Judicial Review and Pre-permission Costs

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Introduction

1. In this session we examine the anticipated impact of the new regulations which remove entitlement to payment by legal aid for costs in judicial review where either the case ends prior to permission being granted or permission is refused.

The new regime for pre-permission costs

2. Regulations now prohibit the Lord Chancellor paying for legal aid work undertaken for the purpose of making a judicial review application unless (1) the court gives permission or (2) the case settles or is withdrawn prior to permission and the Legal Aid Agency (LAA) exercises a discretion to pay in those circumstances.

3. The new provisions only change the circumstances in which a supplier will be paid for their work. It does not remove legal aid from the client, so the legally aided person will continue to have costs protection. It does not change the merits criteria for eligibility for legal aid in judicial review claims i.e. the prospects of success must be 'greater than 50%'.

4. The full provision is in the new Regulation 5A inserted into the Civil Legal Aid (Remuneration) Regulations 2013 by the Civil Legal Aid (Remuneration)(Amendment) (No3) Regulations 2014. This came into force on 22 April 2014.

*"**Remuneration for Civil Legal Services: Judicial review***

5A. (1) where an application for judicial review is issued, the Lord Chancellor must not pay remuneration for civil legal services consisting of making that application unless either the court –

(a) gives permission to bring judicial review proceedings; or

(b) neither refuses nor gives permission and the Lord Chancellor considers that it is reasonable to pay remuneration in the circumstances of the case, taking into account, in particular –

i. the reason why the provider did not obtain a costs order or costs agreement in favour of the legally aided person;

ii. the extent to which, and the reason why, the legally aided person obtained the outcome sought in the proceedings; and

iii. the strength of the application for permission at the time it was filed, based on the law and on the facts which the provider knew or ought to have to known at that time."

5. The standard civil contract has been amended to give effect to the discretion to pay pre-permission costs under 5A(1)(b). The contract provides that there is a right to request a review of a decision to refuse to pay pre-permission costs, but no right of appeal to an Independent Costs Assessor or Independent Funding. This new right of review seems to only apply to a decision not to exercise the discretion. It seems to follow that where the issue in dispute is whether the work falls within the scope of 'making an application', the usual right of right of appeal will arise.

6. The contact now states:

Review of decisions under Regulation 5 A (1) (b) of the Remuneration Regulations

6.68 **A** You and/or Counsel must not submit a final claim for assessment to the court or to us until you have lodged any application you and/or Counsel are intending to make under Regulation 5 A (1) (b) of the Remuneration Regulations (payment for civil legal services to

make an application for judicial review where the court has neither refused nor given permission to bring judicial review proceedings) and received a final decision on the matter from us.

6.69 If you or Counsel are dissatisfied with our decision not to exercise discretion pursuant to Regulation 5 A (1) (b) of the Remuneration Regulations you may seek an internal review of that decision.

6.70 The request for internal review must be made in writing (setting out full reasons) within 28 days of notification of the decision. We will only extend the 28 day time limit where you have requested an extension for good reason within 21 days. Any extension of the time limit will be for a maximum of a further 14 days.

6.71 Failure to comply with any of the requirements set out in Paragraph 6.70 means that you accept our decision and lose your right to an internal review

6.72 For the avoidance of doubt there is no right of appeal to an Independent Costs Assessor or an Independent Funding Adjudicator where we have decided not to exercise discretion pursuant to Regulation 5 A (1) (b) of the Remuneration Regulations

7. The purpose of the change (says the Government) is to address the problem that:

"Legal aid is being used to fund a significant number of weak cases which are found by the court to be unarguable". [1]

The answer, it said, was to:

"…build into the civil legal aid scheme a greater incentive for providers to give more careful consideration to the strength of a case before applying for judicial review…"[2]

8. The scheme originally proposed was simple. Unless permission was granted the LAA would make no payment for pre-permission costs would not be paid.

