The future for costs in judicial review

The *Unison* judgment may inform the debate on Jackson LJ's recent proposal for the current CPR rules on costs in environmental cases to be extended to all judicial review claims, explains **Richard Honey**

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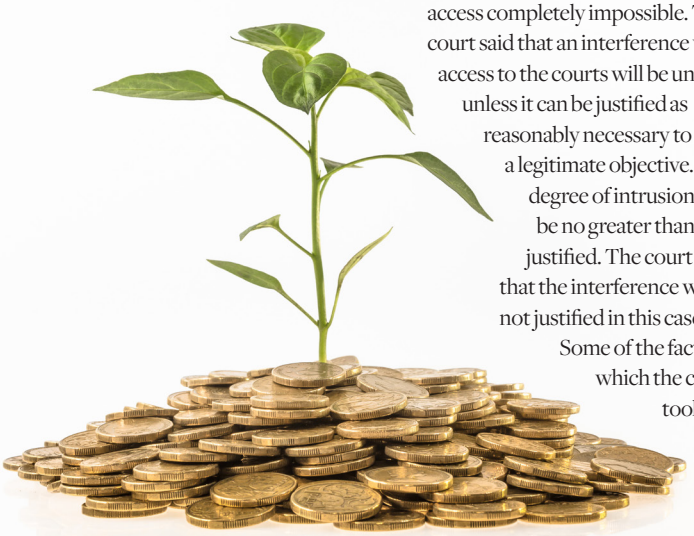

In *R (Unison) v Lord Chancellor* [2017] UKSC 51, the Supreme Court highlighted the practical importance of being able to exercise the right of access to justice. The court found that the fees imposed for employment tribunal cases were unlawful because of their effects on access to justice.

The case was argued primarily on the basis of the common law right of access to justice. The court noted that the constitutional right of access to the courts is inherent in the rule of law. In order for the courts to perform their role, people must in principle have unimpeded access to them.

Lord Reed explained that, without such access, laws are liable to become a dead letter and democracy may become a meaningless charade. Knowing that parties can resort to the courts underpins everyday economic and social relations: the possibility must exist of claims being brought by people whose rights are infringed.

The court recognised that impediments to the right of access to the courts can constitute a serious hindrance, even if they do not make access completely impossible. The court said that an interference with access to the courts will be unlawful unless it can be justified as reasonably necessary to meet a legitimate objective. The degree of intrusion must be no greater than is justified. The court held that the interference was not justified in this case.

Some of the factors which the court took into account included that the employment tribunal system was originally designed to operate without fees, claims are often of little or no financial value, fees were not related to the amount claimed, tribunal decisions often remain unsatisfied by the employer, the system of fee remissions was very restricted, the fall in claims was far greater than anticipated, unmeritorious claims were not being deterred, and there was no explanation of how the fees had been calculated.

Ultimately, the court concluded that the sacrifice of ordinary and reasonable expenditure could not properly be the price of access to one's rights.

Aarhus costs rules

The *Unison* judgment on fees may inform the debate on Lord Justice Jackson's recent proposal for the current CPR rules on costs in environmental cases – Aarhus Convention claims – to be adapted and extended to all judicial review (JR) claims. The proposal was made because of the special role of JR in upholding the rule of law.

The proposal is for default figures to be caps set on recoverable costs in cases where claimants are individuals. Claimants would be able to opt in to the costs protection, but subject to means testing and confidential disclosure of financial information. Either side would be able to apply to vary the standard cost cap figures of £5,000 and £35,000.

Jackson LJ said that the proposal would strike the right balance between the need to protect the public purse and the need to hold public authorities to account. Given that the changes would favour claimants, there is a question mark over whether they would be adopted by the government.

There are some parallels between the *Unison* case and JR. For example, there are not usually any financial awards in JR, and cases are sometimes brought to resolve an important point of genuine uncertainty about the law.

That said, the threshold mentioned in the *Unison* case – whether bringing the case would involve sacrificing the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living – is a high one. Few JRs in the planning and environmental field, for example, would push a claimant into such circumstances.

The Aarhus JR cost rules in the CPR are not uncontroversial. They might need to change further. The Aarhus Convention Compliance Committee (ACCC) has recently found the UK to have moved further away from compliance with the convention through changes to the CPR introduced this year.

The ACCC was particularly critical of the uncertainty concerning the actual level of the cap due to the possibility of variation at any stage until the end of the proceedings. It also criticised the lack of specified maximum caps in appeal proceedings, the requirement to provide financial information, and the potential for satellite litigation. The Jackson proposal will involve some of these issues. Judgment is also awaited in the JR of the new rules brought by environmental NGOs. They argue that the uncertainty produced by the rules will deter claims. The prospects of success in this challenge can only have been increased by the *Unison* judgment and the ACCC report. **SJ**