

The Asylum and Immigration Tribunal: Amendments to the Legal Services Commission General Civil Contract

The response of the Advice Services Alliance

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. Advice UK, Citizens Advice and Law Centres Federation have members with LSC immigration contracts and they have contributed to this response.

2 Introductory comments

- 2.1 We are grateful for the opportunity to respond to this consultation.
- 2.2 We note the request in the covering letter that we restrict our comments to the proposed contract changes and avoid commenting on the policy behind them. We responded to the original DCA consultation giving our views on the policy of introducing conditional fees to immigration work and understand that you do not want us to repeat those views. However, the DCA has not yet published a post-consultation report or the finalised Community Legal Service (Asylum and Immigration) Regulations 2005 (“the Regulations”). Our views on the appropriateness of the changes to the contract specification are dependent on the precise wording of the Regulations and we have therefore found it difficult to comment on the contract changes alone without making reference to the wider policy.

3 The Proposals

One hour for consideration of merit

- 3.1 At section 12.4.1, paragraph 8, the specification states that a maximum of one hour will be allowed for consideration of the merits of an application for review and reconsideration under s.103 A of the Nationality, Immigration and Asylum Act 2002 (NIA). The practitioners we have consulted feel that this is sufficient for a consideration of the merits but that a further hour should be allowed to cover correspondence with the client, Home Office and other parties.

Merits test

- 3.2 At section 12.4.3, paragraph 1, the specification states that when considering whether an application subject to a s103D (NIA) order has merit, the practitioner must consider the existing merits contained in section 12.5.4 of the specification.
- 3.3 We do not yet know whether the test for funding the reconsideration of cases will be that there were “significant” or “very strong” prospects of the appeal being allowed. Whichever wording is chosen, the test for whether or not a case is funded will be different to the merits test in the specification. The existing merits 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. The discrepancy between the two tests means that advisers may decide that a case has merit under the test in the specification and yet is unlikely to meet the prospects of success test. Therefore, advisers who take the view that a case has merit may well feel that they cannot pursue reconsideration because of the fear that their costs will not be met.
- 3.4 It is our view that the existing merits test in the specification is satisfactory. In order to avoid a situation where advisers have to choose between acting in the best interests of their client and protecting the financial interests of their organisation, the prospects of success test that will determine whether a case is funded should be whether the merits test in the specification was correctly applied.

Appealing to the Court of Appeal from the AIT

- 3.5 Section 12.4.14 states that applications for leave to appeal to the Court of Appeal should be carried out under certificates and should not be undertaken as Legal Help or CLR.
- 3.6 Section 103B of the NIA states that permission to appeal to the Court of Appeal will be to the Asylum and Immigration Tribunal (AIT) in the first instance. If the Tribunal refuses permission then permission can be sought from the Court of Appeal itself. This is similar to the existing system under which leave to appeal to the Court of Appeal is to the Immigration Appeal Tribunal (IAT) in the first instance.
- 3.7 Under the existing specification, grounds of appeal prepared for the IAT can be claimed under CLR. If the IAT refuses permission and permission is then sought from the Court of Appeal, the work must be done under a certificate. Given the similarity between the existing and the proposed appeal procedures, it is our view that the funding arrangements should remain the same and applications to the AIT for permission to appeal to the Court of Appeal should be funded under CLR. Indeed, in its consultation paper the DCA listed situations in which existing arrangements would continue to apply and included “any onward appeal to the Court of Appeal”. We are therefore surprised that the proposed specification does not reflect this.

Refusal of CLR

- 3.8 Section 12.5.5, paragraph 9 states that there is no right of review of a decision to refuse or withdraw CLR in connection with an application which is subject to an order under s.103D of the NIA.
- 3.9 In our view it is likely that advisers will be discouraged from pursuing applications to review cases that they believe to have merit because of the fear that they will not be paid for their work. Given this likelihood and the potential conflict between adviser and client that arises from it, it is particularly inappropriate to remove the right to review refusal of CLR.
- 3.10 We can see the difficulty of maintaining the right of review. If the LSC finds that CLR should not have been refused, it will be very hard to compel a supplier to take a case when it is unable to guarantee funding. However, the fact that the right of review will be difficult to operate is not a reason to remove it.

25% uplift

- 3.11 As the DCA has not published information on what the prospects of success test will be, we do not yet know what level of risk the supplier will be taking when they decide to pursue a review. We therefore cannot comment on whether the level of uplift proposed is adequate to compensate for the risk.
- 3.12 A 25% uplift will mean suppliers will have to win 4 out of 5 cases to ensure that they do not make a loss overall (assuming costs per case are the same). Advisers are therefore likely to pursue only the most clear cut cases to the review stage. Some may decide to play safe and not pursue any reviews at all. This will mean that not only the more risky cutting edge cases will be dropped but also some of the more clearly meritorious ones.
- 3.13 Given the particularly vulnerable nature of the client group in this area of law, we believe that it is wrong to give advisers such a strong financial disincentive to act in their best interests.