

**COSTS IN THE FIRST-TIER AND UPPER TRIBUNALS:  
DOES THE REGIME PROMOTE ACCESS TO JUSTICE?**

**I. INTRODUCTION**

1. Characteristics of tribunal proceedings:
  - (i) Intended to provide speedy, inexpensive access to justice.
  - (ii) Meant to be user-friendly, and less legalistic than the courts. T
  - (iii) Have expertise (as often comprise lay members with relevant qualifications or experience as well as judges).
  - (iv) Expertise and inquisitorial nature reduces the need for representations.
  - (v) Procedural simplicity (such as the power to determine appropriate cases without a hearing) also reduces the need for legal representation.
2. Costs shifting (a presumption that the loser pays the winner's costs) has not traditionally been applied in tribunal proceedings (although tribunals are diverse, and this is not true in respect of all types of tribunal, or in respect of all types of claim).
3. A presumption of costs shifting does apply in the civil courts, see CPR 44.2 (although note the position of legally aided parties).
4. The policy underpinning costs-shifting: it is only fair that a successful litigant should recover the costs which he has incurred in vindicating his rights in the face of opposition.
5. Concerns about the effects of costs-shifting, and the risk of an adverse costs order, on access to justice in judicial review proceedings in the Administrative Court:
  - (i) Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009) (at §4.1(iv)): and the recommendation (not adopted) of qualified one-way costs shifting.
  - (ii) CPR 45.41-44 (fixed costs in judicial review claims when the claim is made under the Aarhus Convention).
6. Costs in Tribunals, *Report by the Senior President of Tribunals* (December 2011) ("the Cost Report").

## II. THE STATUTORY FRAMEWORK

### *The Tribunals, Courts and Enforcement Act 2007*

7. Section 29(1) of the 2007 Act provides:

“The costs of and incidental to—

(a) all proceedings in the First-tier Tribunal; and

(b) all proceedings in the Upper Tribunal,

shall be in the discretion of the Tribunal in which the proceedings take place.”

8. Subsection (2) provides that the relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid. Subsection (3) provides that subsections (1) and (2) have effect subject to Tribunal Procedure Rules. Section 29(4) makes provision for the Upper Tribunal to make a wasted costs award.

### *Costs in the Upper Tribunal*

9. Rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (“the UT Rules”) provides in relevant part:

“(1) The Upper Tribunal may not make an order in respect of costs... in proceedings transferred or referred by, or on appeal from, another tribunal except—...

... (b) to the extent and in the circumstances that the other tribunal had the power to make an order in respect of costs.

[...]

(3) In other proceedings the Upper Tribunal may not make an order in respect of costs or expenses except—

(a) in judicial review proceedings...”

### *Costs in the First-tier Tribunal*

10. Different costs regimes apply across the tribunal chambers and in different types of case.

11. First, in some chambers or cases there is no power to make an award of costs:

- (i) The Social Entitlement Chamber (see rule 10 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement) Chamber Rules 2008).
  - (ii) In mental health cases in the First-tier Tribunal (Health, Education and Social Care) Chamber, see rule 10(2) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (“the FTT(HESC) Rules”).
12. Second, in the Immigration and Asylum Chamber the tribunal may order the respondent to pay the appellant an amount no greater than any fee paid to issue the appeal (see 23A of the Asylum and Immigration Tribunal (Procedure) Rules 2005).
13. Third, in some chambers an award of costs may only be made where costs have been incurred as a result of a party’s, or representative’s, unreasonable conduct:
- (i) Cases in the Health, Education and Social Care Chamber (save for mental health), see rule 10(1) of the FTT(HESC) Rules.
  - (ii) In the General Regulatory Chamber (see rule 10 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009).
14. Fourth, there is full cost-shifting in the Tax Chamber if the proceedings have been allocated as a Complex case under rule 23 and the taxpayer has not requested that the proceedings be excluded from potential liability for costs (see rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009).

### **III. THE COSTS REPORT**

15. The Costs Report makes a number of detailed recommendations (the recommendations are summarised at §§193-196).
16. The highlights are as follows:
- (i) The power to make pro-bono costs awards should be extended to tribunals (at §175);
  - (ii) The FTT and UT should be given the power to award interest on costs (at §181).
  - (iii) In a citizen v. State appeal to the UT(AAC) or IAC the citizen should be able to opt into a general costs-shifting regime when he has been the successful party at first instance (at §121).

- (iv) Litigants in person should be able to recover their costs where there is costs-shifting in the FTT or UT (at §165).
  - (v) There should be an express power to order interim payments on account of costs (at §180).
  - (vi) There should be a power to make a costs-capping order where there is a general power to award costs (at §184).
17. The Costs Report did not make a positive recommendation for change in respect of the following matters, but suggested that consideration should be given to consulting users:
- (i) Giving the UT(AAC) and UT(IAC) a power to award costs where there has been unreasonable conduct in an appeal from a lower tribunal, notwithstanding that the lower tribunal had no power to award costs (at §115);
  - (ii) Giving at least those chambers with a power to award costs a power to order one-way costs shifting in appropriate cases (the Costs Report refers to “test cases”) (at §§146,148);
  - (iii) Giving at least those chambers with a power to award costs in first-instance citizen v State jurisdictions a power to award costs to be paid when the decision under appeal was unreasonable (at §152);
  - (iv) Making the fees of all non-lawyer representatives acting for payment recoverable as costs (at §173).

