

The Northern Ireland Funding Code will be underpinned by detailed decision-making guidance. Draft guidance in respect of judicial review proceedings is available for consideration below.

The Northern Ireland Legal Services Commission invites views and comments by Friday 19<sup>th</sup> January 2007.

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## Judicial Review

### 1.1 Scope of this section

1. Judicial review cases are a priority under the Code. Special criteria are set out in section 7 of the Code for court proceedings concerning:

*“Public law challenges to the acts, omissions or decisions of public bodies including, in particular, challenges by way of judicial review or habeas corpus.”* (See section 7.1 of the Code criteria.)

2. This definition in the Code therefore goes wider than the special court procedure known as judicial review. This court procedure is governed by Order 53 of the Rules of the Supreme Court (Northern Ireland) 1980. Judicial review is the normal procedure used to challenge the legality of the acts of a public body where the primary remedy sought is one or more of the following forms of relief:

(a) An order of mandamus – that is the court ordering the public body to do something;

(b) An order of certiorari – that is the quashing of an act or decision of a public body so that it must be taken again;

(c) An order of prohibition – effectively preventing the body from acting;

(d) A declaration (that a particular act or decision was lawful or unlawful);

(e) An injunction (restraining a person or body from doing something).

3. Although the court has some powers to award damages in a judicial review case, these will not normally be the primary remedy.

4. There is no precise definition of what counts as a “public law” challenge. The mere fact that a case is brought against a public body does not make it a public law case. The essence of the test is whether the case is essentially about establishing the legality of the acts, omissions or decisions of the public body, rather than, for example, merely establishing that a public body owes a

client money or is required to do or pay something as a matter of simple contract or negligence. Cases in which the primary remedy sought by the client against the public body is a claim for damages or compensation (for example, a case primarily claiming damages for wrongdoing in public office) should not be dealt with under this section of the Code, but may come within the section which deals specifically with claims against public authorities.

5. In addition to judicial review, an application for a writ of habeas corpus, brought under Order 54 of the Supreme Court Rules will also come within this section. Habeas corpus is an ancient remedy, literally meaning “deliver up the body”, which can be used to challenge the legality of the detention of any person.

6. Section 7 of the Code only covers proceedings in which the court will be acting on administrative law principles to determine how a public authority has acted or has taken an impugned decision. By contrast, proceedings in which the court is solely considering the merits of the act or decision of a public authority (i.e. whether it has made the correct decision) will not be appropriate for this section. Appeals to the Court of Appeal and House of Lords will not usually be considered under section 7 of the Code unless the decision under appeal fell within that section.

7. The Human Rights Act 1998 established a number of new causes of action. These include:

(a) Challenges under section 7 of that Act that a public authority has failed to act in accordance with the Convention;

(b) Challenges under the Act seeking to strike down secondary legislation as incompatible with the Convention;

(c) Applications for a declaration under section 4 of the Act that primary legislation is incompatible with the Convention.

8. Human Rights Act challenges to primary or secondary legislation will almost certainly be made as judicial review applications and will always be considered under section 7 of the Code. Other Convention challenges to public authorities may arise either as judicial review cases or as normal claims for damages (generally considered under the section dealing with claims against public authorities.) The latter is likely to be more appropriate where the primary remedy claimed is damages. The Commission will consider both the nature of the claim and the manner in which the client has chosen to bring the proceedings in deciding which section of the Code the case should be considered under.

9. It occasionally happens that a case which starts as a judicial review is ordered by the court to continue as a damages claim in the High Court. Note that, when applying the Funding Code, what matters is the nature of the case at the time funding is first applied for. Therefore if a certificate is granted for a

judicial review under this section of the Code, the criteria in this section should continue to be applied for the lifetime of the case.

## **1.2 Excluded Work**

1. It will be unusual for a judicial review case to be excluded under Schedule 2 of the Access to Justice Order 2003.

## **1.3 Legal Help**

1. Legal Help is available in judicial review cases, provided the case satisfies the criterion for Legal Help in the General Funding Code i.e. the “sufficient benefit” test and provided also that it is reasonable for the matter to be funded out of the Civil Legal Services fund having regard to any other potential sources of funding.

