

Schedule 4: The Work of the Criminality and Detention Group

TSol carries out work for the Criminality and Detention Group (CDG) in both public and private law cases. Criminality and Detention Group JR & Litigation will be the instructing client on all litigation challenging detention under immigrations powers and all judicial review applications challenging deportation of foreign national prisoners.

Single point of contact: The Client will provide Treasury Solicitors with a single point of contact in UKBA in the form of the named litigation caseworker. All instructions will be sought from and provided through that named single point of contact unless specifically agreed otherwise by the UKBA litigation caseworker and their SEO.

The named UKBA litigation caseworker is TSol's sole point of contact in UKBA. The Client has knowledge of the processes and systems operated within UKBA.

In relation to public law cases, this schedule should be read with schedule 3 in relation to the deadlines which apply as between TSol and CDG and in relation to the amendments to schedule 1, standard terms and conditions as well as with schedule 1 insofar as not disapplied or amended. Except where otherwise stated in schedule 3, the Department will aim to provide final and definitive instructions at least 24 hours in advance of a Court deadline and TSol will aim to provide draft documents to be cleared for submission to the Court at least 2 days in advance of a Court deadline.

In relation to private law matters, schedule 1 shall apply in full.

The following paragraphs deal with the additional requirements of CDG work, in particular disclosure, witness evidence and settlements. It should be noted that these paragraphs may also apply to other aspects of UKBA's work where detention or other claims involving these aspects are involved.

The parties are aware that CDG work gives rise to special considerations, in particular in the sphere of unlawful detention claims due to UKBA's obligations to deal as far as possible with the risk of harm to the public caused by those foreign national prisoners (FNPs) who pose such risk and who have no basis of stay in the UK. UKBA works on a statutory basis and has a legal duty to deport FNPs who meet certain criteria, the power to deport FNPs who meet other criteria and the associated power to detain those FNPs who are being considered for deportation or where deportation action is in progress.

Disclosure

In relation to obtaining documentation from UKBA, including emails and electronic information, particularly in relation to disclosure, TSol relies on the Client to obtain all relevant information from other parts of UKBA to ensure that TSol meets its obligations under Civil Procedure Rules and the Hogg Guidance on the Duty of Candour and Disclosure January 2010 set out at Annex A. The Client is expected to act in accordance with the spirit of the Guidance set out at Annex A.

- TSol will write to the Client no later than **5 working days** after receipt of a new case, enclosing copies of the claim form and any other relevant documents.
- TSol will provide an initial assessment of the type and level of disclosure required i.e. whether or not *all* material related to the case is needed or just significant or key documents where the case is not assessed as concerning significant issues of fact (in order to comply with the duty of candour in JR).
- This initial assessment will usually be communicated to the client on the provision of the TSol prognosis letter but if possible it may be sooner (for example, if the Court has ordered an expedited time table).
- TSol will suggest a reasonable and realistic timeframe, within which this disclosure of documentation/information should be provided, supported by an explanation for the deadline proposed, to be discussed and agreed with the Client. The Client should seek to achieve provision of all relevant material following the request from TSol in an organised bundle.
- In the event that the TSol lawyer encounters difficulties in obtaining the necessary information these difficulties should be escalated promptly to the UKBA line manager.

The UKBA litigation caseworker will also begin the process of pulling together all relevant case material held by all relevant business units, to include any documents specifically requested by TSol. The Client must ensure that the Data Protection Unit (DPU) is informed of the litigation to ensure that the Client is alerted to any Data Protection Act requests, Subject Access requests or FOI requests made in relation to the case as early as possible.

The Client will obtain from the DPU a copy of any response to a Data Protection request which has already been sent and DPU must be informed that they must provide a copy of any draft responses to be sent to the Client who must provide those draft responses to TSol at the earliest opportunity.

From the point at which UKBA are made aware of the litigation, all relevant material held must be preserved and not destroyed, irrespective of whether it has been requested by the Treasury Solicitor.

Cases assessed by TSol to require the Hogg approach to disclosure will be subject of a case preparation conference between Client and TSol (either telephone or round the table) to consider:

- Key issues in the case
- Disclosure
- Witness evidence
- Instruction of Counsel
- A plan for access to Counsel

TSol relies on the Client to obtain all relevant information from other parts of UKBA to ensure that TSol meets its obligations under the Guidance on the Duty of Candour and Disclosure January 2010 set out at Annex A. The Client is expected to act in accordance with the spirit of the Guidance set out at Annex A.

