

Funding a judicial review claim

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What we will cover

LEGAL AID

- Introduction
- Key documents: legislation and guidance
- Types of legal aid
- Criteria for a successful application
- Checklists for applications:
 - All applications
 - Investigative representation
 - Full representation
- Emergency funding
- Limitations, extending funding and reporting

ALTERNATIVE FUNDING

- Paying Privately
- Cost Caps
- Conditional Fee Agreements

Introduction

- This seminar and the [PLP guide](#) sets out the relevant criteria and issues when applying for legal aid for judicial review cases
- Legal aid remains available for many judicial review cases – subject to conditions
- Only a firm or other provider of legal services can apply for legal aid funding for judicial review (usually under a contract for public law)



Key documents: legislation and guidance

- Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') – in particular, Part 1 and Schedule 1
- Civil Legal Aid (Merits Criteria) Regulations 2013 ('the Merits Regulations')
- Civil Legal Aid (Procedure) Regulations 2012 ('the Procedure Regulations')
- Civil Legal Aid (Remuneration) Regulations 2013 ('the Remuneration Regulations')
- Lord Chancellor's Guidance under s4 LASPO ([here](#))
- Lord Chancellor's Guidance on Determining Financial Eligibility for Certificated Work ([here](#))

Tip: always check if there is updated guidance [here](#).

Types of legal aid

- Two forms of legal aid certificate:
 - **Investigative representation:** to investigate the merits of a proposed application for judicial review
 - **Full representation:** covers issuing an application for judicial review at court and all subsequent steps in proceedings

(Note that this seminar and the PLP guide do not cover Legal Help, the form of legal aid funding used for initial advice, including on many judicial review cases)

Criteria for successful application

- **Scope:** the case must be ‘in scope’ for legal aid and must “*have the potential to produce a benefit*” for the individual, their family or the environment
- **Procedural requirements:** the application must comply with the Procedure Regulations (including by using prescribed forms / CCMS as required)
- **Financial eligibility:** the client must qualify financially for legal aid (see Guidance on Determining Eligibility for Certificated Work)
- **Merits criteria:** the application must satisfy the criteria in the Merits Regulations (prospects of success, ‘reasonable private paying individual’ test, proportionality etc)

Checklist for all applications

- For **all applications**, there are certain merits criteria which must always be satisfied, including:
 - The act, omission or subject of the challenge appears to be susceptible to challenge by judicial review (Reg 53(a) Merits Regulations)
 - There are no effective alternative proceedings available (Reg 53(b)), and all reasonable alternatives have been exhausted (Reg 39(d))
 - It is not reasonable for the client to use other potential sources of funding or a Conditional Fee Agreement (Reg 39(a) and (b))
 - No one else can reasonably be expected to bring the claim (Reg 39(c))
 - There is a need for representation in all the circumstances of the case (Reg 39(e))

Checklist for investigative representation

For applications for investigative representation, the following further criteria must be satisfied:

- The prospects of success are unclear (Reg 40(1)(a))
- Substantial investigative work is required to determine the prospects (Reg 40(1)(a))
- There are reasonable grounds to believe the full representation criteria will be satisfied (Reg 40(1)(b))
- The opponent has been notified of the claim and given time to respond, or it is impracticable to do so (Reg 54(b))

Checklist for full representation

For applications for **full representation**, the following further criteria must be satisfied:

- The prospects of success are 50% or higher (Reg 56(3)(a)), or 45-49% if the case is of significant wider public interest, overwhelming importance to the individual or relates to a breach of ECHR rights (Reg 56(3)(b))
- The likely costs of the case are proportionate to the likely benefits (Reg 56(2)(b))
- A pre-action letter has been sent to the opponent, and they have been given time to respond, or it is not practicable to do so (Reg 56(2)(a))

Emergency funding

- The LAA has the power to determine an application on the basis of limited information in the interests of justice (Reg 45(1)(b) Procedure Regs) – i.e. you can apply for funding on an emergency basis, and the LAA will determine the merits initially with further information to be submitted later
- Emergency funding will only cover work that needs to be done on an urgent basis, and will be converted to a substantive certificate if/when the further information is provided and the LAA accepts the client is eligible
- If the further information required is not provided within 5 working days of emergency funding being granted, the funding decision will be revoked
- If it turns out the client is not financially eligible for legal aid, the certificate may be withdrawn or revoked

(Note also 'delegated powers/functions' available for certain categories of case)

Limitations, extending funding and reporting

- Legal aid certificates are subject to limitations on the amount of costs that can be incurred and the stages of work that can be undertaken
- When further work becomes necessary, the limitations on the certificate can be amended/extended by making a further application to the LAA. This may happen where e.g.
 - There is an oral permission hearing
 - Permission is granted
 - Expert evidence or other disbursements are necessary
 - There is a directions hearing
- If at any stage of the case it appears that the criteria for funding are no longer met, you must inform the LAA

ALTERNATIVE FUNDING

- Pay privately
- Conditional Fee Agreement
- Crowd Justice
- Cost Capping Order

Cost Capping Orders

- Sections 88 to 90 of the Criminal Justice and Courts Act 2015 & CPR 46.16-19
 - A CCO can only be made if permission has been granted (s.88(3))
 - Requires an application (s.88(4))
 - Made on notice (CPR 46.17(1)(a))
 - Supported by evidence (CPR 46.17(1)(b)(i)-(iv))
 - Why CCO should be made
 - Summary of financial resources
 - Costs likely to be incurred by the parties
 - If a company: demonstrates it has resources to meet liabilities
 - Must send application and papers to other parties (CPR 46.17(3))

Cost Capping Orders

- The factors that the Court is required to take into account when considering a CCO application (ss88-89 of the 2015 Act:
 - the proceedings are public interest proceedings
 - in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings
 - it would be reasonable for the applicant for judicial review to do so

Reciprocal cap

“A costs capping order that limits or removes the liability of the applicant for judicial review to pay the costs of another party to the proceedings if relief is not granted to the applicant for judicial review must also limit or remove the liability of the other party to pay the applicant's costs if it is” (s.89(2))

Questions?

