

Practice Note - Judicial Review Case Management

The 2017 Guidance on Competence permits OISC advisers authorised at Level 3 to apply for an additional category of authorisation Judicial Review Case Management (JRCM). The Guidance outlines the key areas of competence, skills and aptitudes required by advisers authorised to practise in this area. This practice note aims to provide additional detail as to the work advisers are permitted to do and the standards expected of advisers authorised in this area.

Currently OISC advisers operating in England and Wales are prevented from representing clients in Judicial Review (JR) matters either in the High Court or the Upper Tribunal as they do not have the necessary right to litigate or the rights of audience under the Legal Services Act 2007.

The OISC is, however, aware that many OISC advisers are legally trained or will have acquired substantial knowledge and skills of JR work in other capacities or in other roles. Where advisers are already instructed by clients pursuing an immigration matter they are likely to be very knowledgeable about the client's case and may be in a good position to support them in pursuing a JR application.

In order to retain a client beyond the pre-action protocol stage OISC authorised advisers must satisfy two points. They must:

1. be authorised by the OISC in the category of Judicial Review Case Management; and
2. be permitted by the Bar Standards Board (BSB) to instruct a barrister to undertake the litigation and advocacy element of an immigration JR through their Licensed Access Scheme.

It is important to note that barristers instructed through the Licensed Access Scheme for JR work must have permission to litigate, and only limited numbers of barristers within England and Wales have such permission. As such, advisers considering applying to the OISC for authorisation in this area should ensure that they have made enquires and added such barristers to their experts lists, where it has been confirmed that suitable barristers are available and willing to take instruction from an OISC registered organisation.

Currently barristers in Northern Ireland and Scotland cannot accept instruction from OISC advisers in relation to JR matters. It is further noted that the OISC does not permit registered advisers to retain clients where clients are instructing counsel in England and Wales directly through the Public Access Scheme for JR work. Clients who instruct counsel through the Public Access Scheme are treated by the courts and the respondent for the most part as though they were acting without legal representation. This is not the case where a registered adviser is still under instruction. OISC advisers therefore cannot act as 'Intermediaries' in JR matters being pursued through the Public Access route.

The work conducted by an OISC adviser in relation to Judicial Review

- Assessing the merits of pursuing a JR application and explaining these clearly to the client, ensuring that the client is clear as to what type of order or remedy is being sought and grounds of challenge.
- Discussing with the client any risks involved (including costs and funding issues) and exploring any adequate alternative remedies.
- Explaining to the client the various stages associated with a JR application and the likely timeframes involved at each stage, including the need for the application to be made promptly and issues around applying for an extension and late claims.
- Contacting appropriate counsel, who are permitted to undertake litigation in addition to advocacy work and confirming if it is likely that the instruction can be accepted and agreeing fees.
- With the client's agreement, proceeding with Pre Action Processes (if this step has not already been taken) and consulting with the client regarding the response received.
- Drafting clear and accurate instructions to counsel regarding their client's case and providing any necessary information to counsel in order to allow the barrister to make the permission application on behalf of your client
- Where permission is granted, assisting counsel in the gathering of information and documents to support the Claim Form. This might include the identification of relevant written evidence and the essential reading list, collecting a witness statement from the client or other relevant party, creating the bundles and importantly checking the factual accuracy of the grounds being presented by counsel.
- Collating and holding all documents pertaining to the matter for counsel. For example, maintaining a central record of all correspondence, applications to the court or tribunal, including supporting bundles of evidence and grounds.
- Meeting the client to discuss any further information required by counsel and reviewing evidence supplied by the client to be passed to counsel for potential use, including identifying any essential documents that might be passed to the court for advanced reading or any additional grounds that the client wishes to rely upon at the substantive hearing.
- Meeting the client to take further instruction and re-evaluate the case at each stage of the proceedings and to raise with counsel any developments during the course of the process of which counsel or the court should be made aware.
- Supporting counsel in the preparation of skeleton arguments and the substantive hearing bundle.
- Instructing counsel where an urgent application is required, providing the necessary information from the client and instructions in relation to any interim relief sought.
- Discussing with the client and instructing counsel in relation to any necessary interlocutory applications and consent orders.
- Meeting the client to discuss the outcome of the matter, including any offer by the SSHD to settle. Explaining what the various outcomes mean for the client's immigration status and what further options are available to the client.

Demonstrating Fitness and Competence in Judicial Review Work

Advisers must carefully consider the client's chances of success in considering bringing a JR. It is only appropriate where all other adequate alternative remedies have been exhausted. Advisers must ensure that they are realistic and transparent with their client about the process and the merits of making an application for JR.

