ASYLUM AND IMMIGRATION TRIBUNAL

DM (Timing of funding application) Zimbabwe [2006] UKAIT 00088

THE IMMIGRATION ACTS

Heard at: Field House
On: 24 October 2006

Determination Promulgated:
30 November 2006

Before:

Miss E Arfon-Jones DL, Deputy President of the Asylum and Immigration Tribunal
Senior Immigration Judge Drabu

Between

Appellant

Against

SECRETARY OF STATE

Respondent

Representation:

For the Appellant: Mr C Yeo, IAS (London)
For the Respondent: Mr C Avery, Home Office Presenting Officer

*There is no prescriptive time limit for an application to be made for a funding order under section 103 D (3) of the Nationality, Immigration and Asylum Act 2002, nor in any secondary legislation, nor in the Practice Directions. Paragraph 6 of the CLS Regulations 2005 provides that an order under Section 103 D (3) **must** be made if the Tribunal allows an appeal on reconsideration. There is no requirement for an explanation for any delay.*

DETERMINATION

History

1. The Appellant is a citizen of Zimbabwe, who arrived in the United Kingdom on 20th January 2005 and applied for asylum on arrival. The application for asylum was refused. An Immigration Judge dismissed the appeal on both asylum and

human rights grounds in a determination promulgated on 25th May 2005. At that hearing the Appellant was represented by the IAS.

2. A section 103A Notice was filed on 2nd June 2005 on the Appellant's behalf by the IAS. However, part D relating to costs was not completed; there was no deletion of any one of the three options. Reconsideration was ordered on 9th June 2005 by Senior Immigration Judge Gill.

3. The first stage reconsideration was initially listed before Senior Immigration Judges Freeman and Gill on 27th September 2005 but was adjourned pending a review of the country guidance. On 10th January 2006 the reconsideration was heard by a panel presided over by Senior Immigration Judge Warr, sitting with Mrs J Holt and Mr T A Jones MBE. They concluded that the Immigration Judge had made a material error of law and substituted a fresh decision allowing the Appellant's appeal on both asylum and human rights grounds in line with AA [2005] UK AIT 0144 and LK [2005] UK AIT 159. The IAS made no request for a costs order at the conclusion of the hearing on the 10th January 2006.

4. The Respondent applied for permission to appeal to the Court of Appeal on 17th February 2006, refused by Senior Immigration Judge Warr on 10th March 2006.

5. On 2nd May 2006 the IAS wrote a letter to Field House in which they submitted a list of cases, including this case, in which they were still awaiting funding orders. They asked that such funding orders could be forwarded as soon as possible.

6. On 6th June 2006 Senior Immigration Judge Warr refused the application as follows:-

> *"In this case the Appellant applies for a funding order. The Appellant applied for an order of reconsideration on 2 June 2005 but did not complete part D of the application form. Whilst this might not be fatal it would require explanation: see GD (Funding Orders – restrictions – 2005 Regulations) Serbia and Montenegro [2005] UKAIT 00166. There has been no explanation. Furthermore the Tribunal does not recall any application for a funding order being made at the hearing itself.*
> *It would appear to follow from paragraph 10 of RS (Funding – meaning of "a significant prospect") Iran [2005] UKAIT 001388 that it is necessary to make a application for a funding order on making the application for an order of reconsideration or, at the latest, at the hearing:*
>
> > *"10. Although it is not directly in point in this reconsideration application, because the Appellant was unrepresented when he made the application, it does not seem to us that a failure to complete part D of form AIT/103A would preclude the making of such an application at a later date although the Tribunal would no doubt require a cogent explanation for the failure of the Representative properly to complete that part of the form. It should not be assumed that this would be regarded simply as a formality by the Tribunal. We note the wording*

of the note which makes it clear that an affirmative answer is required "to ensure" that consideration is given to the meaning of a funding order. But, we do not read that as a prerequisite or as a matter which in any way fetters the natural meaning of Rule 33 (1) (b) which may, subject to the note of caution which we have sounded above, in our view be satisfied if the application is made at any time up to the end of the reconsideration hearing. (See Rule 15 (5) of the current Practice Directions of the Tribunal)."
Accordingly this application is refused."

