Costs in judicial review cases in the Upper Tribunal

Introduction

1. This paper aims to provide a brief overview of:
    a. the procedure of getting costs; and
    b. the key principles that apply when Judges in the Upper Tribunal (Immigration and Asylum Chamber) ('UT') consider making an award of costs.
2. It reviews the legal and procedural framework before considering the principles to be derived from relevant case law. Bear in mind that costs decisions are highly fact-sensitive by nature. The case law considered below should be read fully and with some care before advising clients on the relevant principles.

Legal framework

3. Since 1 November 2013, the UT assumed jurisdiction in a wide range of judicial review matters relating to immigration decisions.[1] Previously, the UT had jurisdiction to decide certain immigration judicial reviews concerning fresh claims under paragraph 353 of the Immigration Rules.
4. The dramatic expansion of the UT's jurisdiction has led to a growing stream of decisions on the exercise of the UT's power to make costs orders.

The power to make costs orders

5. The Tribunal Procedure (Upper Tribunal) Rules 2008/2698 as amended ('the Procedure Rules') provides the UT with 3 potential powers to award costs in judicial review cases:
    a. Rule 10(3)(a): the power to make an order for costs in judicial review proceedings;
    b. Rule 10(3)(c): the power to make a wasted costs order under section 29(4) of the Tribunals, Courts and Enforcement Act 2007;
    c. Rule 10(3)(d): the power to make an order for costs if the UT considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings.

[1] See the Lord Chief Justice's Direction Regarding the Transfer of Immigration and Asylum Judicial Review Cases to the Upper Tribunal (Immigration and Asylum Chamber), made pursuant to the section 18(6) of the Tribunals, Courts and Enforcement Act 2007.

Costs applications and procedure

6. The UT's power to make a costs order may be exercised on an application by a party or by the UT of its own initiative (rule 10(4)).
7. A person making an application for costs must:
    a. send or deliver a written application to the UT *and* to the person against whom it is proposed the order be made (rule 10(5)(a)); and
    b. send or deliver with the application a schedule of costs claimed sufficient to allow summary assessment (rule 10(5)(b)).
8. The application may be made at any time during the proceedings but no later than 1 month after the date on which the UT sends:
    a. a decision notice recording the decision which finally disposes of all issues in the proceedings (rule 10(6)(a)); or
    b. a notice under rule 17(5) that a withdrawal which ends the proceedings has taken effect (rule 10(6)(b)).
9. The UT cannot make a costs order against the paying person without:
    a. Giving them an opportunity to make representations; and
    b. If the paying person is an individual (and the order is to be made under rule 10(3)(a) or (d) above), considering that person's financial means.
10. Rule 10(8) provides for summary assessment, agreement between the person entitled to costs and the paying person, or assessment of all or some of the costs claimed, if not agreed.
11. If the UT orders assessment under rule 10(8)(c), either party may apply for a detailed assessment of costs on a standard or indemnity basis.
12. The UT may also order an amount to be paid on account before costs are assessed (rule 10(10)).
13. The UT's powers must be exercised in a manner that accords with the overriding objective (rule 2).

Case law from the higher courts

14. A convenient place to start is *R (on the application of Bahta & Ors) v Secretary of State for the Home Department & Ors* [2011] EWCA Civ 895, which concerned appeals against costs orders by the High Court in immigration cases following settlements by way of consent orders. In each case, the High Court declined to make an order for costs in favour of the Appellants. Mr Richard Wilson QC for the Appellants urged the Court to give

effect to the change of culture in civil litigation following the "Jackson Report" of December 2009.

15. Lord Justice Pill upheld the appeal and set out the guiding principles at §§ 59 to 68. In broad summary, the usual principle is that the loser pays the winner's costs in the absence of compelling reasons to the contrary. Compliance with Pre-Action Protocols ('PAP') is a critical factor (§ 64 and 65), as is the clarity of the pleadings (§ 68).
16. There is no special rule for public authorities, despite the heavy workload of UKBA, as it was called at the time (§ 36). The Judge expressed serious doubt about UKBA's claim that it settled cases for "purely pragmatic reasons". Reliance on this submission would require clearly expressed reasons for settlement that were unconnected with the claim and the Court should subject the explanation to scrutiny (§ 63). Further, Judges should not be tempted to too readily adopt the 'fall back' position of 'no order as to costs' (§ 66).
17. *Bahta* was considered in *M v London Borough of Croydon* [2012] EWCA Civ 595. That case concerned a disputed age assessment by Croydon of an unaccompanied asylum-seeking child. On appeal to the Court of Appeal against the High Court's order that there be 'no order as to costs', the Defendant argued that the outcome of the case was not obvious from the outset. Lord Justice Neuberger, as he then was, emphasising the fact-sensitive nature of costs orders held:
    a. Where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement, the Claimant should be awarded costs unless there is good reason not to (as in *Bahta*);
    b. After a trial where the Claimant has been only partly successful, when considering costs, the Court will consider how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim (§ 60);
    c. After a settlement where the Claimant has been only partly successful, no order for costs is often appropriate (§ 60). This approach is to be contrasted with *Bahta* at § 66;

d. Where a case has been settled for reasons unconnected to the claim, normally no order for costs should be made, but some inquiry may be required to assess whether it is clear that one side would have won at if the matter had not settled and to award costs to the 'winner' on that basis (§ 63).

