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Certainty at all Costs? A Critical Analysis of the Proposed Introduction of Fixed Recoverable Costs in Immigration Judicial Reviews

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Introduction

1. It is axiomatic that costs rules in civil litigation can and do shape access to legal processes. Indeed, when costs rules are being drafted this idea – the 'deterrence effect' – is often a rationale for drafting rules in a certain way.[1] The costs rules in judicial review have been a particularly vexed subject in recent years. There is a widespread view that the current cost rules are a contributing factor to an access crisis in this part of the justice system, although the Government certainly does not share this outlook. Rather, it is more concerned that public money is too often being spent on public bodies defending weak cases that get in the way of efficient public administration. This tension is placed under further strain by both the constitutional position of the judicial review process (supporting claims that access to this process is of particular systemic importance vis-à-vis the constitutional right of access to justice) and the persistent issue of a lack of robust and comprehensive data on costs against which policy claims can be tested.

2. After the Government's manifesto pledge to examine the constitution and the role of the courts in judicial review cases,[2] the Ministry of Justice set up the Independent Review of Administrative Law,[3] ran its own consultation on a broader set of potential changes,[4] and then introduced the Judicial Review and Courts Bill into Parliament. While that process garnered much attention from public lawyers, politicians, and the mainstream press, much less attention was focused on how the Home Office was proposing to change the same system. In its *New Plan for Immigration*, the Home Office reiterated familiar concerns about public law challenges clogging up the system and frustrating the implementation of public policy.[5] Among other suggestions made to 'streamline' processes of appeal and challenge, it proposed to introduce

[1]M Fordham QC and J Boyd, 'Rethinking Costs in Judicial Review' [2009] JR 306.
[2]The Conservative and Unionist Party, *Get Brexit Done: Unleash Britain's Potential* (2019) 48.
[3]*Independent Review of Administrative Law* (CP 407, 2021).
[4]Ministry of Justice, *Judicial Review Reform: The Government Response to the Independent Review of Administrative Law* (CP 408, 2021).
[5]Home Office, *New Plan for Immigration* (CP 412, 2021) 28.

fixed recoverable costs (FRC) in immigration judicial review cases. The Home Office quickly consulted and ploughed ahead with this proposal – despite apparent opposition from those who engaged with the consultation – on the basis that it would enhance certainty for the parties in such cases. It has signalled its intention to pass the matter to the Civil Procedure Rules Committee (CPRC) and the Tribunal Procedure Committee (TPC), for them to take forward.

3. The central question now is whether, based on the available evidence, the introduction of FRC in immigration judicial review cases will have a positive or negative impact overall on access to justice, judicial review, and hence also the legality of government decision-making. In this article, we address this important question. Our analysis of the potential justifications for introducing FRC, guided by engagement with the existing (albeit limited) evidence base, leads us to conclude that the adoption of FRC in immigration judicial review cases may enhance certainty for parties but it also carries serious access to justice risks, particularly given the potential effects it is likely to have on the immigration legal services market. We argue that these wider concerns – the importance of which has been persistently marginalised during the policy process thus far – must be a relevant consideration, but they have not been afforded the degree of attention they deserve. Consequently, the policy case for the adoption of FRC remains far from convincing.

The emergence of the FRC proposal

4. Section 51 of the Senior Courts Act 1981 provides that costs shall be 'in the discretion of the court'. This discretion is '[s]ubject to the provisions of this or any other enactment and to rules of court'. The main rules to which the court's discretion is subject are contained in the Civil Procedure Rules (CPR) Pts 44–46. CPR r 44.2 sets out the general rule in civil litigation that costs will follow the event (i.e. the loser pays), although the court has a discretion to make a different order as to costs (including to make no order at all). CPR r 44.2 requires the court, in exercising its discretion on costs, to have regard to all the circumstances of the case. The rules, like all other parts of the CPR, must be applied and interpreted in accordance with the overriding objective 'to enable[e] the court to deal with cases justly and at proportionate cost'.

