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ILPA's Response to the Ministry of Justice's Call for Evidence on Immigration Legal Aid Fees and the Online System

Background

The Immigration Law Practitioners' Association (ILPA) is a professional association founded in 1984, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official enquiries.

Introduction

This is a response to the call for evidence by the Ministry of Justice ('MoJ') on the role and features of the online system in the First-tier Tribunal (Immigration and Asylum Chamber). We maintain that a thorough consultation process is needed for any new legal aid fees for asylum and immigration appeals, to ensure that legal aid practitioners are remunerated appropriately for their work in representing some of the most vulnerable people in our society.

The online system and the new legal aid fees were introduced during the COVID-19 pandemic, with a paper-based system still running for 'legacy cases' brought prior to the introduction of the online system and for cases which it was not reasonably practicable to commence on MyHMCTS. Practitioners faced numerous difficulties in navigating the new system, together with the prior system, whilst working remotely during a global pandemic. The Tribunal, Home Office, and practitioners were often under-staffed, which only added to the teething issues surrounding the introduction of the system. The new review process for the Home Office, the imposition of the requirement to provide Appeal Skeleton Arguments, and the introduction of the online system placed stress on a new and fragile system. The very practical effect that this has on this Call for Evidence is that it is simply too soon to examine the efficacy of the system.

In our opinion, the period from 22 June 2020, when the online system was introduced by the First-tier Tribunal in Presidential Practice Statement No 2 of 2020: Arrangements during the COVID-19 Pandemic,[1] to December 2021, is not an appropriate or sufficiently lengthy period over which to collect the sample of data to assess the adequacy of the online system or legal aid remuneration because the new system has not been operational during a period of "normal practice". Using only the sample data from this period runs the risk of relying on an unrepresentative set of data, which would be an inaccurate basis on which to form and introduce a new system of legal aid fees. The importance of this consultation for access to justice requires that the MoJ conduct the consultation over a much lengthier period while monitoring the system and collecting evidence. ILPA does not have sufficient data (nor could sufficient data be amassed in the period allocated for this Call for Evidence from 4 November 2021 to 2 December 2021) to provide a comprehensive reply to each of the questions the MoJ has raised. The lack of a detailed response to any specific questions should not be taken as indicating that no issues arise from the matter raised.

Therefore, we respectfully request that the MoJ proffer the following data, so that we may assess the system on the basis of this evidence and provide a further response during the MoJ's forthcoming consultation on new legal aid fees for asylum and immigration appeals. In relation to the questions below, where relevant, we request that MoJ make the relevant enquiries with the Secretary of State for data that she holds. Since the introduction of the new online system:

1. How many appeals have been lodged:
    a. under the online system?
    b. under the paper-based system?
2. How many appeals have been substantively heard under the new online procedure?
3. What percentage of appeals were reviewed by the respondent under the online system?
4. What percentage of appeals were reconsidered by the respondent under the paper-based system?
5. What percentage of appeals reviewed/reconsidered were withdrawn by the respondent:
    a. under the online system?
    b. under the paper-based system?
6. At what stage in the appeal process were the appeals withdrawn:
    a. under the online system?
    b. under the paper-based system?

    (Please provide a breakdown of the percentages for each stage, e.g. prior to service of the respondent's bundle, prior to the ASA, during the respondent's review, following the review but prior to the substantive hearing date (including at a case management review hearing), on the day of the substantive hearing).
7. What is the percentage of appeals in which the respondent complied with directions:
    a. under the online system?
    b. under the paper-based system?

[1] First-tier Tribunal (Immigration and Asylum Chamber) Judge Michael Clements, President, *Presidential Practice Statement No 2 of 2020: Arrangements during the COVID-19 Pandemic*, 11 June 2020 <https://www.judiciary.uk/wp-content/uploads/2020/06/PRESIDENTIAL-PRACTICE-STATEMENT-No-2-2020-FINAL-11-June-2020-1.pdf> (accessed 30 November 2021).

