Neutral Citation Number: [2020] EWHC 1292 (Admin)

Case No: CO/2700/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2020

Before :

MR JUSTICE SPENCER

- -

Between :

EMILY HUNT **Claimant**

- and –

THE DIRECTOR OF PUBLIC PROSECUTIONS **Defendant**

-and-

XY

Interested Party

JUDGMENT ON COSTS

(Determined on written submissions)

Jude Bunting (instructed by Centre for Women's Justice) for the **Claimant**.

Emma Scheer (of the Crown Prosecution Service) for the **Defendant**

APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 22nd May 2020 at 10am.

Mr Justice Spencer:

1. This is my decision on the issue of costs following the withdrawal of the claimant's application for judicial review on agreed terms. The issue arises in unusual if not unique circumstances. The question is whether the claimant is entitled, as part of her costs of the judicial review proceedings, to recover the costs of intervening in unconnected proceedings in the Court of Appeal (Criminal Division).

The issue

2. The claimant, who has waived her right to anonymity, challenged the defendant's decision not to prosecute XY for an offence of voyeurism. She was granted permission and her application for judicial review was to be heard by the Divisional Court on 6 February 2020. On 28 January 2020 the Court of Appeal (Criminal Division) heard and gave judgment in in an entirely unconnected case which raised precisely the same point of law. The claimant had been given leave to intervene in the Court of Appeal proceedings and her counsel made written and oral submissions at the hearing.

3. The Court of Appeal's decision on the point of law meant that the defendant could not continue to resist the claim for judicial review. The defendant agreed to quash the decision not to prosecute, and to take a fresh decision in the light of the Court of Appeal's ruling on the point of law.

4. By a consent order dated 5 February 2020 the claim for judicial review was withdrawn, on terms that the defendant would undertake a fresh review of the decision not to prosecute by no later than 4 May 2020. The order provided that the court should "determine the matter of costs by way of written submissions only".

5. The defendant concedes that he should pay the claimant's reasonable costs of the judicial review claim. The issue for me to decide is whether those costs may properly include the claimant's costs of intervening in the proceedings in the Court of Appeal.

6. The defendant contends that there is no jurisdiction to order payment of the claimant's costs of intervening in the Court of Appeal proceedings because they are not costs "*of or incidental to*" the judicial review proceedings, within the meaning of s.51(1) Senior Courts Act 1981. The claimant contends that the costs in question are recoverable in law as costs "*incidental to"* the judicial review proceedings, and that on the facts, as a matter of discretion, the claimant should be awarded those costs.

7. This appears to be the first time that such an issue has arisen for determination. It is probably a unique situation. It is therefore necessary, in deciding the issue of jurisdiction, to consider and apply the principles to be gleaned from the authorities, and to consider the factual background in order to decide whether (if the jurisdiction exists) it is appropriate to award those costs.

8. I am grateful for the written submissions of the parties, supplemented (at the court's request) by relevant correspondence and other documents. Because the case involves issues of practice in the Court of Appeal (Criminal Division) in relation to interveners, I have consulted with the Registrar of Criminal Appeals. I am grateful for her assistance and that of the specialist lawyer in the Criminal Appeal Office who dealt with this case.

9. Because it is conceded that the defendant should pay the claimant's costs of the judicial review proceedings, strictly speaking it would fall to the Costs Judge to determine, as part of the assessment process in the absence of agreement, whether particular costs which are claimed are costs "*of or incidental to*" the judicial review proceedings. The Judge (or Divisional Court) hearing the judicial review would normally determine only the *incidence* of costs, which in this case is not in dispute. However, in their written submissions both parties invite me to determine the remaining issue of whether the costs of intervening are costs "*of or incidental*" to the judicial review proceedings, and I am content to do so in furtherance of the overriding objective of dealing with the case justly and at proportionate cost.

The factual background

10. It is first necessary to explain a little of the detail of the point of law which arose in the judicial review and in the criminal appeal in order to put into their proper context the issues I have to decide.

11. The claimant (who has waived her right to anonymity) alleged that she had been the victim of an offence of voyeurism, contrary to s.67 Sexual Offences Act 2003. The allegation was that XY had recorded video footage on his phone of the claimant naked and asleep during the course of their encounter in a hotel room. She had no memory of what had happened and believed she may have been drugged. XY claimed when interviewed by the police that consensual sex had taken place between them, following which he saw she was asleep and took a video of her naked for the purpose of future sexual gratification.

