

POLICY BULLETIN 47

JUDICIAL REVIEW

1. PURPOSE AND SCOPE

- 1.1 The purpose of this instruction is to provide caseworkers with advice and guidance on the handling of applications for judicial review (JR). It supersedes the advice given in Policy Bulletin 13, which is hereby cancelled.
- 1.2 Paragraphs 3 - 6 explain the position in England, Wales and Northern Ireland. Paragraphs 7 - 9 relate to the position in Scotland.
- 1.3 Annex A provides a list of contacts and explains the roles of the Judicial Review Monitoring Unit (JRMU), Treasury Solicitor and Legal Adviser's Branch (LAB).

2 THE ROLE OF THE CASEWORKER

2.1 HOW WILL CASEWORKERS BE NOTIFIED THAT AN APPLICATION FOR JR HAS BEEN LODGED.

- 2.1.1 The vast majority of notifications will be received from the Judicial Review Monitoring Unit (JRMU). For NASS cases the JRMU will send notification of the application for judicial review to the Policy and Process Team. If the application concerns an operational issue the papers will be transferred to the Deputy Head of Operations for allocation. Applications involving policy issues only will be handled within Policy and Process Team.
- 2.1.2 Caseworkers may receive written notice of service direct from the claimant. Strictly speaking, service direct on the NASS is not proper service under the Crown Proceedings Act. But in practice where the proceedings are served on NASS they should be copied by fax to the Treasury Solicitor if the applicant is in England and Wales; or, if the applicant is in Scotland, the Office of the Solicitor to the Advocate General. The papers should also be faxed to the JRMU, Policy and Process Team and the Head of Operations. In either case the caseworker should **immediately** do the following:

- notify their HEO or SEO that an application for JR has been received

- obtain the file if it is not already in the section; and
- photocopy the entire contents of the file and give this to the HEO or SEO who will be dealing with the application for JR.

2.1.3 The HEO or SEO who is dealing with the application must notify the JRMU and the Treasury Solicitor of their name, address, telephone number and fax number. A photocopy of the papers must be sent to the solicitor who is acting on our behalf.

2.1.4 The HEO or SEO should next consider whether the case is sufficiently sensitive to justify warning the Director of NASS and Ministers. They should also review thoroughly the decision which has resulted in the application for JR. If some evidence emerges of administrative failing in our handling of the case or our procedures, the caseworker must satisfy themselves that the Directorate will not be vulnerable before the court. If it appears that there has been some inadequacy in the handling of the case, there is a need to consider whether the conclusion reached was nevertheless the right one. If it was, and contesting the case in the courts appears to be appropriate, caseworkers should discuss the issues with Policy and Process Team, Treasury Solicitors and LAB. Caseworkers must ensure that all relevant parties are aware of the deficiency in our handling and to obtain from them confirmation that the deficiency is not so serious as to jeopardise our ability to contest the case successfully.

2.1.5 In the event of the Treasury Solicitor requesting a case conference, the HEO or SEO must ensure that all interested parties are aware of the date and time of the meeting.

2.1.6 The caseworker may also be required, at the request of the Treasury Solicitor, to swear or affirm an affidavit or sign a witness statement and to attend the court if necessary.

2.2 HOW SHOULD CASEWORKERS DEAL WITH A THREAT OF AN APPLICATION FOR JR BY AN APPLICANT OR BY THEIR REPRESENTATIVE? (USUALLY A SOLICITORS FIRM).

2.2.1 Threats to seek Judicial Reviews against NASS decisions may be issued in the form of letter, facsimile or telephone call. Staff **must** inform their HEO or SEO about these cases. **Do not ignore them!**

2.2.2 As with applications for JR, the HEO or SEO should thoroughly review the decision in the case and should respond to the solicitor within any time limit set, even if the letter simply says you are satisfied that your decision was correct. If it seems likely that a full response will not be sent within the

time limit set, contact the solicitors to explain the reason for the delay. This may persuade them to delay lodging an application for judicial review.

- 2.2.3 The HEO or SEO should also notify the Treasury Solicitor as to the possibility of a JR and what they are doing about it.