7. In a letter dated 8th June 2006 the IAS sought a review of the decision not to make a funding order and gave its reasons in the following terms:-

> *"We seek a review of the decision to refuse to make a funding order in this case. The decision is unlawful by way of section 6 (2) of the Community Legal Services (Asylum and Immigration Appeals) Regulations 2005. That says:*
>
> > *"6 (1) The Tribunal must exercise the power to make an order under section 103D(3) in accordance with this regulation.*
> > *(2) If the Tribunal allows an appeal on reconsideration, it must make an order under section 103D(3)."*
>
> *This appeal was allowed on reconsideration. The Tribunal, it is contended, has no discretion in this matter.*
> *In any case there is nothing in the statutory regime, including the Practice Directions, which precludes an application being the following the final determination of a reconsideration application. Rule 15 (5) of the current Practice Directions does not insist in that regards as the Rule refers to submissions in respect of the application for a Funding Order and not to the application itself. Following the promulgation of RS (Funding – meaning of "significant prospect") Iran [2005] UKIAT 00138 such submissions would readily be necessary. Furthermore, the section of RS relied upon by Mr Warr in refusing the order is not expressed as providing hard and fast rules. Nothing in that passage amounts to a proposition in law. If it purports otherwise, it is clearly ultra vires of the 2002 Act and Regulations referred to above.*
> *As to cogent reasons for a failure to tick the appropriate box on the PF244, or to apply for the funding order at the hearing, we simply overlooked doing those things. That was our administrative error. We apologise.*
> *We do nevertheless wonder why the Tribunal would want to deny us a funding order in this case. However the matter is looked at, there was nothing to preclude the granting of the order. We are a charity with no other source of income for our casework. The appeal was allowed. The Tribunal prefers the Appellants are represented at hearings. Was there really any point in trying to deny us funding for this case, incurring the use of further public funds to resolve the matter?"*

8. Senior Immigration Judge Warr then gave instructions that the oral hearing of the review of his decision to refuse an order under section 103D should be heard before another Senior Immigration Judge under Rule 73 of the Community Legal Service (Asylum and Immigration Appeals) Regulations 2005.

Hearing

9. At the hearing before us at Field House on 24th October 2006 Mr Colin Yeo, legal representative of the IAS in London appeared on behalf of the Appellant. Although Mr C Avery, Home Office Presenting Officer, was present, he was not invited to partake in the proceedings as the application did not in any way impact on the Respondent to the substantive appeal.

10. At the outset Mr Yeo acknowledged that the IAS had failed to fill in the application form correctly. He also recognised that there had been no oral application at the conclusion of the hearing. Notification of the application had been made by fax communication thereafter. He informed us that this was the usual practice and one which was administratively convenient for the IAS.

11. He informed us that because of this current application before the AIT the Home Office had recalled the file which had delayed the issuing of the grant of indefinite leave to remain to the Appellant. It had also resulted in further unfunded work by the IAS which he reminded us operated as a charity.

12. Relying on his detailed skeleton argument, Mr Yeo reminded us that paragraph 6 of the CLS Regulations 2005 was mandatory. The wording "*if the Tribunal allows an appeal on reconsideration, it must make an order under section 103D(3)*", did not confer any discretion upon the Tribunal. Its terms were unambiguous; the Funding Order had to be made where an appeal had succeeded on reconsideration.

13. Mr Yeo also relied on the Procedure Rules, especially Rule 33(1) and the President of the AIT's Practice Directions. He also referred us to the cases of GD, EB and RS.