#### **IV. COSTS IN JUDICIAL REVIEW PROCEEDINGS IN THE UT**

18. Rule 10(3)(a) of the UT Rules gives the UT an unfettered discretion to make an award of costs. How should that discretion be exercised? Should the UT adopt costs-shifting (by way of analogy with the general practice in the Administrative Court) or should the UT adopt a different approach to costs?
19. Note that sections 15(4) and (5) of the 2007 Act, which require the UT to apply the principles that the High Court would apply in deciding whether to grant relief on an application for judicial review, do not apply to a decision whether to award costs.
20. The Costs Report:

- (i) No justification for different costs regimes for judicial review cases depending on whether the claim was issued in the UT or the Administrative Court (at §138);
  - (ii) In a judicial review of the decision of a regulator or decision-maker, there should be a costs shifting regime, but that the applicant should have the right to opt-out of the costs-shifting regime into a no costs-shifting environment (at §143);
  - (iii) In a judicial review of the FTT or other lower tribunal, the costs regime in the UT should be the same as in the relevant chamber or tribunal (save in tax cases) (at §144).
21. In *R (ER) v. First-tier Tribunal (Health, Education and Social Care Chamber)* [2012] UKUT 213 (AAC) the Claimant applied successfully for judicial review of a decision by the FTT (HESC) to review a consent order made by the FTT, and to set it aside, pursuant to rule 49 of the FTT(HESC) Rules. The FTT's decision was an excluded decision (as defined in section 11(5) of the 2007 Act). Although the Claimant issued the claim in the Administrative Court, the parties agreed subsequently that only the UT had jurisdiction to hear the claim (see sections 18(2) and 19(2) of the 2007 Act) and the claim was transferred by consent.
22. The Claimant applied for an order that the Interested Party (Hertfordshire County Council) pay the Claimant's costs (the FTT having not participated beyond lodging an Acknowledgment of Service). The Claimant argued, by analogy with CPR 44.2, there ought to be a presumption that the loser pays the winner's costs.
23. The Interested Party argued that where the following conditions applied, the costs regime on an application for judicial review in the UT ought to be that applicable in the FTT proceedings. The conditions were: (i) claim was an application for judicial review of the FTT; and (ii) only the UT had jurisdiction to hear the claim.
24. The Interested Party advanced the following reasons for its submissions.
25. First, the claim was a tribunal proceeding. The policy considerations that led to the adoption of the FTT costs regime, and the UT costs regime applicable to an appeal, applied equally to judicial review proceedings in the UT.

26. Second, it was impossible to justify a difference between proceedings on appeal to the UT and those by way of judicial review, given:<sup>1</sup>
- (i) Both are concerned with overturning the decision of the FTT;
  - (ii) The UT has exclusive jurisdiction in each;<sup>2</sup>
  - (iii) Both require permission;<sup>3</sup>
  - (iv) Both require the appellant/claimant to demonstrate an error of law;<sup>4</sup>
  - (v) In both cases the UT is empowered to set aside the decision and either remit to the FTT for reconsideration or remake the decision.<sup>5</sup>
27. Third, the overriding objective in rule 2 of the UT Rules requires the UT to ensure “so far as practicable, that the parties are able to participate fully in proceedings”. Cost-shifting was incompatible with the overriding objective.
28. Fourth, the requirement of permission meant that there was no need for costs-shifting to act as a sanction to ensure unmeritorious claims were not brought.
29. Fifth, the tribunal’s case law discouraged the importation of the CPR (with its attendant complexity) into the tribunal rules, see for example, *Howes v. Child Support Commissioners* [2007] EWHC 559 (Admin) (per Black J at §39).
30. On 20 May 2013, a three judge panel of the UT (Sullivan LJ, Judge Ockelton and Judge Ward) heard the Claimant’s application. A decision has yet to be issued.

**SARAH HANNETT**

**Matrix Chambers**

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<sup>1</sup> It should be noted that the UT Rules sets out a different process for each. Part 3 of the UT Rules governs appeals, and Part 4 of the UT Rules governs applications for judicial review.

<sup>2</sup> Appeal, section 11(1) and (2); judicial review, section 19(2) of the 2007 Act.

<sup>3</sup> Appeal, section 11(3); judicial review, section 16(2) of the 2007 Act. Note in respect of appeals that the FTT has the power to grant leave permission, section 11(4)(a). The FTT does not have an equivalent power in respect of judicial review.

<sup>4</sup> Appeal, section 11(1) of the 2007 Act.

<sup>5</sup> Appeal, section 12(2) and (4); judicial review, section 17(1) of the 2007 Act, although in judicial review proceedings the UT’s power to substitute its decision for that of the FTT is limited to cases in which there was only one possible decision, see section 17(2) of the 2007 Act.