

Annex B: Paying for permission work in judicial review cases

148. The consultation paper proposed that providers should only be paid for work carried out on an application for permission (including a request for reconsideration of the application at a hearing, the renewal hearing or an onward permission appeal to the Court of Appeal), if permission is granted by the court. We also proposed that Legal Aid Agency (LAA) would have a discretion to pay providers in certain cases which conclude prior to a permission decision.
149. The paper stated that the proposal would only apply to issued proceedings. Legal aid would continue to be paid in the same way as now for the earlier stages of a case, to investigate the prospects and strength of a claim (including advice from Counsel on the merits of the claim) and to engage in pre-action correspondence aimed at avoiding proceedings under the Pre-Action Protocol for Judicial Review. In addition, payment for work carried out on an application for interim relief in accordance with Part 25 of the Civil Procedure Rules would not be at risk, regardless of whether the provider is ultimately paid in relation to the substantive judicial review claim.
150. Reasonable disbursements, such as expert fees and court fees (but not Counsel's fees), which arise in preparing the permission application, would continue to be paid, even if permission were not granted by the court.

Key issues raised¹⁵

Market sustainability and access to justice

151. Many respondents (including the senior judiciary, legal aid providers and representative bodies) argued that providers will not be able to carry the uncertainty and financial risk of work on a permission application, even with the introduction of a discretionary payment mechanism. As a result, they argued that the number of providers willing to carry out public law work will reduce considerably and access to justice will be compromised. They argued that this will mean clients will be unable to find representation, which they say would breach Article 6 of the European Convention on Human Rights, Article 47 of the Charter of Fundamental Rights of the European Union and the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Respondents suggested this will impact particularly upon vulnerable groups and those with protected characteristics, as such persons are more in need of legal aid for judicial review and their cases involve greater uncertainty at the point of issue.
152. Some providers who responded argued that they have modelled the likely financial impact on their firms of the increased uncertainty they would face under the proposal and concluded that it would not remain viable for them to continue to take judicial review work. Others argued that they would in practice be likely to apply a higher

¹⁵ A number of respondents referred to their response to the consultation *Transforming legal aid: delivering a more credible and efficient system* and made reference to those points. Those arguments and the Government response to that consultation were set out in the response paper *Transforming Legal Aid: Next Steps*.

merits test than exists in the Civil Legal Aid (Merits) Regulations 2013, and take on only the very strongest cases.

Merits test

153. Some respondents argued that the merits test is in place at which point the provider and the LAA already give consideration to the prospects of success so it is unnecessary to provide any greater incentive to the provider to give careful consideration to the strength of the case before issue. There was also concern at the LAA applying both the merits criteria and discretionary criteria. If the former have already been applied by the LAA at the outset, some respondents queried whether the LAA would be able to exercise a finely balanced judgement looking behind all the circumstances of the case at the end of the process.

Other general issues on principle of proposal

154. Some respondents argued that the proposal misunderstood the nature of judicial review and was disproportionate, in particular in cases which are refused permission but where there is substantive benefit to the client, and in cases which are meritorious but settle for a good reason such as the claim becoming academic through an external event.

155. Many respondents raised concerns that the proposal would impact heavily on the provider as a lot of preparation and work for the judicial review is frontloaded because of the need to pass the permission stage. They were also concerned that not only would the preparation of the permission application be at risk, but also that the proposal would extend to work on an oral renewal hearing and appeal; that on pursuing the other side for costs; and the work on a rolled up hearing.

LAA discretion and criteria

156. Although respondents recognised that the proposed system of discretionary payment sought to address concerns raised with the original proposal, they argued that it is only a partial response and creates fresh uncertainty for providers. Many responses pointed to the Exceptional Funding scheme and low levels of grants seen following the introduction of LASPO, asserting that this suggests they could have little confidence in a system of discretionary payments for JR work determined by the LAA.