5. Jackson LJ undertook an extensive review of civil litigation costs and considered the judicial review costs rules as part of that exercise. In his first report in 2009, Jackson LJ recommended that qualified one-way costs shifting be introduced in relation to judicial review cases.[6] The Government did not adopt this recommendation. In his 2017 *Supplemental Report on Litigation Costs*, Jackson LJ concluded that a system of FRC should not be introduced for judicial review claims.[7] His primary reason for that conclusion was that '[e]ven though many JR cases fall into a standard pattern, costs

[6]Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (2009).
[7]Lord Justice Jackson, *Review of Civil Litigation Costs: Supplemental Report, Fixed Recoverable Costs* (2017).

are too variable to permit the introduction of a grid of FRC'. The report recommended instead that a modified version of the Aarhus rules should be extended to all judicial reviews. Again, the Government did not adopt this recommendation. Instead, in March 2019, the Ministry of Justice launched a consultation on extending FRC in civil cases, following Jackson LJ's *Supplemental Report*, and stated the following in relation to judicial review:

> Sir Rupert also considered the introduction of FRCs in JR cases. His conclusion was that costs in JRs 'are too variable to permit the introduction of a grid of FRC'. Immigration and asylum JRs, which are the most common form of JR, are, however, relatively uniform, and represent a great cost to the Home Office and the Government is considering whether a bespoke FRC regime can and should be developed for these cases in the Upper Tribunal.[8]

6. In 2020, the Ministry of Justice established the Independent Review of Administrative Law, chaired by Lord Faulks QC. It posed questions on costs as part of its sweeping investigation into the state of the judicial review system. Reporting in 2021, it noted a range of concerns about the impact of costs on both claimants' access to justice and 'the diversion of government funds in having to defend … applications for judicial review'.[9] The Panel concluded overall that:

> the potentially serious impact of the current costs regime in judicial review cases on access to justice, and the concern of defendants as to the impact of that regime on their functioning – and what might be done about that impact – needs further careful study by a body equipped to carry out the kind of research and evaluation that we have not been able to apply to this question.[10]

7. The Ministry of Justice's consultation paper, which was published at the same time as the IRAL Report, made no proposals for reform of costs in judicial review.

8. Only a week later, the Home Office published the *New Plan for Immigration*. Among a wide-ranging package of reforms to the immigration and asylum system, there was a proposal for the introduction of FRC in immigration judicial review cases:

> We want to ensure the asylum and appeals system is faster and fairer. Our end-to-end reforms will aim to reduce the extent to which people can frustrate removals through sequential or unmeritorious claims, appeals or legal action, while maintaining fairness, ensuring access to justice and upholding the rule of law. This will achieve efficiencies in the system as a whole – decreasing the costs of unnecessary litigation and failed removal actions for the taxpayer and freeing up valuable judicial resources.[11]

9. The Home Office further stated in specific relation to FRC that:

> Most judicial reviews lodged in England and Wales are immigration-related and involve considerable legal costs for the parties and the taxpayer. In the cases which the Home Office

[8]Ministry of Justice, *Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's proposals* (2019) 36.
[9]*Independent Review of Administrative Law* (n 3) 78.
[10]ibid 78–79.
[11]*New Plan for Immigration* (n 5) 27.

> ultimately wins, it is rarely able to recover costs. As part of our measures to promote fairness, certainty and balance to the way in which costs are incurred in these cases, we are considering extending 'Fixed Recoverable Costs' to apply to immigration-related judicial reviews. Such a system would specify the amount in legal costs that the winning party can recover from the losing party. By setting this out in advance, both sides will benefit from a greater degree of certainty about the potential cost and risks attached to contesting a case.[12]

10. Most publicly available submissions to the consultation objected to this proposal, principally on the basis that it would undermine access to the judicial review process.[13] Nonetheless, the Home Office concluded, in its response to the consultation, that it would move ahead:

> A new system of 'Fixed Recoverable Costs' would provide additional certainty to both sides by setting out in advance the amount in legal costs that the winning party can recover from the losing party. We intend to deliver this by proposing that the TPC and Civil Procedure Rules Committee consider making new Rules.[14]

11. By virtue of the reference to the TPC and the CPRC, the intention appears to be that the proposed change will affect immigration judicial reviews in both the Upper Tribunal and the Administrative Court, but not other type of judicial review case.