8. What is the percentage of appeals in which the appellant complied with directions:
    a. under the online system?
    b. under the paper-based system?
9. Of those decided, what is the percentage of cases in which an appellant was successful following withdrawal:
    a. under the online system?
    b. under the paper-based system?
10. Of those decided, what is the percentage of cases in which an appellant was refused following withdrawal:
    a. under the online system?
    b. under the paper-based system?
11. What is the median, mean, and range of time waited by appellants to receive a grant following withdrawal:
    a. under the online system?
    b. under the paper-based system?
12. What is the median, mean, and range of time waited by appellants to receive a refusal following withdrawal:
    a. under the online system?
    b. under the paper-based system?
13. What is the percentage of appeals from the First-tier Tribunal in which permission is granted to appeal to the Upper Tribunal:
    a. under the online system?
    b. under the paper-based system?
    c. under the paper-based system in each of the three years preceding its introduction?
14. What is the percentage of appeals from the First-tier Tribunal in which the Upper Tribunal has allowed the appeal:
    a. under the online system?
    b. under the paper-based system?
    c. under the paper-based system in each of the three years preceding its introduction?
15. What, if any, evidence has the MoJ collated from appellants on the online system and whether it is better or worse for them. We understand the Home Office has conducted research with its 'asylum customers'. Please disclose this evidence to the public.

Similarly, we respectfully request that the Legal Aid Agency ('LAA') provide the following data:

1. How many providers have billed legal aid fees under the online system?
2. What is the median, mean, and range of fees billed for asylum cases?
3. What is the average median, mean, and range of fees billed for non-asylum immigration cases?
4. What is the average median, mean, and range of time from the date of the controlled legal representation ('CLR') form being signed/CLR matter being opened to the CLR file being billed?

For all of the above questions to the MoJ and LAA, please provide a breakdown of figures for the different tribunal centres.

1. DIFFERENCES BETWEEN THE ONLINE SYSTEM AND THE PROCESS PRIOR TO THE ONLINE SYSTEM

Question 1: What do you consider to be the key differences between the online system and the paper-based process in place prior to the introduction of the online system?

There are three key differences between the online and the paper-based system noted by our members.

In addition to the obvious differences, in terms of the digitisation of the system, the first key difference is that the online system requires extensive preparation much earlier in the process. The second key difference, which is related to the first, is the protracted, bureaucratic, rigid process between filing the appeal notice and the substantive hearing. However, without the data we have requested above, it is difficult to ascertain to what degree the length of the process can be attributed to the COVID-19 pandemic, and to what degree it is caused by the various stages in the new system, their associated timeframes, and the lack of compliance with directions which can cause delay. The third key difference is that the respondent is required to conduct a review, as a specific stage in the process, before the appeal reaches a substantive hearing.

Different practitioners prepare appeals in different ways. This can vary due to the types of cases they take and the weight of their caseload, and, of course, not every organisation will instruct external counsel. Where external counsel is not instructed early in the process, a caseworker may feel pressured to prepare an Appeal Skeleton Argument ('ASA') even though this task may be one for which they would have previously instructed external counsel shortly before the hearing. This places greater demands on representatives, much earlier in the process.

However, we have noted that where external counsel is instructed, due to the earlier directions for producing an appellant's bundle and the new ASA, counsel is often instructed earlier in the appeal preparation process than they were under the paper-based system. This can be positive and result in greater engagement of counsel with those instructing them, in consulting on the issues, presentation of the case, and compilation of evidence, in addition to the drafting of the ASA by counsel. As a consequence, additional time is spent by counsel in preparation for the appeal than was previously the case under the paper-based process.

