

Homelessness & allocations cases

LASPO

s9 (1) Civil legal services are to be available to an individual under this Part if—

(a) they are civil legal services described in Part 1 of Schedule 1, and

(b) the Director has determined that the individual qualifies for the services in accordance with this Part (and has not withdrawn the determination).

Schedule 1

34(1) Civil legal services provided to an individual who is homeless, or threatened with homelessness, in relation to the provision of accommodation and assistance for the individual under—

(a) Part 6 of the Housing Act 1996 (allocation of housing accommodation);

(b) Part 7 of that Act (homelessness).

Exclusions

(2) Sub-paragraph (1) is subject to the exclusions in Parts 2 and 3 of this Schedule.

Definitions

(3) In this paragraph “homeless” and “threatened with homelessness” have the same meaning as in section 175 of the Housing Act 1996.

See also Para 28(c) of the 2013 Category Definitions¹ which reads:

The provision of accommodation and assistance under Parts 6 and 7 of the Housing Act 1996 for an individual who is homeless or threatened with homelessness (paragraph 34 of Part 1 of Schedule 1 to the Act). References to Part 7 of the Housing Act 1996 (or to provisions within Part 7 of the Housing Act 1996) include reference to Part 2 of the Housing (Wales) Act 2014 (or equivalent provisions within Part 2 of the Housing (Wales) Act 2014

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/441385/category-defenitions-2013.pdf

So it's clear that Legal Aid is available for homelessness cases. The position is less though in respect of allocations cases. Does the Lord Chancellors Guidance offer any assistance? In a word, no. There is nothing in the guidance regarding homelessness and allocations cases. Most of the guidance which is relevant to housing cases relates to disrepair.²

Civil Legal services are excluded unless they fall within schedule 1. The rationale is that Civil Legal Aid is available to deal with housing cases where there is a risk of homelessness (either through possession proceedings or where client is homeless/threatened with homelessness) or where there is other risk of harm (for example through serious disrepair).

The reference to Part 6 Housing Act 1996 in Paragraph 34(1(a) of Schedule 1 does not in my view mean that allocations cases are in scope in the way that they used to be. It is there because the homelessness duty under s193 Housing Act 1996 can be discharged by an offer of accommodation under Part 6. A cautious interpretation of the provision is that Legal Aid is available for work relating to allocations only to the extent that it relates to the discharge of the homelessness duty. In practical terms that means advising the client that the duty could be discharged by a Part 6 offer and also perhaps raising a query with the Local Authority regarding the client's priority under the allocations scheme.

A bolder interpretation is that Legal Aid could extend to cases where it can be argued that the client's housing circumstances are such that it is no longer reasonable to continue in occupation of the property. We will all be familiar with such situations from our homelessness cases³, for example severely overcrowded accommodation or perhaps accommodation that has become unaffordable by virtue of the benefit cap. However it seems to me that there is significant risk in running a case under Legal Help - a case which is likely to be long running and will probably become an exceptional claim – on the assumption that the Legal Aid Agency will agree that the client's circumstances are so dire that its no longer reasonable for him/her to continue occupying the property. The position may be strengthened if the

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332795/legal-aid-lord-chancellors-guidance.pdf

³ See Birmingham v Ali & others [2009] UKHL 36 <http://www.bailii.org/uk/cases/UKHL/2009/36.html>

client makes a homelessness application on that basis, particularly if the Local Authority concedes the point, although equally it could be weakened if the Authority makes a decision against the client.

When dealing with Part 6 cases it is easy to fall in to the trap of thinking that Legal Aid will be available if the client is homeless/threatened with homeless or is in temporary accommodation because both groups are entitled to reasonable preference. However the fact of being in temporary accommodation does not bring the case within the scope of Legal Aid unless there are grounds to argue that the client is homeless or threatened with homelessness as set out above.

Public Law

There is greater scope to do allocations work if you have a Public Law contract provided of course that you are able to identify a potential ground for challenge on public law grounds. In practice of course that will relate to a potential challenge to the Local Authority's allocations policy and/or to the assessment of the client's application under that policy. Obviously routine enquiries about the assessment of the client's application etc. would not in scope as a public law matter although, as set out above you may be able to do that under a housing contract if the client is homeless/threatened with homelessness.