What will be the impact of FRC in immigration judicial reviews?

12. Now that the proposal to introduce FRC is being given a firm push by the Home Office, it is important to consider its potential impact by reference to the evidence available and the relevant claims that have been made to justify its adoption. In this respect, six points are central to understanding the likely impact of the proposal.

13. First, the Home Office's central rationale for the adoption of FRC in immigration judicial reviews is that it will increase certainty for all parties involved in litigation. This is probably true. Fixing costs will likely increase certainty. However, there has been very little detail given thus far about how FRC may be implemented in practice and there may still be a need for considerable discretion and flexibility. Furthermore, while certainty may be a relevant consideration, it cannot be the only consideration when designing a system of costs. Ensuring and maintaining access to justice should be the principal and overriding objective.

14. Second, at various points, the Home Office has mixed into the rationale for FRC that it is frustrated that it cannot recover its costs when it wins immigration judicial reviews. This is an entirely separate point which should not be conflated – it is about enforcement of a costs order rather than the principles upon which costs are allocated. As regards the inability to recover costs, we do not have access to any data on the

[12]ibid 23.
[13]For example, see Liberty, *Liberty's Response to the New Plan for Immigration Consultation* (2021); JUSTICE, *New Plan for Immigration Consultation Response* (2021).
[14]Home Office, *Consultation on the New Plan for Immigration: Government Response* (CP 493, 2021) 13.

scale of this alleged problem. The Home Office and the Government Legal Department hold data on how much litigation debt from immigration judicial reviews remains outstanding and how many claimants who are ordered to pay costs in practice do so. However, this information has not been published despite an FOIA request being lodged. The Home Office also did not publish any related data as part of the consultation process on the *New Plan for Immigration*. Even if litigation debt from immigration judicial review cases is not paid often, it is difficult to see how introducing FRC will go any distance to addressing this problem. Furthermore, the Home Office already has powers to manage this issue. In 2016, a power to refuse immigration applications on the basis that an applicant owes a litigation debt was introduced as a general ground of refusal in the Immigration Rules.[15] The Home Office guidance further explains that a litigation debt for these purposes can arise from judicial review litigation and instructs caseworkers to take into account all litigation debts. Although there is a general presumption in favour of refusal where an unpaid litigation debt exists, Home Office caseworkers must consider whether refusal is reasonable taking account of all relevant factors, including: how the debt was accrued; the level of cooperation with Home Office debt recovery attempts; the location of an applicant; the purpose of the application; an applicant's ability to pay; how long the debt has been outstanding; and the amount of the debt. If the concern is about non-payment of litigation debts by claimants, it is this mechanism, and the evidence on its operation, which ought to be examined.

15. Third, the Home Office has consistently suggested that FRC is suitable in immigration cases because costs in such cases are relatively uniform and predictable. In a recent empirical study of immigration judicial reviews in the Upper Tribunal, we investigated costs.[16] We concluded, on the best evidence made available to us by HM Courts and Tribunals Service, that it is difficult to know the average costs of an immigration judicial review. The legal costs will vary in accordance with several factors, such as: the length of litigation; the complexity of a case and the amount of work involved; the type of case; the rates charged by a law firm; and whether counsel is instructed. We were informed that an initial judicial review claim might cost in the region of £1,000–£1,500. If counsel is engaged and a case proceeds to a substantive hearing, then costs can increase considerably. Through our case-file analysis, we also had access to data on costs awarded after the grant or refusal of permission. In cases where there was an order for a specific amount of costs at permission, the range of awards ran from £90 to £1,148. The average award was £458. These costs may seem to be within a relatively stable range but there is no equivalent data on costs when a case proceeds to a substantive hearing, where they are likely to be considerably more unstable and unpredictable. This raises the question of why the Home Office believes immigration to be distinct from other types of judicial review in

