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Judicial Review Guidance

Section 4

Litigation Costs

4.1 The authorisation process

4.1.1 The UK Border Agency is likely to incur legal costs whenever legally challenged. It is a UK Border Agency strategic objective to reduce costs and ensure it manages litigation and associated legal costs efficiently and effectively. General guidance on how litigation costs are to be managed is in Chapter 17 of the Finance Manual [Horizon > UKBA finance policy > Chapter 17: litigation costs](#)

4.1.2 When dealing with a legal challenge, caseworkers must consider the prognosis provided by Treasury Solicitors Department and then consider whether or not to seek policy or legal advice before instructing Treasury Solicitor's Department to seek advice from Counsel. Both Treasury Solicitors and Counsel charge for their advice, and although it is often appropriate to seek that advice consideration should be given to whether internal advice would be as, or more, useful, if time limits allow.

4.1.3 Caseworkers should not agree that Treasury Solicitors can instruct Counsel until they have authority in accordance with the local unit arrangements. The JR caseworker is also responsible for ensuring appropriate authorisation is received for instructing Counsel as costs rise. The thresholds are:

- Up to £4,999 - as per local arrangements
- £5,000-19,999 - Directors
- £20,000 - £49,999 - Senior Director
- £50,000 - Treasury

4.1.4 It is the caseworkers' responsibility to ensure authority is in place to cover likely litigation costs. As a general rule - if a JR is granted permission to proceed - it is likely the £5,000 threshold will be exceeded. In those circumstances, the caseworker should notify their Director - copying to the Litigation Finance Unit LitigationFinanceTeam@homeoffice.gsi.gov.uk. In most cases the appropriate Director will be the Appeals and Litigation Director or the Criminal Casework Director.

4.1.5 If a case proceeds - and is then lost - the UK Border Agency is usually liable to pay the other sides' legal costs as well as its own. As a guide, the other sides' legal costs can be two and a half times those of the UK Border Agency. If the UK Border Agency is advised there is a risk (50:50) of losing a case, it is probable costs will exceed £20,000. In those circumstances, caseworkers must seek authority from their Senior Director immediately.

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4.2 Costs and consent orders

4.2.1 If a JR is withdrawn or settled a consent order will be drawn up. This will specify who should pay costs – the circumstances of the case will determine if the UK Border Agency must pay costs. An example of when we may have to pay costs is where we concede a case on facts that were already known at the time when we made the decision under challenge. If you are in doubt as to whether costs should be accepted you should seek advice from Treasury Solicitors Department.

4.2.2 If the UK Border Agency agrees to pay costs the consent order will say it will pay reasonable costs to be agreed between the parties. If agreement cannot be reached a court will determine what reasonable costs are. In very limited circumstances – for example if a claimant will not agree to the consent order without first agreeing the sum or the Treasury Solicitor's Department advise the case can be settled for a fixed amount – the costs to be paid can be agreed and the figure included in the consent order.

4.2.3 Caseworkers commit the UK Border Agency to litigation spend as soon as they agree a consent order to pay costs. Before agreeing a consent order a caseworker must ask the Treasury Solicitor's Department for an estimate of what reasonable costs are expected to be and ensure relevant financial authority is obtained. If the figure to be paid is specified in the consent order financial authority must always be obtained.

4.3 Requesting costs at substantive hearings

4.3.1 If the UK Border Agency successfully defends a case at a substantive hearing, it should always seek an order for its costs. However, the claimant's solicitors may make submissions as to why this might not be appropriate, for example in some publicly funded cases. In these circumstances, Counsel or the Treasury Solicitor's Department will be able to advise on the best course of action but the starting point is that costs will be sought wherever possible.