Upper Tribunal case law

18. In *R (on the application of Kumar & Anor) v Secretary of State for the Home Department (acknowledgement of service; Tribunal arrangements) (IJR)* [2014] UKUT 104 (IAC), Vice President Ockleton and UTJ Peter Lane considered the costs consequences of the Defendant's frequent failure to serve and Acknowledgement of Service ('AoS') in breach of rule 29(1) of the Procedure Rules (modeled on CPR r 54.8(1)).
19. Mr Declan O'Callaghan for the Appellants argued that the UT should apply the robust approach adopted by the Court of Appeal to relief from sanctions under the CPR in *Mitchell v News Group Newspapers Limited* [2013] EWCA Civ. The UT at § 65 disagreed, finding the two regimes distinct.
20. It held:
    a. The Defendant should not be routinely penalized in costs for failing to file an AoS in breach of rule 29 of the Procedure Rules;
    b. The Defendant should face costs orders where failure to file an AoS has resulted in a wasted permission hearing (ie. where an AoS would have led to the application being recorded as 'totally without merit') or for permission to be granted where it would not have been if the AoS had been filed (§ 61 and 66);
    a. Finally, where permission is granted without the benefit of an AoS and summary grounds, the Defendant will ordinarily be liable to pay the Claimant's costs, up to the point when the Defendant's detailed grounds are filed, regardless of the ultimate fate of the judicial review application (§ 68).
21. By relaxing, even temporarily, the rigour of the Procedure Rules as they apply to the Defendant, the UT's approach is contrary to the clear principles of *Bahta* and *M v Croydon*. Neither case is cited in the determination. Both those cases strongly discouraged such "special rules" for public authorities.

22. The Defendant was treated with less lenience in *R (on the application of Muwonge) v Secretary of State for the Home Department (consent orders: costs: guidance) (IJR)* [2014] UKUT 514 (IAC), where the UT took stock of unsatisfactory practices relating to consent orders and the AoS.
23. The Defendant had conceded Mr Muwonge's claim and embedded within its draft consent order an order for costs in the sum of £90.00 for the AoS (which was served considerably late). Mr Muwonge, acting in person, relied on *M v Croydon* and disputed the costs under the threat that the Defendant would seek its further costs of at the hearing (of £600). The UT dismissed the Defendant's application for costs as "utterly hopeless" and required the Defendant to provide justification in the AoS whenever it sought to incorporate a costs order as part of a draft consent order. Draft consent orders should not be presented to the UT at the last moment and costs orders should take into account the extent to which parties have complied with the *Muwonge* guidance (§ 17).
24. Another key point in *Muwonge* is the adoption of the Administrative Court Guidance in "*How the Parties should assist the Court when Applications for Costs are made following Settlement of Claims for Judicial Review*", particularly paragraphs 5 to 7, which require Parties to negotiate prior to costs submissions and affirms the principles in *M v Croydon* should apply.
25. Where a new decision is made by the Defendant during judicial review proceedings and the UT considers that it is unreasonable for the Defendant to rely upon it, then that may give rise to an appropriate costs order agreement the Defendant (at § 15 in *R (on the application of Natalia Heritage) v Secretary of State for the Home Department and First-tier Tribunal IJR* [2014] UKUT 441 (IAC)).
26. In *R (on the application of Soreefan and Others) v Secretary of State for the Home Department (judicial review – costs – Court of Appeal)* [2015] UKUT 00594 (IAC), President McCloskey set out guidance on appealing the UT's costs decisions to the Court of Appeal, finding that:
    a. In making costs orders, *M v Croydon* continues to apply (§ 17);
    b. Provided that a costs decision of the UT is "in harmony with established principles and has a tenable basis for the course chosen by

the Judge in the exercise of his discretion, it will be unassailable" (§ 18).

27. Also of interest is *R (on the application of Khan and Others) v Secretary of State for the Home Department (common costs) IJR* [2015] UKUT 00684 (IAC), a case concerning "ETS cases" where the Defendant applied for an award of costs as common costs against Claimants in ETS claims (2,539 in total) if the Defendant was successful in the individual cases in addition to the costs of the AoS. The UT held that:
    a. The UT may in principle make a common costs order, although it declined to do so in this case;
    b. If ETS cases are pursued to an oral hearing at which there is no prospect of success, the Tribunal will consider whether the case should be treated as an exception to the *Mount Cook* [2003] EWCA Civ 1346 principles, (ie. not limited to the AoS).

