Procedure where leave is sought to file further evidence

After completion of the evidence rounds a party may claim that further, relevant material has become available which should properly be before the Registrar. There is no statutory time limit upon making an application for leave to file further evidence, though if the matter is nearing the top of the pending hearing list, the filing of further evidence (and possibly evidence in reply) will affect priority of the hearing. Whether further evidence will be allowed is a matter for the Registrar's discretion (rule 20(3)).

Further evidence may be admitted in any proceedings under rules 20(3); 38(4); 44(3) and 50(9). The provisions of rule 82 are also relevant.

If the request is made after the hearing date for the substantive hearing has been advised and particularly after a pre-trial review has taken place, it is highly unlikely that the request will be entertained.

Before the Registrar will exercise his discretion, the party seeking leave should identify the further evidence involved by submitting a draft statutory declaration or affidavit. He should also forward a copy to the other party to seek their consent. The consent of the other party will not automatically result in leave being granted, but will nevertheless weigh in the leave seeker's favour. Conversely, the lack of consent will not necessarily be fatal to the application.

The Registrar will, as far as practicable, allow the other party an opportunity to comment on the request. The comments must be copied to the party seeking leave.

The Registrar will issue his provisional determination after considering the other party's position. Either party will have the right to request an interlocutory hearing under section 70 and rule 74.

The following considerations will be taken into account :

- Why was the evidence not available previously?

- Is it an attempt to introduce evidence by the backdoor (e.g. when an earlier extension of time to file the main evidence was refused or the evidence was struck out as not being strictly in reply)?

- Is it an attempt to delay the proceedings?

- Is it in the public interest to have this evidence considered?

- Would it help the Hearing Officer to arrive at a just decision?

- How far would the other party be disadvantaged?

- Who should be the last to file evidence?

- What are the costs implications?

The time allowed to file and serve a copy of further evidence will be set by the Registrar, but it is unlikely that the time granted will exceed 14 days from the date of the final order.

The right to be the last to file evidence

In opposition proceedings the opponent has the right to be the last to file evidence. If the applicant is given leave to file further evidence under rule 20(3), the opponent may be granted, if he so requests, a further period within which he may file and serve evidence strictly in reply. The period will be fixed by the Registrar after taking into account the extent of the new evidence and the length of time the draft has been in the hands of the opponent.

In revocation, invalidation, variation or rectification proceedings it is the applicant for revocation etc. who has the right to be the last to file. In the case where opposition and revocation proceedings between the same parties are consolidated, this rule becomes impossible to apply. In the absence of agreement between the parties, the Registrar is likely to allow the person who began the earliest proceedings to file last.

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