Schedule 1 LASPO

19(1) Civil legal services provided in relation to judicial review of an enactment, decision, act or omission.

(2)....

(3) The services described in sub-paragraph (1) do not include services provided to an individual in relation to judicial review **that does not have the potential to produce a benefit for the individual, a member of the individual's family or the environment.**

So LASPO provides that a judicial review claim must "have the potential to produce a benefit for the individual, a member of the individual's family, or the environment". Benefit is not defined but this is intended to exclude a pure public interest challenge.

Housing or Public Law?

Paragraph 6 of the 2013 Category Definitions provides that where a case falls within two or more categories you can choose in which category to conduct the case.

The Categories are drafted to ensure that the majority of cases clearly fall within one Category or another. For example, mortgage arrears possession cases fall within the debt category and are excluded from the housing category. However, there will be some cases which genuinely fall within more than one Category in which case you can choose in which Category to carry the case out.

Paragraph 13 provides that a Judicial Review case will fall within the category to which the “underlying substance” of the case relates.

Public law challenges to the acts, omissions or decision of public bodies (including under the Human Rights Act 1998), in particular challenges by way of judicial review (as described in paragraph 19 of Part 1 of Schedule 1 to the Act) and habeas corpus (as described in paragraph 20 of Part 1 of Schedule 1 to the Act) are covered by the Category in which the principal matter or proceedings appear or by the Category which relates to the underlying substance of the case (as referenced by the widest Category Definition incorporating excluded work). They are also covered by the Public Law Category.

On the face of it then that means that an allocations Judicial Review would fall within the housing category provided that there are grounds to argue that the case is within the scope of LASPO.

Exceptional Funding

Detailed consideration of the availability of exceptional funding is beyond the scope of this paper but it is worth bearing in mind. The rationale is that Legal Aid will be available through exceptional case funding if not funding the case would lead to breach of an individual’s Article 6 rights. See the Lord Chancellor’s Guidance on Exceptional Case Funding⁴ and also the two articles by Martha Spurrier in the April and May 2013 editions of Legal Action.

⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/433502/legal-aid-chancellors-guide-exceptional-funding-non-inquests.pdf

Applications for Legal Aid and the Civil Legal Aid (Criteria Merits) Regulations

For Full Representation and Investigative Help

Regulation 39 Criteria met (see Appendix); and

The act, omission or other matter complained of in the proposed proceedings appears to be susceptible to challenge; and

There are no alternative proceedings before a court or tribunal which are available to challenge the act, omission or other matter, except where the Director considers that such proceedings would not be effective in providing the remedy that the individual requires; and

For investigative help

the individual has—
 (i) notified the proposed defendant of the individual's potential challenge and given a reasonable time for the proposed defendant to respond; or
 (ii) shown that doing so would be impracticable

For full representation

A letter before claim has been sent to the proposed defendant (except where this is impracticable), and the proposed defendant has been given a reasonable time to respond; and

The proportionality test is met (Regulation 8 – see Appendix); and

The prospects of successfully obtaining the substantive order sought in the proceedings are very good, good or moderate; and

- (i) the case is of significant wider public interest; or
- (ii) the case is one with overwhelming importance to the individual; or
- (iii) the substance of the case relates to a breach of Convention rights

There is extensive guidance in the Lord Chancellor's Guidance⁵ regarding public law and Judicial Review. See pages 29-31 at Appendix. The key points are as follows:

7.35.. The effect of the standard and specific merits criteria are that legal representation for Judicial Review can only be provided **where there is an immediate right and intention to bring a challenge to an identifiable act, omission or other matter.....**

7.36 (b) The regulation 53(b) criterion is additional to the general provision regarding the exhausting of reasonable alternatives to litigation at regulation 39(d). In general, where there are court or tribunal proceedings available to challenge the act, omission or decision of the authority, that route should be followed. There may, however, be exceptional reasons why that route would not be effective in providing the remedy the applicant needs.

