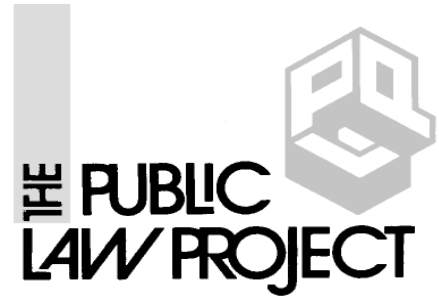


How to get public funding for judicial review – a guide for advisers



1. Judicial review – a priority under the Funding Code

Funding decisions by the Legal Services Commission (LSC) are governed by the Funding Code, which is made up of “Criteria” and “Procedures”. The former contains the merits test that must be met to obtain an offer of public funding. The Code is also accompanied by Decision-Making Guidance (DMG).

Both the Funding Code Criteria and the DMG have sections on judicial review applications: see section 7 of the Funding Code Criteria and section 16 of the DMG which can be accessed via the following links:

- http://www.legalservices.gov.uk/docs/civil_contracting/funding-code-criteria-new-dec05.pdf
- http://www.legalservices.gov.uk/docs/stat_and_guidance/manual_r03_volume_3_pt_c.pdf

It is important to be familiar with these as specific tests apply to JR funding applications. Judicial review is also a priority under the Funding Code, and therefore it is arguably more straightforward to get public funding for JRs than other cases.

This guide will set out the criteria to meet, with reference to specific parts of the Code (using the prefix “FCC” for Funding Code Criteria) and the DMG. We have also set out below how to deal with certain sections of the APP1.

2. Criteria for full representation certificates (see below for investigative help)

The Code sets out separate criteria for judicial review applications before and after the permission stage, although there is a considerable overlap between the two. (It is also rare to be applying for public funding after you have obtained permission.)

Pre-permission stage: FCC 7.4

- Is JR available (FCC 7.4.2)? (i.e. is it a public body, exercising a public function, and are you in time?) **See DMG 16.4**
- Have you exhausted all genuine alternative remedies (FCC 7.4.3)? (e.g. is there an appeals process you could use, should your client make a complaint or use the Ombudsman?) **See DMG 16.5**

- Have you complied with the judicial review pre-action protocol (FCC 7.4.4)? Public funding will normally only be granted once you have sent a letter of claim and given the defendant the chance to respond.
- Is the costs benefit test met? *There is a special “proportionality” test for JR: funding may be refused unless “the likely costs are proportionate to the likely benefits of the proceedings, having regard to the prospects of success and all other circumstances”.* See FCC 7.4.6; DMG 4.9
- What are the prospects of success? *This only relates to obtaining the substantive order in the proceedings, not for example, getting a fresh decision in your client’s favour.* See FCC 7.4.5, DMG 16.6

IF THE CASE MEETS THESE CRITERIA (and has prospects of success that are good or better), YOU SHOULD GET PUBLIC FUNDING.

YOU SHOULD COVER ALL OF THESE IN YOUR STATEMENT OF CASE IN THE APP1 SPECIFICALLY DEALING WITH EACH POINT.

Post-permission stage: presumption of funding: FCC 7.5

If you get permission, there is a presumption that funding will be granted (or will continue if the client already has public funding), assuming the case meets the “proportionality” cost benefit test and prospects of success are good: FCC 7.5.3 – funding will be refused if prospects of success are poor or borderline, or the cost benefit test is no longer met.

Even if prospects of success are borderline, if one of the special categories are met (see below), then there is still a presumption that funding will continue (or be granted if this is a new application): FCC 7.5.2.

3. Borderline prospects of success: the “special categories”

If the prospects of success are borderline, you may still be able to get public funding if your case falls into one of the three special categories:

- significant wider public interest
- overwhelming importance to the client
- significant breach of human rights.

THESE CONCEPTS HAVE VERY SPECIFIC DEFINITIONS IN THE FUNDING CODE AND IF YOU WISH TO RELY ON THEM, YOU SHOULD CHECK YOUR APPLICATION MEETS THE CORRECT DEFINITION AND THAT YOU HAVE SPECIFICALLY ADDRESSED THIS ON THE APP1.

A SIGNIFICANT WIDER PUBLIC INTEREST

FCC DEFINITION: that the case has the potential to produce real benefits for individuals other than the particular applicant for funding. **See FCC 2.4, and also section 5 of the DMG.**

This does not mean that the public are interested in the outcome, or that there will be “public interest” in the law being clarified.

See also the specific types of “benefit” and what sort of numbers the LSC are looking for, as set out in the DMG (at 5.2 and 5.3). If you are saying others will benefit, you will also need to address whether a fighting fund has been set up (see DMG 5.5).

If the case has borderline prospects of success, but may have significant wider public interest, the regional office is likely to refer it to the Public Interest Advisory Panel (known as PIAP) for guidance on this issue; for further details on PIAP, see below.

B OVERWHELMING IMPORTANCE TO THE CLIENT

FCC DEFINITION: “a case which has exceptional importance to the client, beyond the monetary value (if any) of the claim, because the case concerns the life, liberty or physical safety of the client or his or her family, or roof over their heads”; **FCC 2.4; see also DMG 4.10.**

This does not mean that it is really important to the client. The case must meet the specific test.

