

# POLICY BULLETIN 47

## JUDICIAL REVIEW

### 1. PURPOSE AND SCOPE

- 1.1. The purpose of this instruction is to provide case owners with advice and guidance on the handling of applications for judicial review (JR) relating to the provision of asylum support.
- 1.2. The procedure rules for judicial reviews are set out under part 54 of the [Civil Procedure Rules](#).
- 1.3. Paragraphs 3 - 7 explain the position in England, Wales and Northern Ireland. Paragraphs 8 - 10 relate to the position in Scotland.
- 1.4. Annex A provides a list of contacts and explains the roles of the Judicial Review Unit (JRU), Treasury Solicitor and Legal Adviser's Branch (LAB).
- 1.5. Annex B provides a glossary of terms used in this instruction.

### 2. HOW WILL CASE OWNERS BE NOTIFIED THAT AN APPLICATION FOR JR HAS BEEN LODGED?

- 2.1. The vast majority of notifications will be received from the Judicial Review Unit (JRU). Following receipt of JR notifications, JRU will allocate the JR to the case owning team.
- 2.2. Case owners may alternatively receive written notice of service direct from the claimant. Strictly speaking, service direct on the case owning team is not proper service under the Crown Proceedings Act. But in practice where the proceedings are served on the case owning team, copies should be sent by e-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 JRU. In either case the Case Owner should **immediately** do the following:
  - notify their HEO or SEO that an application for JR has been received
  - obtain the Home Office file and other relevant documentation if they are not already in the section;

- photocopy the relevant sections of the file, e.g. asylum decision letter, IS96, refusal letter, etc;
- compile an immigration chronology and, if the case is a supported case, an asylum support chronology; and
- scan the relevant documents onto ASYS.

2.3. The Case owner who is dealing with the application must notify the JRU and the Treasury Solicitor of their name, address, telephone number, fax number and e-mail address. A photocopy of the papers must be sent to the solicitor who is acting on the UK Border Agency's behalf.

2.4. If the JR challenges current published asylum support processes or policy, the HEO or SEO should notify NAM+ Asylum Support Team in the first instance.

2.5. The Case Owner should next consider whether the case is sufficiently sensitive to justify warning the Regional Director 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 the UK Border Agency's handling of the case or UK Border Agency procedures, the case owner must satisfy themselves that the UK Border Agency will not be vulnerable before the Court.

2.6. 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, case owners should discuss the issues with Treasury Solicitors, and if the JR concerns a matter of policy or law, NAM+ Asylum Support and LAB. Case Owners must ensure that all relevant parties are aware of the deficiency in the handling of the case and to obtain from them confirmation that the deficiency is not so serious as to jeopardise the UK Border Agency's ability to contest the case successfully.

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

2.8. The case owner may also be required, at the request of the Treasury Solicitor, to swear or affirm an affidavit, contribute to and/or sign a witness statement and to attend the Court on behalf of the Secretary of State.

### **3. HOW SHOULD CASE OWNERS DEAL WITH A THREAT OF AN APPLICATION FOR JR BY AN APPLICANT OR BY THEIR REPRESENTATIVE? (USUALLY A SOLICITORS FIRM).**

3.1. Threats to seek Judicial Reviews against asylum support decisions may be issued in the form of letter, fax, e-mail, or telephone call. As with applications for JR, the case owner 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.

3.2. The Case Owner should also notify the Treasury Solicitor as to the possibility of a JR and what they are doing about it.

#### **4. WHAT IS JUDICIAL REVIEW (JR)?**

4.1. 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).

4.2. Any decision taken by a case owner 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 and Asylum Act 1999) or rules (such as The Asylum Support Regulations 2000) and it is therefore important to adopt a consistent approach.

4.3. Some decisions made by case owners give a right of appeal to the First-Tier Tribunal - Asylum Support ("the Tribunal"). An application for judicial review resulting from a decision by the Tribunal to dismiss an appeal will fall to be dealt with by the case owner. The Tribunal 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.

4.4. 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 UK Border Agency. It is imperative that all sections having an interest in the application for JR are notified promptly of the existence of the application.

#### **5. THE APPLICATION FOR PERMISSION TO PROCEED FOR JUDICIAL REVIEW**

5.1. 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 or regional equivalent, 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 (“SSH”) but it will be normal practice for this notice to be served on Treasury Solicitor.

5.2. On receipt of the application for JR, if it is intended to contest the claim, an acknowledgement of service (AOS) must be filed at Court within 21 days of the receipt of the papers. The AOS 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 UK Border Agency will undertake these actions.