2. Legal Help is important in judicial review cases because, at the time the client first hears of the act or decision complained of, it will often be very difficult to estimate the prospects of successfully bringing a challenge. Legal Help may therefore cover the work necessary in writing a letter before claim to the body potentially under challenge, and all other preparatory steps involved. The letter before claim should always be sent and responded to prior to starting judicial review proceedings unless it is impracticable to do so. Clearly in cases of exceptional urgency, due to the circumstances involved, it may well be justified to issue an emergency certificate for Full Representation following a request for a telephone emergency. This would allow an application for leave to bring judicial review proceedings to be made, to protect the client’s position, at the same time as notifying the other side.

3. Judicial review should be seen to be a remedy of last resort. The actions taken by practitioners before lodging judicial review papers may have a profound impact upon the final outcome of any application and a failure to take all reasonable steps before pursuing judicial review proceedings may attract the criticism of the Court and influence its ultimate decision. In *Re Cunningham* [2004] NIQB 58 the Court provided guidance to practitioners regarding pre-action steps in relation to judicial review proceedings and opined:

“The Court would be slow to grant leave where [the applicant] has failed in clear and open correspondence (properly exhibited to the grounding affidavit):

- (a) To set out his case at an early stage;
- (b) To seek confirmation or clarification of the reasons for the decision if there is any doubt about the reasons for the decision, and
- (c) To give [the respondent] a reasonable opportunity to set out the response to the [applicant’s] complaint.”

4. The Commission will expect all funded judicial review cases to be conducted in accordance with this principle to ensure a proper use of the limited funds available.

## 1.4 Investigative Help

1. The standard definition of Investigative Help under the Code includes the issue and conduct of proceedings so far as necessary to protect the client's position. (See definition in section 2.1 of the Code). In principle therefore a leave application could be covered by an emergency certificate covering Investigative Help, but this will be unusual. An Investigative Help certificate, in judicial review cases, is most likely to be limited to obtaining Counsel's opinion on the merits.

2. Standard criteria 5.4.2 allows funding to be refused if there are persons other than the applicant who can reasonably be expected to bring the case instead. This may apply in judicial review cases even if the applicant appears to have sufficient interest to make the challenge (see *Re Anderson [2001] NI 445 (CA)*; also *Re M, a minor [2004] NIQB 6*, *[2004] BNIL 23*.)

3. Investigative Help is available in judicial review cases, but the criteria are different from those in the General Funding Code. In particular, criterion 5.6.2 (minimum damages level) in the General Funding Code does not apply and is inappropriate given the nature of judicial review proceedings.

In addition, there are two specific criteria applying to judicial review at the Investigative Help stage and are:

(a) Is judicial review available? An application may be refused if the act or decision complained of in the proposed proceedings does not appear to be susceptible to challenge; and

(b) Have the available administrative procedures been exhausted? Investigative Help may be refused if there are administrative appeals or other procedures which should be pursued before proceedings are considered.

## 1.5 Is Judicial Review Available?

1. The criterion asking whether judicial review is available is a safeguard to ensure that the proceedings really do concern a public law challenge to a public body. There is much case law on what bodies can be open to challenge. Clearly central and local government and most public bodies established under statute, including for example the Northern Ireland Legal Services Commission itself, are susceptible to challenge.

2. The criterion also applies where, even though the body under challenge is a public body, the decision proposed to be attacked is not susceptible to judicial review. Some decisions by public bodies, for example as to individual employment rights, have been held to be private not public law matters.

3. Investigative Help will not be refused under this criterion if there is at least a good argument that the decision complained of is susceptible to challenge.

4. The criteria will therefore only be used to exclude obviously inappropriate cases. However any difficulty there may be in persuading a court that a decision is challengeable should be taken into account, along with all the other factors, in deciding on the prospects of success.

## **1.6 Administrative Procedures**

1. Under criterion 7.2.3, Investigative Help for judicial review may be refused if there are administrative appeals or other procedures such as recourse to an Ombudsman which should be pursued before proceedings are considered. It is an important principle of judicial review that a court will usually only interfere where the client has first exhausted all other remedies. Therefore if a public body makes a decision, but gives the client the right to appeal that decision administratively, the client must first make that appeal and then, if appropriate, consider a judicial review of the final appeal decision, rather than the original decision.

2. Where, for example, a funding decision taken by the Commission under the Code is the subject of challenge, an application for judicial review should not generally be made until all rights of review and reconsideration under the Code procedures have been completed.

3. Similarly, if, following a refusal of funding and an unsuccessful review/appeal, fresh information comes to light, the appropriate course is to make a fresh application for funding before considering any subsequent application for judicial review of the Commission.