12. A person commits the offence of voyeurism if, for the purpose of obtaining sexual gratification, and knowing that the other person does not consent to it, he observes another person "*doing a private act*": s.67 (1) of the Act. A person also commits the offence if he records another person "*doing a private act*" with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at an image of the other person "*doing a private act*" and he knows that the other person does not consent to his recording the act with that intention: s.67(3).

13. The Act provides that a person is "*doing a private act*" if that person "*is in a place which, in the circumstances, would reasonably be expected to provide privacy*" and (so far as is relevant) the person's genitals, buttocks or breasts are exposed or covered only with underwear: see s.68.

14. The defendant's decision not to prosecute XY (taken on 10 April 2019) was based on the proposition that the prosecution would be unlikely succeed in proving that when the recording was made the claimant was "*in a place which, in the circumstances, would reasonably be expected to provide privacy"*. The defendant contended that the factual context was relevant and, on the face of it, the act of recording had been preceded by consensual sex between the two of them only shortly beforehand, and in the very same place.

15. The claim for judicial review was issued on 4 July 2019. Following the grant of permission on 26 September 2019, the claimant's solicitors wrote to the defendant on 22 October 2019 inviting the defendant to concede the claim and reconsider the decision to prosecute. The defendant declined to do so.

16. The judicial review was listed to be heard by the Divisional Court on 6 February 2020. The claimant's skeleton argument had to be filed by 23 January 2020.

17. Meanwhile, unbeknown to the claimant and her legal team, on 1 October 2019 a defendant in completely unconnected criminal proceedings, Tony Richards, had been granted leave to appeal against his conviction in the Crown Court on 15 July 2019 for two offences of voyeurism. That case raised exactly the same legal issue, namely the proper construction of the definition of "*private act*" in s.67. His appeal was listed to be heard by the Court of Appeal (Criminal Division) on Tuesday 28 January 2020.

18. On the afternoon of Thursday 23 January the CPS lawyer, Emma Scheer, served a formal request to adjourn the hearing of the judicial review in the Divisional Court set for 6 February, on the grounds that "precisely the same" point of law was to be considered by the Court of Appeal on 28 January and that, as it was likely that judgment would be reserved, the judicial review hearing should be vacated, particularly as the judgment of the Court of Appeal would be binding on the Divisional Court. This was the first that the claimant and her legal team knew of the forthcoming hearing in the Court of Appeal of a case raising the same point of law.

19. On the morning of Friday 24 January the claimant's solicitor replied at length suggesting that it was premature to adjourn the Divisional Court hearing, as the Court of Appeal might give judgment on the day. The letter also gave notice that the claimant was minded to make an urgent application to the Court of Appeal that day to intervene in the case of *Richards* on the basis that it raised precisely the same point of law as the judicial review. The letter invited the defendant to provide a copy of the prosecution's skeleton argument in the appeal of *Richards* and to indicate whether they would consent to the claimant's proposed application to intervene in the appeal of *Richards*.

20. Ms Scheer responded early that afternoon, declining to disclose the prosecution's skeleton argument and declining to consent to the proposed application to intervene. The letter included the following passage:

> "*Both the Judicial Review and the Appeal Against Conviction have been granted permission and it is therefore evident that both are arguable. In addition, the decision of the CACD will be binding on the Divisional Court. We have therefore instructed counsel to present arguable submissions on the matter before the senior court and once judgment has been handed down we will, of course, reconsider our position in the judicial review. No doubt, the Claimant will also be assisted by guidance from the Court of Appeal."*

21. A little later that Friday afternoon, 24 January, the claimant's solicitors wrote to the Registrar of Criminal Appeals formally applying to intervene in the appeal of *Richards* listed the following Tuesday, 28 January. Their very full letter explained the background, confirming that the point of law in issue in the appeal was precisely the same as that in the judicial review. The letter included the following passage:

> *"As a result, despite having campaigned publicly on the precise point of law in issue in this appeal, at great personal distress, and*

> *having developed full argument in her judicial review claim, it now appears that Emily Hunt may be unable to influence the resolution of that point of law. The Court of Appeal may also, therefore, be left without the benefit of the detailed submissions that she has advanced in her judicial review claim."*

22. The letter requested that the claimant's counsel, Mr Jude Bunting, be permitted to make written and oral submissions. The email accompanying the letter requested a decision that afternoon so that if permission to intervene was granted counsel could prepare a skeleton argument over the weekend.