7.38 In relation to investigation representation, regulation 54(b) creates a new requirement regarding notification to the proposed opponent of the potential challenge. This is distinct from the requirement for full representation for judicial review applications to have followed the pre-action protocol, and involves notification only of the potential for a challenge rather than an exposition of the legal grounds for that challenge. This work could have been completed under legal help.

7.42 Regulation 56(2)(a) sets out the requirement in relation to applications for full representation for judicial review that the judicial review pre-action protocol should be followed in all cases unless this is impracticable. This work can have been carried out under legal help or investigative representation. In order for the Director to be satisfied of this requirement the application for full representation must enclose the Letter before Claim and proposed Defendant's response under the protocol or, where no response has been received, be made after the reasonable period given in the letter before claim for a response has passed. The circumstances in which it is impracticable to follow the pre-action protocol will be where, under the terms of the protocol itself, proceedings may be issued without having followed its procedures. **It is therefore never appropriate for the Judicial Review pre-action protocol to be conducted under full representation itself.**

Thus, in order to qualify for legal services for Judicial Review, an individual must show the Judicial Review has a potential to produce a benefit for themselves or their family or the environment. This cuts out challenges brought for the benefit of the

⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332795/legal-aid-lord-chancellors-guidance.pdf

public but without benefit to the individual seeking the Judicial Review. The removal of borderline cases further restricts the ability to bring cases in the public interest.

Delegated Functions

The tightness of the judicial review time limit of course means that it is almost always necessary to apply for an emergency certificate, rather than a substantive certificate. That is particularly so now that the Court of Appeal has decided in *R(Frank Kigen & Janet Cheruiyot) v SSHD* [2015] EWCA Civ 1286⁶ that a delay in obtaining Legal Aid is not a good reason for failing to comply with time limits imposed by the CPR or by a court order.

*There has been a very significant increase in the number of claims for judicial review, many of which are in substance little more than private proceedings between the claimant and the relevant public body rather than proceedings which raise issues of importance to the public at large. Moreover, the change in the climate of litigation which has come about since that case was decided makes it no longer appropriate to treat delay in obtaining legal aid as a complete answer to a failure to comply with procedural requirements. It may still be a factor that can be taken into account (see *Sacker v H.M. Coroner for West Yorkshire* [2003] EWCA Civ 217), but no more. To hold otherwise would place those who apply for and obtain legal aid in a better position than those who, through no fault of their own, are forced to represent themselves. For similar reasons I am not impressed by Miss Radford's submission that the fact that the appellants were granted legal aid shows that they could not reasonably be expected to act on their own behalf. Whether that was so or not depends to a large extent on the steps they had to take. [per Moore-Bick LJ at para 18]*

For the future, however, practitioners and parties cannot proceed having any such expectation [i.e of the Court exercising its discretion to extend time]. On the contrary, they should proceed in the expectation that any explanation based on the proposition that the delay was "only" for a few days, whether or not coupled with an explanation that a decision from the Legal Aid Agency was awaited, will not be received with indulgence by the tribunal or court. It is most important that the requirements of the Tribunal Procedure (Upper Tribunal) Rules 2008 as to time limits - in the present case, the requirements of rule 30(5) - are observed. [Davis LJ at para 32]

⁶ www.bailii.org/ew/cases/EWCA/Civ/2015/1286.html

Delegated Functions cannot be used to grant an emergency Legal Aid Certificate for Judicial Review cases⁷ unless the proceedings concern:

- Part 7 Housing Act 1996.
- Section 21 National Assistance Act 1948 (as amended),
- Section 20 Children Act 1989 (as amended),
- Section 47(5) National Health Service and Community Care Act 1990 (as amended),
- Section 19(3) Care Act 2014
- Section 36 of the Social Services and Well-being (Wales) Act 2014

It follows that an emergency application will need to be made for an allocations case or a housing benefit judicial review etc.

