

Fixed Costs in Judicial Review and Human Rights

Introduction

1. The purpose of this paper is to stimulate debate on means of improving access to justice by reforming the costs rules in Judicial Review and Human Rights.
2. It is not enough for the substantive law to be adequate. As important is the ability to obtain access to the courts, otherwise claims cannot be brought.

Particular Considerations in Judicial Review

3. Judicial Review (and related Human Rights) litigation serves a vital constitutional function, in delineating the powers of public authorities, as the recent Article 50 litigation has compellingly illustrated.
4. Three of the five cases Lord Neuberger chose as being among the most significant of the first five years of the Supreme Court are public law and/or human rights cases: <http://www.independent.co.uk/news/people/lord-neuberger-on-the-supreme-court-five-key-cases-from-its-first-five-years-9789269.html>
5. It is important for the functioning of a modern day democracy that the rule of law is respected by all, and the availability of judicial review is an irreplaceable element of that.

What can be done to improve access to justice in judicial review?

Qualified One Way Costs Shifting

6. This was the preferred recommendation of Sir Rupert Jackson in his Final Costs Review, and it still has compelling logic.

7. His Lordship noted that the permission requirements was an effective filter to weed out unmeritorious cases, and recommended that all claimants in judicial review cases (other than wealthy or commercial claimants) be protected from paying costs in excess of what is reasonable bearing in mind the financial resources of all parties and their conduct.
8. However that recommendation has not been adopted by the government, and it does not seem likely that it will do so in future.

Mandatory Fixed Recoverable Costs

9. There is evidence that the risk of adverse costs orders is preventing legitimate claims from being brought. That is unsurprising: a public authority may spend tens of thousands of pounds defending a claim, and there are few individuals with sufficient liquid assets to regard the loss of a judicial review with equanimity. Although in theory the possibility of a Protective Costs Order may have provided a solution, in practice few cases qualify for protection.
10. One way of mitigating the problem would be by the adoption of a mandatory rule for fixed recoverable costs in public law.
11. However that would run a serious risk of rendering it impossible for important test cases being run. Nor would it be a good fit for every case: such is the variability of judicial review cases that it is difficult to generalise when estimating the amount of time reasonably required for a claim.
12. Further, the adverse costs risk only applies to non-legally-aided cases, and there would be no reason for those with the benefit of legal aid to adopt a fixed costs regime.
13. It might give rise to an inequality of arms. Defendants are generally relatively well-resourced in comparison to claimants (who are typically individuals), and limiting fixed recoverable costs may tip the balance too far towards the defendant, for it

effectively limits the time which can be spent in preparing the case by the claimant. In a complicated case that might make the difference between winning and losing.

14. Also, the question for the court not uncommonly involves a moving target: the decision under challenge is often re-taken by the defendant, sometimes more than once, during the course of the litigation, which can entirely change the nature of the challenge. The defendant's approach (and in particular, how many points are defended, both good and bad) has a profound effect on the work required for the case.

Optional Fixed Recoverable Costs

15. One suggestion is to introduce an optional system of fixed recoverable costs, as with the Aarhus Convention principles, which have been incorporated into the CPR in rules 45.41 - 44.
16. Article 9(3) of the *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environment Matters* places an obligation on the United Kingdom to ensure that members of the public had access to judicial procedures to challenge such contraventions in "environmental matters" which are not "prohibitively expensive".
17. CPR PD 45 lays down limits for adverse costs in Aarhus Convention claims: £5,000 for individuals who are Claimants, £10,000 for non-individuals who are Claimants, and £35,000 for Defendants. Usually orders are made binding both the claimant and defendant.
18. CPR 45.42(2) permits a claimant to opt out of fixed recoverable costs, even if the claim falls within the Convention.
19. If a particular claimant thought that the benefit of a fixed potential costs liability was worth fixing their recoverable costs for, they would be allowed to do so, but it would not be imposed upon them.

20. Amendments made on 28 February 2017 are likely to increase uncertainty somewhat, by introducing a power to vary or remove the costs limits if satisfied that proceedings would not be rendered “prohibitively expensive” for the claimant (ie exceed the “financial resources” of the claimant, or are “objectively unreasonable”). A schedule of the claimant’s financial resources which takes into account any financial support which any person has provided or is likely to provide must be filed with the application for a costs cap. That requirement alone may discourage claimants from seeking a costs cap, notwithstanding the possibility of the relevant part of the hearing being in private.

The shape of a Fixed Recoverable Costs rule in Judicial Review

21. A system could be designed making all recoverable costs fixed, taking account of the procedural stages applicable to judicial review claims.
22. Thus a table would not simply adopt the structure of Sir Rupert’s table at paragraph 5.4 of his lecture of 28 January 2016, but it might look like this (assuming four bands of complexity):

Stage	Band 1	Band 2	Band 3	Band 4
Pre-action				
Issue				
Summary Grounds				
Permission decision - written				
Permission decision - oral				
Detailed Grounds				
Claimant’s Skeleton				
Defendant’s Skeleton				
Substantive hearing				

23. Ascertaining the complexity of a case is not always straightforward prior to a final hearing. The remedy sought is usually non-pecuniary in nature, typically a declaration, so there is no reliable objective hook to attach a judgment as to proportionate cost. It is usually not easy to infer how complex the case is on its face, or indeed until the Detailed Grounds of Defence and Evidence have been filed by the Defendant. Often the complexity of the case is underplayed in the Summary Grounds of Defence for understandable tactical reasons by the defendant in order to resist permission. The number of witnesses or experts or pages in the bundle is not a good guide to complexity in this field.
24. JR claims are heavily front-loaded in terms of preparation time by the claimant, much more so than in private law. More than 50% of the work is done by the time the claim is issued, and possibly more. The costs permitted at each stage would need to take this into account.
25. There may be different opinions on when the complexity of the case should be determined. Some might say that it could not properly be assessed before the Detailed Grounds, and possibly only when the defendant's skeleton is received, yet many cases would be concluded before those stages. The parties are unlikely to agree on the complexity, for the defendant would be likely to underplay the complexity of the case. Any other approach would make it impossible to resist permission.
26. The scheme could be amended if there was experience of costs budgeting, which would provide better empirical evidence of what sums might be appropriate in each category.

Optional Costs Budgeting

27. It may not be attractive in larger cases to seek fixed recoverable costs, and the limit may be removed if the principles governing the latest Aarhus amendments are applied to JR fixed recoverable costs generally.

28. In those circumstances a claimant may wish to seek permission for the case to be costs budgeted within CPR 3. A defendant may also seek costs budgeting to limit its risk of adverse costs.
29. It would be desirable if decisions regarding permission for costs budgeting and the quantum of any limits imposed were decided by Administrative Court judges, owing to their experience of hearing judicial review cases.
30. Such applications could be made after the permission decision.

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