3 WHAT IS JUDICIAL REVIEW (JR)?

- 3.1 A claim for judicial review (JR) means a claim to review the lawfulness of an enactment or a decision, action or failure to act in relation to the exercise of a public function. The procedure must be used where the claimant is seeking a mandatory order (formerly known as an order of mandamus) a prohibiting order (formerly known as an order of prohibition) or a quashing order (formerly known as an order of certiorari).
- 3.2 Any decision taken by a caseworker in NASS against which there is no statutory right of appeal may potentially give rise to applications for JR. The results of a successful action can have an important effect on practices, procedures and the interpretation of laws (particularly the Immigration & Asylum Act 1999) or rules (such as The Asylum Support Regulations 2000) and it is therefore important to adopt a consistent approach.
- 3.3 Some decisions made by NASS caseworkers give a right of appeal to the Asylum Support Adjudicator (ASA). An application for judicial review resulting from a decision by an adjudicator to dismiss an appeal will fall to be dealt with by the NASS caseworker. The ASA should be notified of the receipt of the application and given a chance to comment on any aspects of the application which relate to the determination of the appeal.
- 3.4 All applications for JR will be about individual cases. In some cases the individual case may be considered as a "lead case" and other related cases may need to be held pending a decision on the test case. Alternatively, a number of related cases may be considered as one case. An application may raise issues which impinge on the work of other areas of the NASS or other areas of IND. It is imperative that all sections having an interest in the application for JR are notified promptly of the existence of the application.

4 THE APPLICATION FOR PERMISSION TO PROCEED FOR JUDICIAL REVIEW

- 4.1 An application for permission to proceed for judicial review must be filed promptly and in any event within 3 months of the date of the decision to be reviewed. The claimant (who may be represented by a solicitor) making the application for permission to proceed for JR first lodges an application

with the Administrative Court Office of the Royal Courts of Justice, together with the supporting statements stating the facts of the case. Within 7 days of the lodging of the papers with the court the claim form must be served on the defendant. The defendant will actually be named as the Secretary of State for the Home Department but it will be normal practice for this notice to be served on Treasury Solicitors. Annex A explains what a caseworker should do if the notice is served on them.

- 4.2 On receipt of the application for JR, if it is intended to contest the claim, an acknowledgement of service must be filed at court within 21 days of the receipt of the papers. The acknowledgement of service must be served on the claimant and any other interested parties no later than 7 days after it has been filed at the court. The Treasury Solicitor acting on behalf of NASS will undertake these actions.
- 4.3 The acknowledgement of service on the court must contain a summary of the grounds of resistance. This summary will fall to the NASS caseworker to provide with the assistance of the Treasury Solicitor and, possibly, Legal Adviser's Branch (LAB). LAB would wish to be involved if a matter of policy or law was at issue. There will be cases in which it will be appropriate to point to some fatal flaw in the application for JR as our main ground of resistance rather than seeking to justify, in full, the original decision. In other cases the types of issues which the summary should contain include:
- the basic history of the case;
 - the reason and facts which caused the Directorate to reach the decision made;
 - that regard has been taken of any published policy (where this has been the case). A copy of the relevant Policy Bulletin must be attached;
 - any compassionate or compelling circumstances that were taken into account when making the decision;
 - where the decision was taken on or after 2 October 2000 and the application has raised a human rights issue a statement that we are satisfied the decision is in accordance with the Human Rights Act 1998 (HRA) and the reasons why we believe this to be the case. Policy Bulletin 30 gives further guidance on the HRA.
- 4.4 In order to obtain permission to proceed for judicial review (and thus a full hearing of the case) an applicant must demonstrate to the Judge that

there is a case to argue. Applications for permission to proceed can either be considered on the papers or by an oral hearing in open court.

- 4.5 Where the case is considered on the papers a Judge will, unless the Court directs otherwise, decide whether to grant permission without hearing oral submissions. The purpose of this procedure is to ensure that applications may be dealt with speedily and without unnecessary expense. The decision of the Judge will be served on the claimant, the defendant and any other person who filed an acknowledgement of service. Alternatively the claimant may request that the application for permission to proceed be dealt with at an oral hearing in open court. The claimant may appear in person or be represented by Counsel. Neither the defendant nor any other interested party need attend the hearing, unless the court directs otherwise.
- 4.6 Where following consideration of the application on the papers permission to proceed is refused, or is granted subject to conditions or on certain grounds only, the claimant may request that the decision be reconsidered at an oral hearing. Such a request must be filed within 7 days of the service of the notification of the decision.
- 4.7 If the application for a hearing for permission to proceed is once again refused, an appeal for a similar purpose may be made to the Court of Appeal within 7 days of the refusal.