23. At 16.14 hrs that Friday afternoon the Registrar informed the parties that the Lord Justice who was to preside over the appeal, Fulford LJ (Vice President of the CACD), had considered the application carefully and consulted with the Registrar, and that he gave permission for the claimant to intervene. The intervener's written submissions were to be furnished to the parties and the court by 12 noon on Monday 27 January, and permission was also given for oral submissions to be made by the intervener at the hearing.

24. Now that the claimant had permission to intervene, Mr Bunting liaised with the other counsel in the appeal and was provided with the skeleton arguments. Mr Bunting duly served his skeleton argument (and a bundle of authorities) and made oral submissions at the hearing of the appeal on 28 January. Both appellant and respondent (i.e. defence and prosecution) were represented by Queen's Counsel.

25. At the hearing on 28 January the appeal was dismissed. Fulford LJ gave the judgment of the Court the same day: [2020] EWCA Crim 95. The Court adopted the interpretation of the relevant statutory provisions for which the claimant had been contending in the judicial review proceedings, accepting the arguments advanced by leading counsel for the Crown and by Mr Bunting on behalf of the intervener.

26. In the course of the judgment the respective arguments of the appellant, the respondent and the intervener were summarised. Mr Bunting's submissions were dealt with at paragraphs 15 -17 of the judgment. It is unnecessary to quote those paragraphs in full, but important to note how Mr Bunting's submissions were introduced:

> "*15. Emily Hunt, who is the applicant in a linked judicial review claim – in the sense that many of the same issues arise in her case which will be heard after this appeal – was allowed, without objection, to intervene on general issues through Mr Bunting of counsel."*

27. In relation to the words "without objection" in that paragraph of the judgment, Mr Bunting explains in his written submissions on costs that at the outset of the hearing Fulford LJ explained that the claimant had been permitted to intervene because the decision in the appeal may be "entirely or partially determinative" of the judicial review claim. He invited counsel for the Crown to confirm whether the Crown (i.e. the defendant in the judicial review proceedings) had "any disquiet" about the claimant's intervention. Counsel for the Crown did not raise any objection.

28. I should also add for completeness that, through shortage of time on the Friday afternoon when permission to intervene was granted, the Registrar had not sought the Crown's views on the application to intervene; nor had the CPS lawyer, Ms Scheer, been sent the claimant's solicitor's letter applying to intervene. She was, however aware that the application was to be made and she was informed immediately it was granted.

29. On 29 January the defendants indicated that in the light of the judgment in *Richards* the decision whether to prosecute XY would be reviewed. The hearing of the judicial review listed for 6 February was formally vacated on 5 February when the consent order was agreed and sealed.

30. As a postscript, there was an application by the appellant, by way of further appeal, to certify a point of law for the Supreme Court, but that application was refused by the Court of Appeal.

The relevance to the judicial review of the intervention in *Richards*

31. Having set out the factual history, I make the following observations on the reasonableness and relevance to the judicial review proceedings of the claimant's intervention in the appeal of *Richards*, before addressing the issue of jurisdiction.

32. There can be no doubt that there was indeed an identical point of law in both sets of proceedings. The decision of the Court of Appeal on that point of law would have been binding on the Divisional Court. It was therefore entirely appropriate that the Court of Appeal should have given its ruling before the Divisional Court heard the judicial review.

33. It is regrettable that the claimant's legal team had not been alerted much earlier to the fact that there was an appeal against conviction pending in the Court of Appeal which raised the identical point of law. By the time that was disclosed Mr Bunting had already prepared the claimant's skeleton argument for the judicial review to meet the deadline of 23 January.

