

The Asylum and Immigration Tribunal – The Legal Aid Arrangements for Onward Appeals

The Advice Services Alliance's response to the
Department for Constitutional Affairs consultation
paper

1 About the Advice Services Alliance

- 1.1 The Advice Services Alliance (ASA) was established in 1980, and is the umbrella organisation for independent advice services in the U.K. Our aims are to:
- Champion the development of high quality information, advice and legal services;
 - Ensure that people are not denied access to such services on account of lack of means, discrimination or other disadvantage;
 - Encourage co-operation between organisations providing such services;
 - Provide a forum for the discussion of issues of common interest or concern to advice organisations.
- 1.2 Full membership of ASA is open to national networks of independent advice services in the U.K. Current full members are:
- Advice UK (formerly Federation of Information and Advice Centres)
 - Age Concern England
 - Citizens Advice (formerly National Association of Citizens Advice Bureaux)
 - Citizens Advice Scotland
 - DIAL UK (the disability information and advice service)
 - Law Centres Federation
 - Scottish Association of Law Centres
 - Shelter
 - Shelter Cymru
 - Youth Access
- 1.3 Our members represent over 2,000 organisations providing a range of services to diverse groups and working mainly on a local level throughout the U.K.

2 Introductory comments

- 2.1 If implemented, the proposals in this consultation will introduce a conditional fee scheme to asylum work.
- 2.2 In an area of law where what is frequently at stake is the client's life, such a scheme is wholly inappropriate. Coming on the back of recent changes to the public funding of immigration work, the new scheme will further disadvantage an already vulnerable client group.
- 2.3 The aim of the scheme is to discourage representatives from taking unmeritorious cases and we agree that wholly unmeritorious cases should not be funded. However, asylum appeal cases frequently involve complicated facts and complex points of law. Their merits are rarely clear-cut and they involve a strong subjective element. It is therefore not unlikely that even when a representative genuinely believes that a case has merit, the judge will conclude that the prospects of success were too low.
- 2.4 Furthermore, the scheme will create a conflict of interest between the client and the representative. The representative will be required to decide whether to challenge a tribunal decision in the knowledge that if the judge does not agree with their assessment of the prospects of success, they will not be paid for their work.

Therefore, there is a risk that decisions will no longer be based solely on the interests of the client but also on the financial position of the advice agency.

- 2.5 Moreover, given the proposed wording of the prospects of success test, where a case has moderate or good prospects of success, it will be in the client's interests to appeal the case but not the representative's.
- 2.6 We believe that this will make it difficult for representatives to seek review of cases that they consider to have merit. The ultimate result of this is that the appeals of those facing death or torture in their home countries will not be pursued.

3 Existing measures

- 3.1 There have been a number of changes to publicly-funded immigration over the past year.
- 3.2 In an attempt to curb spending on immigration work and prevent abuse of the fund, the LSC has withdrawn contracts, limited hours per case and removed devolved powers to grant CLR for appeals.
- 3.3 With the intention of improving quality, the LSC has introduced a compulsory accreditation scheme and from April next year, all immigration and asylum advisers will have to be accredited in order to carry out LSC-funded work. Although many advisers have already taken the exam, it is far too early to assess the impact of the scheme. However, we are hopeful that it will have the desired effect of improving quality.
- 3.4 Given the number of changes and the short period of time that they have been effective, we do not see the logic in introducing further measures so soon. It is our view that the changes already in place should be given time to take effect and should be properly evaluated before any further reforms are considered.

4 Consultation questions

Q.1 Do you agree that the exemption categories for the new arrangements are appropriate?

- 4.1 We cannot think of any other exemptions.

Q.2 Do you agree with the transitional arrangements proposed?

- 4.2 Yes.

Q.3 Which test – Option 1 or Option 2 – best achieves the aims of the new arrangements and the wishes of Parliament?

Q. 4 Are there any practical difficulties that each option is likely to cause, and do you have any suggestions as to how they might be overcome?

