

## JR Funding and Costs

**Leon Glenister**

**25 February 2019**

**(slides adapted from those written by Jenny Wrigley)**

## As billed:

- Legal Aid in brief;
- Crowd funding;
- Cost Capping Orders;
- Aarhus Regime.

(obviously the claim can be fully privately funded)



## Costs to bear in mind

- The Claimant needs to pay their own lawyers
- The Claimant may need to pay the Defendant's legal costs in the event they lose

## Legal Aid in brief



- Legal Aid Sentencing and Punishment of Offenders Act 2012 (“LAPSO”);
- The Civil Legal Aid (Merits Criteria) Regulations 2013;
- The Civil Legal Aid (Procedure) Regulations 2012;
- The Civil Legal Aid (Remuneration) Regulations 2013;
- Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013.

# Legal Aid – still available for JR



- Para 19, Sch 1 LAPSO, if has potential of providing a benefit to the individual, member of family or the environment;
- Certain types of immigration case excluded (Sch 1 para 19(5)-(6));
- Subject to financial eligibility criteria – s.21 and Regs;
- Subject to merits criteria – Merits Regs;

## Legal Aid – Merits Criteria

- Regulations 56, 53 and 39 of the Merits Regulations;
- Subject to the proportionality test (reg 8);
- 50% or better prospects or marginal/borderline prospects and:
  - wider public interest; or
  - breach of Convention Rights; or
  - of ‘overwhelming importance to the individual’;
- No alternative proceedings or sources of funding.

# Legal Aid – Payment Restriction



- No payment unless permission is granted (reg 5A of the Remuneration Regulations);
- Subject to some exceptions:
  - various types of settlement;
  - court orders oral hearing to consider permission;
  - court orders rolled- up hearing.
- So, no payment if permission refused on the papers and then also refused at renewed oral hearing.
- Can still seek costs as “successful” party: R (M) v Croydon LBC [2012] EWCA Civ 595; R (RL) v Croydon LBC [2018] EWCA Civ 726; R (Tesfay) v SSHD [2016] EWCA Civ 415

# Crowd Funding



- Platforms such as Crowd Justice and Crowd Funder;
- Usually all or nothing initial target;
- No card charged unless initial target met;
- Stretch targets can be added – flexible;
- Unused funds – returned to platform – either towards another case or Access to Justice Foundation charity;



# Cost Capping Orders

- SS. 88 - 90 Criminal Justice and Courts Act 2015;
- CPR Part 46.16 – 46.19, PD46, 10.1 – 10.2;
- Exclusive regime to High Court and Court of Appeal (s.88(1));
- Only after permission has been granted (s.88(3))
- There must be a reciprocal cap (s.89(2))

## Cost Capping Orders (2)

- Requirements to be met (s.88(6))
  - public interest proceedings;
  - C would withdraw in absence of CCO;
  - It would be reasonable for C to do so;
- ‘Public interest’ – general public importance, public interest requires issue to be resolved, proceedings are likely to provide an appropriate means of resolving it.

## Cost Capping Orders (3) – s. 89 Factors



- Financial resources of parties including financial supporters;
- Extent of likely benefit to applicant;
- Extent of likely benefit to financial supporters;
- Legal representatives – free of charge? (but see *R (Beety) v. Nursing and Midwifery Council* [2017] EWHC 3579)
- Whether applicant is appropriate person to represent interests of others or public interest.

## Recent cases on Cost Capping

- *Stephen Hawking and others v. Secretary of State for Health & Social Care and National Health Service Commissioning Board* [2018] EWHC 989 (Admin);
- *R (Beety) v. Nursing and Midwifery Council* [2017] EWHC 3579.

# Aarhus – Costs Protection



- Planning and environmental cases CPR 45.41- 45.44 (Venn v SSCLG [2014] JPL 447; [2014] EWCA Civ 1539);
- But – recommended by Lord Justice Jackson as worthy of extension to all judicial review claims;
- Automatic £5,000/£10,000 cap and £35,000 reciprocal cap:
  - if opted for in Claim Form, and
  - if Schedule of Financial Resources provided

## Aarhus – Costs Protection (2)

- Whether Aarhus or not can be challenged in Ack of Service;
- Application to vary or remove caps can also be made in Ack of Service;
- Key issue is whether ‘prohibitively expensive’
- To be determined at earliest opportunity;
- No costs if C loses determination;
- Provision for any financial hearing to be in private;
- Recent changes prompted by *RSPB, Friends of the Earth, ClientEarth v. SS Justice* [2017] EWHC 2309 (Admin)

## Advantages of Aarhus over CCOs

- Default position and certainty;
- No public importance test;
- No requirement that C would withdraw and would be acting reasonably in doing so in absence of protection;
- ‘Prohibitively expensive’ test arguably more predictable than consideration of range of factors in ss. 88-89
- Not dependent on grant of permission.

## JR Funding and Costs

**Leon Glenister**

**(slides adapted from those written by Jenny Wrigley)**