14. At paragraph 6 of GD the Tribunal had found that there would be need for a "*cogent explanation*" where an application for funding had not been specified at the outset on the appropriate form. Mr Yeo submitted that there was no statutory basis for that assertion. Nowhere in the primary nor secondary legislation, nor the rules, nor the practice directions was there any requirement specified as to the timing of an application. The statutory framework was entirely silent on the timing of an application for a Funding Order. The only limitation was the requirement at paragraph 4 of the CLS Regulations which required that a supplier was acting pursuant to a grant of Legal Representation.

15. Whilst paragraph 15.4 of the AIT Practice Directions purported to require that a Funding Order Application under section 103D of 2002 Act "*specified*" at the time at which a reconsideration application was made, Mr Yeo submitted that the President in his Practice Directions could not disapply the requirement of the Procedure Rules or the CLS Regulations.

16. He invited us to approach the construction of the statutory framework in a purposeful manner, reminding us that its intention was to discourage unscrupulous and incompetent representatives. Reminding us that the Appellant had won his appeal, there was no discretion to refuse a Funding Order. Financial implications had ensued from these protracted proceedings and he urged us to order that the Appellant's costs in respect of the reconsideration be paid out of the prescribed Funds.

The Law

17. The statutory framework is found in the National Immigration and Asylum Act 2002, in the Community Legal Service (Asylum and Immigration Appeals) Regulations 2005 ("CLS Regulations") and The Asylum and Immigration Tribunal (Procedure) Rules 2005 as amended by the Asylum and Immigration Tribunal (Procedures) (Amendment) Rules 2005, and the AITs own Practice Directions issued by the President, Mr Justice Hodge.

18. The relevant primary legislation is found in the 2002 Act at section 103D which provides as follows:-

> *"103D Reconsideration: legal aid*
> *(1) On the application of an appellant under Section 103A, the appropriate court may order that the appellant's cost in respect of the application under section 103A shall be paid out of the Community Legal Service Fund established under section 5 of the Access to Justice Act 1999 (c.22).*
> *(2) Subsection (3) applies where the Tribunal has decided an appeal following reconsideration pursuant to an order made –*
> *(a) under section 103A(1), and*
> *(b) on the application of the appellant*
> *(3) The Tribunal may order that the appellant's costs –*
> *(a) in respect of the application for reconsideration, and*
> *(b) in respect of the reconsideration,*
> *shall be paid out of that Fund.*
> *(4) The Secretary of State may take regulations about the exercise of the powers in subsections (1) and (3).*
> *(5) Regulations under subsection (4) may, in particular, make provision –*
> *(a) specifying or providing for the determination of the amount of payments;*
> *(b) about the persons to whom the payments are to be made;*
> *(c) restricting the exercise of the power (whether by reference to the prospects of success in respect of the appeal at the time when the application for reconsideration was made, the fact that a reference has been made under section 103C(1), the circumstances of the appellant, the nature of the appellant's legal representatives, or otherwise).*
> *(6) Regulations under subsection (4) may make provision –*
> *(a) conferring a function on the Legal Services Commission;*

(b) modifying a duty or power of the Legal Service Commission in respect of compliance with orders under subsection (3);
(c) applying (with or without modifications), modifying or disapplying a provision of, or of anything done under, an enactment relating to the funding of legal services…"

19. Section 107 of the Nationality, Immigration and Asylum Act 2002 provides that:-

> *"107. Practice directions*
> *(1) The President of [the Tribunal] may give directions as to the practice to be followed by the Tribunal."*

20. The relevant secondary legislation is found at paragraph 6 of the CLS Regulations 2005 which sets out the criteria for making orders under section 103D(3) as follows:-