4. There are exceptions to this principle, for example if the internal appeal procedure is only limited in scope and is unable to put right the error complained of. It is up to the solicitor on completing the application form for Legal Representation to specify why any procedure available to the client has not been followed in an individual case. If there is very good reason for applying for judicial review straight away, funding will not be refused under this criterion. However, any difficulty in persuading the court to entertain the case and grant the relief would be taken into account in assessing the prospects of success of the case.

5. Again, it is important that judicial review is seen as a last resort. The issue for the Commission will be whether a reasonable private paying client would go to court rather than seek to pursue alternatives, taking into account the likely effectiveness of those alternatives (compared to what might be obtained on judicial review), the urgency of the case, the attitude of the opponent and all the other circumstances. However the Commission recognises that the three month time limit for applying for judicial review may make it impracticable to pursue alternative methods of dispute resolution (ADR) prior to making the application. If so, it may be appropriate for ADR to be considered when leave has been granted and the opponent has served its evidence. Part 54 of the Rules of the Supreme Court require, of course, judicial review proceedings to be made promptly and, in any event, within three months from the date when the grounds for the application first arose,

unless the court considers that there is good reason for extending the time-limit.

6. In addition, in considering whether an action for judicial review should be funded, the Commission will have particular regard to the judgments and directions made in the cases of *Kebilene (R v DPP, ex parte Kebilene* [1999] UKHL 43, [2000] 2 AC 326, [1999] 4 All ER 801) and *Pepushi (R (on the application of Pepushi) v CPS* [2004] EWHC 798 (Admin)). The core of both judgments, is that the Commission and: "...those advising prospective applicants for judicial review should always realise that judicial review is very rarely appropriate where an alternative remedy is available. If such a remedy is available, a judicial review application should not be pursued." (See the judgment of *Pepushi* at para 50.) Therefore, if an application for funding relates to proceedings where an appeal would be an appropriate vehicle to address the points at issue, it would not generally be appropriate to grant funding for a judicial review in respect of those proceedings.

### **1.7 Full Representation**

1. The criteria for Full Representation in the General Funding Code do not apply in judicial review cases. Instead, two sets of criteria are provided for judicial review. Section 7.4 of the Code sets out the criteria which apply if funding is applied for before the court has granted leave for the case to continue (pre-leave), and also applies in proceedings (such as applications for a writ of habeas corpus) where there is no procedural requirement to obtain leave from the court. As explained below, a different set of criteria apply in cases where the court is required to grant leave and has done so before funding is applied for (post-leave).

2. Where leave has not been granted or is not required, the relevant criteria are:

(a) Is judicial review available? See 1.5 above;

(b) The existence of administrative procedures such as appeals which should be pursued before proceedings are considered – see 1.6 above;

(c) Notification to defendant – Full Representation will be refused unless the proposed defendant has been given a reasonable opportunity to respond to the challenge or deal with the applicant's complaint, save where this is impracticable in the circumstances.

(d) Are there other parties with sufficient interest? Full Representation may be refused if there are other persons who could reasonably be expected to bring the case instead.

3. In addition, there are criteria for prospects of success and cost benefit. Prospects of success are defined as the "prospects of successfully obtaining the substantive order sought in the proceedings". It is necessary to consider what the primary remedy sought in the proceedings is and the prospect that

this will be ordered in the client's favour following the final hearing between the parties. Note that:

(a) The prospects of obtaining leave from the court are not the issue. However, in considering the percentage chance of obtaining the substantive order at the end of the case, it is necessary to take into account the risks of the case failing at an earlier stage, including failing to obtain leave. Therefore, if there is only a 50% chance of obtaining leave, the chance of obtaining the substantive order is bound to be less than 50%;

(b) Since the issue is the prospect of obtaining the substantive order in the proceedings, it is not necessary for this purpose to consider whether, if the case were successful, the public body in question when re-taking its decision would reach a different conclusion. However, since all judicial review remedies are discretionary, it is relevant to consider the risk that, as part of the court's discretion, no substantive order would be made, for example because the issue in the proceedings had become academic or futile because it had been overtaken by events.