34. Potentially, as the claimant's legal team would have seen it, the situation which had developed by Friday 24 January was that the CPS were advancing diametrically opposed arguments in the two sets of proceedings. In the judicial review the CPS were seeking to support an interpretation of the words "*doing a private act*" which was quite contrary to the argument they were putting forward in opposing the appeal against conviction in *Richards*. As Ms Scheer pointed out in correspondence, and as she repeats in her written submissions on costs, the fact that permission had been granted in the judicial review and leave granted in the criminal appeal demonstrated that both interpretations of the relevant statutory provision were arguable. But that could not assuage the claimant's concern that contradictory arguments were being advanced by the Crown.

35. The claimant was naturally anxious that the point of law should be resolved in her favour. Had there been no criminal appeal in *Richards*, the point would have been decided by the Divisional Court in her judicial review. But in view of the appeal in *Richards*, the Divisional Court was going to be bound by the decision of the Court of Appeal. It was therefore entirely understandable and appropriate that the claimant should wish to have the opportunity of advancing her arguments on the point of law in the forum which, in reality, was going to determine the outcome of her judicial review. That is

precisely why, most unusually, she was granted permission to intervene in the appeal of *Richards*.

36. I am grateful to the Registrar of Criminal Appeals, and to her specialist lawyer who dealt with the intervention in the present case, for their assistance in understanding the practice of the Court of Appeal (Criminal Division) in relation to interveners. There is also helpful background in *Court of Appeal Criminal Division: A Practitioner's Guide,* Beldam and Holdham (2nd ed, 2018), at paras 5-140 and 141. As Mr Bunting rightly points out in his written submissions, it is very unusual indeed for a private individual to be permitted to intervene. In fact the Registrar and the specialist lawyer can think of no other case where an individual applied or was permitted to intervene in an appeal.

37. There have certainly been cases where organisations or interest groups have been permitted to intervene in criminal appeals. Mr Bunting gives examples in his written submissions. *Joint Enterprise: Not Guilty by Association* was granted permission to intervene in the post-*Jogee* joint enterprise appeals: *R v Johnson (Lewis) and others* [2017] 1 Cr App R 12. *Anti-Slavery International* was granted permission to intervene in a guideline case about human trafficking: *R v Joseph (Verna) and others* [2017] 1 Cr App R 33. *Liberty* and *Friends of the Earth* were permitted to intervene in a sentence appeal about public protest: *R v Roberts (Richard)* [2019] 1 WLR 2577.

38. There is, it appears, currently no Criminal Procedure Rule or Practice Direction which sets out the procedure for applying to intervene in proceedings in the Court of Appeal (Criminal Division). There appears to be no power to award costs, within the appeal itself, to an intervener. A very general power to award costs from central funds in any criminal proceedings is contained in s.19(3)(a) Prosecution of Offences Act 1985:

> "(3) The Lord Chancellor may by regulations make provision out of central funds, in such circumstances in relation to such criminal proceedings as may be specified, of such sums as appear to the court to be reasonably necessary – (a) to compensate any witness in the proceedings, and any other person who in the opinion of the court necessarily attends for the purpose of the proceedings otherwise than to give evidence, for the expense trouble or loss of time properly incurred in or incidental to his attendance…".

It appears that no relevant regulations have been made under s.19(3).

39. By contrast, in the Supreme Court express provision is made for interveners and their costs. Rule 26 of the Supreme Court Rules 2009 provides that any person may apply to the Court to intervene in an appeal, and in particular "any official body or non-governmental organization seeking to make submissions in the public interest" and "any person with an interest in proceedings by way of judicial review". An intervener is deemed to be a "party" to the appeal: Rule 2. As to costs, Rule 46 (3) provides:

> "Orders for costs 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)."

40. In the present case, the fact that the claimant was, so exceptionally, granted permission to intervene is a measure of how directly relevant and how important her intervention was to her judicial review claim. It is quite apparent from the Court's judgment in *Richards* that Mr Bunting's submissions were focused and valuable. Ms Scheer suggests in her written submissions on costs that the intervention was unnecessary because the Crown was ably represented by very experienced leading counsel, and the claimant's submissions really added nothing. I cannot accept that assertion. In granting permission to intervene, Fulford LJ clearly took the view that the claimant should have the opportunity not merely to observe the proceedings in the appeal of *Richards* but to participate in those proceedings by assisting the Court to shape the law which was equally applicable to her judicial review claim. As it was put in the application to intervene, the claimant wished to be able to "influence the resolution of that point of law."