> "*General restrictions on power to make section 103D orders*
>
> *4. (1) The High Court or the Tribunal shall only make a section 103D order in immigration review proceedings where an appellant is represented by a supplier acting pursuant to a grant of Legal Representation.*
> *(2) The High Court or the Tribunal shall not make a section 103D order in fast track proceedings.*
> *(3) Regulations 5 to 8 apply in relation to immigration review proceedings in which the High Court or the Tribunal has power, under section 103D(1)-(3) and this regulation, to make a section 103D order.*
>
> *Criteria for making orders under section 103D(1)*
>
> *5. (1) The appropriate court must exercise the power to make an order under section 103D(1) in accordance with this regulation.*
> *(2) If, upon a section 103A application, the appropriate court makes an order for reconsideration, subject to paragraph (5) it must not make an order under section 103D(1).*
> *(3) If the High Court makes a reference under section 103C of the 2002 Act, it must make an order under section 103D(1).*
> *(4) If the appropriate court dismisses or makes no order on the section 103A application, it may make an order under section 103D(1) only if-*
> *(a) there has been a change in any relevant circumstances or a change in the law since the application was made; and*
> *(b) at the time when the application was made, there was a significant prospect that the appeal would be allowed upon reconsideration.*
> *(5) The appropriate court may, on an application in writing by a supplier or counsel instructed by the supplier, make an order under section 103D(1) where it has made an order for reconsideration, but no reconsideration of the appeal takes place.*
> *(6) In this regulation, "the appropriate court" means –*

(a) the High Court; or

(b) a member of the Tribunal who considers a section 103A application by virtue of paragraph 30 of Schedule 2 to the 2004 Act.

Criteria for making orders under section 103D(3)

6.(1) The Tribunal must exercise the power to make an order under section 103D(3) in accordance with this regulation.

(2) If the Tribunal allows an appeal on reconsideration, it must make an order under section 103D(3).

(3) If the Tribunal does not allow an appeal, it must not make an order under section 103D(3) unless it is satisfied that, at the time when the appellant made the section 103A application, there was a significant prospect that the appeal would be allowed upon reconsideration.

(4) If, where paragraph (3) applies, the Tribunal decides not to make an order under section 103D(3), it must give reasons for its decisions.

Review by Tribunal of decision not to make order under section 103D(3)

7.(1) A supplier, or counsel instructed by a supplier, may apply to the Tribunal in writing for a review of a decision by the Tribunal not to make an order under section 103D(3).

(2) An application under this regulation must be filed within 10 business days after the supplier is served with the Tribunal's decision not to make an order, or such longer period as the Tribunal may allow.

(3) A review shall be carried out by a Senior Immigration Judge who was not the member of the Tribunal, or a member of the constitution of the Tribunal, which made the original decision.

(4) The Senior Immigration Judge may –

(a) carry out the review without a hearing; or

(b) hold an oral hearing, if one is requested by the supplier or counsel.

(5) The Senior Immigration Judge may –

(a) make an order under section 103D(3); or

(b) confirm the Tribunal's decision not to make an order.

(6) The Senior Immigration Judge must give reasons for his decision on a review.

Terms and effect of section 103D orders

8.(1) Subject to paragraph (2), a section 103D order shall have effect as an order for payment of all the costs incurred by a supplier representing the appellant in the proceedings to which the order relates, including the fees of counsel instructed by the supplier, for which payment is allowable under the terms of the contract between the Commission and the supplier.

(2) In relation to proceedings in which a supplier has instructed counsel, the High Court or the Tribunal may in special circumstances make a section 103D order –

(a) in respect of counsel's fees only; or

(b) in respect of the costs incurred by the supplier excluding Counsel's fees

(3) A section 103D order must not specify –

(a) the amount to be paid by the Commission; or

(b) the person or persons to whom payment is to be made.

And the Commission shall determine those matters in accordance with the terms of its contract with the supplier. "

21. The 2005 Procedure Rules also provide for the arrangements for the making of a funding order as follows:-

"Orders for funding on section 103A applications

28A.(1) This rule applies where a section 103A application has been made by an appellant in relation to an appeal decided in England, Wales or Northern Ireland.

(2) If an immigration judge, when he considers a section 103A application, makes an order under section 103D(1) of the 2002 Act, the Tribunal must send a copy of that order to –

(a) the appellant's representative; and

(b) the relevant funding body.