Clients should be aware of what the JR is trying to achieve and the basis on which their case is being argued. They should, at the outset, be given some indication of the whole process, what the various stages are, how long it might take, what position they will be in at each stage and potential costs.

It is important that clients realise that the process may be a long one and that permissions need to be sought and granted at each stage in order for the matter to proceed and that only material that was before the original decision maker will be considered.

When a decision is made that JR is necessary, all OISC advisers are expected to follow the Pre Action Protocol for JR. It is however accepted that it is probably better to bring a JR claim in time than to lodge a late claim merely in order to comply with the protocol. Nevertheless, it is advisable where possible to bring the claim in time and follow the protocol.

Advisers should be aware of the Home Office template letter for Pre Action Protocol which can be found at <https://www.gov.uk/government/publications/pre-action-protocol-for-judicial-review> and that these letters can now be e-mailed to: UKVIPAP@HOMEOFFICE.GSI.GOV.UK

Pre Action protocol letters should be reasonably brief and to the point. Where it is necessary to cite legal authority and Home Office policies, these should be restricted to the key text and applied closely to the facts of the client's case.

Advisers should be aware that Pre Action Protocol will not be appropriate where the respondent does not have the power to change the decision being challenged.

Where advisers do not wish to take on Judicial Review Case Management (JRCM) for a client, or they wish to withdraw from the matter they are perfectly entitled to do so but must ensure they comply with Principle 5.

Where a decision is made by the client to pursue a JR claim following the Pre Action Protocol stage, advisers must instruct appropriate counsel to lodge the Claim Form. OISC advisers may not lodge this form; their role in the proceedings from this point is administrative and one of supporting the instructed counsel who will be acting as their legal representative in deal with the Upper Tribunal, the Administrative Court and the Respondent. The OISC adviser will continue to be responsible for ensuring the client fully understands the proceedings going forward and is working with the adviser and the instructed counsel to meet deadlines for information required.

At the permission stage a written decision will be sent to all parties which will indicate if permission is granted on limited grounds. It is also possible at this stage that the case will be certified as being 'totally without merit', meaning there can be and the only remedy will be an appeal to the Court Of Appeal. It is vital that clients are immediately informed of this outcome and what it means given the short window for an appeal to be lodged if one is deemed appropriate. Similarly, clients must always be consulted on any decision to request an oral hearing following a refusal of permission and be made aware of any additional cost implications.

Where permission is granted the role of the OISC adviser will again be administrative, to support the instructed counsel in preparing and checking the factual accuracy of any further grounds to be relied upon, evidence to be submitted at the substantive hearing and the skeleton arguments and assisting counsel in creating and serving the bundles.

Advisers should be aware that a decision to withdraw a JR application must be made by the client.

Advisers should not take on or continue to act in cases which they believe to be completely without merit or those that are being made to frustrate or abuse legitimate immigration processes.

When carrying out a premise audit of organisations who undertake JR CM, the OISC will expect advisers to be able to demonstrate through their written records (see Record Keeping below) that they have exercised good judgement in relation to such cases and clearly explained to their client the merits of their application for JR and any subsequent action.

The OISC will take action against any organisations where it believes poor judgement is being exercised. This may for example be evident by organisations that have a large proportion of their cases assessed as 'Totally Without Merit' at the Paper Permission Stage. Similarly the OISC will take action against organisations where it is evident that clients are being given an overly optimistic assessment of success and thus encouraged to make JR applications which have little or no merit, or where clients are advised or supported to make applications for purposes other than challenging the Home Office decision (for example to delay removal). Such behaviours will be viewed by the OISC as a serious breach of the following Code or Codes:

Code 4.2. Provide prompt, clear and competent advice to your clients.

Code 5.1. Always act in the best interest of your client

Code 7.2. Provide each client with equal opportunity to secure a favourable outcome in their matter, irrespective of their vulnerability or susceptibility to discrimination.

Code 1.3. Not abuse any judicial and/or immigration process.

The OISC will in particular wish to review cases at premises audits where OISC advisers instruct counsel to make an application for an injunction against removal where non-suspensive appeal JRs are being pursued. The OISC will also wish to review cases where repeat JR applications have been made. In relation to repeat applications advisers will need to be able to demonstrate why subsequent applications are materially different and why these arguments could not have been made in any earlier applications.

OISC advisers authorised in JR CM will always be advisers already authorised by the OISC at our highest Level, Level 3. As such the OISC will expect high levels of competence and professional conduct to be evident in the information and evidence they gather from clients to support the application to be made by the legal counsel instructed. Evidence obtained and grounds for JR presented to counsel should therefore always be unique and tailored specifically to the client's case. OISC advisers should take all reasonable steps to support instructed counsel in engaging with the Respondent and will be responsible for assessing the quality of advice and services their client's case receives from the instructed barrister. The OISC will take action against the regulated adviser where it believes poor quality work is being undertaken by the OISC adviser or counsel instructed.