41. I am satisfied that it was entirely reasonable for the claimant to intervene in the appeal of *Richards*, and satisfied that her intervention was directly relevant to the judicial review proceedings.

42. The question is whether, as a matter of law, the costs of her intervening in the case of *Richards* can properly be regarded as costs "*of or incidental to*" the judicial review proceedings.

Costs "*of or incidental to*" the judicial review proceedings

43. Section 51(1) of the Senior Courts Act 1981 provides so far as relevant:

> "(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in… the High Court… shall be in the discretion of the court."

The defendant's submissions

44. Ms Scheer submits that there is no jurisdiction to grant the costs of the claimant's intervention in the appeal of *Richards* because they are not costs "*of or incidental to*" the judicial review proceedings. She relies heavily, but by analogy, on *In re Gibson's Settlement Trusts* [1981] Ch 179 where Sir Robert Megarry V-C gave guidance on the interpretation of the words *"of or incidental to*" in relation to the costs of work done prior to the commencement of proceedings. That, of course, is not the situation in the present case.

45. The Vice-Chancellor's review of the authorities in *Gibson* led him to conclude (at 186 H) that there were three "strands of reasoning" to be applied: (i) that of proving use and service in the action (ii) that of relevance to an issue (iii) that of attributability to the paying party's conduct.

46. Ms Scheer submits that although these principles relate to costs incurred prior to the commencement of proceedings, "similar considerations should apply" when determining whether the costs of the intervention in the present case are costs "*of or incidental to*" the proceedings. She does not explain why similar considerations should apply, or support that submission with any further authority.

47. Taking each "requirement" in turn, Ms Scheer does not accept (i) that the costs of the intervention were "for use in the claim" or (ii) were "relevant to matters in issue". She submits that the costs of the intervention were not (iii) "attributable to the defendant's conduct", in that the defendant's conduct was not the subject matter of the criminal proceedings. She submits that the intervention was "wholly unnecessary" because the defendant had already agreed to reconsider its position in the judicial review proceedings depending on the outcome of the criminal appeal.

48. Ms Scheer also refers (quite properly) to CPR 44.2, which deals in general terms with the court's discretion as to costs, and provides:

> "In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including – (a) the conduct of all the parties..."

The conduct of the parties is also one of the factors to be taken into account, pursuant to CPR 44.4, in in deciding the amount of costs.

49. Ms Scheer submits that the defendant's position in seeking to defend the judicial review claim on the same basis that the Single Judge had granted leave in the appeal of *Richards* (i.e. that the point of law was arguable) was not unreasonable. She submits that it was wholly unnecessary and disproportionate for the claimant to intervene in the criminal proceedings when both parties were represented by Queen's Counsel. The defendant had taken the view that the court would not be assisted further by satellite submissions and for that reason had not consented to the proposed intervention. She submits that the claimant's intervention added nothing of substance to the judgment; the Court of Appeal was persuaded by the submissions of counsel for Crown rather than the submissions of the intervener.

The claimant's submissions

50. In response, Mr Bunting submits that even if the three "tests" in *Gibson* are those properly to be applied, they are met. The costs of intervening were (i) "of use and service" in the judicial review proceedings, because the defendant accepted that the criminal appeal would be decisive of the judicial review claim. The costs of intervening were (ii) "of direct relevance" to the claim for judicial review, because they raised the same legal issue. The costs of intervening were (iii) "attributable to the defendant's conduct", because it was necessary for the claimant to intervene only because the defendant acted wholly unreasonably in arguing opposite sides of the same legal point in parallel legal proceedings.

51. Mr Bunting submits that the intervention was not "unnecessary and disproportionate". It was unreasonable for the defendant not to inform the claimant (or the Administrative Court) of the criminal appeal until the day the claimant's skeleton argument was due to be lodged. He submits that it was unreasonable for the defendant to refuse to provide the claimant with the Crown's skeleton argument for the appeal, with the result that the claimant did not know precisely what points were to be advanced. He submits that it was unreasonable for the defendant not to consent to the proposed intervention. As to the suggestion that the claimant's intervention added "nothing of substance", Mr Bunting submits that had that been the position, the Court of Appeal would have said so.