157. A number of responses suggested that the criteria should not be exhaustive because, first, an exhaustive list cannot cater for all the circumstances in which it might be appropriate to make payment, leading to potential injustice, and second, an exhaustive list would amount to unlawful fettering of discretion. Some respondents argued that it would not be constitutionally appropriate for the LAA to exercise discretion on behalf of the Lord Chancellor in cases in which the Lord Chancellor might also be the defendant.

158. Several respondents argued that the discretion would be an additional burden for both the LAA and the provider.

159. Many responses also argued that there should be a right of appeal against an LAA decision, arguing that review by an independent panel should form part of the proposal.

160. Many responses did not comment in detail on the proposed criteria, although it was suggested by many that they did not in practice differ significantly from the considerations that a court would apply when considering costs, so would offer little extra protection to providers in ensuring that meritorious cases continued to receive payment. In addition, respondents argued, in particular, that:
- a. The criteria do not take into account that it is the defendant who is in fact in the best position to know the strength of a case, and that the behaviour and conduct of both the claimant and defendant in the proceedings should be taken into account.
 - b. New evidence which materially affects the merits of the case may only come to light following issue (either from the defendant, from the client or from a third party). Respondents argue that the criteria should ensure that providers are not prevented from receiving payment on the basis of information emerging which they could not have known or could not reasonably be expected to know at the time of issue.
 - c. Similarly, the prospects of a case which was assessed as having merit at the outset can diminish in the light of a change of circumstances, a change of law (for example a new Supreme Court decision) or the actions of a third party. A case can become academic for the same reasons. In such cases, where the claim was properly issued (and concluded) by the provider, they ought to be paid.
 - d. It will not be possible in practice for the LAA to determine “the likelihood, considered at the point the settlement is made (or the case is otherwise concluded), of permission having been granted if the application had been considered”, and that to do so would be costly and unproductive. They argued that the criteria would involve an element of “crystal ball gazing” for the LAA.
 - e. Where the defendant settles “without admission of liability”, it was difficult for providers to demonstrate the true motivation of public bodies and it would be difficult for the LAA to look behind the stated reasons to make proper assessments of why a case settled.
 - f. Defendants routinely argue that their reason for reaching a particular decision is unrelated to the claimant’s grounds of claim. Giving weight to the defendant’s reasons or alleged motivation for settling will further encourage them to say they settled on a pragmatic basis rather than admit the claim had genuine merit. It was unjust that this should have an impact on whether the provider is then paid.
 - g. A defendant resisting a costs order might want to say that they have compromised the claim for pragmatic reasons and that they ought not to pay costs. However, such claims are treated with great scepticism by the courts and the question generally applied is whether the client has achieved success (*R (Bahta) v SSHD* [2011] EWCA Civ 895).

Wider impacts

161. In terms of wider impacts some respondents were concerned that the proposal would lead to costs beyond those set out in the impact assessment, in particular for public bodies and the courts resulting in satellite costs litigation where costs are not agreed, an increase in litigants in person, and additional oral renewal hearings. They argued that the projected savings to the legal aid fund compared to potential costs and administrative burdens (both to the LAA and wider system costs) did not justify the proposal.

162. Some respondents argued that the proposal would impact in particular on BAME providers and vulnerable clients (young people, the disabled) whose cases entail the greatest risk for providers. They argued that often judicial review is the only means available to vulnerable people to challenge decisions or failures of public bodies and they were concerned about the particular impact on disabled people and their ability to access justice.
163. Some respondents raised that implementation of the procedural defects proposal in the consultation paper would increase the amount of work undertaken at risk and therefore add to the uncertainty in taking on a case.

Alternative proposals

164. Some respondents argued that payment should be made available in certain cases refused permission by the Judge and in all cases which issue but conclude prior to a court decision (for whatever reason).
165. Some respondents, and in particular the Judicial Executive Board (JEB), argued that payment should only be withheld in cases certified by the court as “totally without merit”. The JEB also proposed that the judiciary should have a discretion to allow legal aid rates to be paid for cases where permission is refused but it was reasonable for permission to have been sought.