[15]Statement of Changes in Immigration Rules, HC877.
[16]R Thomas and J Tomlinson, *Immigration Judicial Reviews: An Empirical Study* (Palgrave Macmillan 2021) Ch 5.

their degree of uniformity and predictability, and therefore why Jackson LJ's objection to FRC in judicial review cases generally does not also apply to immigration cases. There has been no clear answer to this question from the Home Office. In the absence of better and more comprehensive data on costs, it is difficult to conclude whether or not the costs in immigration judicial reviews are indeed uniform or predictable when compared with non-immigration cases.

16. Fourth, the Home Office has underscored its desire to move to a system of FRC by suggesting that it is concerned about how much taxpayer money is directed towards defending immigration judicial reviews. This argument, of course, can give rise to the objection that preserving legal processes which ensure the legality of government action are valuable, and that there are already mechanisms in place to filter out weaker cases and therefore limit the burden on the public purse (e.g. the permission procedure and 'Totally Without Merit' certification). However, beyond these points, the evidence presented by the Home Office on the fiscal impact of managing the immigration judicial review caseload has been so inconsistent that it is difficult to understand what the cost is. For instance, the Independent Review of Administrative Law Report noted a range of concerns about 'the diversion of government funds in having to defend … applications for judicial review'. It went on to cite evidence provided by the Home Office in their submission:

> The Home Office puts the cost of a substantive judicial review hearing at £100,000 and reports that it spent over £75 million in 2019/20 on defending immigration and asylum judicial reviews and associated damages claims, while only recovering £4 million in terms of its own costs, much of which will be written off in future years given the difficulty in recovering debts from those who bring such challenges.[17]

17. The Home Office's full submission to the Independent Review of Administrative Law has not been made public, although the summary of all Government submissions has been published.[18] This summary references the Home Office's estimate of having spent over £75 million in defending claims. The summary document also refers to evidence that 'even in simple, fact specific challenges [the costs] can run to almost £100,000 if the case goes to substantive hearing'.[19]

18. There are various comments to be made about the Home Office's statement. Our research and the available data demonstrate that only a handful – less than one per cent – of immigration judicial reviews ever reach a substantive hearing.[20] There is a high rate of settlement after claims are granted permission and it is up to the parties to decide whether or not to settle a case out of court prior to a substantive hearing. If cases do not settle post-permission, then this would strongly suggest

[17] *Independent Review of Administrative Law* (n 3) 78.
[18] *Summary of Government Submissions to the Independent Review of Administrative Law* (2020).
[19] ibid 21.
[20] Thomas and Tomlinson (n 16) Ch 2.

that there is a real substantive legal issue worth fighting over. Determining such disputes is, after all, the purpose of the judicial review procedure.

19. Another point is that the Home Office has subsequently modified and qualified its submission to the IRAL. In response to a FOIA request made by the Public Law Project for the underlying data about the cost of immigration judicial reviews, the Home Office revealed the that costs of a substantive judicial review hearing have rarely reached £100,000:

> Costs of judicial reviews that proceed to a substantive hearing vary considerably on a case-by-case basis depending on the outcome and whether adverse costs are awarded or compensation needs to be paid. Whilst the majority of cases do not reach £100,000 it is possible for costs to escalate to, and exceed this figure if adverse costs are awarded and compensation is paid.[21]

20. The Home Office also made clear that the 'over £75 million' figure was inflated, as it also included costs relating to statutory appeals and appeal refunds. It also included staffing costs of the Home Office, as well as lawyers' costs. Furthermore, the £4 million in claimed recovered costs was said only to be 'indicative figure' and not attributable to 2019/2020 specifically.