(3) If, pursuant to regulations under section 103D of the 2002 Act, the appellant's representative applies for an order under section 103D(1) of the 2002 Act where an immigration judge has made an order for reconsideration of an appeal but the reconsideration does not proceed –

(a) the immigration judge may decide that application without a hearing; and

(b) the Tribunal must sent notice of his decision to –

(i) the appellant's representative; and

(ii) if he makes an order under section 103D(1), the relevant funding body.

(4) In a case to which rule 27(5) applies, the Tribunal must not send an order or decision under this rule to the appellant's representative until either –

(a) the respondent has notified the Tribunal under rule 27(5)(c) that it has served the documents mentioned in rule 27(5)(b) on the appellant; or

(b) the Tribunal has served those documents on the appellant under rule 275(d).

(5) In this rule, "relevant funding body" has the same meaning as in rule 33.

Orders for funding on reconsideration

33.(1) This rule applies where –

(a) the Tribunal has reconsidered an appeal following a section 103A application made by the appellant in relation to an appeal decided in England, Wales or Northern Ireland; and

(b) the appellant's representative has specified that he seeks an order under section 103D of the 2002 Act for his costs to be paid out of the relevant fund.

(2) The Tribunal must make a separate determination ("the funding determination") stating whether it orders that the appellant's costs –

(a) in respect of the application for reconsideration; and

(b) in respect of the reconsideration,

are to be paid out of the relevant fund.

(3) The Tribunal must send the funding determination to –

(a) the appellant's representative; and

(b) if the Tribunal has made an order under section 103D, the relevant funding body.

(4) Where the determination of the reconsidered appeal ("the principal determination") is served in accordance with rule 23, the Tribunal must not send the funding determination to the appellant's representative until –

(a) the respondent has notified the Tribunal under rule 23(5)(b) that it has served the principal determination on the appellant; or

(b) the Tribunal has served the principal determination on the appellant under rule 23(6)

(4A) Where, in accordance with regulations under section 103D of the 2002 Act, a senior immigration judge reviews a decision by the Tribunal not to make an order under section 103D(3), the Tribunal must send notice of the decision upon that review to –

(a) the appellant's representative; and

(b) if the senior immigration judge makes an order under section 103D(3), the relevant funding body.

(5) In this Rule –

(a) "relevant fund" means –

(i) in relation to an appeal decided in England or Wales, the Community Legal Service Fund established under section 5 of the Access to Justice Act 1999[7];

(ii) in relation to an appeal decided in Northern Ireland, the fund established under paragraph 4(2)(a) of Schedule 3 to the Access to Justice (Northern Ireland) Order 2003[8]; and

(b) "relevant funding body" means –

(i) in relationto an appeal decided in England or Wales, the Legal Services Commission;

(ii) in relation to an appeal decided in Northern Ireland, the Northern Ireland Legal Services Commission."

22. The Asylum and Immigration Tribunal's Practice Directions also make provision for Funding Orders in the following terms:-