Government response

Market sustainability and access to justice

166. It is difficult to assess the extent to which providers would, in practice, refuse to take on judicial review cases in future. A number of respondents argued that they would not be able to continue acting in JR cases if the proposal were taken forward. The potential impact turns on the level of risk and uncertainty that providers would face (or perceive they would face) of not receiving payment for meritorious cases. Similar arguments have been made in respect of other reforms to civil legal aid scope and remuneration. Despite this significant numbers of providers have to date remained in the civil area.
167. In order to carry out legally-aided judicial review work, a provider must hold a public law contract or a contract in the underlying area of law. The number of providers holding a public law contract pre 2010 was 43 and following contract tender in 2010 there were 103 providers offered contracts and 82 held contracts by February 2011.¹⁶ This would suggest that in recent history there has been a strong willingness amongst providers to undertake public law contract work. Since February 2011 there has been little change in the number of providers (80 providers at January 2014) with public law contracts since despite recent fee changes. While it is still early to assess the impact of this fee cut, it does suggest that there remains a willingness amongst providers to undertake public law work at current levels of remuneration (despite previous predictions that providers would leave the market).
168. In relation to arguments that providers would in practice be inclined to operate a threshold of more than 50% prospects of success in order to minimise their risk, providers will still receive payment for their pre-proceedings work which will assist

¹⁶ The figures relate to firms rather than schedule offices.

them in robustly considering the merits of the case prior to issue. Having carried out that consideration, we would expect providers generally to proceed to issue a claim which they and the LAA had properly assessed as having prospects of success of 50% or more, in accordance with the merits test. The Government's decision to modify the criteria following consultation (see below) also lessens the risk the provider is expected to take at the point of issue.

169. We do not therefore accept that providers will leave the market or there will be insufficient numbers of providers as a result of our proposal, leading in turn to a denial of access to justice. We consider that it is likely that there will remain sufficient providers who will undertake judicial review work, taking on cases which they consider to be of merit. It is proper that they scrutinise claims carefully before applying to the LAA for funding, and in a case where the LAA and the provider agree that the case is meritorious the client will still be represented (albeit that the provider will act at risk up to the point of a permission decision). In a meritorious case the provider will still be paid, either through costs from the defendant at *inter partes* rates, or at legal aid rates because either the case is granted permission or concludes prior to permission and LAA exercises its discretion in the provider's favour. Taking into account respondent's points we have modified the discretionary criteria in a number of respects (see below), which will also serve to mitigate some of the concerns raised by providers and lessen the degree to which they are expected to act at risk. For these reasons we do not accept that the proposal gives rise to a chilling effect on access to justice or is unlawful.

Merits test

170. We consider that legal aid should be directed at cases where it is needed most and taxpayers should not be expected to fund unmeritorious cases. We continue to believe that it is appropriate to introduce a degree of risk based on whether or not a claim passes the permission threshold. We note that payment will not depend on the ultimate success of a claim but on whether the issues raised reach the permission threshold, which is a lower test.

171. The LAA merits assessment requires a case to have at least 50% prospects of success. A significant number of cases pass the merits test but fail the permission threshold. Therefore we consider it is appropriate to introduce further controls in these cases. Although the LAA will assess the case at the outset, the agency is necessarily guided by the provider's assessment on the information provided. Consultees stated that the LAA can and do challenge that assessment, but ultimately the LAA will be dependent in large part on the information provided at the point of issue by the provider. So it is important that the provider is incentivised to do all they can to consider the prospects of success thoroughly.

Other general issues on the principle of the proposal

172. We do not agree that the proposal should not place rolled up hearings at risk. We consider that this could incentivise their use where they are not warranted and, were more hearings ordered, could undermine the permission filter. We also consider that it would have the effect of putting a provider who failed at a rolled-up hearing (which takes more time for all parties and the court) in a better position than a provider who had lost at the permission stage in the ordinary way.