Discussion

52. I have considered all these submissions carefully. I am not persuaded that the "three strands" test in *Gibson* is necessarily applicable in the different and unique circumstances of the present case. The Vice-Chancellor was dealing specifically with costs incurred prior to the commencement of proceedings, and the authorities he relied upon addressed that discrete issue. One can readily see why a strictly drawn test is necessary to ensure that such costs are properly to be regarded as "incidental to" the subsequent proceedings, when those earlier costs may have been incurred in relation to more general issues of dispute which were not necessarily the subject of the subsequent proceedings. The case of *Gibson* was not concerned with the costs of intervening in other proceedings.

53. However, even if the "three strands" test were applicable, it would in my judgment be satisfied, for the reasons Mr Bunting gives.

54. The intervention in the criminal appeal of *Richards* was plainly "of use and service" in the judicial review proceedings because it advanced the claimant's arguments on the very same point of law. That was precisely why the intervention was permitted, as I have already observed.

55. The intervention was plainly "relevant" to the judicial review proceedings because the issue of law in question went to the heart of the claim for judicial review, and the criminal appeal was ultimately determinative of the judicial review proceedings.

56. The intervention was "attributable to the defendant's conduct" because there was a most unusual and unsatisfactory contradiction between the stance taken by the defendant in resisting the judicial review on the one hand and resisting the criminal appeal on the other. The Crown was, in effect, arguing opposite cases on the same point of law in parallel proceedings. More generally, the intervention was attributable to the defendant's conduct because the reason underlying the necessity for the claimant to intervene and argue the same legal point arose from the decision not to prosecute XY, which was the conduct challenged in the judicial review.

57. In terms of authority, I have gained considerably greater assistance from the decision of Davis J (as he then was) in *Roach v Home Office;Matthews v Home Office* [2009] EWHC 312 (QB); [2010] QB 256. The case involved two separate costs appeals in civil proceedings for negligence arising from deaths by suicide in prison. The issue in each case was whether the costs of the subsequent personal injury claim could include the costs of counsel and solicitors attending and taking part in the inquest into the prisoner's death Were those costs recoverable as costs "*of or incidental to*" the subsequent civil proceedings? Like *Gibson*, the case therefore related to costs incurred before the personal injury claim was commenced. But that was not the issue in the appeals. The value of the case is that the costs in dispute were the costs of taking part in other court proceedings.

58. Davis J held that there was no rule that the costs of one set of proceedings were never recoverable as costs "of or incidental to" another set of proceedings, within the meaning of s.51(1) of the Act. The costs of attendance at an inquest were therefore capable of being recoverable as costs "incidental to" subsequent civil proceedings. In other words, there was jurisdiction to award such costs.

59. Davis J also held that although the purpose of a party's attendance at an inquest will be a relevant consideration when determining whether, or the extent to which, the costs of such attendance were "of or incidental to" subsequent proceedings, it could not be decisive. It was essential also to have regard to the relevance of such attendance to the subsequent proceedings and to the reasonableness and proportionality of the costs so incurred.

60. At the conclusion of his judgment, Davis J declined to lay down guidelines for the assistance of costs judges and those who practise in this field. He said, at [62]:

> "Each case should properly be decided by reference to its own circumstances. I am fortified in this view by the suggestion, as to which I express no opinion, that what is decided in these cases (which relate solely to inquests preceding a subsequent resolution of civil proceedings) may also be relevant in other contexts: for example, attendance prior to civil proceedings at a criminal trial involving death by dangerous driving or a criminal trial involving health and safety issues. Better, I think, to leave it to costs judges to decide each case on its own facts by reference to section 51 and the subordinate statutory rules and having regard to the principles indicated in *In re Gibson's Settlement Trusts* [1981] Ch 179."

61. I should also mention, for completeness, the decision of the Court of Appeal in *Darroch v Football Association Premier League Ltd* [2017] 4 WLR 6. There the Divisional Court had quashed convictions in the magistrates' court on an appeal by way of case stated, but refused the successful appellants' subsequent application under s.51 Senior Courts Act 1981 for a third party costs order against the respondent in respect of the costs of the magistrates' court proceedings. The Court of Appeal affirmed the Divisional Court's decision, dismissing the appeal for want of jurisdiction because the Court of Appeal had no jurisdiction in a "criminal cause or matter": see s.18 of the 1981 Act. But on the merits, the Court of Appeal held (per curiam) that s.51 did not empower the High Court, on an appeal by way of case stated or a claim for judicial review that seeks to quash convictions, to make a civil order in respect of costs incurred in the underlying criminal proceedings in the magistrates' court or in the Crown Court, such costs not being "*incidental to*" the proceedings in the High Court.