5.3. The acknowledgement of service on the Court must contain a summary of the grounds of resistance. This summary will fall to the case owner 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 including immigration and asylum support chronologies;
- the reason and facts which caused the UK Border Agency to reach the decision made including copies of relevant decision letters and application forms;
- that regard has been taken of any published policy (where this has been the case). A copy of the relevant guidance document must be attached;
- any compassionate or compelling circumstances that were taken into account when making the decision;
- where the application has raised a human rights issue, a statement that we are satisfied that the decision is in accordance with the Human Rights Act 1998 (HRA) and the reasons why we believe this to be the case.

- 5.4. 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.
- 5.5. If 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 AOS. 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.
- 5.6. If 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.
- 5.7. 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.

## **6. PERMISSION TO PROCEED REFUSED**

- 6.1 If an application for permission to proceed is refused, action can be resumed on the decision. But, case owners need to bear in mind that the Claimant may appeal the decision to the Court of Appeal. Any enquiries about whether an application has been renewed should be addressed to the Treasury Solicitor. N.B. The Administrative Court Office should not be approached for information by case owners.

## **7. PROCEDURE FOLLOWING THE GRANT OF PERMISSION TO PROCEED**

- 7.1 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.
- 7.2 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 application 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.

7.3 Either party may seek to appeal to the Supreme Court 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 Supreme Court itself. If the Court of Appeal refuses leave to appeal, the Claimant is required, within the same one month period, to lodge a petition for leave to appeal with the Supreme Court. It should be noted that very few cases are granted leave to appeal to the Supreme Court 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 or five of the Supreme Court's Justices.

7.4 The Supreme Court has the power to quash the decision that led to the application for JR. The Supreme Court can remit the case back to the Respondent i.e. the UK Border Agency with a direction to reconsider it and reach a decision in accordance with the findings of the court. Alternatively, the Supreme Court has the power to take the decision itself.

## **8. SCOTLAND**

8.1 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 (“OSAG”) 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.

## **9. THE APPLICATION**

9.1 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 asylum support 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.

9.2 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.

## **10. FIRST HEARINGS**

10.1 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.

- 10.2 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.

## 11. JUDGMENTS

- 11.1 A copy of any Judgment must be sent to NAM+ Asylum Support. They will consider whether the Judgment has any implications for asylum support policy and processes.

## 12. TREASURY SOLICITORS' BILLS

- 12.1 The Treasury Solicitor charges the UK Border Agency for the services it provides on an hourly basis +VAT. Case owners may be asked to confirm that the services charged for have been provided.

## 13. AGREED COSTS

- 13.1 In certain circumstances Treasury Solicitors may ask for agreement, in advance of any hearing, that the UK Border Agency will, in principle, pay costs. All payments must have appropriate G7 or G5 approval in place. **It is essential that approval is sought before the case proceeds.** Case owners must obtain approval in order to meet the court deadlines, and it is the responsibility of the Unit Director to ensure this approval is in place.
- 13.2 For cases up to £5,000, the G7 or G6 of the case owning team can authorise the costs. All costs up to £20,000 must be authorised by a G5 Director (if delegated) or G3 Senior Director. All cases between £20,000 and £50,000 must have G3 Senior Director approval. Treasury approval must be obtained if costs are expected to exceed £50,000.

## ANNEX A

### 1. JUDICIAL REVIEW UNIT (JRU) CONTACT DETAILS

Central Appeals and Litigation  
Appeals and Removals Directorate  
UK Border Agency  
9th Floor, St Anne House  
20-26 Wellesley Road  
Croydon  
CR0 9XB

Fax Number: 020 8604 1884  
Duty Line: 020 8604 1869  
Inbox: [ERJRUinbox@UKBA.gsi.gov.uk](mailto:ERJRUinbox@UKBA.gsi.gov.uk)

## ANNEX B

### 1. GLOSSARY

Term	Explanation
Appellant	The person who has submitted an appeal to the Court of Appeal against refusal to grant permission to proceed.
Case owner	The UK Border Agency case owner, case working team or specialist team in charge of the case.
Claimant	The person who is making a claim against the UK Border Agency
Judicial Review Unit (JMU)	The JRU is the central point of contact with the Treasury Solicitor and the Office of the Solicitor of the Advocate General for receiving applications for judicial review involving the UK Border Agency. The JRU is responsible for allocating the case to the case owning team.
Legal Adviser's Branch (LAB)	The function of LAB is to give legal advice to the Home Office about the interpretation of legislation and questions of law.
Respondent	The person or authority that has responsibility to respond to the judicial review. For the purpose of this

	instruction the respondent is the UK Border Agency.
<b>TREASURY SOLICITOR</b>	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. Also known as TSol.

## Document Control

### Change Record

Version	Authors	Date	Change Reference
3.0	BF	27/11/2008	Update branding only
4.0	SM	11/03/2011	Updated responsibilities and team names