The Client will provide to TSol at the time of the provision of documentation a clear note of what parts of UKBA have been searched for documentation and which have not and the reasons why searches have not been carried out in particular areas. If searches include searches for electronic documentation/information then the Client will provide TSol with the search terms used and the reasons why those terms were selected.

In relation to Court deadlines for disclosure of documentation TSol may, if without instructions to disclose when the deadline is reached, write to the Court and explain that it is without instructions in relation to disclosure.

Legal Professional Privilege

UKBA's internal consideration of legal advice provided to the Client by the TSol and/or Counsel, which is subject to legal professional or litigation privilege, will not be disclosed beyond TSol unless specifically authorised by the UKBA litigation caseworker and their SEO.

Other Case Preparation and Management Issues

Case preparation will be a collaborative process involving TSol and the Client from an early stage of the litigation.

Witness Statements

In both private and public law claims, the TSol lawyer will, at the earliest possible opportunity and in any event in a time frame which will enable deadlines to be met (the TSol lawyer to specify if necessary), suggest to the Client, from the case papers available, the identity of those UKBA officers whose evidence he or she considers would be beneficial if the claim is to be defended (whether wholly or in part) and why that evidence is important. The request for witness evidence will specify a time by which the witness evidence is required.

The Client will then, being mindful of any specified time frame, advise TSol of any reasons as to why this is not an appropriate witness and propose alternative witnesses or evidence. Once the witness is agreed the Client will take immediate steps to contact the appropriate person and inform them that a witness statement will be necessary and to expect email contact from the named TSol lawyer. The client will then provide contact details, as soon as possible, to the TSol lawyer so that the lawyer can contact the proposed witness directly for the purposes of gathering information for the drafting of the statement. This contact will be by email and copied to the Client.

The TSol lawyer will provide a first draft of the statement to the witness as soon as is reasonably practicable and will deal directly with the witness at all stages of the drafting process. It is necessary, that all correspondence between the witness and the TSol lawyer is copied to the Client. However, if necessary, and with advance notice to the Client,, the TSol lawyer will contact by telephone the proposed witness for the purposes of gathering information for the statement. In that event, the TSol lawyer will provide the Client with a copy of the attendance note of the telephone call between the TSol lawyer and the witness no later than 3 days after the date of the telephone call.

The Client recognises the importance of witness evidence being provided by those individuals responsible for decision-making in these claims and will endeavour to ensure that such evidence is secured promptly and in accordance with the deadlines required in order to comply with any court order. Wherever possible TSol lawyers will assist in the preparation of the witness statement by drafting the case facts based on the documentation provided.

When ascertaining witness availability the Client will explain to potential witnesses that they will be expected to attend court and be cross examined on their evidence. The TSol lawyer will ensure, through the litigation caseworker, that the witness has access to support and preparation with Counsel and the TSol lawyer.

Settlement

Where legal advice from Tsol and/or Counsel to the client is to seek to concede and settle the matter, TSol will obtain specific instructions before:

- giving any indication to other parties or the court of compromising the claim/challenge; or
- making any offer of damages or to submit to judgment.

The Client will seek to undertake all necessary consideration in order to meet the agreed timescale for payment of damages and adverse costs. Where this is challenging the TSol lawyer will make every effort to secure more time for the Client.

Quantum/ Costs

Advice in relation to reasonable value of claims for damages and estimations of Claimant's costs should be consistent, accurate, evidenced and fully reasoned.

However, the Client recognises the final amount of costs claimed by opponents may exceed the estimate provided by TSol. Reasons for this may include –

- the opponent's solicitor provided an incorrect estimate of final costs; or

- the base costs are inflated by a success fee under a conditional fee agreement; or
- the base costs are inflated by a premium for After the Event (“ATE”) insurance.

TSol will provide clear advice concerning the Client’s likely exposure to costs but the Client recognises that these cannot be guaranteed e.g. TSol is unlikely to know the amount of an ATE premium until conclusion of a case.

Requests for UKBA attendance at a hearing will be made only when necessary and sufficiently in advance (unless the Court makes an urgent order for attendance). Such requests will be supported by clear reasons and an explanation of the purpose of the attendance/ role of the attendee. The Client should attend in all cases in which TSol has advised attendance with good reason. If the Client is unable to attend then it must give full and detailed reasons as to why the Client is unable to attend. Such reasons may have to be given to the Court.

Complaints

Any concern or complaint by TSol about the performance of the Client should be brought to the attention of the UKBA Line Manager of the named UKBA litigation caseworker or to the person nominated for this purpose by the Client.

Annex A

Hogg guidance