62. At [28]-[29] Burnett LJ said:

> "28. The general approach to the meaning of that term is found in *Gibson's Settlement Trusts* [1981] Ch 179 but none of the features identified by Sir Robert Megarry V-C in that case is relevant in this appeal. It *Wright v Bennett* [1948] 1 KB 601, on considering an earlier version of the same provision, the Court of Appeal held that "one has to treat proceedings below as a separate proceeding… from the proceedings here": per Somervell LJ, at p 606.
>
> 29. It follows that the term "of [or] incidental to" is not apt to include the costs of the proceedings from which an appeal is brought. Appeal courts have power to make orders in respect of the costs underlying proceedings because it is expressly conferred by legislation or by the rules….Thus when an appeal court makes an order in respect of the

> costs incurred in the underlying proceedings it is not using power conferred by section 51 but express power conferred elsewhere."

63. By contrast, where the costs of an appeal are awarded, and the claim is for "incidental" costs not incurred in the proceedings from which the appeal is brought, the situation is different. Thus in *Roach v Home Office* (supra), Davis J did not regard the fact that the claimants' legal representation at the inquest (as parents of the deceased) had been publicly funded affected their entitlement to those costs as costs "incidental to" the subsequent civil proceedings. In the present case, for the reasons I have explained, the claimant in any event had no entitlement to apply in the Court of Appeal for her costs of the intervention in *Richards*.

Conclusion

64. I am abundantly satisfied, in the very unusual circumstances of this case, that there is jurisdiction to award the claimant, as part of her costs of the judicial review proceedings, her costs of intervening in the criminal appeal of *Richards*. In my judgment they are costs "*incidental to"* the judicial review proceedings. The claimant was permitted to intervene in the criminal appeal, quite exceptionally, because the point of law for decision in the appeal was the very same point of law for decision in the judicial review.

65. Because that point of law was likely to be determinative of the judicial review, and because she should not have been disadvantaged by the fact that the criminal appeal was to be argued before the judicial review, it was necessary, reasonable and proportionate that she should intervene and participate actively in the criminal appeal, through counsel, to argue that which she sought to argue in the judicial review and (in effect) seek to persuade the Court of Appeal to declare the law to be in her favour. Had she not intervened she would have been deprived of the opportunity to argue her case in the forum which was to decide the very point of law on which her judicial review claim would stand or fall.

66. The assessment of the claimant's costs of intervening will be a matter for the Costs Judge if agreement is not reached. I have been provided with no figures because I am invited only to decide the issue of principle. As I said at the outset of this judgment, strictly speaking the determination of whether particular costs are or are not "of or incidental to" the proceedings in which the order for costs has been made is normally a matter solely for the Costs Judge. However, the parties have specifically requested me to decide the issue and, having seen this judgment in draft, they have both agreed that my Order should be expressed in the following terms: "The defendant shall pay the claimant's costs of intervening in the criminal appeal of *R v Richards*, to be assessed on the standard basis (if not agreed)."

67. For the avoidance of doubt, I would expect the costs of intervening to include the preparation of the letter to the Registrar of Criminal Appeals seeking permission to intervene, the costs of counsel's preparation of the skeleton argument and other documentation served as part of the claimant's intervention, and counsel's preparation for and attendance at the hearing of the appeal. I assume the claimant's solicitor also attended that hearing, but in the absence of agreement it must be for the Costs Judge to determine whether the solicitor's attendance should also be included.

Postscript

68. I would not want this costs ruling to be regarded in any way as an encouragement to other litigants in judicial review claims to seek to intervene in proceedings in the Court of Appeal (Criminal Division). Far from it. This is a truly exceptional case which turned entirely on its special facts.

69. More generally it may be appropriate for thought to be given by the Criminal Procedure Rules Committee (or others) to issuing some formal guidance on the principles and practice of intervening in the Court of Appeal (Criminal Division).