

Costs, complaints and claims against the police



A recent decision of the Supreme Court Costs Office, *Kerr and others v The Commissioner of Police for the Metropolis* SCCODOR500414, unreported, offers assistance to claimants' lawyers in recovering costs associated with complaint processes against the police and other public authorities. **Fiona Murphy** – who represented the claimants in *Kerr* – discusses the implications for case-handling and endeavours to make sense of the Legal Services Commission's (LSC's) new Funding Code guidance.¹

The claim and the complaints

On 6 July 1997, John Kerr and his co-claimants suffered assaults at the hands of police officers. They were falsely imprisoned and, thereafter, maliciously prosecuted on evidence concocted and fabricated by the officers who had assaulted them. The men recorded complaints against the police. The initial investigation of the complaints was concluded by January 2000. It was decided that there was insufficient evidence to prosecute or discipline any officer. At that stage, the Commissioner of Police for the Metropolis advanced derisory offers of settlement which the claimants rejected.

The claimants made detailed representations with regard to the adequacy of the complaints investigation and the irrationality of the attendant decision-making processes. The investigation was reopened but the new inquiry did not complete until late 2002. In the summer of 2003, the Crown Prosecution Service (CPS) and the then Police Complaints Authority (PCA) reaffirmed their original decisions that there was insufficient evidence to support criminal or disciplinary proceedings against any officer. Nevertheless, the claims against the commissioner were, subsequently, rapidly compromised with substantially improved damages. The total sum of £182,000 was negotiated on a 'full liability basis' with both aggravated and exemplary damages being accommodated within each award.

The claimants' involvement in the complaint process materially contributed to the successful resolution of their civil dispute. At a detailed assessment hearing on 23 March 2005 (see 'The assess-

ment hearing' below), the commissioner was ordered to pay the costs associated with assisting the claimants with their complaints, including the making of representations to the PCA and CPS. The commissioner lodged an appeal but, following counsel's opinion, withdrew the action and paid the claimants' costs associated with responding to it (see 'The commissioner's appeal' below).

The assessment hearing

At the assessment hearing on 23 March 2005, Deputy Master Haworth was asked to adjudicate on a preliminary decision with regard to work associated with the complaints investigation. The claimants' bill of costs had not differentiated between work that had been undertaken in relation to the action, and that which had been undertaken in relation to the complaints. The work associated with the complaints included advising and assisting the claimants with their complaints, and communications with the PCA and the CPS in relation to the decision-making concerning those complaints.

On behalf of the commissioner, it was submitted that:

- The costs associated with making complaints and associated representations were not covered by the agreed consent order that the defendant would pay the claimants' costs of the action;
- Work carried out by the claimants' lawyers in relation to either the CPS or the PCA could not be recovered in the course of the civil proceedings because that work did not relate to the costs of the action;
- Work associated with making complaints and representations in relation to the complaints were

EWHC 62 (Admin), Collins J held that it was quite clear from the European Court of Justice's (ECJ) decision in *Collins v Secretary of State for Work and Pensions*, 23 March 2004, Case C-138/02, that a work seeker is not to be regarded as a worker and does not have the rights to benefits which are provided by Regulation 1612/68 article 7.

Other persons excluded from the habitual residence test include accession state workers and their dependants. Generally speaking, a national of an accession state must complete a continuous period of 12 months' registered work before s/he is able to exercise the same rights as other EU nationals. The scheme is set out in the Accession (Immigration and Worker Registration) Regulations 2004 SI No 1219, which exclude an accession state national from registration if, on 30 April 2004, s/he had leave to enter or remain in the UK that was not subject to a restriction on employment, s/he was legally working on 30 April 2004 and had been legally working in the UK without interruption for 12 months ending on that date, or s/he legally works in the UK without interruption for a period of 12 months falling partly or wholly after 30 April 2004. It is also worth noting that on or after 1 May 2004, any leave to enter or remain that has been given to an accession state national or family member ceases to have effect.

A person with a right to reside under the Immigration (European Economic Area) Regulations (I(EEA) Regs) 2000 SI No 2326 is also excluded from the habitual residence test insofar as that right derives from Council Directives 68/360/EEC, 73/148/EEC or 75/34/EEC. In summary, these provide for a right to reside for workers and their families, for EU nationals with regard to the establishment and the provision of services and for an EU national to remain in another EU state after having pursued there an activity in a self-employed capacity. A person may also have a right to reside under the I(EEA) Regs if s/he is unable to work due to

injury or accident in the workplace, as may his/her family and dependants.