173. Although we have listened to the points made, we continue to consider that providers should generally only be paid for work carried out on an application for permission if

permission is granted by the court. However, we also consider that a discretion should be introduced permitting the Legal Aid Agency (LAA) to pay providers in certain cases which conclude prior to a permission decision. In light of the views of respondents we have adjusted the factors that the LAA will take into account in those cases in order to strike an appropriate balance between disincentivising weak cases and paying providers in cases which were properly issued but concluded prior to permission for reasons beyond the provider's control.

LAA discretion and factors

174. We do not accept the criticisms made of the exceptional funding scheme or that it would be inappropriate for the LAA to operate this discretion on behalf of the Lord Chancellor, including where the MoJ or one of its agencies is the defendant in the case. Remuneration decisions are made at present by the LAA in such cases, including elements of discretionary decision-making. The decision would be made on ordinary public law grounds, under which it would not be relevant to take into account that the defendant to the case was the Lord Chancellor. Were an unlawful decision to be made on such a basis, it would ultimately be subject to judicial review.
175. We have carefully considered and taken into account arguments raised by respondents regarding the proposed criteria against which applications for discretionary payment would be assessed.
176. We agree that the list of criteria should be non-exhaustive in order to take into account the range of circumstances in which a judicial review may conclude prior to permission. In operating the discretionary payment system, the LAA will therefore be required to consider whether it is reasonable to pay the provider, taking into account in particular the factors¹⁷ outlined below. When considering cases, the LAA will look at the facts of each individual case. We also recognise a number of specific points made by respondents regarding the proposed factors. Taking these into account, we intend that the final factors¹⁸ will be as follows:

i) The reason for the provider not obtaining a costs order or agreement (whether in full or in part) in favour of the legally aided party.

177. In accordance with the terms of their contract with the Lord Chancellor, providers are required to endeavour where possible to obtain and pursue a client's costs order or costs agreement, as they would do if acting for a privately paying client.¹⁹ The LAA will therefore closely scrutinise the reasons why costs were not obtained. In the consultation this criterion also referred specifically to the conduct of the claimant both at the pre-action stage and in the proceedings. A number of respondents argued that the conduct of the defendant should also be considered by the LAA in exercising the discretion. We agree that the conduct of both parties should be taken into account. Given that the parties' conduct would be relevant to whether costs were awarded or

¹⁷ Some respondents pointed out that the discretion will be based on factors to be taken into account rather than criteria. We have adjusted the language accordingly.

¹⁸ In light of responses we have developed the language of some of the criteria (e.g. criterion (i) on costs no longer refers to seeking a costs order as we consider that is included in the reasons for not obtaining such an order). Consultation criteria (ii) and (iii) have been combined and reference to "redress or benefit" removed as otiose. These changes are not intended to change the meaning. Precise language will depend on the final drafting of the regulations.

¹⁹ 2013 Standard Civil Contract, paragraph 6.58.

agreed, we intend that in applying this factor the LAA should take that conduct into account, but that it need not be stated expressly.

ii) the extent to which, and reason why, the legally aided party obtained the remedy they had been seeking in the proceedings (or failed to do so).

178. When considering cases against this factor, the LAA will take into account whether and to what degree the remedy which was in fact sought by the claimant was obtained. Where a case concludes prior to permission and the claimant receives the remedy sought in full, this will be a significant indicator that the claim was a good one (even if ultimately it was not possible to obtain costs).

179. The LAA will also consider the reasons why any remedy was obtained, or not. This was a separate criterion in the consultation, about which many respondents raised concerns. It was suggested in particular that this would mean that where defendants claimed for tactical reasons that the outcome had nothing to do with the claim this would adversely affect the provider's prospect of payment. This was not the intention. Rather, the reason why the remedy was or was not obtained may be relevant is because for example, the claimant may have obtained the remedy but it was demonstrably unrelated to the claim and therefore the provider should not receive payment.

180. Conversely, where in certain pre-permission cases there was a third party intervention rendering the claim academic but this factor could operate in the provider's favour (because the reason the remedy was not obtained was related to the intervention) when looked at in the round with the rest of the factors.

iii) the strength of the application when it was made (based on the facts which the provider knew or reasonably ought to have known, and on the state of the law at that time).