5. PERMISSION TO PROCEED REFUSED

- 5.1 If an application for permission to proceed is refused, action can be resumed on the decision. But, caseworkers need to bear in mind that the claimant may appeal the decision to the Court of Appeal (see paragraph 3.6 above). Any enquiries about whether an application has been renewed should be addressed to the Treasury Solicitor. The Administrative Court Office should not be approached for information by caseworkers.

6. PROCEDURE FOLLOWING THE GRANT OF PERMISSION TO PROCEED

- 6.1 The defendant has 35 days from the date of service of the order granting permission to proceed to file and serve detailed grounds of resistance and any written evidence. The substantive hearing will take place before a single judge in the Divisional Court (Queen's Bench Division). The case is decided when the written Order of the Court is "sealed" or dated.
- 6.2 An unsuccessful claimant or defendant can seek leave to appeal from the Judge who actually heard the case. If the Judge refuses, or no application is made at the end of the case, an application can be made direct to the

Court of Appeal. The applicant for permission to appeal must include his application in an appellant's notice and file it with the Civil Appeals Office, usually within 14 days of the decision sought to be appealed. The notice must be served on the solicitor for the other party not less than 7 days after it is filed. The application will be considered on the papers by one Lord Justice. If it is refused the applicant may ask the Court of Appeal to reconsider the application at a hearing, which again may be before a single Lord Justice. If the Court of Appeal grants permission to appeal the substantive appeal will be heard by a full court consisting of two or three judges, one of whom may be a High Court Judge.

- 6.3 Either party may seek to appeal to the House of Lords against the decision of the Court of Appeal. This can often be a 2-stage process. The application for leave to appeal must be lodged within one month and must first be made to the Court Of Appeal. Usually, the application is made immediately after that court gives judgement. Only rarely, however, does the Court of Appeal grant leave. Normally the decision on whether to grant leave is made by the House Of Lords itself. If the Court of Appeal refuses leave to appeal, the applicant is required, within the same one month period, to lodge a petition for leave to appeal with the Judicial Office of the House of Lords. It should be noted that very few cases are granted leave to appeal to the House of Lords and where leave is granted the case will usually involve an important point of legal principle or interpretation of law. Where leave to appeal is granted the case will be decided by three Law Lords.
- 6.4 The court has the power to quash the decision that led to the application for JR. The court can remit the case back to the defendant i.e. NASS with a direction to reconsider it and reach a decision in accordance with the findings of the court. Additionally, with the coming into force of the Human Rights Act 1998, the court now has the power to take the decision itself.

7. **SCOTLAND**

- 7.1 Scottish judicial review procedures differ in various ways from those in the rest of the United Kingdom. The main differences are:
- the applicant raises a petition for judicial review and is known as the Petitioner;
 - there is no permission to proceed stage in Scotland. Cases go straight to a first hearing from the first orders stage. As with cases in the rest of the United Kingdom the Judge will be looking to see whether the case is arguable on its merits;

- there is no time limit for lodging an application. However, the Office of the Solicitor to the Advocate General for Scotland will take account of any undue delay in presenting a petition;
- a petition is lodged with supporting documents. These supporting documents consist mainly of a decision letter, a determination, or whatever is being challenged in the Petition;
- there is no table hearing. An oral application has to be made by the Petitioner irrespective of whether or not any interim orders are sought;
- a Petitioner can amend his case whilst it is running;
- there is no requirement for grounds of resistance" to be lodged.

8. THE APPLICATION

8.1 In Scotland the judicial review applicant raises a Petition and is known as the Petitioner: the Secretary of State is known as the Respondent. It is not necessary for the Petitioners' representatives to notify the Office of the Solicitor to the Advocate General for Scotland in advance of a petition being presented to the Court. In NASS cases it is anticipated that only a first order will be sought. In these circumstances, the Respondent does not have the opportunity to be present.