Procedure and Responsibility to the Court

Advisers are required to be familiar with the amended Tribunal Procedure (Upper Tribunal) Rules 2008 and High Court Guidance on applying for Judicial Review. They should ensure that their instructed counsel is acting in compliance with these Rules, that all claims are issued in the correct forum and issued in a timely fashion in keeping with the time limits set. Applications should always be made on the correct form and accompanied by the relevant fee. A failure by the instructed counsel in any of these areas will be deemed a direct breach of Principle 4 against the authorised adviser.

Advisers working in this area must additionally ensure that they, and the counsel they instruct, are conscious of and fully compliant with their duty to the courts. The Bar Standards Board notes that:

“A barrister has an overriding duty to the Court to act with independence in the interests of justice: he must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court”.

OISC registered organisations and advisers themselves are also required under Principle 1 to not knowingly or recklessly allow clients, the Commissioner, the Home Office, the courts and tribunals and/or third-party agencies to be misled and to not abuse any judicial and/or immigration process.

In order to be compliant with this Principle and to ensure that the duty of candour of the instructed counsel is not compromised, advisers need to ensure that they are liaising with counsel all relevant matters. There must be no attempt to mislead the courts by the non-disclosure of relevant information. Should the adviser become aware that the client's case has in any way inadvertently misled the court they must, with the client's consent inform the court. Should the client not consent to such an action the adviser must withdraw from the case, pursuant to Principle 5.

OISC advisers should be aware that there is an ongoing duty on every applicant's legal representative to conscientiously reassess the viability and propriety of their client's application for JR at each stage of the proceedings and those proceedings should be withdrawn where it becomes apparent that the application is no longer appropriate.

Advisers practising in JRCM should ensure that are aware of the guidance on this area provided in **R (on application of SN) v Secretary of State for the Home Office (SSHJ) IJR [2015] UKUT 00227 (IAC)**.

Costs for Judicial Review Work

OISC advisers authorised in JRCM should be aware that legal aid funding may be available for some clients. Details as to whether a JR is within scope of legal aid can be found at Paragraph 19 of Schedule 1, Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Whether a client will qualify for legal aid must be assessed by the adviser who should be fully aware of the required means and merits test and discuss this with the client, irrespective of whether the OISC adviser holds a Legal Aid Contract.

Clients must also be told before any proceedings are commenced, that an unsuccessful JR application may result in their being asked to pay the Respondents legal costs. An idea of these costs will normally have been provided by the Respondent at the Acknowledgement of

Service stage. These costs can be substantial, and it will be imperative that advisers document clearly that they have made clients aware of these potential costs. OISC registered firms should also be aware that the Upper Tribunal has the discretionary power to award wasted costs to be paid by the legal representative and should ensure that they are aware of guidance provided in **Cancino [2015] UKFFT 59** regarding wasted costs. This is an issue that may need to be considered in relation to the regulated organisation's Professional Indemnity Insurance.

Emergency Applications

Where an adviser authorised in JRCM believes an urgent application needs to be made on their client's behalf (for example where removal directions are to be enforced imminently, or a client has been detained) the adviser must still instruct appropriate counsel to make the emergency application. Even in an emergency situation counsel should fax the draft claim form to the respondent to notify them of the intention to issue the claim.

Applications made in an emergency situation may be subject to some deviation from the normal procedural timeframes; however, this does not negate the responsibilities on the adviser and instructed counsel in relation to the collection and disclosure of information to be provided to the court. Where subsequent enquiries suggest that the court needs to be made aware of corrections to the information, permission should be sought to amend the application.

It should be noted that the misuse of the urgent application system may result in a wasted costs order being made against the claimant irrespective of whether the application is successful or not.

Record Keeping

Advisers are required through Codes 8.4 – 8.7 (Record and case management) to keep accurate and appropriate records. For those involved in JRCM they will need to be able to produce:

1. Detailed individual client records that clearly show that the client has been informed, both at the outset and as the case progresses, of: the grounds on which the JR is being pursued, why various courses of action are being taken and the merits of their case at each stage, their immigration position at each stage and potential position in relation to action to be taken and the costs involved throughout.
2. Records of engagement with suitable counsel and active review of arrangements.
3. A detailed list of cases where JRCM has been undertaken. This list should include the date the organisation were instructed for this particular area of work (even if they were under instruction previously), the stage at which the case is at and outcomes, including whether cases are at any point assessed as 'Totally Without Merit'.

In relation to point 3 above it is recommended that advisers authorised in JRCM create a central recording system to collate this information as the OISC is likely to ask for such information to be provided at premises audits.