> *"15 Legal aid on reconsideration*
>
> *15.1 The relevant statutory provisions concerning the provision of legal aid in respect of the reconsideration of appeals (other than fast track appeals) decided in England and Wales are to be found in:*
>
> *(a) section 103D (as inserted by section 26(6) of the 2004 Act);*
> *(b) rule 28A (orders for funding of section 103A applications) (as inserted by the Asylum and Immigration Tribunal (Procedure) (Amendment) Rules 2005) and rule 33 (orders for funding on reconsideration);*
> *(c) the Community Legal Service (Asylum and Immigration Appeals) Regulations 2005 ("the CLS Regulations").*
>
> *15.2 On an application under section 103A which is dealt with by an immigration judge under the filter provision referred to in paragraph 13.3, the immigration judge has power to make an order under section 103D for the appellant's costs to be paid out of the CLS fund ("a funding order"). That power is, however, exercisable only in the following circumstances:*
>
> *(a) where the immigration judge dismisses or makes no order on the section 103A application, that judge may make a funding order only where there has been a change in relevant circumstances or a change in the law since the application was made* ***and*** *at the time the application was made, there was a significant prospect that the appeal would be allowed upon reconsideration (regulation 5(4));*
> *(b) where the immigration judge makes an order for reconsideration but, in the event, no reconsideration takes place (e.g. because the immigration decision appealed against is withdrawn) (regulation 5(5)).*
>
> *15.3 A funding order of the kind described in paragraph 15.2(b) can be made only on application by a supplier (as defined in the CLS Regulations) or counsel instructed by the supplier (regulation 5(5)).*
>
> *15.4 Rule 33 (orders for funding on reconsideration) requires the Tribunal that has reconsidered an appeal to make a funding determination, where the appellant's representative has specified in the application for reconsideration that he is seeking a funding order. The funding determination is separate from the determination of the appeal itself.*
>
> *15.5 Unless it directs otherwise, the Tribunal shall hear any submissions as to such as order at the conclusion of the proceedings on the reconsideration.*
>
> *15.6 If the Tribunal allows the appeal on reconsideration, it is required by regulation 6(2) to make a funding order. If it does not allow the appeal, the Tribunal must not make a funding order unless it is satisfied that,* ***at the time when the appellant made the section***

***103A application**, there was a **significant prospect** that the appeal would be allowed upon reconsideration (regulation 6(3)).*

15.7 The Tribunal must give reasons where it decides not to make a funding order, following a reconsideration of an appeal (regulation 6(4)). A supplier, or counsel instructed by supplier, may apply under regulation 7 for a review of such a decision. The review will be carried out by a senior immigration judge, who will decide whether to hold a hearing, if one is requested.

15.8 It should be noted that the power to make a funding order in the circumstances described in paragraph 15.2(b) covers only the costs in respect of the review application; not any costs incurred in connection with preparing for a reconsideration that does not, in the event, take place. In certain circumstances, it may be inappropriate for a supplier or counsel to be denied a funding order which would cover the costs of preparing for the reconsideration. In an appropriate case, therefore, the Tribunal will consider representations as to whether it should make a decision by consent on the appeal following reconsideration (whether or not involving a hearing), so as to enable the Tribunal to make a funding order under section 103D(3) in respect of the review application and the reconsideration, notwithstanding that it may not otherwise have been necessary to undertake the reconsideration.

15.9 A funding order can only be made where there has been an application for an order under section 103A(1) (see section 103D(2)(b)). Accordingly, a funding order may not be made in a case described in paragraph 14.6 or paragraph 14.11. Nor can such an order be made in a case described in paragraph 14.1 where a pending application to the IAT is treated as an application under section 103A(1) (see paragraph 14.5 and article 6(5) of the Commencement Order)."

23. Senior Immigration Judge Warr in his determination of 6th June 2006 refusing the application for a funding order referred to two recent reported cases promulgated on the subject of Funding Orders.

24. Reference was made to GD (Funding Orders – restrictions – 2005 Regulations) Serbia and Montenegro [2005] UKAIT 00166 and RS (Funding – meaning of "a significant prospect") Iran [2005] UKAIT 001388.

25. In the case of RS the panel, having reminded itself that regulation 6 of the CLS Regulations provides that the Tribunal must make an order under section 103D(3) where the Tribunal allows an appeal on reconsideration, went on to consider the mode of application for a funding order. The Tribunal at paragraph 5 of the determination considered the method of application as follows:-

> *"These regulations are silent as to the mode of application for a funding order which is the subject of a specific provision in the Asylum and Immigration Tribunal (Procedure) Rules 2005 at Rule 33. The only part of those rules which relates to the making of the application is that contained in subparagraph 1 of Rule 33. Rule 33(1)(b) merely refers to an appellant's*

representative having "specified" that he seeks an order under section 103D of the 2002 Act for his costs to be paid out at the relevant fund."