8.2 If interim orders are being sought in the petition, for example interim liberation, pending the outcome of the petition, then the Office of the Solicitor to the Advocate General for Scotland (OSAG) will be notified by the Keeper's Office of the petition and when the hearing is to proceed before a Judge. The OSAG has an opportunity to instruct Counsel to oppose any interim orders sought and can also take the opportunity to oppose first orders where the petition appears to have no merit. The Keeper is obliged to do this since the Advocate General has a caveat (warning mechanism to prevent interim orders being granted without the Advocate General having an opportunity to appear). If no interim orders are sought the petitioner can appear and seek first orders for intimation and service without opposition. A copy of the petition and first orders will then be served on the OSAG.

9. FIRST HEARINGS

9.1 These are usually fixed by the Parliament House Clerks of both parties in attendance with the Keeper of the Rolls of the Court of Session although this can also be done by one of the parties with the written consent of the other. In practice the first hearing is treated as the main hearing for

immigration cases however there is provision within the court rules for a second hearing where evidence is required to deal with a factual dispute.

- 9.2 Counsel will advise if it is appropriate to proceed to a first hearing and whether any affidavits are necessary. The affidavit contains general and personal details of the Deponent (the person swearing it) including name, age and length of service. In the course of the affidavit, the Deponent will be called upon to identify various documents which they may have had reference to in the decision making process. These will normally have to be signed by the Deponent and a Notary Public or Commissioner for Oaths.

10. **JUDGEMENTS**

- 10.1 A copy of any Judgement must be sent to Policy and Process Team. They will consider whether the Judgement has any implications for NASS policy and processes. Policy and Process Team will also keep a list of JR applications which can be accessed by caseworkers when dealing with applications for support.

11. **TREASURY SOLICITORS' BILLS**

- 11.1 The Treasury Solicitor charges IND for the services it provides. Invoices are tendered to, and paid by, FSD. Caseworkers may be asked to confirm that the services charged for have been provided.

12. **AGREED COSTS**

- 12.1 In certain circumstances Treasury Solicitors may ask for agreement, in advance of any hearing, that we will, in principle, pay costs. Where we receive such a request SEOs have the authority to agree costs of up to £1,000 in a case. Amounts higher than this must be approved by the DDG.

1. CONTACTS

Policy & Process Team
3rd Floor
Voyager House
Tel: 020 8633 0144 or 0143
Fax: 020 8633 0131

JRMU
Tel: 020 8603 8489 or 8491 or 8484 or 8487

The Treasury Solicitor
Queen Anne's Chambers
28 Broadway
LONDON
SW1H 9JS
Tel: 020 7210 3039
Fax: 020 7210 3433

2. THE ROLE OF THE JUDICIAL REVIEW MONITORING UNIT (JRMU)

- 2.1 The JRMU is the central point of contact with the Treasury Solicitor and the Office of the Solicitor of the Advocate General for all applications for judicial review involving IND.
- 2.2 The JRMU is responsible for allocating the case to a caseworker and then monitoring the case to ensure that responses are produced within the allocated timescales.
- 2.3 The JRMU also analyses the results of individual applications for judicial review which will inform Departmental policy and enable IND to inform our external audience (Treasury Solicitor, Office of the Solicitor of the Advocate General, Lord Chancellor's Department and Legal Services Commission) more effectively.

3. THE ROLE OF THE TREASURY SOLICITOR

- 3.1 The function of the Treasury Solicitor is to conduct litigation, together with Treasury Counsel, in accordance with Home Office instructions. The Treasury Solicitor will prepare the case for the Court hearing and will arrange for the filing of any affidavits. Treasury Solicitors should not be approached for legal advice on policy or the interpretation of legislation.

4. THE ROLE OF LEGAL ADVISER'S BRANCH (LAB)

- 4.1 The function of LAB is to give legal advice to the Home Office about the interpretation of legislation and questions of law. Caseworkers should in the first instance contact Policy and Process Team. If it is decided that advice should be sought from LAB this will be obtained by Policy and Process Team.

Document Control

Change Record

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