[1] '*Transforming legal aid: delivering a more credible and efficient system"* 9 April 2013 (See para 3.61)
[2] Ibid. para 3.62

9. The majority of the very large number of respondents to the consultation (over 16,000) opposed the proposal. Treasury Counsel and the Judicial Executive Board were amongst those doing so.

10. In response, the Lord Chancellor consulted on an amended scheme which included the discretionary payment element for those cases which settle or are withdrawn pre-permission.

11. Despite the continuing opposition, the final version of the scheme was introduced by way of amendment to the Civil Legal Aid (Remuneration) Regulations 2013, detailed above, was introduced from 22 April 2014.

12. The discretion for the LAA to pay arises where no permission decision is made. Where permission is refused, for whatever reason, there is no power for the LAA to pay the Claimant's costs.

13. The regulations make provision for transitional protection for cases where the Claimant applied to the LAA for civil legal services prior to 22 April 2014.

What costs are "at risk"

14. The regulation is limited to non-payment of the costs of "making an application" for judicial review.

15. In its consultation document on the measure "Judicial review – Proposals for Further Reform" – September 2013 – para 119 the MOJ said:

> "*The proposal would only apply to issued proceedings. Legal aid would continue to be paid in the same way as now for the earlier stages of a case, to investigate the prospects and strength of a claim (including advice from Counsel on the merits of the claim) and to engage in pre-action correspondence aimed at avoiding proceedings under the Pre-Action Protocol for Judicial Review. In addition, payment for work carried out on an application for interim relief in accordance with Part 25 of the Civil Procedure Rules would not be at risk, regardless of whether the provider is ultimately paid in relation to the substantive judicial review claim. Reasonable disbursements, such as expert fees and court fees (but not Counsel's fees), which arise in preparing*

the permission application, would continue to be paid, even if permission were not granted by the court."

16. The regulation does not provide any definition of what work is covered by "making an application for judicial review". The costs of an application for interim relief are not expressly protected in the regulation despite the position set out in the consultation.

Will the scheme achieve the Government's objective?

17. To the extent that the new scheme will apply to cases where permission is refused then (disregarding for a moment that such a decision might be overturned on appeal if the Claimant pursues the matter that far), at first blush it might appear to be the obvious answer. The case is proven to be weak (permission is refused) and the State will not pay for the Claimant's solicitor's 'mis-judgment'.

18. But the scheme does not take into account the 'chilling effect' i.e. the risk that cases will not be issued, not because the prospects of success are too low (falling below the 50% threshold for legal aid funding), but because the financial risk posed to legal aid providers is just too great.

19. The Government acknowledged in its impact assessment that some cases might not be issued (and would not, therefore, be subject to the permission test) but *"this is assumed to apply only to weaker applications that probably would not have secured permission had they been pursued"* (see paragraph 17[3]**)** This 'assumption' clearly evidences the Government's failure to address the impact that financial risk will have on the provider's decision-making.

[3] Payment to providers to work carried out on an application for Judicial Review - Impact Assessment 6 September 2013

The financial risk

20. Legal aid practice is barely sustainable. There is no margin, either in terms of profit or cash flow, to absorb the additional risk of unremunerated work. Those departments or firms which are largely dependent on legal aid are particularly vulnerable.

21. Civil legal aid providers are already under increasing financial pressure as a result of the failure to increase legal aid rates for many years, and the 10% cut implemented on 3 October 2011. It is hardly surprising that they are not in a position to absorb unremunerated or 'at risk' work to any significant extent.

22. The inevitable conclusion that must be drawn is that legal aid practitioners will be forced to turn away cases that previously they would have undertaken not because they estimate the prospects of success to fall under the legal aid threshold of 50%, but because the financial risks that they pose is too great in this financial context.

Likely quantum of pre-permission costs

23. Setting aside for a moment the likelihood (the risk) of being refused permission, a significant factor in practitioners' decision making will, of course, be the size of the financial risk being taken.

24. In judicial review that may well be significant. It is a front-loaded procedure. It must be prepared and presented in sufficient detail to satisfy the permission judge that the case should proceed to a full hearing. The MOJ in the Impact Assessment at paragraph 22 explained that it had estimated the cost of preparing a permission application (and therefore the financial risk to the provider) as being £1350 (including counsel's fees):

> "*We are unable to establish the exact cost of preparing permission applications; however the LAA have advised that the default emergency certificate limit is £1,350 per case. This has therefore been used as the estimated cost to the provider for each case for which legal aid is no longer paid out.*"

25. In our experience, this is remarkably low, and it is to be noted that the impact assessment itself acknowledges that the figure is uncertain. The Legal Aid Agency itself will normally grant a cost limit about double this (£2250) as the initial costs limit for the permission stage.

26. There are many types of cases where that figure is likely to be significantly exceeded. For example:

- A court may order an oral permission hearing of its own volition, for example where the defendant's Acknowledgement of Service discloses a serious attempt to deal an early 'knock-out' blow or where there are issues of delay or venue to be decided at an early stage.

- The court might order a rolled up hearing, again of its own volition, as an alternative to dealing with application for interim relief and/or expedition;

- The case is particularly complex, for example there are a number of potential defendants and/or interested parties, or the case has a lengthy but relevant history or is otherwise factually complex.

Assessing prospects of success at permission stage

27. This is not always a straightforward application of experience and expertise to the facts of a particular case.

28. There are problems assessing merits inherent in any judicial review. Research has demonstrated significant differentials in the rate of grant of permission between different judges[4].

29. It has also been noted by some that the test applied by the courts at the permission stage is (perhaps necessarily) imprecise. (There have been recommendations for the

[4] Dynamics of Judicial Review Litigation: the resolution of public law challenges before the final hearing: Bondy and Sunkin Public Law Project 2009

amendments to the court rules by both the Law Commission[5] and Jeffrey Bowman's Review of the Crown List in 2000[6].

30. A particular problem faced by claimants' lawyers is the need to make an assessment of prospects of success often based on only limited information. A claimant often does not have access to formal policy documents or even a written explanation of a decision. The pre-action protocol itself does not create any obligation on the defendant to make disclosure of relevant information.

31. The claimant can, of course, where applicable, make use of rights conferred by the Data Protection Act 1998 and the Freedom of Information Act 2005 but the former only requires a *"prompt"* response with a back stop period of 40 days (which is often interpreted as a 40 day time limit) and the latter has an equivalent scheme but with a shorter backstop time limit of 20 days.

32. Furthermore under the Freedom of Information Act, time is suspended from the date of notification of any fee to be paid until payment.

33. Public authorities often do not comply with the time requirements, and although a complaint can be made to the Information Commissioner, the Commissioner's workload is such that this can take many months to process. Meanwhile, the claimant is faced with the requirement to issue proceedings promptly, and in any event, within three months (now six weeks in planning cases and 30 days in procurement cases).

34. In addition, the majority of clients do try and resolve their problems without approaching a lawyer, and it can take a little time to find solicitors who can assist once they have decided to do so. By the time that we are instructed, it is not unusual for many weeks to have passed. In other cases, urgent need for action may be required, for example if a child or young person has been made street homeless or a package of home care has been removed. In all of these situations, there is then only very limited time to

[5] Administrative Law: Judicial Review and Statutory Appeals (Law Com. No.226/1994)
[6] Review of the Crown Office List: A Report to the Lord Chancellor 2000 – Jeffery Bowman

investigate the merits without prejudicing the client's case with delay in issuing proceedings.

35. As well as the general problems inherent in judicial review in estimated prospects of success with great precision, there are particular types of cases which create difficulty because of the risk of permission being refused:

- Complex or novel cases which test the boundaries of a legal principle.

- The appropriate venue might be unclear e.g. *MA v Secretary of State for Work and Pensions* [2013] EWHC 2213 (the 'bedroom tax' case).

- In HRA claims where the Defendant argues that the Claimant is not a "victim" so permission should be refused.

- 'Delay' cases can also be problematic because the risk is dependent on the cogency of the defendant's evidence of prejudice. It can be a particular problem in cases which are challenging budget decisions or policies to implement budget cuts.

- Clause 64 Criminal Justice and Courts Bill 2014 proposes to introduce a new provision into s31 Senior Courts Act 1981 where the court must refuse permission if it appears "highly likely that the outcome for the applicant [in judicial review proceedings] would not have been substantially different" if the conduct complained of had not occurred.

Pre-permission settlement

36. The risk of permission being refused is not the only risk facing practitioners. There is also the risk of the case not proceeding to permission. In the absence of a permission decision, payment is not automatic. Practitioners will be dependent on the exercise of a broad discretion by the LAA.

37. It is not uncommon for judicial review proceedings to be brought to an end post-issue but pre-permission, not because of any concession on the part of the defendant, but because they become 'academic' i.e. a ruling on the issue between the parties is no longer of any significance to the claimant.

38. This is because judicial review proceedings, uniquely, are often not concerned with an immutable historical incident which forms the subject matter of the case, but often with a decision or inaction which may be overtaken by events in the course of the litigation. This is particularly problematic in the social welfare field, and particularly community care, where there is an ongoing relationship between the public authority and the individual claimant.

39. For example, in a community care judicial review challenging the lawfulness of a local authority's policy on residential respite care for an adult with learning disabilities living in the family home with parents as the main carers. The policy allocates respite without regard to the willingness of the family carers to continue to provide care. If, between issue and grant of permission, the local authority offers a supported living placement in a new development, the provision of respite care is no longer relevant to that individual and the claim is academic.

40. In other cases, the actions of third parties may render the proceedings academic. A judicial review challenge to the lawfulness of a local authority's eligibility policy can be rendered academic if, after proceedings are issue, an assessment concludes that the claimant is eligible for NHS Continuing Healthcare and therefore no longer the responsibility of the local authority.

41. In a further example, proceedings issued to challenge a local authority's decision to refuse to support a destitute and disabled asylum seeker who is waiting for a decision on his application for leave to remain in the UK, can be rendered academic by a decision by the Secretary of State for the Home Department to grant leave to remain.

42. In some cases which settle pre-permission, the defendant will agree, or will be ordered by the court, to pay the claimant's costs. However, there are significant number of meritorious judicial review cases which settle pre-permission where the defendant will not be liable for costs, or where the risk of them not being liable deters an application being made which may increase the size of the cost bill which the claimant's solicitor is at risk of not being paid. The case law is still such that there is considerable uncertainty.[7]

43. In response to these issues, the Government has introduced a discretionary scheme to pay providers in some cases where the case has been issued, but not proceeded to a permission decision.

44. The non-exhaustive list of factors set out in the Regulations are:

- the reason why the provider did not obtain a costs order or costs agreement in favour of the legally aided person.

- the extent to which, and the reason why, the legally aided person obtained the outcome sought in the proceedings;

- the strength of the application for permission at the time it was filed, based on the law and on the fact which the provider knew or ought to have known at the time.

45. The problem is that this discretion is exercised after the event. Practitioners must make their judgement on whether they can bear the risk of not being paid at a much earlier stage and may well decide that they cannot take the risk, irrespective of the potential to apply for a discretionary payment at a later date.

46. At present, it is not possible to predict which cases will and will not benefit from the discretion. The default position in the Regulations is that providers will not be paid, subject only to the discretion to do so. We can be certain that in some cases the LAA will decline to exercise its discretion to pay.

[7] M –v- Croydon [2012] EWCA Civ 595.

47. It is right to say that over time, as cases pass through the system the way in which the discretion is being exercised may become clearer. However, there is a real risk that practitioners will not run the 'hard cases' and so the boundaries of the LAA discretion will not be properly tested. All that experience may demonstrate, over time, is a fairly conservative pattern. This is not going to provide a sufficiently secure safety net on which solicitors can rely when assessing the risk of taking on a case at the outset.

Strategies to minimise the risk

48. The Regulations prohibit payment for "*making an application*" for judicial review.

49. Although the Regulations do not set out, in express terms, what falls within the scope of "making an application", the LAA has indicated that work carried out to get investigate the strength of a claim and engage in pre-action correspondence will not be caught and will be paid irrespective of outcome.

50. It seems likely that the LAA may treat work undertaken under a Legal Help or an Investigative Help certificate falling outside its scope.

51. It is important to remember, however, that there are criteria which limit the circumstances in which an Investigative Help certificate will be granted. It is only available when it is not possible to determine the prospects of success without undertaking substantial investigative work. S39 Civil Legal Aid (merits Criteria) Regulations 2013 provide that the criteria for Investigative representation are met where:

    (a) the prospects of success are unclear and substantial investigative work is required before those prospects can be determined

    (b) there are reasonable grounds to believe that once the investigative work is completed the case will satisfy the criteria for full representation

Once it is possible to form that view, then work under the certificate should not continue, but either the certificate should be discharged (because the view reached is that the prospects of success are less than 50%) or the application for full representation should be made.

52. It is inevitable that there will be some disputes with the Legal Aid Agency about the boundaries of investigative work, and it will be necessary to keep careful records of work done and why it was adjudged to be investigative or otherwise not within the scope of "'making an application'.

53. Where work is clearly investigative work, that work can (and should) be carried out in the most efficient way. This may reduce the work necessary in actually making the application for judicial review. However, at some point an assessment of the risk of not getting a positive permission decision (either because of early settlement, or because of a refusal of permission) will have to be made.

54. It is important that fee earners address their minds to the relevant factors - some kind of aide memoir or checklist may help – and do so at an early enough stage in the process.

55. For example one of the factors to be taken into account by the LAA when exercising the discretion was the merits of the application for permission at the time it was issued taking into account not only the facts known to the conducting solicitor but also what they reasonably ought to have known. Fee earners need to give themselves time to make appropriate factual enquiries.

56. It may be worth considering amendments to the firm's pro forma letter before claim to include a request for the defendant to disclose both specific information that the fee earner has identified as relevant but also any information or documents that the defendant will rely on as relevant.

57. Where work is clearly investigative work, that work can (and should) be carried out in the most efficient way. This may reduce the work necessary in actually making the application for judicial review. For example:

- when instructing counsel, counsel could be informed of the relevant facts of the case in the form of a draft witness statement;

- the bundle of documents provided with instructions could be provided in a structure and order which can easily be converted into a Claimant's Bundle.

- Counsel could set out his or her advice on the merits in a structure and format which would allow for use of that material in drafting the Statement of Grounds.

58. There needs to be a clear decision-making process within the practice so that junior fee earners are not forced to make decisions when it is clearly inappropriate for them to do so.

59. The very fact that such decision-making processes need to be introduced makes it clear practitioners cannot, necessarily, as a matter of course act where they have assessed the prospects of success as being more than 50%. There will be no issue to decide if prospects have been assed as 50% or less – because legal aid will simply not be available.

60. This then raises a very difficult question as to whether we acting in accordance with our contract with the Legal Aid Agency if we were to refuse to do so for this reason. The standard terms for the 2013 and 2010 contracts both include the requirement that, when performing contract work, we must act in the best interests of our clients, and be uninfluenced by any factor other than the client's best interests. (Clause 7.2).

Vulnerable cases

61. The types of cases that are more vulnerable to a negative risk assessment are:

- where it is more difficult to assess merits because of the extent to which the assessment relies on disclosure by the defendant.

- those which involve a novel point of law

- those involving higher up-front preparation costs because of, for example, a significant amount of research, or extensive documentation.

- where there is a higher risk of the case being rendered academic, such as with community care cases.

- where the level of costs risk is higher because of the possibility of an oral permission hearing or rolled up hearing.

- there is a higher risk that the claimant may drop out of the case before permission, for example, because of mental health problems, substance dependency, chaotic lifestyle or homelessness.

- where the merits are close to, albeit above, the merits threshold for legal aid eligibility.

62. The following three cases in which Public Law Solicitors has acted recently might well have fallen victim had they post-dated the implementation of the new scheme.

63. Novel point of law:-

- We act for three Claimants in the case of MA –v- Secretary of State for Work and Pensions challenging the lawfulness of the regulation concerning the Housing Benefit spare room subsidy – the "bedroom tax" case. The Claimants argue that

the regulation is unlawful as it discriminates against them on the basis of their disability, contrary to Article 14 ECHR. According to the Government's impact assessment the regulation will reduce benefit entitlement to more than 600,000 of who more than 400,000 are disabled. The novelty of the case means it is replete with difficulty and financial risk. The law is novel and complex. The Claimants approached us for assistance late in the day so the matter was urgent, and there was significant work to be done to prepare evidence and read the extensive documentation to prepare the claim for issue before limitation.

- The Defendant argued that permission should be refused because it was unarguable. Further he asked for permission to be refused on the basis of prematurity, incorrect forum and absence of standing. As there were multiple claimants in three different firms, and a number of interested parties, and the matter was urgent, it was inevitable that the court would order a directions hearing to case manage the claims effectively.

- Had permission been refused we would have received no payment at all for all our work to prepare and issue the claim, to consider and address the Defendant's arguments and prepare for and attend the hearing.

- This is a good example of the kind of case which we may not be able to take on in future because of the financial risk.

64. Limitation issues:

- We acted for 12 claimants - all children and young people going to be adversely affected by the local authority's re-tendering process for supporting people services for the provision of accommodation and support services for homeless young people. We were only instructed a few days before limitation - all the clients were young and vulnerable and a high percentage had either a mental or physical disability. Many had lead chaotic lives and had been street homeless. They were not aware until late in the day that the decision had been made. We

had to do significant urgent work to issue the claim within limitation. We had to read extensive council documentation and obtain witness statements from the clients. Because of short time before limitation we could not give council time to respond to pre-action correspondence. Post issue, we agreed to stay claim, consistent with our obligations to seek to resolve the matter, so that council could consider the case. Having done so, the entire tender worth several million pounds was withdrawn and the council agreed to continue the current service and carry out a full consultation exercise before re-tendering on a proper basis. We could not obtain inter partes costs because the council said they did not have a chance to consider our complaint before issue, and once they had had a chance they acted promptly to give full redress – no order for costs.

65. Risk of becoming academic

- We acted for a destitute 72 year old failed asylum seeker with significant physical disabilities in relation to a decision by social services to refuse her accommodation and support. The matter was extremely urgent as the client was about to be street homeless so involved considerable work over a weekend. After interim relief was granted but prior to permission the local authority liaised with the Secretary of State for the Home Department who was persuaded to make a prompt decision on the client's outstanding application for leave to remain and the client was granted leave. As a result of this she became eligible for homelessness and financial assistance and the claim became academic. The was no order for costs on the substantive issue as the case was academic and the court decided after considering written representations it could not properly make a proportionate decision as to whether or not the Claimant would have won her case at trial.

Conclusion

66. The regulations create a scheme where legal aid practitioners will have to to carry our work which is unremunerated, with real consequences for the financial viability of their

practice, in circumstances where it is unclear whether the terms of the contract with the LAA permit them to make judgments and decline work based on an assessment of the size of the risk. This is in a context where the financial viability of the sector is fragile and is unable to absorb further cuts to income. This is bound to have an adverse effect on the willingness of practitioners to take on meritorious, but financially "risky", cases and thus have a chilling effect of access to justice.

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