

Introduction to Strategic Litigation

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What is Strategic Litigation?

- The focus and impact of a case determines if it is strategic litigation.
- Test: individual facts and benefit v significant wider public Interest.

The Civil Legal Aid (Merits Criteria) Regulations 2013

Definition of Public interest

- **6.—(1)** For the purposes of these Regulations, a case is of significant wider public interest if the Director is satisfied that the case is an appropriate case to realise—
 - (a) real benefits to the public at large, other than those which normally flow from cases of the type in question; and
 - (b) benefits for an identifiable class of individuals, other than the individual to whom civil legal services may be provided or members of that individual's family.

Practicalities of applying for legal aid

- Two types: Legal Help for initial advice
- Public funding to investigate formally or to bring actual proceedings
- Eligibility- i. means and ii. Merit
- Legal Help for initial advice
- Some passporting benefits
- Gross income not to exceed: £2,657 per month* Disposable income not to exceed: £733 per month
- Deductions for specified outgoings
- Capital limit of £8k after specific allowances, including full outstanding mortgage on main dwelling and £100,000 equity disregard

Practicalities of applying for legal aid

- Public funding for court proceedings: more deductible outgoings when assessing eligibility
- Public funding required to instruct a barrister to advise formally on merits at investigative stage or to prepare pleadings for proceedings
- Legal Aid Agency (LAA) has online calculator for eligibility
- Key questions:
- Is there an eligible client?
- However, LAA will consider if there should be community financial contribution for claims with wider public interest

Alternatives to legal aid

- Conditional Fee Agreement: “No win no fee “
- Private funding: hourly rate or fixed fees potentially via group contributions
- Crowdfunding: requires significant work
- CrowdJustice and other crowdfunding platforms
- Applying to funding bodies

SLF expanded funding criteria: for litigation concerning vulnerable migrants

- Expanded criteria as of 4 February 2021 remove the age limit of beneficiaries
- Expanded to cover legal advocacy and communications linked to the pre-litigation research or third-party interventions
- In making recommendations about funding, the Expert Panel will take into account:
 - That the legal issue has the potential for significant impact on vulnerable migrants.
 - Whether alternative funding may be available for the proposed work; and whether the applicant has applied for such funding.
 - Whether the applicant has had previous funding from the SLF. Whether they consider there to be a real prospect of success if and when a claim is brought before a Court.

SLF funding criteria

- Whether the applicant has had previous funding from the SLF.
- Whether they consider there to be a real prospect of success if and when a claim is brought before a Court.
- Any priority areas of law or points of law which they have decided, in agreement with the funders, to prioritise and which have been publicised as such.

SLF funding criteria

- Where applications that raise the same or similar legal issues are considered at the same Panel meeting, and the Panel decide the criteria for funding are met, then funding will be awarded considering the following:
 - (i) where the work outlined is most likely to have the desired outcome.
 - (ii) the staff who would work on the project are deemed to have the most relevant experience and skill.
 - (iii) where the application is for an intervention, which case is strongest on the facts and which case is or is likely to be listed in court first.

Exclusions from SLF funding

- In general, the SLF will not make grants where:
- Funding is sought for pre-litigation research on an issue where work is already in progress by other legal representatives.
- The funding will not produce any significant positive change to the rights of vulnerable migrants in the UK.
- The applicant is based outside of the UK. Partnership applications where the lead partner is based in the UK may be considered.

Exclusions from SLF funding

- It is judged that the goals of the application may be more successfully achieved through an alternative route e.g. policy work.'
- Organisations have already received two grants from the SLF in the last 18 months, except in exceptional circumstances.
- Organisations that are in serious financial deficit.

Stages of strategic litigation: Pre-litigation research

- Methods: include gathering empirical evidence, statistics, case-studies
- Timescales: need to be mindful of these in terms of strict limitation
- Locate pre-existing research/evidence from other organisations that may assist
- Use of counsel: consider if necessary at this stage
- Appropriate expertise of counsel
- Pro bono element to match SLF funding
- Realistic estimate of work/ time involved
- Ensure as far as possible the outcome will be useful for the proposed litigation

Post pre-litigation research/ Substantive applications

- Counsel advice on merits: Junior/Senior / QC?
- Decide on prospective parties
- Interveners? Nature of intervention
- Availability of public funding?
- Pro bono element
- Any risks such as bringing the wrong case prematurely
- Costs risk: consider protective costs order
- Realistic estimate of work involved
- Realistic estimate of fees
- Remedies sought for most successful outcome

CASE STUDIES

Case Study 1

You are contacted by a potential new client. He is a failed asylum seeker who applied for support under s 4 Immigration and Asylum Act 1999 pending making a fresh claim. Support was refused and he appealed to the FTT which allowed his appeal. He was represented at the hearing and informed afterwards that he could be given emergency accommodation if he requested it but was also told that he would have to travel straight to that accommodation from the FTT and there was no additional funding available to him so that he could return to his existing accommodation and collect his belongings. He declined to do so as he understood he would receive accommodation within a few days. Two weeks have gone by since the appeal and he still has no accommodation. He was living with a friend but yesterday he was asked to leave and he spent the night in a park. He currently has nowhere to stay and no food available to him. He has been told that he is not able to request emergency accommodation now; the request must be made at the FTT itself after the hearing.

You are aware that this is not an isolated problem. There are currently considerable delays in individuals being provided with accommodation following a successful appeal. There is also an issue with individuals not being informed prior to hearings that if successful they may request emergency accommodation immediately after the hearing but only on the proviso that they travel immediately from the FTT to the accommodation. As such most individuals do not bring their belongings with them and are generally destitute such that they cannot afford to make the journey back to their accommodation for the purpose of collecting their things.

Questions

1. Is this a potential case for strategic litigation?
2. What are the client's immediate needs and how should these be addressed in terms of a claim?
3. What are the potential challenges you want to make in terms of strategic litigation?
4. How do you propose to develop them and what is needed in terms of evidence?
5. How should the individual and group aspects of the case be reconciled?
6. What should you seek in terms of relief on the strategic aspect of the case?
7. If the SSHD offers to settle the case against the individual, can you continue with the strategic litigation aspect?
8. What are the costs and other risks?

Case Study 2

You are contacted by a support worker working under a sub-contract with the Salvation Army to provide support and assistance to potential victims of trafficking and slavery. They have alerted you that they have recently been informed by their employer that during the pandemic specialist counselling and therapy services for their clients are to be cut and that henceforth clients will have to access such services through the ordinary channels within the NHS which include very long waiting times of around 6 months. The support worker informs you that she was not supposed to contact a lawyer, but was concerned that the cessation of the counselling and therapy services will have a very serious impact on clients and is wrong in principle as they are entitled to a period of recovery from their trafficking/slavery experiences by law as contained within an EU Directive, a Council of Europe Convention against Trafficking and published policy. There does not appear to have been any amendment to the published policy, nor any official announcement as regards the cessation.

The support worker tells you that she is in particular very worried about one female client who is very vulnerable having been subjected to years of sexual abuse by her traffickers who forced her to work in a brothel. She had started weekly 1:1 sessions in person which continued online during the pandemic. That client is very reliant on the sessions and is now constantly calling the support worker and breaking down on the phone.

Case Study 2 continued ..

Article 11 of the EU Directive provides:

Assistance and support for victims of trafficking in human beings

1. Member States shall take the necessary measures to ensure that assistance and support are provided to victims before, during and for an appropriate period of time after the conclusion of criminal proceedings in order to enable them to exercise the rights set out in Framework Decision 2001/220/JHA, and in this Directive.

2. Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to any of the offences referred to in Articles 2 and 3....

5. The assistance and support measures referred to in paragraphs 1 and 2 shall be provided on a consensual and informed basis, and shall include at least standards of living capable of ensuring victims' subsistence through measures such as the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services where appropriate.

This provision is broadly echoed in ECAT and in published policy. Article 4 ECHR which contains a prohibition on slavery is also relevant although the procedural aspects have not been fully litigated.

Questions

1. What further information do you want to elicit from the support worker?
2. Is this a potential case for strategic litigation?
3. If so who should be your client/s? Do you need more than one?
4. What are the client/s immediate needs and how should these be addressed in terms of a claim?
5. What are the potential challenges for strategic litigation?
6. How do you propose to develop them and what is needed in terms of evidence? Do you need evidence from the support worker? If she refuses to give a statement what can be done?
7. How should the individual and group aspects of the case be reconciled?
8. What should you seek in terms of relief on the strategic aspect of the case?
9. If the SSHD offers to settle the case against the individual, can you continue with the strategic litigation aspect?
10. What are the costs risks?

Strategic Litigation

Christine Benson, Maternity Action

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Maternity Action's focus - An end to all NHS Charging for maternity care

- Fed into government consultations and reviews about NHS charging since 2011
- Carried out research about impact of charging on vulnerable migrant women
- Called on the government to conduct a full inquiry about the effects of charging on vulnerable groups

Maternity Action's work...

- Casework service representing vulnerable migrant women charged for their care
 - Making an impact but no systemic change

SLF Funding

- Maternity Action and Southwark Law Centre were awarded £13,000 by the SLF
- Instructed our legal team – Janet Farrell from Bhatt Murphy solicitors, Shu Shin Lu, Laura Profumo and Jason Coppell QC
- FOI Requests to 146 Local Authorities, 180 NHS Trusts plus analysis Carried out research about impact of charging on vulnerable migrant women
- Witness statements from 7 charities, RCN, RCOG and academics plus detailed witness statement from Maternity Action bringing the evidence together

Queen (on the application of Maternity Action and DZT) v SSHC

- In October 2019, Maternity Action issued JR proceedings
 - The claim argued that:
 - the DHSC's failure to conduct a full inquiry into the impact of NHS charging on vulnerable migrant women was unlawful
 - Carried out research about impact of charging on vulnerable migrant women
 - The failure to fully exempt 3 categories of migrant women was discriminatory on grounds of sex

LEARNING FROM OUR EXPERIENCE

- Key information obtained in casework files
- Is the case management system being used effectively to capture data?
 - Costs – is strategic litigation right for the organisation? Costs Capping Orders/Crowd Justice/Risk to the organisation/exposure of organisation's finances
- Is everyone on board? Trustees/policy colleagues

What is a win?

- In the litigation, the DHSC disclosed that a review into NHS charging and the impact on vulnerable groups was planned
- Because of the litigation, the DHSC were pushed to publish a timeframe for the review
- Maternity Action will feed into the review and use evidence obtained as part of the litigation

Next steps:

- Parliamentary work to keep pressure on the DHSC to conduct the review
 - Continue with casework and policy work
- Further litigation of individual cases and possible further strategic litigation...?

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What does successful strategic litigation look like?

Kris Harris – Project 17

04/02/2021

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Background

Project 17:

Project 17 is a small charity that works to end destitution among migrant children. Project 17 works toward an end to the unjust NRPF condition and towards ensuring that individuals eligible for support under Section 17 of the Children Act 1989 are able to access appropriate support.

NRPF:

The no recourse to public funds' (NRPF) condition is imposed on undocumented migrants and most migrants with time-limited leave to remain in the UK.

NRPF prevents some migrants from accessing social housing and most welfare benefits, such as Universal Credit and child tax credits.

Without the safety net of social security to fall back on, many migrants with NRPF experience hunger, homelessness, and debt, and are at higher risk of exploitation and abuse.

Women, low-income families, individuals with disabilities, and black and minority ethnic people are disproportionately impacted.

This risk of destitution for vulnerable young migrants and their families has significantly increased under Covid-19.

The opportunity

Many strategic interventions are planned years ahead with targeted evidence gathering and preparation. Others are seized upon in the moment but both can be very successful if the organisation has the monitoring and structure in place to take advantage of the opportunity.

The Unity Project and Adam Hunt of DPG had been challenging the issue for years – however, case after case had been resolved before it made it to court. We did not know this one would be heard.

The upcoming case was brought to our attention in the end of March with a substantial hearing coming up in early May – so we had to act very quickly.

We were only able to do this because:

We have a reasonably robust case monitoring system

We were carrying out a survey of the impact of Covid-19 on families with NRPF at the time

We had access to good quality legal advice from legal representatives who were willing to advise pro bono.

We have the support of our board of trustees and an organisational appreciation of risks and benefits.

The case - WJ v SSHD

An eight-year old boy and his mother, supported by The Unity Project, brought a Judicial Review challenging the No Recourse to Public Funds (NRPF) scheme as it relates to the parents of British children granted leave to remain under the ten-year route to settlement.

Repeated NRPF conditions had led to this family experiencing long periods of destitution, street homelessness, and instability. The child had moved school five times before he was eight years old.

The family argued that:

- Limited leave applications carry significant cost – 4x£2033 (now £2593)
- NRPF would ‘normally’ be imposed upon those granted leave to remain as a partner, child or parent unless applicant can evidence they are destitute or other compelling circumstances.
- Possible to apply for NRPF to be lifted but the application is complex, often slow, not covered by legal aid.
- The policy required an applicant to become destitute **before** the NRPF condition could be lifted and was therefore incompatible with Article 3 of the European Convention on Human Rights (ECHR) because it forced people into destitution.

Should Project 17 intervene?

Project 17 wanted to intervene in support of the claimant. However, needed to consider if our intervention would be of genuine and substantial assistance to the court in this matter.

It was felt that the defendant would likely argue that there would not be a breach of Article 3 rights on the grounds that families with NRPF who become destitute should be able to access accommodation and limited financial support from the local authority under section 17 of the Children Act 1989.

Project 17's casework evidence shows that:

- families of vulnerable young migrants face significant difficulties in securing section 17 support
- section 17 is an inadequate safety net against destitution, both in the present public health emergency and in ordinary times.
- vulnerable young migrants and their families are at increased risk of destitution as a result of the COVID-19 pandemic.

The Preparation:

We secured a strong legal team at Public Law Practitioners and Amanda Weston QC of Garden Court.

Both acted on a pro bono basis in advising on the merits on intervention, advising on issues to intervene on and liaising with the Claimant's legal team.

The legal team also advised our Trustee Board on issues such as cost risk.

For the intervention Amanda Weston QC agreed to work pro bono whilst PLP acted on reduced rates – limiting the cost of our intervention.

Strategic Legal Fund

Project 17 applied for funding from the Strategic Litigation Fund for Young Migrants in order to be able to instruct the Public Law Project to intervene in the case.

The outcome

On 7 May 2020, the High Court ruled that part of the Home Office's 'no recourse to public funds' policy was unlawful (*R (W, A Child By His Litigation Friend J) v Secretary of State for the Home Department & Anor* [2020] EWHC 1299).

The judgment found that, taken together, the Immigration Rules and the guidance for caseworkers were unlawful as they failed to uphold the Secretary of State's legal obligation to take proactive steps to prevent destitution occurring. It was the judges' view that these documents had the 'potential to mislead caseworkers in a critical respect', which gave 'rise to a real risk of unlawful decisions in a significant, and certainly more than minimal, number of cases'.

A significant legal victory! but...

The impact

The court ordered the Home Office to publish revised guidance – which now makes clear that the NRPF condition ‘must’ be lifted, or not imposed, *‘if an applicant is destitute or is at risk of imminent destitution without recourse to public funds’*.

This should mean that more people are granted access to public funds if they are experiencing, or are at risk of, destitution. It also means that people can apply at an earlier stage.

However, exactly how ‘imminent risk’ will be interpreted by caseworkers remains to be seen. Similarly, we will need to monitor the extent to which the changes in guidance work in practice.

The judgement does not go far enough

- The NRPF policy still remains largely intact, and the issues that led up to the case have not gone away.
- Will not change things for undocumented people nor people with NRPF who are on other visas e.g. student or work visas - many of whom have become destitute as a result of the Covid-19 pandemic.

Must build on the case to argue for NRPF to be scrapped. Everybody should have the right to a home and enough to eat, regardless of their immigration status!

So, what does strategic litigation look like?

There are many paths to successful strategic litigation, but a few rules of thumb:

- Speak from your strength – your area of expertise
- Ongoing quality data collection and monitoring – without our database we could not have intervened
- It needs to be the right case
- Prepare well and access good quality legal advice before and during the process
- Get organisation buy-in and be aware of (and prepared for) the risks
- Recognise the limitation of the impact of strategic litigation – part of wider strategy
- The job is never done..... monitor application, impact of change and wider applications