Rethinking Costs in Judicial Review

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1. This paper is written in the context of Chapter 35 of Lord Justice Jackson's *Preliminary Report into Civil Litigation Costs* (8th May 2009), where he reviewed the current costs regime for Judicial Review claims and invited comments.

2. Judicial review is special. It is wrong simply to carry over into judicial review those costs practices and presumptions which have been found in private law cases. As Sedley LJ explained in *R (Davey) v Aylesbury Vale District Council* [2007] EWCA Civ 1166 [2008] 1 WLR 878 at [18], the fact that a particular costs order "*would … follow the practice in civil litigation*" is "*not a sufficient justification in public law.*"

3. What judicial review calls for is a 'one-way cost shifting' system. That means the default position would be: (a) that a claimant's costs are recoverable from the defendant public authority if the claimant wins (as at present); but (b) the defendant public authority's costs are not recoverable from the claimant if the claimant loses (reversing the current presumption). Other than in special categories of case ("at-risk cases"), or unless there is unreasonable conduct of the litigation, the claimant would not have to bear the defendant's or an interested party's costs.

4. Judicial review procedure allows this to work. The permission stage provides the perfect case-management opportunity for the Court, informed by the defendant and interested parties, to take steps: (i) to protect against an

unfounded or frivolous claim by refusing permission for judicial review; and (ii) to address whether the case should be allocated to the "at-risk case" category. Unfounded claims should be refused permission. And costs orders can still be visited in appropriate cases: for example where a private company brings a commercial judicial review claim against its regulator.

5. A public law costs regime should promote access to justice. It should be workable and straightforward. It should facilitate the operation of public law scrutiny on the executive, in the public interest. This is the key point. For judicial review is a constitutional protection, which operates in the public interest, to hold public authorities to the rule of law. It is well-established that judicial review principles "give effect to the rule of law": see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 [2003] 2 AC 295 at [73]; and *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60 [2008] 3 WLR 568 at [41]. The facilitation of judicial review is a constitutional imperative. As Lord Phillips said in his speech to the Commonwealth Law Conference in 2007, judicial review *"is increasingly becoming the single most important function of the judge in the field of civil law"*. He added this: "*The rule of law requires that the courts have jurisdiction to scrutinise the actions of government to ensure that they are lawful … The citizen must be able to challenge the legitimacy of executive action before an independent judiciary."* That is why, as Lord Diplock famously explained in *R v Inland Revenue Commissioners, ex p National Federation* [1982] AC 617, 644E-G, it would be a *"grave lacuna in our system of public law"* if a group or individual *"were prevented by outdated technical rules of locus standi from bringing [a] matter to the attention of the court to vindicate the rule of law"*.

6. The current (two-way costs shifting) rules are just as much a practical bar as any technical standing rules. They mean that claimants are required to bear

very considerable financial risks when they apply for judicial review. That is known and intended as a deterrent. But such a deterrent is not in the public interest. Especially when it is remembered that judicial review (a) performs the essential constitutional function of being a legal audit of the use of executive power and (b) allows the robust weeding out of weak and frivolous claims at the permission stage.

7. As noted in chapter 46 of Jackson LJ's preliminary report, Lord Woolf looked at costs in promoting the reforms of the Rules of the Supreme Court, through the introduction of what became the Civil Procedure Rules. Thus, in Chapter 25 of his *Interim Report on Access to Justice* (June 1995), Lord Woolf considered the traditional costs regime. He identified the following considerations in support of two-way costs shifting. (1) It was fairer that a party who succeeds in litigation should at least recover the major proportion of his own costs from his opponent. (2) It deterred unmeritorious litigation. (3) It encouraged earlier settlement. These can be thought of as the "fairness rationale", the "deterrence rationale" and the "settlement rationale". Lord Woolf felt that these considerations outweighed the arguments against the traditional regime and that the conventional rule should be retained.

8. It can properly be suggested that these considerations fail to justify the conventional costs rule in the special context of judicial review. Take the fairness rationale. It must be remembered that public authorities have at the heart of their function and being the duty to act in the public interest: see eg. *R v Tower Hamlets London Borough Council, ex p Chetnik Developments Ltd* [1988] AC 858, 872C-F. The facilitation of judicial review scrutiny is itself in the public interest. There is no 'unfairness' in the State absorbing the cost of this vital public law audit. The State readily absorbs the costs of an ombudsman investigation, an inquest, a public inquiry. Viewed in this light, there is nothing 'unfair' in the State being expected to absorb the cost where the Court has 'called in' a public law matter, having identified viable grounds

of challenge at the permission stage. The threat of a costs order will never prevent the authorities of the State from defending themselves on judicial review. There is nothing 'unfair' in removing the costs-risk bar which would serve to exclude judicial review claimants.

9. The settlement rationale also lacks force in relation to judicial review. Such cases can rarely be 'settled' in the same way that private law litigation can be compromised, with negotiated 'give and take'. A public authority which wishes to agree to reconsider an impugned decision afresh will be perfectly entitled to offer this, the sooner the better, and the judicial review will become unnecessary. No claimant or claimant's lawyer is entitled to insist on an 'academic' claim proceeding: see eg. *R (Tshikangu) v Newham London Borough Council* [2001] EWHC Admin 92. On the other hand, a public authority may be *functus* or may hold to its self-direction in law, in which case it cannot "settle" the case. No costs principle will change that.

10. That leaves the deterrence rationale, that the existence of a serious costs risk may play a useful function in discouraging would-be claimants from bringing weak or frivolous claims. But there are two answers to that. First, the judicial review process contains a built-in mechanism for weeding out weak or frivolous claims: the permission stage. As Jackson LJ has explained, about 80% of claims for judicial review are weeded out at the permission stage (Ch. 35 at §2.1). Secondly, the risk of a crippling costs order disincentivising the bringing of a claim works on meritorious as well as on unmeritorious claimants. Indeed, to the extent that it does a job that is not already done by the permission requirement, it is weeding out viable (arguable) public law challenges not weak or frivolous ones. In other words, this deterrence rationale invokes a rule which is, on analysis, classically disproportionate. It is not necessary: the permission filter serves this important function. And it is untailored and indiscriminate: it serves to exclude the meritorious with the unmeritorious. It is unworthy of public law.

11. There is of course the protective costs order (PCO) regime. But that regime does not adequately address the problems with the conventional costs rules and presumptions. Tinkering with it might alleviate some of the concerns. But there remains a case for more fundamental reform.

12. In Chapter 35 of his interim report, Jackson LJ notes a number of possible problems with the PCO regime. (1) The circumstances in which a PCO should be made are defined too restrictively. (2) There is no reason why the fact that the applicant has a private interest in the outcome should be fatal, provided that the "public interest" test is satisfied. (3) The *Corner House* criteria put undue pressure on claimant solicitors to act *pro bono*. It is simply not practicable for firms specializing in this line of work to do cases *pro bono* as a matter of routine. (4) If the existing CFA regime survives, then capping the costs recoverable by the claimant at the same level as the costs recoverable by the defendant creates substantial difficulties. (5) Any judicial review claimant, who has obtained permission to proceed with his or her claim, has a proper case which merits determination. A claimant of modest means who brings such a case against a public authority should not be at risk of a crushing adverse costs liability.

13. These are urgent and serious concerns. They demonstrate the inadequacy of the current PCO regime to answer the special concerns that arise in relation to claimants' costs in judicial review proceedings – in relation to access to justice, equality of arms and fairness. The Court of Appeal has since acknowledged that the *Corner House* principles fall to be applied "flexibly" (*R (Compton) v Wiltshire Primary Care Trust* [2008] WECA Civ 749; *R (Buglife) v Thurrock Thames Gateway Development Corp* [2008] EWCA Civ 1209; *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107). But this approach does not promote legal certainty; nor does it offer much comfort in light of

the acknowledgement that PCOs are to be granted only in “rare” or “exceptional” cases.

14. The costs rule that best suits, and acknowledges, the nature and purpose of public law proceedings is that proposed in paragraph 4.5 of Chapter 35 of Jackson LJ’s interim report, namely one-way costs-shifting. The following regime may be envisaged. The permission judge will decide at the permission stage whether the case in hand is an “at-risk case”. If not then if the claimant loses, there will be no order as to costs, subject always to the familiar proviso: provided that the claimant has not behaved unreasonably in the litigation (in which case the defendant could seek referable costs). If the claimant wins, the defendant is liable for the claimant’s costs in accordance with, and subject to, the usual principles for judgments as to costs. The presumption would be overridden if the permission judge orders that the case is an “at-risk case”, based on the nature of the dispute and the position of the parties.

15. It cannot be said that such a regime must be rejected as being, in principle, incompatible with the nature and purpose of public law. Had we inherited such a system, we would not think it unprincipled or lacking in sense and justice. Jackson LJ notes that Canada applies a regime of one-way costs shifting to costs in judicial review without difficulty (Ch. 35, 3.8-3.9). This is also the system that applies to complaints brought to the European Court of Human Rights, there being no provision in the Convention for the respondent Government’s costs to be paid by the applicant in any circumstances. By contrast, a successful applicant’s reasonable costs may be recovered from the respondent Government. Absence of a costs risk is a crucial element in enabling states to be held accountable under the Convention, regardless of means, to those individuals whose rights the Convention aims to protect.

16. Domestically, statutory processes which serve to 'audit' administrative action are freely available. Take the investigations by the Parliamentary Ombudsman or the Local Government Ombudsman. It has been recognized that the availability of these means of scrutiny and redress is a necessary public good, the cost of which stands to be borne by the public purse. Even where such proceedings are adversarial, unsuccessful claimants are not as a rule required to pay the government's costs of resisting a complaint. It is understood, for instance, in appeals to Planning Inspectorate that no cost order is made unless one of the parties has behaved unreasonably; that 'no costs' is also the default rule before the Special Educational Needs, the Disciplinary Tribunal, the Criminal Injuries and Compensation Appeals Panel and the Pensions Appeal Tribunals; and now in the new Upper Tribunal (absent unreasonable behaviour).

17. Finally, this. In chapter 36 of his report Jackson LJ discusses compatibility with the Aarhus Convention and the conclusions of the Sullivan report that the judicial review costs regime is prohibitively expensive and thus in breach of the Convention. In that context, one-way costs shifting is considered as a solution (§4.6). The point is powerfully made (§4.9) that there is an obvious case for a harmonized system, and that whatever solution is adopted for environmental cases should be expanded to judicial review in general.

18. Remembering always judicial review's vital constitutional function, we can properly paraphrase Lord Diplock's principled observation from the *National Federation* case, in this way. It is in truth a *"grave lacuna in our system of public law"* that a group or individual should be *"prevented by inapt private law rules of costs from bringing [a] matter to the attention of the court to vindicate the rule of law"*. It is time to close the gap.