181. When considering cases against this factor, the LAA will take into account whether the application was genuinely meritorious at the time the application was made, based on the law and the facts as the provider knew or ought reasonably to have known them. The relevance of facts which come to light after issue will depend on whether the provider could reasonably have ascertained them at that time. We recognise concerns raised by respondents that information may only come to light following issue of an application, and that (where a case is withdrawn prior to permission) providers should not be denied payment if such information materially alters the prospects of success in a way that they could not have foreseen at the time of application. The LAA will therefore consider whether the provider knew (or ought reasonably to have known) information which affects the prospects of success. Where it transpires that there were facts that the provider could reasonably have ascertained at the point of issue, but did not do so, and those facts materially weaken the case, then this would tend against payment. This factor would allow the LAA to take into account the circumstances of that application, for example where it was genuinely urgent.

182. In relation to other points made about the review process we intend to introduce an internal review process in line with that proposed in the consultation. Providers will need to request that the LAA makes payment under the factors, providing evidence in support of their claim. The initial consideration of the claim will be taken by the LAA. If the provider is not satisfied with the LAA's decision they will have the opportunity for an internal review by the LAA. Ultimately challenge by way of judicial review will also

be available to the provider. The discretionary payment process will be prior and separate to existing costs assessments.

Wider impacts

183. We have taken into account the points raised by respondents in the Impact Assessment and the Equalities Statement.²⁰ We do not accept that the arguments made in respect of the combined effect of this change and the procedural defects proposal. Although that proposal may involve more work in preparing for permission, it is likely to apply to only small number of legally aided cases in which an alleged procedural defect is the only ground. The test for refusal of permission in such a case will remain a high one, and therefore we do not consider it is necessary to make an exception for such cases.

Alternative proposals

184. We have considered but do not intend to pursue the alternative proposals suggested. We recognise that there will be certain cases which conclude before a permission decision is made and as a result the LAA will have a discretion to permit payment in cases which are meritorious. We do not propose to apply the discretion to all cases in which permission is refused because those cases will have been subject to a court decision that they should not proceed any further and we consider that it is legitimate not to pay for cases which fail that threshold. We consider that restricting the principle of proceeding at risk to cases certified as “totally without merit” would certainly capture some cases which ought not to have been brought, but will not extend to all weak cases and therefore will not necessarily incentivise providers sufficiently to consider the strength of the claim before issuing.

185. In relation to the alternative suggested by the Judicial Executive Board and others, we consider that the judiciary has an important role to play in weeding out cases which are not meritorious which has been evidenced by the number of legally aided cases not granted permission (751 in 2012–13). However a similar system of judicial discretion previously existed in immigration and asylum upper tribunal appeals where legal aid for the application for reconsideration of a ruling of the Asylum and Immigration Tribunal (AIT) and the reconsideration hearing was awarded at the end of the process. The aim of the scheme was that it would reduce the number of weak challenges to AIT decisions reaching the Administrative Court. However, costs orders were made almost as a matter of routine and the scheme therefore failed to transfer any financial risk to the provider. We therefore do not propose to introduce a similar scheme in this context as we are not persuaded that it would achieve the intended aim.

Conclusion

186. The Government continues to believe that limited legal aid resources should be properly targeted at those judicial review cases where they are needed most, if the legal aid system is to command public confidence and credibility. Under our proposal the provider would still receive payment for meritorious cases through one of three routes: i) the case is granted permission (and therefore will be guaranteed payment at either legal aid or *inter-partes* rates); ii) if a case does not proceed to a permission decision, costs are agreed as part of a settlement or through a costs order; iii) if in

²⁰ Available at <https://consult.justice.gov.uk/digital-communications/judicial-review>

such a case costs cannot be recovered, for example where a settlement which is clearly in the best interests of the client is only offered on the basis of no costs, but the case was meritorious, then the provider will be able to recover payment at legal aid rates under the LAA's discretion.

187. We consider this and the adjustment to the factors under the LAA discretion will ensure that pre-permission meritorious cases will continue to be paid.