Wasted costs

28. This topic deserves a paper of its own, so I will not go into detail on the application of this power and the case law under it.
29. For the present purposes it is sufficient to note that this power is reserved for (hopefully) a small minority of cases where the standards of legal representatives constitute an "improper, unreasonable or negligent act or omission" pursuant to section 29(5) of the Tribunals, Courts and Enforcement Act 2007, itself based upon the definition of the phrase in *Ridehalgh v Horsefield & Anor* [1994] EWCA Civ 40, particularly paragraph

> *"Improper" ... covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.*
>
> *"Unreasonable" ... aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether*

the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.

..."negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

30. The recent case of *MSM and others (wasted costs, effect of s.29(4))* [2016] UKUT 00062 (IAC) considered whether the UT had power to make wasted costs orders in proceedings that began in the FTT prior to the commencement on 20 October 2014 of the 2014 Procedure Rules.
31. It held that:
    a. Section 29(4) results in the Upper Tribunal having powers in relation to the making of wasted costs orders (as defined in section 29(5)) which are not subject to the limitations in section 29(3) or rule 10 of the Procedure Rules (notwithstanding the comments in *Cancino (Costs: First-tier Tribunal – New Powers)* [2015] UK FTT 00059 (IAC) at § 5);
    b. the words "as may be determined in accordance with the Tribunal Procedure Rules", found in section 29(4), do not restrict the jurisdiction of the Tribunal to make an order for wasted costs, but rather relate to the amount of any such order (§ 38).

Conclusion

32. Despite the overarching principles in *Bahta* and *M v Croydon*, it appears that Claimants continue to face difficulties in obtaining costs orders against the Defendant in judicial review claims.
33. The UT has on occasion adopted a lenient approach to defaults of the Defendant which are not in sync with the current approach in the civil court system and CPR, which so heavily informed the founding cases of *Bahta* and *M v Croydon*. However, more recently, *Soreefan* returns to the basic principles of *M v Croydon* as the starting point.

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APPENDIX 1: Extracts from statutes

Tribunals, Courts and Enforcement Act 2007

29 Costs or expenses

(1) 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.
(2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
(3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.
(4) In any proceedings mentioned in subsection (1), the relevant Tribunal may–
(a) disallow, or
(b) (as the case may be) order the legal or other representative concerned to meet,
the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.
(5) In subsection (4) *"wasted costs"* means any costs incurred by a party–
(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
(b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.

Tribunal Procedure (Upper Tribunal) Rules 2008/2698

2.— Overriding objective and parties' obligation to co-operate with the Upper Tribunal

(1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly.
(2) Dealing with a case fairly and justly includes—
(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
(b) avoiding unnecessary formality and seeking flexibility in the proceedings;
(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
(d) using any special expertise of the Upper Tribunal effectively; and
(e) avoiding delay, so far as compatible with proper consideration of the issues.
(3) The Upper Tribunal must seek to give effect to the overriding objective when it—
(a) exercises any power under these Rules; or
(b) interprets any rule or practice direction.
(4) Parties must—
(a) help the Upper Tribunal to further the overriding objective; and
(b) co-operate with the Upper Tribunal generally.

10.— Orders for 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;

…

(4) The Upper Tribunal may make an order for costs (or, in Scotland, expenses) on an application or on its own initiative.

(5) A person making an application for an order for costs or expenses must—

(a) send or deliver a written application to the Upper Tribunal and to the person against whom it is proposed that the order be made; and

(b) send or deliver with the application a schedule of the costs or expenses claimed sufficient to allow summary assessment of such costs or expenses by the Upper Tribunal.

(6) An application for an order for costs or expenses may be made at any time during the proceedings but may not be made later than 1 month after the date on which the Upper Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

[

(b) notice under rule 17(5) that a withdrawal which ends the proceedings has taken effect.

(7) The Upper Tribunal may not make an order for costs or expenses against a person (the "paying person") without first—

(a) giving that person an opportunity to make representations; and

(b) if the paying person is an individual and the order is to be made under paragraph (3)(a), (b) or (d), considering that person's financial means.

(8) The amount of costs or expenses to be paid under an order under this rule may be ascertained by—

(a) summary assessment by the Upper Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs or expenses ("the receiving person"); or

(c) assessment of the whole or a specified part of the costs or expenses [, including the costs or expenses of the assessment,] 12 incurred by the receiving person, if not agreed.

(9) Following an order for assessment under paragraph (8)(c), the paying person or the receiving person may apply—

(a) in England and Wales, to the High Court or the Costs Office of the Supreme Court (as specified in the order) for a detailed assessment of the costs on the standard basis or, if specified in the order, on the indemnity basis; and the Civil Procedure Rules 1998 shall apply, with necessary modifications, to that application and assessment as if the proceedings in the tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply;

…

(10) Upon making an order for the assessment of costs, the [Upper] 14 Tribunal may order an amount to be paid on account before the costs or expenses are assessed.