Payment for Judicial Review cases

There are “special” rules for remuneration in Judicial Review cases. You may remember that on 3 March 2015 the High Court⁸ ruled that the relevant regulations were unlawful on the ground that they were inconsistent with the statutory purpose of LASPO and on 24 March the High Court ruled that the regulations should be quashed. However the celebrations were short-lived as four days later, and on the last day Parliament sat before the General Election, the Civil Legal Aid (Remuneration) (Amendment) Regulations 2015⁹ were passed.

The regulations apply to all Legal Aid Certificates applied for on or after 27.03.15 and provide that you (and Counsel) will be at risk of not being paid unless:

⁷ Contract Specification, Paragraph 5.3 . See Appendix

⁸ R(Ben Hoare Bell Solicitors and others) v Lord Chancellor
<http://www.bailii.org/ew/cases/EWHC/Admin/2015/523.html>

⁹ http://www.legislation.gov.uk/ukSI/2015/898/pdfs/uksi_20150898_en.pdf

The court gives permission to bring Judicial Review proceedings

or

The defendant withdraws the decision to which the application for Judicial Review relates and the withdrawal results in the court (a) refusing permission to bring Judicial Review proceedings, or (b) neither refusing nor giving permission

or

The court orders an oral hearing to consider whether to give permission to bring Judicial Review proceedings or a relevant appeal

or

The court orders a rolled-up hearing

or

The court neither gives nor refuses permission and the LAA considers payment is reasonable taking into account

- (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 known at that time;

It should be noted that:

- The Regulations apply to the payment of profit costs and Counsel's fees but **not** other disbursements.
- The restriction on payment only applies where the application for Judicial Review has been issued. If it is not issued then all preparatory work will be remunerated in the usual way.
- The exclusion on payment does not apply to the costs of an application for interim relief, even if it is made at the same time as the application for judicial review.

The Lord Chancellor's October 2014 Guidance on Regulation 5A (as quoted in the Ben Hoare case) states:

3. The effect of regulation 5A is that work on an application for Judicial Review (including drafting the grounds of claim or instructing Counsel to draft the grounds of claim, preparing the claim form or application for permission and the bundle of documents) will, if proceedings are issued, be undertaken by providers at risk of not being remunerated. Any work done for a rolled up hearing will also be at risk.

4. Regulation 5A does not apply to the earlier stages of work on 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.

...

6 ... Regulation 5A does not apply to any work that relates to an application for interim relief in accordance with Part 25 of the CPR, even when that application is made alongside, or in the context of, an application for Judicial Review.

7 Case workers must ensure that, to the extent that work relates to an Interim Relief application, it is remunerated in the usual way, even where the application is made within the context of a substantive Judicial Review application under Part 54 of the CPR or Part 4 of the UTR to which regulation 5A otherwise applies."

The exclusion of interim relief arises because the amended regulations adopt a narrow meaning of "making an application" for Judicial Review to cover only those

parts of the application that necessarily fall under CPR Part 54. Other steps (including an application for an injunction) do not fall within that phrase even though they would ordinarily be treated as the costs of those proceedings. On that basis it may well be that other ancillary steps not within CPR Part 54 are also excluded from the narrow definition, such as an application for disclosure under CPR Part 31, and therefore could also attract payment even if permission is refused.

Tactics:

- Front load the application for Judicial Review so as much work as possible is done before proceedings are issued. For example prepare witness statements before instructing Counsel to advise on merits.
- Ensure that any attendance notes make it clear which work relates to an application for interim relief.
- Do not assume that Counsel will be aware of the Regulations. Make specific reference to them in your instructions to Counsel and ask Counsel to confirm whether he/she is willing to work “at risk” once proceedings have been issued. If Counsel is prepared to work on that basis make sure that you and Counsel agree the point at which you are both working at risk.
- When Counsel gives an advice as to merits he/she should consider setting out the grounds for Judicial Review in addition to providing advice as to the merits of those grounds. Counsel can then quickly lift the grounds from that advice when it is time for the claim to be issued, thereby minimising at risk work.
- There is a pro-forma for requesting that the LAA exercise its discretion to make payment¹⁰ (Copy in Appendix)

CCMS

- Obviously now mandatory for all civil legal aid applications so practise deep breathing techniques!
- “Urgent” application replaces old “App6” application for urgent cases where Delegated Functions cannot be used.