26. At paragraph 9 of the determination the Tribunal stated:-

> *"It does not appear to us, having regard to the provisions of Rule 33(1) of the 2005 Procedure Rules, that there is any limitation in point of time as to the making of an application for a funding order. All that is required is for the appellant's representatives to "specify" that he seeks such an order under section 103D of the 2002 Act."*

27. The Tribunal considered the timing of making an application for a Funding Order in the case of GD, albeit that on the particular facts of that case the Tribunal had no power to make a Funding Order as the Appellant's representative was not a supplier acting pursuant to a grant of Legal Representation. It nevertheless at paragraph 6 considered the timing of an application for a Funding Order in the following terms:-

> *"We took the view that the fact that the application for a funding order had not been made in the application form as not fatal as it is clear from the case of RS (Funding – meaning of "significant" prospect) [2005] UKAIT 138, that where an application for review is successful and reconsideration is ordered, an application for funding under s103D(3) may be made at any time up to the end of the substantive reconsideration of the appeal. But where the application for review was made by a legal representative rather than the Appellant in person, there will need to be a cogent explanation why the application for funding was not specified at the outset on the form AIT/103A."*

Conclusions

28. It is incontrovertable that the CLS Regulations require at paragraph 6(2) that the Tribunal must make a funding order where an appeal is allowed on reconsideration. It is clear that where a request is made for a funding order that the Tribunal has no discretion to refuse that request if the relevant criteria are met namely that the supplier is acting pursuant to a grant of Legal Representation.

29. There is no prescribed form for making a request for a funding order under section 103D of the 2002 Act. Rule 33 of the Procedure Rules states that a Funding Order can be granted where the Appellant's representative has "*specified*" that he seeks an order. The case of RS Iran reinforces that position.

30. The AIT's Practice Directions at paragraph 15.4 appear to require that a Funding Order application under section 103D of the Act is "*specified*" at the time at which the reconsideration application is made. However, we note that the Procedure Rules do not require that the Funding Order be sought in the application for reconsideration. Indeed no such requirement exists in the Procedure Rules, nor

in the CLS Regulation, nor in the 2002 Act itself. Section 107 of the 2002 Act does confer a power on the President of the AIT to make practice directions to provide for the practice to be followed by the Tribunal. We accept Mr Yeo's argument that section 107 does not enable the President to override or in any way disapply the requirements of the Procedure Rules nor the CLS Regulations. No such requirement as to timing of the application for a Funding Order exists in any of the primary or secondary legislation and the requirement at paragraph 5.4 of the Practice Directions therefore exceeds the powers conferred on the President by section 107 of the 2002 Act. The Practice Directions can not restrict the powers contained in Rule 33.

31. Similarly the requirement in RS that there be cogent reasons given by a representative for making a late request for a Funding Order has no basis in any of the legislative framework. The only legal requirement is that they representative "*specifies*" that a Funding Order is sought.

32. Whilst administrative convenience would suggest that a request for a Funding Order be made at the time of the application for reconsideration, there is no legislative basis for that requirement. Excessive delay in requesting funding could, in some circumstances, amount to an abuse of procedure but each case would inevitably turn on its own particular facts.

33. Having found that there is no prescriptive time limit expressed in any of the statutory framework applying to Funding Orders, we would add that there is an important public interest aspect to this matter. The purpose of the legislation in respect of Funding Orders is clearly to deter unscrupulous and incompetent representatives from pursuing unmeritorious applications. However, the Tribunal would not wish to discourage appellants from the benefit of legal representation by imposing an over restrictive approach to Funding Orders. The Tribunal welcomes and would wish to facilitate competent legal representation in the cases before it.

Decision

34. We find that the CLS Regulations required the Tribunal to make a Funding Order as the appeal had been allowed on reconsideration. We further find that there is no legislative basis for imposing a time limit to that application, albeit files need to be cleared within a three month period.

35. Accordingly we order pursuant to section 103D(3) of the 2002 Act that the Appellant's costs in respect of the reconsideration proceedings including the preparation for and representation at the review hearing shall be paid out of the prescribed Fund.

E ARFON-JONES, DEPUTY PRESIDENT
Date: