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Judicial Review Guidance

Section 1

Introduction

The purpose of this guidance is to provide Judicial Review (JR) caseworkers with an overview of the JR process and their responsibilities as caseworkers.

1.1 The purpose of Judicial Review

Judicial Review is a process by which individuals can challenge the lawfulness of decisions or actions¹ of the Executive, including those of Ministers, local authorities, other public bodies and those exercising public functions. It is a largely judge-developed procedure and can be characterised as the rule of law in action, providing a key mechanism for individuals to hold the Executive to account. It is, however, intended to function quickly and proportionately. Certain protections are in principle provided against spurious claims, and they usually work in practice. Judicial Review is not available if there is an alternative remedy (for example a statutory right of appeal); only those with sufficient interest in the outcome are able to bring a case and they must first obtain permission for their case to be heard.

For caseworkers who deal with JR's there are two main responsibilities that you must follow:

- If you receive a JR then it is important that you take the appropriate actions within any deadlines. The JR Process is set out in Section 3 of this IDL.
- When dealing with a JR, if at any stage you are unclear what is expected of you - or you need legal or policy input - then in the first instance you should contact your senior caseworker or line manager.

The JR will normally be brought against the Agency, but in some cases the Agency will be named as an interested party in a case. This is most likely when the challenge is to the Upper Tribunal decision to refuse permission to appeal in a statutory appeal. Sometimes the challenge will be against a decision of a local authority or another Government Department. Where the Agency is an interested party a decision first needs to be made about whether to take part in the proceedings and then whether the Agency is the appropriate party. With statutory appeals where the challenge is the refusal by the Tribunal to grant permission the Agency will usually lead on the litigation liaising with the MoJ if required. In other cases involving different Departments advice should be sought from policy and Legal Advisers Branch if it is unclear whether the Agency should be an interested party.

1.2 The pre action protocol

A JR pre-action protocol (PAP) is normally a letter sent to the UK Border Agency which challenges an action taken by the UK Border Agency and threatens that a JR will be lodged if a satisfactory response is not received. The challenge can be to any part of our activities and can include not only a decision we have made but also a delay in us making a decision. The PAP is designed to enable disputes to be resolved before they reach court. It operates for cases in England and Wales. Northern Ireland operates a similar procedure. Dealing appropriately with PAPs can therefore reduce the volume and costs of JRs - see section 2 of this IDI. Scottish JR procedures differ – see section 5 - and the PAP does not currently apply there.

1.3 Stage at which a court may hear a case

A JR can be lodged at any time. However normally the Court will only hear a case if all other remedies open to the claimant have been exhausted, for example any right of appeal. However where there is no right of appeal against a decision JR may be the only remedy available to the claimant, for example a challenge based on a failure to implement an allowed appeal or a delay in deciding an application.

1.4 Compliance with court orders and undertakings

All caseworkers must comply with any court order or undertaking given to the court.

A court order can include:

- An injunction against removal
- An order that the UK Border Agency take a certain action - for example a grant of immigration leave or release from detention

An order can include a requirement to make a decision within a specified timeframe, or not to remove a person from the UK before a specific date or event.

Failure to comply with a court order can lead to the Home Secretary being found in contempt of court. Any failure to comply with a court order must be escalated to senior managers and a submission should be sent to the Home Secretary setting out the circumstances of the failure and the proposed remedial action.

1.5 The Treasury Solicitor's Department

Treasury Solicitor's Department acts as the solicitor for the UK Border Agency and will prepare the case for the court hearing. They will consult the case worker (or the relevant directorate if no case worker has yet been allocated), and will act on the instructions of the case worker in relation to the decisions on the case, for example on whether to defend or settle and whether to brief Counsel.

Treasury Solicitor's Department, LAB and the caseworking directorate have important, separate roles. However, Treasury Solicitor's Department function is – with Counsel - to manage the litigation in line with UK Border Agency instructions.

1.6 Home Office Legal Adviser's Branch (LAB)

LAB will provide in house legal advice for caseworkers generally and should be consulted if a case ceases to be routine because of any of the following four factors:

- its legal complexity;
- it is potentially political sensitive;
- its financial value;
- an adverse outcome in that case could require a change to the law or have a significant effect on policy or on the wider Home Office.