¹⁰ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418492/legal-aid-judicial-review-guidance.pdf

- Remember difference between single stage and dual stage applications
- Don't forget about the need to assign Counsel
- Limitations for Judicial Review cases are currently problematic. You have to choose between the default "Hearing" scope limitation or various limitations relating to Counsel's opinion. The JR 004 limitation¹¹ doesn't seem to be available which is very unsatisfactory as some housing Judicial Reviews e.g gatekeeping or s188(3) cases can be very fast moving and you need to be able to issue the claim and in some instances instruct Counsel to apply to the Duty Judge without the need to first apply for an amendment.

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July 2016

¹¹ Limited to an application for permission on the papers (to include if necessary an application for interim relief on the papers or orally with the consent of the court). If permission is granted limited to filing of the defendant's evidence and thereafter obtaining external counsel's opinion or the opinion of an external solicitor with higher court advocacy rights

Appendix 1

The Civil Legal Aid (Criteria Merits) Regulations (as amended)

Regulation 8

For the purposes of these Regulations, the **proportionality test** is met if the Director is satisfied that the likely benefits of the proceedings to the individual and others justify the likely costs, having regard to the prospects of success and all the other circumstances of the case.

Regulation 39

An individual may qualify for legal representation only if the Director is satisfied that the following criteria are met—

- (a) the individual does not have access to other potential sources of funding (other than a conditional fee agreement) from which it would be reasonable to fund the case;
- (b) the case is unsuitable for a conditional fee agreement;
- (c) there is no person other than the individual, including a person who might benefit from the proceedings, who can reasonably be expected to bring the proceedings;
- (d) the individual has exhausted all reasonable alternatives to bringing proceedings including any complaints system, ombudsman scheme or other form of alternative dispute resolution;
- (e) there is a need for representation in all the circumstances of the case including—
 - (i) the nature and complexity of the issues;
 - (ii) the existence of other proceedings; and
 - (iii) the interests of other parties to the proceedings; and
- (f) the proceedings are not likely to be allocated to the small claims track

Regulation 53

For the purposes of a determination for legal representation in relation to a public law claim, the Director must be satisfied that the criteria in regulation 39 are met (standard criteria for determinations for legal representation – see Appendix) and that—

- (a) the act, omission or other matter complained of in the proposed proceedings appears to be susceptible to challenge; and
- (b) there are no alternative proceedings before a court or tribunal which are available to challenge the act, omission or other matter, except where the Director considers

that such proceedings would not be effective in providing the remedy that the individual requires.”

Regulation 56

(1) For the purposes of a determination for **full representation** in relation to a public law claim—

(a) the criteria in regulations 41 to 44 (criteria for determinations for full representation) do not apply;

(b) the Director must be satisfied that the criteria in regulation 53 (standard criteria for determinations for legal representation in relation to public law claims) are met; and

(c) the criteria in paragraphs (2) and (3) apply.

(2) An individual may qualify for full representation in relation to a public law claim only if the Director is satisfied that—

(a) the individual has sent a letter before claim to the proposed defendant (except where this is impracticable), and where such a letter has been sent, the proposed defendant has been given a reasonable time to respond;

(b) the proportionality test is met; and

(c) the criterion in paragraph (3) is met.

(3) The Director must be satisfied that the prospects of successfully obtaining the substantive order sought in the proceedings are—

(a) very good, good or moderate¹²; and—

(i) the case is of significant wider public interest;

(ii) the case is one with overwhelming importance to the individual; or

(iii) the substance of the case relates to a breach of Convention rights.

54. For the purposes of a determination for **investigative representation** in relation to a public law claim, the Director must be satisfied that—

(a) the criteria in regulation 53 (standard criteria for determinations for legal representation in relation to public law claims) are met; **and**

(b) the individual has—

¹² Borderline cases removed from scope from 27.01.14 by the The Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2014

- (i) notified the proposed defendant of the individual's potential challenge and given a reasonable time for the proposed defendant to respond; or
- (ii) shown that doing so would be impracticable

Lord Chancellor's Guidance

Public Law claims (chapter 2, Part 6 MR)

7.34 By virtue of the definition at regulation 2 merits regulations, chapter 2 Part 6 (Public law) of the regulations covers:

- (i) Judicial review (as described in Paragraph 19, Part 1, Schedule 1 to the Act
- (ii) Habeas corpus (as described in Paragraph 20)
- (iii) Homelessness cases (as described in Paragraph 34).