4. Full Representation will also be refused if prospects of success are poor or unclear (although in the latter case Legal Help/Investigative Help may be applied for). If prospects of success are border-line (see draft guidance on the principles of merits, costs and damages), Full Representation may be granted but only if one or more of the following apply:

(a) The case has a significant wider public interest (section 2.4 of the Code criteria);

(b) The case is of overwhelming importance to the client (section 1.10 of the draft guidance on the principles of merits, costs and damages);

(c) The case raises significant human rights issues.

5. The proportionality cost benefit test applies in judicial review, namely that Full Representation may be refused unless the likely costs are proportionate to the likely benefits of the proceedings, having regard to the prospects of success on all other circumstances. Guidance on this form of cost benefit criterion is contained in the draft guidance on the principles of merits, costs and damages.

6. All the circumstances of the case must be taken into account in the cost benefit criterion. This can include consideration of the real benefits to the client if an order is successfully obtained, including whether it is likely that the public authority will alter its decision if obliged to re-take it. The Commission will usually only take this factor into account in cases where it is otherwise doubtful whether funding should be granted under cost benefit or affordability criteria. The issue is most likely to be considered in the context of challenges based on procedural irregularity rather than perversity or other unlawfulness.

## 1.8 The Presumption of Funding

1. If a judge grants leave for a judicial review case to proceed, this affects any subsequent funding decisions in a number of ways. It is highly significant that a judicial decision will have been made on the prima facie merits of the case, which indicates that the application for judicial review has substance and is sufficiently arguable that it should proceed to a contested hearing. The Code divides judicial review cases in which leave has been granted into two categories:

(a) Cases where the Commission is satisfied that the case has a significant wider public interest, is of overwhelming importance to the client or raises significant human rights issues; and

(b) Cases which do not exhibit any of these three features.

2. In the former category, funding must be granted except where, in the light of information which was not before the court at the leave stage or has subsequently come to light, it appears unreasonable to do so (see criterion 7.5.2). It often happens in a judicial review that, at the stage that the opponent files evidence, the merits of the case become much clearer and what seemed like a promising application should no longer proceed. Indeed, legal representatives are under a specific duty to reconsider the merits of judicial review cases at that stage. The issue for the Commission in these cases is whether new evidence has come to light which was not before the court and which, if it had been before the court, might well have led to leave being refused. If such information does come to light, the Commission will consider future funding in the same way as for cases to which the presumption of funding does not apply.

3. Note also that the presumption of funding is expressly subject to the standard criteria in sections 4 and 5.4 of the Code. This means that whilst the grant of leave is effectively a “passport” to funding in relation to legal merits, funding can still be refused on other grounds such as alternate funding (criterion 5.4.2) or alternatives to litigation (criterion 5.4.3).

4. If leave is granted in a case which does not have a significant wider public interest, overwhelming importance to the client or significant human rights issues, the Commission has a more general discretion as to whether to fund the case. Funding will normally be refused if prospects of success are borderline or poor or on the proportionality cost benefit criterion described at section 1.9 of the draft guidance on the principles of merits, costs and damages.

5. However in these cases due weight must be given to the judicial decision. The fact that leave has been granted almost invariably means that the prospects of success of the case are at least in the borderline category. Therefore, in practice, once leave has been granted by the court funding is most likely to be refused or withdrawn where it appears that:

(a) New information has come to light, including disclosure of the other side's evidence, which seriously and adversely affects the assessment of prospects of success;

(b) The case is not cost effective; or

(c) There are alternative means by which the case could be funded.

### **1.9 Standard Limitations**

1. Legal Help in judicial review cases will normally facilitate making further enquiries and the taking of all other preparatory steps necessary including writing a full letter before claim.

2. Certificates granted for Investigative Help in judicial review cases may be limited to seeking counsel's opinion on the merits of a case and/or upon its prospects of success.

3. Certificates for Full Representation in judicial review cases may initially be limited to applying for leave to judicially review. If leave is granted, a written request must be made to the Commission for a full certificate. If leave is refused and the client proposes to appeal, a fresh application must be made to the Commission for funding. That fresh application must clearly set out in the form of a detailed counsel's opinion and solicitor's comments, the reasons as to why it is considered that the decision should be appealed. The application must be accompanied by the pleadings and any written judgement. The legal representative may however lodge a notice of appeal on foot of the existing certificate. A copy of the notice of appeal must also be provided along with the papers outlined above.

4 In some cases, it may be necessary to make an application for public funding for a judicial review on an emergency basis. In such a situation, a request for a telephone emergency may be made and the appropriate procedures will apply.