C SIGNIFICANT BREACH OF HUMAN RIGHTS

The FCC DEFINITION has three elements:

- (a) the breach is material to the case (i.e. an important part of the case);
- (b) the HR breach argument must have good prospects of success (this is a different question to overall prospects of success);
- (c) significant HR issues must flow from case itself not the funding decision; the nature and consequences of the breach must also be taken into account; **DMG 6.4.**

4. Investigative help

This form of certificate exists specifically in relation to cases where the prospects of success are uncertain and substantial investigative work is needed; FCC 5.6 and DMG 10. A number of criteria applying to full certificates still apply, in that you must show JR is available, and that any administrative or appeal procedures have been exhausted. You do not necessarily have to comply with the pre-action protocol; in fact Investigative Help can be used to draft a complex protocol letter of claim as part of the investigation you need to carry out.

You must also show that if the issue on which prospects of success are unclear is resolved, the case will have good prospects of success; FCC 5.6.4. This may sound an impossible feat, but consider the following example:

You are concerned that the claim may be out of time because the claimant has delayed whilst pursuing a complaints procedure. You think that if this issue is resolved (i.e. counsel advises positively that the court is unlikely to find the claim is out of time), the claim has good prospects of success, but you need counsel to advise on the specific case and the current case law on delay and complaints procedures. You could apply for Investigative Help to clarify this issue.

You must also show that a substantial amount of work needs to be done before prospects of success will be clear and that this cannot be done under Legal Help. "Substantial" is defined in the DMG at 10.3, as being more than six hours of fee-earner work or disbursements over £400. Refer to these guidelines when making your application.

5. Dealing with a funding refusal

If your client's application is turned down, you have two options: request a review or go the Funding Review Committee (FRC), although the LSC now appears to review all decisions before forwarding the application on to the FRC.

(a) REVIEW: You can simply ask the LSC to reconsider; all regional offices have an internal review process. This is particularly important when the LSC have misunderstood an aspect of your application or have refused it for a reason that you can deal with simply in correspondence (for example, they think you are out of time but they have got the date of the decision wrong). This also allows you the opportunity to deal with the rather frustrating standard letters that do not really give you a proper decision.

(b) "APPEAL" TO THE FRC: Going to the FRC is slower and more complicated. The FRC look at the decision afresh, so do not focus your representations on the Regional Office's initial decision only. You should in fact prepare your submissions to meet the various criteria as set out above; create an unassailable argument as to why your case should be funded, addressing the specific points in the Code. If you attend the FRC meeting, take with you sufficient copies of the relevant sections of the Funding Code as the FRC members may not be familiar with them.

If the FRC's decision is unlawful, and the LSC refuse to make a fresh decision, you can of course judicially review them. You will need to apply to a different regional office for public funding for the challenge.

6. Completing the APP1 – specific issues

- Typed is better than handwritten; LSC staff are allocated a set number to deal with per hour, and receive performance related pay on the basis of how quickly they deal with applications.
- Use the specific definitions where possible and refer to the Funding Code and DMG by paragraph reference as outlined above. Check the updated version online if necessary.
- Make sure you enclose the decision letter, your letter of claim and any other relevant correspondence.
- Alternatives to litigation (page 6) – deal specifically with any possible alternative remedies; if it is not a genuine alternative or is not suitable to resolve your client’s problem, spell this out (e.g. complaints procedure will be too slow; ombudsman will not deal with point of law). Attempts at ADR can include negotiation through a pre-action protocol letter of claim; if you have not had a response from the other side, point this out: if they do not even reply to letters, how can you get them to agree to ADR?
- Other people who will benefit (pages 4 and 7) – if you are claiming the case has “significant wider public interest”, or simply saying others are involved, could they set up a fighting fund? If not, why not?
- CFAs – insurance is not generally available and is prohibitively expensive.
- Statement of case – explain the story clearly, starting with an opening paragraph stating what your client wants to challenge in one sentence. Give factual background first, followed by your legal analysis (i.e. the grounds for judicial review). Spell out why the decision, action or failure to act is unlawful. Have a paragraph on ADR/alternative remedies, and one on the pre-action protocol. State that the case meets the appropriate cost benefit test and what the prospects of success of getting your substantive order are.

7. Public Interest Advisory Panel

Although a regional office can allow funding for a case with borderline prospects of success on the basis of significant wider public interest (SWPI), they in fact usually refer such cases to the Public Interest Advisory Panel (PIAP) for a finding on this issue. The Panel’s view is advisory only, i.e. they do not make a decision on whether a case should be funded, but it is very unlikely that a regional office would depart from their advice and refuse to fund a case with a positive finding from the panel.

As set out above, the definition of SWPI is very specific. The Panel does not carry out a full merits test, but does consider whether the case is so hopeless that there will be no potential benefit because the claim is bound to fail. Do not bombard the Panel with every possible document; less is more. The best way to address SWPI is to set out simply what the “real benefits” are and who it is

that would benefit. Include a short chronology on the proposed action to date if appropriate; provide relevant copy correspondence (including letter of claim and any response).

You should have addressed the various criteria in your APP1 in any event, but ensure that you have specifically covered cost benefit and the prospects of success of obtaining the substantive order your client seeks. You will also need to have addressed whether a fighting fund can be set up or not, as outlined above, with reference to DMG 5.5.

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