7.35 Notwithstanding the scope of this category, it is primarily judicial review claims for which the additional criteria within this chapter will be most relevant. The criteria are intended to reproduce the position under the funding code, with the exception of the inclusion of an additional criterion for investigative representation. The effect of the standard and specific merits criteria are that legal representation for judicial review can only be provided where there is an immediate right and intention to bring a challenge to an identifiable act, omission or other matter, subject only, in respect of investigative representation, to the need to confirm that the prospects of success test for full representation is met.

7.36 Regulation 53 sets out criteria to be applied to applications both for investigative and full representation:

- (a) In principle the question of whether the act, omission or other matter is susceptible to challenge might be viewed simply as an aspect of the prospects of success. However, it may be important to focus attention independently on the question of whether there does exist a matter capable of giving rise to a public law challenge particularly in the context of the 'unclear' prospects that apply for investigative representation. Regulation 53(a) requires, for example, that there must be an arguable case that the proposed defendant was carrying out a public law function in relation to the matter complained of.

Further, it is essential that the act, omission or other matter must exist and be capable of challenge at the point of the legal aid application; an application for legal representation cannot be made in relation to the position an authority might adopt in response to work that is proposed to be carried out, such as assistance with an application for re-housing or a community care assessment.

- (b) The regulation 53(b) criterion is additional to the general provision regarding the exhausting of reasonable alternatives to litigation at regulation 39(d). In general, where there are court or tribunal proceedings available to challenge the act, omission or decision of the authority, that route should be followed. There may, however, be exceptional reasons why that route would not be effective in providing the remedy the applicant needs

7.37 To meet this criterion it will not be sufficient that the applicant may consider judicial review more convenient, or otherwise preferable to the alternative proceedings. The circumstances where the Director may consider that the usual appeal/proceedings will not be effective in providing the remedy that the individual needs will broadly be:

- (i) where alternative court or tribunal proceedings will not provide the full remedy potentially available through judicial review. This will only apply, however, where the alternative procedure is unable to address a substantive part of the client's challenge. The alternative procedure will not be considered ineffective simply because it is unable to provide an ancillary remedy, such as the award of damages.
- (ii) Where the speed of the alternative proceedings prevent those proceedings being effective in providing the remedy that the individual needs. This may be as compared with the timescale of a substantive application for judicial review or more probably the availability of injunctive relief under judicial review. The consequences of instead having to wait for the outcome of the alternative proceedings, however, would have to be serious, going beyond mere convenience of the applicant, to matters akin to those described under overwhelming importance to the individual.

7.38 In relation to investigation representation, regulation 54(b) creates a new requirement regarding notification to the proposed opponent of the potential challenge. This is distinct from the requirement for full representation for judicial review applications to have followed the pre-action protocol, and involves notification only of the potential for a challenge rather than an exposition of the legal grounds for that challenge. This work could have been completed under legal help.

7.39 This provision is most relevant in relation to alleged omissions by an authority, such as failure to carry out a community care assessment. Notification of authority may prevent the need for substantive investigation, for example through resolving a misunderstanding with the applicant as to whether the authority has in fact already carried out the required action or where the relevant section of the authority had not been aware of the applicant's position.

7.40 In a proposed challenge to an act or omission it is important that the timescale provided for response by the authority does not create a significant risk of prejudice to the prospects of ultimately bringing a successful challenge, having regard to the requirement to bring any judicial review challenge promptly. However, early notification of potential proceedings may still be of benefit in preventing or curtailing the need for investigations.

7.41 In respect of all potential challenges, however, early notification is not required if it would be impracticable. For a judicial review application this may arise in two types of circumstance:

- (i) Where the applicant's position is one of such urgency that the pre-action protocol itself need not be followed; or

(ii) Where any delay would create a significant risk of prejudice to the applicant's prospects of a successful claim, either through being unable effectively to follow the pre-action protocol within the judicial review time limit or to meet that time limit at all.

(iii) For appeals under section 204 Housing Act 1996 the time limits, and potential circumstances of the applicant, are such that early notification will generally be considered impracticable

7.42 Regulation 56(2)(a) sets out the requirement in relation to applications for full representation for judicial review that the judicial review pre-action protocol should be followed in all cases unless this is impracticable. This work can have been carried out under legal help or investigative representation. In order for the Director to be satisfied of this requirement the application for full representation must enclose the letter before claim and proposed defendant's response under the protocol or, where no response has been received, be made after the reasonable period given in the letter before claim for a response has passed. The circumstances in which it is impracticable to follow the pre-action protocol will be where, under the terms of the protocol itself, proceedings may be issued without having followed its procedures. It is therefore never appropriate for the judicial review pre-action protocol to be conducted under full representation itself.

7.43 Legal Proceedings in relation to homelessness provisions will fall within this chapter whether they take the form of a judicial review in relation to the provision of interim accommodation or a challenge on a point of law against a decision of the local authority under sections 204 or 204A Housing Act 1996.

7.44 Where a local authority has failed to notify the result of a review under section 202 Housing Act 1996, the decision as to whether to bring a judicial review to compel a section 202 decision or to challenge the decision under section 184 in the county court remains on the basis of what is in the best interests of the applicant. Nothing in 39(d) or 53(b) of the regulations prevents either course of action: the section 202 review has properly been pursued as required, whilst the section 204 appeal and judicial review will be challenges to separate matters: the authority's underlying homelessness decision as against its failure to notify a section 202 decision.

The Civil Legal Aid (Remuneration) (Amendment) Regulations 2015

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—

(a) the court gives permission to bring judicial review proceedings;

(b) the court neither refuses nor gives permission to bring judicial review proceedings 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 known at that time;
- (c) the defendant withdraws the decision to which the application for judicial review relates and the withdrawal results in the court—
- (i) refusing permission to bring judicial review proceedings, or
 - (ii) neither refusing nor giving permission;
- (d) the court orders an oral hearing to consider—
- (i) whether to give permission to bring judicial review proceedings;
 - (ii) whether to give permission to bring a relevant appeal, or
 - (iii) a relevant appeal, or
- (e) the court orders a rolled-up hearing.

(2) Nothing in this regulation affects any payment—

- (a) by the Lord Chancellor of disbursements incurred by a provider in accordance with the relevant contract, or
- (b) on account by the Lord Chancellor to a provider in accordance with the relevant contract.

(3) In this regulation—

- (a) “2010 Standard Crime Contract” means the contract so named between the Lord Chancellor and a provider with whom the Lord Chancellor has made an arrangement under section 2(1) of the Act for the provision of advice, assistance and representation made available under sections 13, 15 or 16 of the Act;
- (b) “2013 CLA Contract” means the contract so named between the Lord Chancellor and a provider for the provision of civil legal services under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012;
- (c) “application for judicial review” means an application for judicial review made or treated as made in accordance with—
 - (i) Part 54 of the Procedure Rules, or
 - (ii) Part 4 of the Tribunal Rules,

and includes bringing a relevant appeal and making an application for permission to bring a relevant appeal, but does not include a relevant application for interim relief;

(d) “costs agreement” and “costs order” mean, respectively, an agreement or an order that another party to the proceedings pay all, or part of, the costs of the legally aided person;

(e) “court” includes the Upper Tribunal established under section 3 of the Tribunals, Courts and Enforcement Act 2007(2);

(f) “issued” includes—

(i) the sending of the application by the Upper Tribunal under rule 28(8) of the Tribunal Rules(3), or

(ii) the provision of the application by the applicant under rule 28A(2)(a) of the Tribunal Rules(4),

to each person named in the application as a respondent or interested party;