- 4.3 The stated aim of the new arrangements is to encourage representatives to assess thoroughly the merits of cases and to reduce the number of weak challenges. At the same time, this government maintains that asylum seekers with genuine claims should be able to pursue appeals. In our view, therefore, it cannot be Parliament's intention that representatives who reasonably believe that their clients' cases are worth appealing should suffer financial loss.

- 4.4 This is not reflected in either of the proposed tests. Given the complexity of making merits decisions at this level, it is rare that a representative or a Tribunal judge will conclude that a case is “very likely to succeed” or “has very strong prospects of success”. Therefore the second test will create too high a risk that representatives will not be funded for their work.
- 4.5 Requiring a case to have “significant” prospects of success is apparently a lower test but will still mean that meritorious cases may not get funded.
- 4.6 Therefore, whilst we prefer the requirement that a case has “significant” prospects of success, it is our view that both tests will deter representatives from pursuing cases they believe to be meritorious.
- 4.7 We are also concerned that the proposed tests depart significantly from the existing merits test in the Funding Code. This test applies for CLR and Certificated work and requires a representative to judge whether a case has “very good”, “good”, “moderate”, “borderline” or “poor” prospects of success. These criteria are defined in percentage terms. The test allows representatives to pursue cases where the prospects of success are as low as “borderline” if the case is of overwhelming importance to the client or where there are human rights or public interest issues. Under the proposed new tests, there will be no consideration of these issues as the test will be based purely on prospects of success.
- 4.8 We understand that the existing test in the Funding Code will continue to apply for appeals to the new AIT and to the Court of Appeal. It therefore seems completely anomalous and unfair to devise such a different test for the review stage.
- 4.9 In view of this, we suggest that a more appropriate test would be for the judge to consider whether it was reasonable for the representative to pursue the case. This evaluation of reasonableness should include consideration of whether the case is of overwhelming importance to the client and whether there are human rights or public interest issues.

Q.5 Should any additional circumstances in which the Administrative Court may award funding be added to the regulations?

- 4.10 We cannot think of any.

Q.6 Do you agree with the proposed arrangements for review?

- 4.11 Yes.

Q.7 Should a time limit be set for applying for a review of a funding decision?

- 4.12 This would seem reasonable.

Q.8 Should barristers have a right to apply for a review of a funding decision independently of a solicitor.

- 4.13 As the Tribunal will make decisions about the funding of cases as a whole and not about the amounts claimed, we do not think it is appropriate for barristers to be able to apply for reviews independently of solicitors.

Q.9 Are the arrangements for risk-sharing appropriate, given the aims of the new legal aid arrangements.

- 4.14 Yes, we agree that solicitors and barristers should share the risk.

Q.10 Would a risk premium ensure that this work is cost effective for suppliers?

- 4.15 We agree that a risk premium will serve to mitigate the risk involved in undertaking review work. However, we cannot comment on whether a premium will make the work cost effective without knowing the percentage proposed.
- 4.16 We understand “cost effective” to mean that a representative doing reasonable work should not lose out financially. In order to make the scheme cost effective, the premium should be proportionate to the risk. Therefore, if Option 2 is chosen as the prospects of success test, the premium should be set at a high level. Alternatively, if the test is phrased in terms of reasonableness, as we suggest, we accept that the premium does not need to be at such a high level.

Q.11 Are the proposals for the treatment of disbursements appropriate?

- 4.17 We welcome the proposal that disbursements for experts and interpreters will be payable in all cases.
- 4.18 However, we are concerned that the consultation paper does not include High Court fees as disbursements. It is unreasonable and unwise to expect representatives to pay court fees out of their own funds as it is likely to deter them from pursuing reviews which they believe to have merit. Furthermore, non-LSC funding for asylum is diminishing and some small agencies may simply not have the money.

Q.12 Do you agree with the suggested amendments to the CLS regulations and the Funding Code Criteria and Procedures?

- 4.19 Subject to the comments made in this paper, we agree with the suggested amendments.