Finally, it is worth noting that the ECJ has recognised that an applicant may have the right to reside by direct application of article 18(1) of the EC Treaty in certain limited circumstances. For example, in *Baumbast and R v Secretary of State for the Home Department*, 17 September 2002, Case C-413/99, it was held that where children have the right to reside in a host member state in order to attend general educational courses, the parent who is the primary carer of those children, irrespective of his/her nationality, is entitled to reside with them notwithstanding the fact that the parents have meanwhile divorced or that the parent who has the status of EU citizen has ceased to be a migrant worker in the host member state.

Summary

As was warned at the start of this article, the housing rights of immigrants and asylum-seekers is a complicated subject. However, once a client's immigration status has been established, it should be possible to establish whether NASS, social services or the local authority are responsible for providing housing assistance.

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* Available at: www.homeoffice.gov.uk.

outside the scope of the claimants' certificates of public funding. Therefore, there was no retainer in respect of work of this nature;

- Specific points of objection were taken in relation to, for example, the formulation of the complaints, the drafting of complaint statements, and representations to the PCA and CPS concerning the adequacy of investigations and the quality of decision-making.

On behalf of the claimants it was submitted that:

- The costs of all reasonable investigations incidental to the claim are recoverable and covered by the public funding retainer;

- The material generated by the commissioner's own complaints investigation had, on this occasion, proved an inadequate basis for decision-making with regard to the complaints and, therefore, the civil claim;

- It was necessary to offer assistance to the claimants in the preparation of their complaint statements as any discrepancy between those accounts and those provided in civil proceedings would adversely affect the merits of their civil claim;

- Police complaint procedures required victims of police misconduct to provide a detailed and signed account at an early stage without the benefit of the protections that are available in civil proceedings. It had, therefore, been necessary and appropriate to assist the claimants with the preparation of their statements including attendance at meetings with the investigating officers;

- The initial investigation of the complaints had been flawed. Therefore, it had been necessary and, indeed, valuable for the purposes of the civil dispute to communicate with the PCA and CPS so as to point out the deficiencies in the investigation of the complaints;

- The representations advanced on behalf of the claimants had led to the investigations being reopened and further evidence, much of which had been collated by the claimants' solicitors, being considered;

- The commissioner had requested – and the claimants had agreed – to delay progressing the civil claim so that he would have the benefit of considering the outcome of the reopened investigation;

- The care that had been taken to ensure that the investigation proceeded on a correct evidential footing materially contributed to the outcome of the civil dispute albeit that none of the complaints were, in fact, upheld;

- The claimants' involvement and contribution to the complaint process was in keeping with the spirit of the Civil Procedure Rules, and had contributed to the resolution of the civil dispute without recourse to the courts; and

- Had the claimants permitted the complaints' investigation to proceed without the involvement of their solicitors (ie, without the benefit of professionally prepared statements from the claimants and their witnesses, disclosed medical evidence and detailed submissions concerning the inadequacies of the original investigation and attendant decision-making), the commissioner may have contemplated litigating the case in the mistaken view that the claims were without merit.

The judgment

Deputy Master Haworth's judgment has not been reported but a transcript has been obtained.² He concluded that the conduct of the litigation could not be compartmentalised 'in different boxes' in the manner proposed by the commissioner. In his conclusion, the 'way in which the claim was investigated, was tortuous, labyrinthine and took a vast amount of time both by the police and also the claimants' solicitors'. The claim was 'handled in a way that was intent on saving costs, and indeed in my judgment did save costs'. With regard to the need to assist the claimants with the preparation of their complaint statements, he added, 'I have no doubt that [any discrepancy between the civil and complaint statements] would have been ventilated in court and

would have come back to haunt [the claimants]'.³

Accordingly, the master found for the claimants on the preliminary issue. In the event, his ruling resulted in a prompt and advantageous compromise of the claimants' costs. Had this not been achieved, a careful item by item consideration of reasonableness – with regard to the length of time spent on each one – would have been necessary.

So far as the retainer point was concerned, the master noted that, in correspondence with the LSC before the granting of certificates, the claimants' solicitors had described the need for assistance to be offered with the complaint process. He also noted that the certificate of public funding permitted, 'all steps up to and including the mutual exchange of witness statements'. He concluded that "all steps" included the investigative process and that investigative process must mean an element of dealing with PCA, CPS, et al'.

The commissioner's appeal

The commissioner sought leave to appeal and this was granted. Deputy Master Haworth noted that it was a relatively novel point and there were substantial costs involved.

On 6 April 2005, the commissioner lodged an appeal and, on 21 April 2005, a Respondent's Notice was entered on behalf of the claimants. Subsequently, and having obtained counsel's opinion, the commissioner withdrew his appeal with an agreement to pay the claimants' appeal costs. In a letter dated 29 April 2005, the commissioner sought to explain his reasons for not proceeding with his appeal. He accepted that work associated with the preparation of statements and evidence which was of 'use and value' to the civil proceedings was properly chargeable *inter partes* notwithstanding that the immediate purpose of the work was in relation to the complaints. This is an important concession on the part of the commissioner and will, hopefully, bring to an

end a long history of acrimonious dispute on the topic.

However, the commissioner continued by taking issue with Deputy Master Haworth's judgment in relation to the costs associated with representations to the PCA and CPS concerning the adequacy of investigations and decision-making processes. The commissioner endeavoured to make good the argument that the entirety of the costs associated with those areas of the complaints had not been included in the *Kerr* bill and that this had influenced his decision not to pursue the appeal.

By a letter dated 13 May 2005, we responded and pointed out that the boundary we had drawn – and which had proven acceptable to Deputy Master Haworth – was to claim against the commissioner for work associated with 'submissions we made in an effort to improve the investigation and decision-making upon which both parties would be relying [in the civil proceedings] and the preparation of judicial review proceedings against the PCA/CPS which were also in contemplation'.

This exchange of correspondence is brought to practitioners' attention because, in a subsequent, unrelated assessment hearing before Master Rogers on 25 May 2005, the commissioner's representative endeavoured to rely on the letter of 29 April 2005 by way of qualification of Deputy Master Haworth's judgment but without reference to the claimants' response. In the event, Master Rogers followed Deputy Master Haworth's reasoning, and costs associated with assisting the claimants in pursuing their complaints and liaising with the prosecutorial authorities were also allowed against the commissioner in that matter.

Housing rights of immigrants and asylum-seekers – Part 2

HOUSING

Costs, complaints and claims against the police

PRACTICE AND PROCEDURE

Amendments to the Funding Code

On 25 July 2005, s8 of the Funding Code, which relates to claims against public authorities, was amended to include new criteria at 8.2.2 and 8.3.4 (police complaints) that permitted the LSC to refuse funding Investigative Help and Full Representation respectively, where it is more appropriate for a client to pursue the police complaints procedure than litigation. The LSC has emphasised, in its introduction to the new procedures, that these criteria are discretionary rather than automatic and that, 'In a wide range of circumstances cases will not be refused under this criterion.'

Funding Code decision-making guidance concerning the operation of the new criteria has been posted on the LSC's website.³ Section 7.3 considers the general relevance of complaints and ombudsman schemes to funding decisions whereas ss17.4 (criteria for cases in s8) and 17.6 (police complaints) respectively, consider the specific issues that arise in litigation against the police and other public authorities. The guidance addresses the circumstances in which funding may be deferred if a complaint is not first pursued, but it fails to address the more relevant consideration for police cases regarding how LSC decision-makers should respond to a request for legal representation to be granted while the complaint process is pursued. It is submitted that the LSC should give thought to offering additional guidance in light of *Kerr*.

The general guidance at s7.3 asserts that 'funding is available, under Legal Help, to enable the client to pursue a complaint' but 'Legal Representation is not available'. This assertion contrasts with Funding Code criterion 2.1 (levels of service) which explains the scope of Legal Representation in the following terms:

'Legal Representation' is a level of service the grant of which authorises legal representation for a party to proceedings or for a

person who is contemplating taking proceedings. This includes the following:

- (i) *Litigation services.*
- (ii) ...
- (iii) *All such help as is usually given by a person providing representation in proceedings, including steps preliminary or incidental to proceedings.* (Author's emphasis)

It was a necessary element of Deputy Master Haworth's judgment in *Kerr* that he found work associated with the complaints to be 'steps preliminary or incidental to proceedings' and/or 'litigation services'. Indeed, even the commissioner has conceded as much in relation to some aspects of the costs associated with the complaint process.

Where there is a conflict between the code and the guidance, as would appear to be the position here, the code prevails. It is submitted that it would, in any event, be irrational for the LSC to decline to approve complaints-related work of the type undertaken in *Kerr* under the terms of the certificate: to do so would jeopardise the Community Legal Service (CLS) fund. Certainly the LSC's Special Cases Unit, which has developed expertise in the management of these cases, has proven willing to approve complaints-related work under funding certificates where a practitioner has made good an argument about why such work is necessary, proportionate, and likely to prove of 'use and value' to the resolution of the civil dispute.

It is also relevant to the scope of this article to consider the impact of the new criterion and guidance concerning the discretion to decline funding until after a complaint has been pursued. Section 17.6 of the decision-making guidance considers the circumstances in which it 'is more appropriate for the client to pursue a complaint against the police than to litigate'. The guidance is silent on the topics of when, and by what funding method, practitioners might or should pursue a joint complaint

and litigation approach. These fundamental lacunae in the guidance reflect a lack of understanding about how litigation of this type should be pursued.

It was recognised by the costs judge in *Kerr* that effective and cost-efficient litigation against the police can and – it is submitted – often will involve ensuring that the quality of the complaints investigation is informed by the victim's participation through providing evidence to the inquiry and/or making representations with regard to the manner of the investigation and the quality of the related decision-making. It will ill-serve the victims of police misconduct and the imperatives that have been set for the LSC (as reflected elsewhere in the code) to permit the abandonment of responsibility for securing evidence to the very police force whose conduct has been called into question. Effective litigation against public authorities requires early and effective action to protect the victim's position and, in the case of police complaints, representations to the relevant investigators and, if appropriate, to their supervisors at the Independent Police Complaints Commission (IPCC) regarding the conduct of investigations and the attendant decision-making.

The guidance is, however, couched in discretionary terms and it is clear that the LSC will consider the circumstances of individual cases. For example, the guidance remarks that the degree of involvement by the IPCC is a relevant consideration in deciding whether funding should be deferred. Thus, a case that is supervised rather than independently investigated is more likely to secure funding at the outset.

It is noted that this guidance may provoke the most unpalatable outcome: that those who have suffered the most catastrophic consequences of police misconduct are the least likely to secure timely funding. In any event, practitioners should endeavour to make good the argument, in appropriate cases, that funding should be granted to enable the client's position in both

the complaint and the civil claim to be protected.

The guidance explains that the private client test will be considered in each case, ie, 'would a reasonable client of moderate means be prepared to pay solicitors privately to investigate a potential claim before first pursuing a formal complaint against the police and considering the response received?' (s17.6(3)). It is submitted, therefore, that where a client has good reason for declining to pursue a complaint, that explanation should be provided to the LSC with the expectation that it will be a persuasive one.

With regard to permitting funding for the purposes of pursuing a joint litigation and complaint approach, a modified private client test is similarly appropriate, ie, would a reasonable client of modest means, who has decided to await the outcome of the complaint process before litigating, be prepared to pay solicitors privately to ensure that his/her interests are protected in that process and all necessary evidence is secured on his/her behalf, so that the outcome of the complaint process is of better value to the resolution of the civil dispute? In essence, this argument is that the work associated with the preservation of evidence and the protection of a client's interests in the complaint process is proportionate to the benefit to be achieved and, thus, consistent with the new proportionality test which now applies to claims against public authorities (in substitution for the general cost benefit test).

Section 17.6(5) of the guidance indicates that funding is likely to be granted (provided the other merit criteria are met) if the complaint has not been resolved within six months of it being communicated, and provided that the complainant has been cooperative. It will often be appropriate, therefore, to seek funding for the purposes of preserving evidence (including within the complaints process) and to make clear that other steps – such as the instruction of counsel and

ACTIONS AGAINST THE POLICE: A PRACTITIONER'S CHECKLIST

Obtain client's instructions

- Most victims of police misconduct have a clear and rational explanation about why they might or might not wish to be involved in a complaint process and/or civil litigation. In offering explanations to the court and/or the LSC with regard to the decision reached, the most compelling explanation will be that offered by the victim.
- Full advice about the pros and cons of becoming involved in a complaint process and/or civil litigation should be offered to the client and the file should be recorded carefully.

Complaint only

- Consider whether there is sufficient benefit to the client from professional, legal assistance with the complaint process. If so, Legal Help will be available subject to his/her means.

Civil remedy only

- Consider whether a reasonable private client of modest means would, in the particular circumstances of the case, proceed with a civil remedy without first pursuing a formal complaint and taking into account the response received.
- If it is considered that the private client test is met, submit an application for funding as soon as practicable relying on the discretionary nature of criteria 8.2.2 and 8.3.4 of the Funding Code.
- Factors to emphasise in the application might be the following:
 - Any well-founded lack of confidence in the process (perhaps arising from earlier experience);
 - The level of IPCC involvement;
 - Any impending limitation periods;
 - Any disparity between the issues raised by the civil proceedings and any complaint;
 - The client's personal circumstances; and
 - Any delay in the investigation of the events to date.

Civil and complaint remedy

- Consider whether there is sufficient benefit to the client from professional, legal assistance with his/her funding application and the initial stages of the complaint process. If so, proceed with those stages under Legal Help.
- Consider whether there is a necessity to undertake work to protect your client's position within the complaint process including the following factors:
 - Any concerns that your client expresses with regard to the conduct of either the police or the IPCC to date;
 - Any flaws that have already been identified in the decision-making process including, for example, the mode of investigation;
 - Any likelihood that the quality of investigation is likely to be improved by your client's active participation at this stage of the process. (In this context particular considerations arise if articles 2 or 3 of the European Convention on Human Rights are engaged);
 - Your client's perspective about the need for representation;
 - Your client's vulnerability;
 - Any areas of evidence that fall to be secured as a matter of urgency including, for example, photographic, medical or witness statements;
 - The complexity of the incident (in complex cases it is usually detrimental to delay taking witness statements until the conclusion of the complaint process); and
 - Whether a private client of modest means would instruct solicitors, and to what extent, while the outcome of the complaint process is awaited.
- If those factors or sufficient of them are present to meet the private client test, submit an application for a certificate of public funding without delay. Offer to address any concerns about the reasonableness or proportionality of any envisaged step by reference to a costed case plan. Make reference to *Kerr* and to your duty to protect the CLS fund.
- Rely on that correspondence as evidence of your publicly funded retainer so as to recover reasonable costs inter partes at the end of the case, if successful.
- If there is no work associated with protecting your client's position in the complaint process, defer your application for six months but keep the position under review in the event that the police and/or the IPCC fail to respond appropriately to the complaint.
- Continue to record your file carefully with regard to the justification for any assistance to your client with the complaint process and any advantage thereby secured.

the commencement of proceedings – will not be proceeded with until six months after the complaint was communicated.

It is to be noted that although the guidance contemplates circumstances in which the complaint need not be first pursued, and the LSC's own introduction to the changes envisages that 'in a wide range of circumstances cases will not be refused under this criterion', only the following narrow examples are actually offered:

- Where proceedings are necessary for urgent limitation purposes;
- Where a case would be severely prejudiced through delay, for example, because witnesses who need to be interviewed are going abroad or are seriously ill; and
- Where the subject of the case does not involve allegations of misconduct against police officers but, for example, concerns the direction and control of the police force.

There is, therefore, a risk that decision-makers will apply the guidance in a mechanistic manner without reference to the prevailing imperatives of the code, which rely on proportionality and offer a priority to this type of case. It is hoped, however, that decision-makers will be persuaded of the logic of the approach advocated here and approved in *Kerr*, so that practitioners might best focus their endeavours on representing their client's interests, improving the merits of litigation and securing payment for reasonable work from the opponent rather than from the LSC.

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- 1 The amended Funding Code and *Funding Code decision-making guidance* are available at: www.legalservices.gov.uk/civil/guidance/funding_code.asp.
- 2 Transcript available from MK Transcribing Services, tel: 01908 640067.
- 3 See note 1.