(g) “Procedure Rules” means the Civil Procedure Rules 1998(5)

(h) “relevant appeal” means an appeal against a decision to refuse permission to bring judicial review proceedings under—

(i) Part 52 of the Procedure Rules, or

(ii) Part 7 of the Tribunal Rules;

(i) “relevant application for interim relief” means application for an interim remedy under—

(i) Part 25 of the Procedure Rules, or

(ii) Part 4 of the Tribunal Rules;

(j) “relevant contract” means whichever of the 2010 Standard Civil Contract, the 2010 Standard Crime Contract, the 2013 Standard Civil Contract, the 2013 Individual Case Contract (Civil), the 2013 Individual Case Contract (High Cost Civil), the 2013 CLA Contract or the 2014 Standard Civil Contract (Welfare Benefits) governs the provision of the civil legal services for which remuneration is claimed(6);

(k) “rolled-up hearing” means a hearing at which the court considers the application for judicial review (including whether to give permission to bring judicial review proceedings);

(l) “Tribunal Rules” means the Tribunal Procedure (Upper Tribunal) Rules 2008(7).”

(4) At the beginning of regulation 6(2), insert “Subject to regulation 5A,”.

(5) In paragraph (2) of regulation 7 (remuneration for civil legal services: general), for “Subject to paragraphs (3) and (4),”, substitute “Subject to regulation 5A and paragraphs (3) and (4) of this regulation,”.

(6) After paragraph (2) of regulation 12 (payments on account by the Lord Chancellor direct to barristers in independent practice) insert—

“(2A) Where an application for judicial review is issued and none of sub-paragraphs (a) to (e) of regulation 5A(1) applies, the barrister must repay to the Lord Chancellor any amount paid on account under paragraph (1) of this regulation for civil legal services consisting of making that application.”

Contract Specification

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/526402/2013-standard-civil-contract-specification-general-provisions-1-6-ame....pdf

Delegated Functions in respect of Licensed Work

5.2 Subject to Paragraph 5.2A below, provided you have Schedule Authorisation in the relevant Category of Law, and subject to any restriction within your Schedule and to Paragraphs 5.3 and 5.4, you may carry out the following actions on behalf of the Director in accordance with an Authorisation:

- (a) make a determination that a Client qualifies for authorised representation provided on an emergency basis;
- (b) amend or refuse to amend a limitation or condition to which a determination in respect of Emergency Representation is subject;
- (c) any actions in the Category Specific Rules set out at Sections 7 to 10; and
- (d) any additional actions delegated to you in accordance with an Authorisation.

5.2A The requirement to have Schedule Authorisation in the relevant Category of Law referred to in Paragraph 5.2 above shall not apply by way of restriction on the exercise of Delegated Functions where expressly exempt under an authorisation made by the Director under section 5(3) of the Act or under regulations pursuant to section 5(4) of the Act.

5.3 The Delegated Functions set out at Paragraph 5.2 are subject to the following:

- (a) Judicial Review: you do not have the power to make a determination that a Client qualifies for authorised representation provided on an emergency

basis, or to amend or refuse to amend a limitation or condition to which a determination in respect of Emergency Representation is subject, in relation to Judicial Review in any Category of Law, other than in relation to proceedings under Part VII Housing Act 1996 (as amended), section 21 National Assistance Act 1948 (as amended), section 20 Children Act 1989 (as amended), section 47(5) National Health Service and Community Care Act 1990 (as amended), section 19(3) Care Act 2014 or section 36 of the Social Services and Well-being (Wales) Act 2014 unless we have specifically delegated this function to you by way of an Authorisation. You must only exercise such a Delegated Function in relation to such cases and in such circumstances as we specify;

- (b) public interest cases: you do not have the power to make a determination that a Client qualifies for civil legal services on the grounds that the case has a significant wider public interest; and
- (c) Exceptional Case: you do not have the power to make a determination under section 10 of the Act.

Decisions on public interest are taken by the Director (where necessary after referral to the Special Controls Review Panel).

5.4 The Director may extend or restrict the extent of your Delegated Functions relating to Licensed Work, by varying an Authorisation.