary costs and in preserving the purpose underlying the new statutory costs capping regime.

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[208] B. Jaffey and T. Hickman, '*Loading the Dice in Judicial Review: The Crime and Courts Bill 2014*.' U.K. Const. L. Blog (6th February 2014): http://ukconstitutionallaw.org.
[209] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (2009), para. 4.1(vi).

- Nothing in the CJCA 2015 prevents the consideration of both applications for permission and costs-protection simultaneously. In practice, it is likely that permission and costs capping will logically be considered together at an early stage, in order to meet the statutory purpose of the costs capping provisions in the CJCA 2015. This will enable the court, before substantial costs are accrued, to assess the extent to which (a) the criteria for a costs capping order - other than the grant of permission - are made out, and (b) whether the material before the court indicates that the claimant cannot bear the costs risk of being refused permission.

- As explained above, the court's approach to permission stage is historically fact sensitive and sensitive to the context of a claim. It is clearly arguable that if the test for a costs capping order is satisfied, then the arguability threshold will be met. If the court is persuaded that a case raises issues of general public importance, the issues to be determined are in the public interest and the claim is an appropriate vehicle for its consideration, it is difficult to see how the application of a more rigorous "arguability" test might serve the public interest.

- In those cases in which the court considers that, on the material before it, the rule of law is likely to require the claim to be heard in the public interest, but that the claimant cannot bear the defendant's unquantified costs of permission (in addition to the court fee, and the costs associated with the costs capping application), this may impact upon the approach of the court both to permission and to case management. For example, it is unlikely that a rolled-up hearing would be appropriate in any case involving an application for a costs capping order.

- It may be possible for the court to grant both permission and a costs capping order on the papers, with a direction that the defendant has the liberty to apply to set aside the grant of permission within a specified number of days following service of the order on the defendant. The basis on which the court might be asked to make such an order would be that the claim could not otherwise proceed because of the costs risk to the claimant. While CPR Part 54.13 appears to preclude an application to set aside an order granting permission where the defendant has been served with the claim form, this rule is clearly predicated on the defendant having had an opportunity to file an Acknowledgement of Service, and there is authority for the proposition that the court retains inherent jurisdiction to set aside the grant in appropriate circumstances.

CHAPTER 5: ACCESS TO JUSTICE, THE PUBLIC INTEREST AND JUDICIAL REVIEW

5.1 The constitutional significance of judicial review as a tool for ensuring that public decision making is lawful, transparent and accountable, in a manner consistent with the rule of law is trite. While its effectiveness cannot be maintained through ossification, the appetite for reform in Government over the past five years has been substantial. Many recent changes are subject to litigation and the application of some, like Part 4 of the CJCA 2015, remains uncertain.

5.2 The authors are concerned that many recent changes may have a particular impact on access to the court for claimants, whether through heavier procedural burdens or through new limitations on access to legal aid or inhibiting access to sources of third party support. Yet, the pace of change has been such that it is extremely difficult to understand how consecutive reforms may individually have affected the cost and efficiency of the process of judicial review or the ability of individuals to pursue a claim. Further empirical research on the accessibility of judicial review and its effectiveness may be crucial to understanding of the impact of the latest round of changes, including those in Part 4, CJCA 2015. However, faced with significant budgetary restraints, we understand that further change may yet be imminent. For example, in July 2015, the Government consulted on a further increase in civil fees across the justice system, including in connection with claims for judicial review.[210]

5.3 The constitutional function of judicial review creates a particular imperative for evidence-based and cautious reform, in a manner consistent with the rule of law. While there may be means to further increase the efficiency of the process, any further reform should be evidenced based, proportionate, consistent in its impact on both claimants and respondents and respectful of the fundamental role which the remedy plays in our constitutional framework.

5.4 For example, the problems raised by Section 88(3) CJCA 2015 – and the need for an effective and proportionate framework for costs protection – are a manifestation of a wider problem relating to judicial review claimants' costs exposure that warrants consideration of a wider solution. We are concerned that the guidance in *Mount Cook* does not offer responsible judicial review claimants sufficient comfort to outweigh the deterrent effect of claimants' liability for defendants' costs to permission in many cases. A fixed or guideline fee regime both for defendants' costs to permission and defendants' costs of the costs capping application would accord with the approach taken in environmental judicial review claims that are subject to Article 9(4) of the Aarhus Convention.

5.5 This approach was recommended by Lord Justice Jackson in his review of civil litigation costs. His report concluded that a fixed costs regime for judicial review, available for both legally aided and non-legally aided claimants should be introduced in a practice direction. As a starting point, he suggested that:

[210] See *Enhanced fees response and consultation on further fee proposals* (Cm 9124), July 2015. JUSTICE has prepared a short response to this consultation: http://justice.org.uk/court-and-tribunal-fees-consultation-on-further-fees/.

> [S]ave in exceptional circumstances, (i) the cap on the claimant's liability for adverse costs up to the grant of permission should be no less than £3,000; and (ii) if permission is granted, the cap on the claimant's liability for adverse costs (in respect of the whole case) should be no less than £5,000.[211]

5.6 Capping defendants' costs, as Lord Justice Jackson proposed, would impose discipline on defendants and interested parties at the permission stage. If defendants and interested parties were encouraged to spend proportionately on resisting permission, fewer, better points would be taken, focused on any knock-out blow(s). Some may be encouraged not to contest permission at all. The permission hurdle could truly act as a filter on weak cases, would cost less to administer, and would drive down costs for both claimants and defendants.

5.7 While safeguards may be necessary to ensure that a fixed fee approach would not inhibit the ability of parties to secure effective representation and to conduct their cases fully and proportionately, there are at least three possible solutions worth further consideration:

a) A fixed fee regime set out in the Civil Procedure Rules;

b) A fixed fee regime set out in a Practice Direction;

c) An indicative fee regime set out in the rules or a Practice Direction, which could be departed from for good cause, for example where there has been a failure to use the pre-action protocol.

There is every reason to have a regime of this kind given the limited but crucial filtering purpose of the permission hurdle. Effective use of the pre-action protocol ought to mean that the Acknowledgement of Service is a simple document to draft. The amounts suggested in the Jackson report, in our view, strike a sensible balance. We note that Lord Justice Jackson concluded that these changes could be most flexibly achieved in a Practice Direction.

5.8 This is a change which could improve practice beyond public interest claims and ought – as Lord Justice Jackson acknowledged – lead to better practice in all judicial review claims, not only those where costs capping orders might be necessary and appropriate.

5.9 Short of exploring the recommendations of the *Jackson* review, the implementation of the recommendations in *Streamlining Judicial Review in a Manner Consistent with the Rule of Law* would, in our view, help to increase the efficiency of judicial review, while respecting the rule of law and the ability of both parties to access the court.[212] These recommendations include a suggestion that the courts should use their existing powers to impose adverse costs consequences on defendants who unsuccessfully oppose permission. Many of these changes could be implemented without primary legislation and could increase the efficiency and fairness of judicial review in practice.

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[211] Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (2009), para. 4.1(vi).

[212] M. Fordham, M. Chamberlain, I. Steele & Z. Al-Rikabi, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law* (*Bingham Centre report 2014/01*), Bingham Centre for the Rule of Law, BIICL, London, February 2014: http://www.biicl.org/files/6813_bingham_jr_report_web.pdf.

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