21. It is unfortunate that these important caveats and qualifications have only come to light after the Home Office responded to the IRAL consultation and through a response to a FOIA request. The current position about costs is now confused and unclear. We still lack any reliable or credible data on the costs of immigration judicial reviews. This is necessary so that policymakers can make informed and evidence-based decisions on an important change to the costs rules. Given the lack of clarity from the Home Office, it is difficult to see how informed policy decisions can now be taken. What is now required is for the Home Office and the Ministry of Justice to undertake and publish a detailed and methodologically robust analysis of costs that interested parties can consider.

22. The fifth and perhaps most significant problem with the proposal to introduce FRC is that the Home Office has failed to take proper account of other potentially significant effects of this shift. For instance, there is no consideration of the effect of this change on settlement rates (which are high in immigration judicial review cases, particularly post-permission). Most importantly, however, is that there has been no apparent consideration of the effect that this shift may have on the immigration legal services market.[22] Representatives operating in this market under a contract with the Legal Aid Agency often need to supplement their legal aid income by taking on privately funded work, in order to make their business sustainable.[23] For those firms and

[21]FOIA Reference 64588 (2021).
[22]For an extensive, recent analysis of the existing challenges of this market, see J Wilding, *The Legal Aid Market: Challenges for Publicly Funded Immigration and Asylum Legal Representation* (Bristol University Press 2021).
[23]*R (E) v Governing Body of JFS* [2009] UKSC 15 [24]–[25].

practitioners who focus on legal aid work, their additional income is usually generated through the recovery of their costs at inter partes rates when they win cases. The major risk of introducing the FRC model is that immigration advisors will withdraw from undertaking immigration judicial review work as it will become commercially unsustainable, and in turn undermine the ability of people aggrieved by an immigration decision to challenge an adverse decision in the courts. Moreover, good quality service providers may withdraw from the market. The poor quality of some immigration representatives is a well-documented, persistent, and serious issue in immigration judicial review cases, and it negatively impacts upon claimants, the Home Office and the system itself.[24] The potential withdrawal of better-quality representatives from immigration judicial review work risks exacerbating such impacts, rather than improving the operation of the system. On available data, it is impossible to model the potential impacts of FRC on the market in any precise way, but it ought to be at the centre of the policy debate.

23. A sixth point also concerns what has been overlooked in the debate so far. There are alternative remedies to judicial review, such as tribunal appeal rights. Immigration appeal rights have been restricted under the Immigration Act 2014 and this affects the use of judicial review.[25] But if the Government is correct to state that a significant number of immigration judicial reviews are 'relatively uniform' and 'fact-specific', then reintroducing appeal rights is an obvious point to consider. Tribunal appeals are less costly and less procedurally complex than judicial review. Having previously curtailed appeal rights, the perception now will be that access to judicial review is potentially being indirectly restricted through an ostensibly procedural clamp down.

Conclusion

24. Overall, the Home Office's proposal was not based on a fully rounded analysis and the justification put forward in its most recent articulation of the policy verges on the myopic. Where the evidence on the current system is available and robust, it raises some real concerns about the impact of FRC on access to both the system and high-quality legal advice, which is itself an important component of accessibility. At the same time, the evidence that has been held out to support the introduction of FRC by the Home Office has often been inconsistent and dubious.

25. It seems that the matter of whether FRC will be introduced in immigration judicial review cases is now going to be sent to the TPC and CPRC. It is open to the CPRC and TPC to consider and reject the Home Secretary's proposal for FRC. Given the myopic reasoning behind the latest iteration of the proposal, the apparent weakness

[24]Thomas and Tomlinson (n 16) Ch 3.
[25]ibid Chs 2–3.

of other claims that have been made at various other points to support it, and the risks that the introduction of the FRC model entails for access to justice, it is hoped that the TPC and CPRC will give – as should always be expected – rigorous scrutiny to the proposal that has been put before them. In its current form, it is far from compelling.