

Judicial review and pre-permission costs

Karen Ashton
Anne McMurdie
Public Law Solicitors

The new regime

- ▶ The basic provision – a prohibition on payment if permission refused
- ▶ If settled/withdrawn pre-permission – a discretion to pay

Scope of provision

- ▶ Civil legal aid services consisting of ‘making the application’
- ▶ App for interim relief, investigation and sending letter before claim excluded? (see assurances in consultation document)
- ▶ NB only affects payment of the provider – not costs protection
- ▶ There are transitional provisions e.g. for certificates granted before 22.4.14

The discretion

- ▶ If settled/withdrawn post- issue but pre-permission
- ▶ LAA has broad discretion
- ▶ 3 factors mentioned in regs:
 1. Reason for not obtaining IP costs
 2. Extent to which and why outcome
 3. Strength of app for permission when filed taking into account what knew or ought to have known.

Right to review of discretion

- ▶ New clause in LA contracts – 6.68 on
- ▶ Must request exercise of discretion before assessment
- ▶ If no – can ask for *internal* review within 28 days (poss extension)
- ▶ Normal right of appeal on issues such as whether work was within scope of ‘making an application’?

Why?

- ▶ *“Legal aid is being used to fund a significant number of weak cases which are found by the court to be unarguable”*

So:

“..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.”

Will it work?

- ▶ Will the disincentive operate to catch only ‘unarguable’ cases
- ▶ The Gov “assumed” this to be the case i.e. only weak cases that would have been refused permission will not be issued
- ▶ But is this right – fails to take into account providers’ assessment of the financial risk which is different to the assessment of prospects of success

The financial risk – the context

- ▶ No margins to absorb risk in legal aid practice
- ▶ Rates not increased for years
- ▶ 10% cut in 2011

The size of the risk

- ▶ Costs front loaded
- ▶ MOJ – estimate of average – £1350
- ▶ But v low
- ▶ Normal permission limitation – £2250
- ▶ Many cases where likely to be higher:
 - Court orders (sometimes more than 1) oral permission hearing
 - Court orders rolled up hearing
 - Particularly complex

The level of risk

Assessing prospects of success at permission stage – factors beyond practitioners' control:

- ▶ Depends on the judge
- ▶ Imprecise test of arguability
- ▶ Limited information
- ▶ Limited time

Difficult cases

- ▶ Novel case testing the boundaries
- ▶ Venue unclear
- ▶ HRA cases where ‘victim’ status in dispute
- ▶ ‘Delay’ cases where D’s evidence of prejudice not fully set out before issue e.g. budget challenges
- ▶ Effect of Clause 64 Criminal Justice and Courts Bill – new ‘highly unlikely would have made a difference’ test for permission

Risk of pre-permission settlement

- ▶ Discretionary payment
- ▶ If concession by D then will seek IP costs in an event
- ▶ But what if becomes academic? Case law on IP costs suggest that v uncertain will get an order see *M v Croydon* [2012] EWCA Civ 595

Discretion to pay

LAA has broad discretion but 3 factors specifically mentioned in regs:

1. Reason for not obtaining IP costs
2. Extent to which have achieved outcome but also why have done so
3. Strength of app for permission when filed taking into account what knew or ought to have known.

But it is exercised after the event – the decision on risk must be taken before issue

Academic cases

- ▶ Ever present 'risk' in some types of cases e.g. community care cases where ongoing relationship between C and D e.g. D argues reassessment that would have undertaken anyway
- ▶ Third parties may take action e.g. CCG may provide NHSCHC or HO may grant leave to remain. Will LAA say that should have taken into account?

Strategies to minimise the risk

Investigative work

- ▶ Arguable that falls outside work in ‘making the application
- ▶ Arguably not limited to work under IH certificate
- ▶ But if under IH cert more likely to be accepted by LAA to be investigative work?

Investigative Help Certificates

Reg 39 Civil Legal Aid (Merits Criteria)
Regulations 2013:

- ▶ Prospects of success unclear
- ▶ Reasonable grounds for believing that on completion of investigation case will satisfy criteria for full rep

Keeping records

- ▶ Introduce system to maintain records of what work is investigative
- ▶ Record contemporaneous justifications

Using investigative work efficiently

- ▶ E.g. when instructing counsel to advise, consider providing info on factual background using draft witness statements
- ▶ Provide documents to counsel in form of draft claimant's bundle?
- ▶ Counsel should consider setting out advice in form of Statement of Grounds

Keep an eye on the discretion factors

- ▶ E.g
- ▶ Merits at time of issue
- ▶ But assessed on basis of what was known or ought to have been known to conducting solicitor at that time
- ▶ So need to make appropriate factual enquiries
- ▶ And leave yourself time to do it

What should we have known?

- ▶ Possible action by a third party e.g. risk of client's app for leave to remain being determined within likely timescale for permission decision?
- ▶ Possible reconsideration as part of a process the D already has in mind e.g. CC review (but NB need to deal with any limitation risk if considering waiting)
- ▶ Key factual element of claim is unclear – DPA/FOIA/ seek express clarification in LBC e.g. is it a final decision?

Standard paragraphs in LBC

- ▶ Set out sufficiently detailed account of relevant factual material
- ▶ Ask D to explain if dispute any of that factual material and if so on what basis
- ▶ Ask for disclosure of any documents relevant to case

Decision-making process

- ▶ Merits must be more than 50% for LA eligibility
- ▶ But in addition is risk (amount and level) one that the firm/organisation can afford to take?
- ▶ Who has responsibility to take that decision?
- ▶ And how does it square with our contractual responsibility to act in BI of client?

Vulnerable cases

- ▶ More difficult to assess merits because relies on D disclosure
- ▶ Novel point of law
- ▶ Higher up front costs e.g. complex history
- ▶ High risk of becoming academic
- ▶ Risk of oral permission or rolled up hearing
- ▶ Client may drop out
- ▶ Lower overall prospects of success e.g. 50–55%

Examples

- ▶ Novel point of law, risk of oral hearing pre-permission, higher up front costs – the bedroom tax case
- ▶ Need to issue urgently because of limitation issues – potential loss of supporting people's services for homeless young people.
- ▶ Risk of becoming academic –

The inherent conflict

- ▶ Client's interests: if overall prospects greater than 50% – issue
- ▶ Lawyers' interests: if financial risk too great don't issue