Under the standard directions contained in Directions to Represented Appellants in Presidential Practice Statement No. 2 of 2020, '[n]ot later than 14 days after the Notice of Appeal is provided, the respondent must provide a bundle compliant with rule 24(1) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. This bundle must include the refusal decision

and any material submitted in support of the application'.[2] Although in certain cases, the appellant's representatives may have all of the documents upon which the Secretary of State intends to rely, the Secretary of State's bundle can be extremely important. For example, where the genuine and subsisting nature of a relationship is in question, or in revocation or deception cases, the Secretary of State's minutes, notes, transcripts, and other evidence to which the appellant does not have access can be crucial. The respondent's bundle is particularly important if there is insufficient time for a Subject Access Request of these documents. For example, the importance of the Secretary of State's evidence, where there is an allegation of deception, is crucial in determining whether the initial evidential burden of the Secretary of State has been discharged.[3]

However, we have noted from our members that even upon being repeatedly directed to serve her bundle, the Secretary of State often fails to do so. Under the online system, this is a significant concern as it can delay progression of the case and service of the ASA (which under the standard directions must be served not later than '28 days after the respondent's bundle is provided, or 42 days after the Notice of Appeal, whichever is the later'). Tribunal caseworkers are often sympathetic to this delay by the Secretary of State and are willing to grant extensions for compliance or ask if the requirement can be waived altogether. The failure of the Secretary of State to provide timely service of her bundle can leave appellants blindsided as to the evidence against them. If appellants attempt to serve their bundle and ASA, without sight of the respondent's bundle, to avoid any further delay in the hearing and review process, this results in an unjust system where there is only one-sided compliance with directions. It can also result in a more drawn out process in the online system, attributing to the second key difference noted by members.

A benefit of the online system is that as a matter of course, the Secretary of State should conduct a review prior to the substantive hearing. Under the ordinary directions, within 14 days of the ASA being provided, the Secretary of State must undertake a meaningful review of the appellant's case considering the appellant's bundle and ASA. The Secretary of State must provide the result of that review and particularise the grounds of refusal upon which she relies. As this is built into the process, at an earlier stage, it should have the effect of reducing the late and ad hoc withdrawals by presenting officers and counsel for the Secretary of State which were a common feature of the paper-based system.

ILPA members have found that under the new online system, there are fewer late adjournments and the Secretary of State's review can result in the withdrawal of the decision being appealed. These are both important improvements that save the Tribunal's resources and are in the interests of justice.

However, one of our members, who was a part of the pilot scheme, has noted significant delays since the roll out of the online system nationally. They have experienced significant delays in the Secretary of State uploading her bundle (waiting approximately 3 months for a corrected bundle to be uploaded

[2] Annex 1 First-tier Tribunal (IAC) On-line Directions (Using "MyHMCTS"), *Directions to Represented Appellants (Presidential Practice Statement No 2 of 2020)* <https://www.judiciary.uk/wp-content/uploads/2020/06/Annex-1-FINAL-11-June-2020.pdf> (accessed 30 November 2021).

[3] See, for example, *Secretary of State for the Home Department v Shehzad & Anor* [2016] EWCA Civ 61 [30].

in one case, with the dates for compliance with directions pushed back without penalisation). They provided an example of two cases in which the Secretary of State withdrew the decision on the day prior to the hearing, meaning that the appellant had to attend the hearing the following day. In both of these cases, the withdrawal *could* have taken place during the respondent's review but it did not.

The Secretary of State must meaningfully engage in the review process if the purpose is to narrow the issues in an appeal and allow for withdrawals and reconsiderations of decisions in advance of hearings. If the Secretary of State merely goes through the motions of a review, and provides generic responses, then the review is pointless and simply results in delaying the date of the appeal hearing. One of our members, who has drafted a large number of ASAs since the rollout of the online system, has seen a noticeable decline in the quality of the respondent's reviews. We recommend the MoJ enquire with the Home Office as to the reason for this. Additionally, it is not always the case that appellants receive a review of their case or response to an ASA within the timeframe directed, or at all. If a case is only withdrawn very shortly before the substantive hearing, or on the day of the hearing itself, then this is akin to the prior paper-based system where errors and concessions would happen when the case was reviewed by a presenting officer or counsel for the Secretary of State shortly before the hearing.

The system was built around affording the Secretary of State the opportunity to review her decisions at a specific juncture in the appellate process. It requires compliance by both parties. If the Secretary of State does not comply with directions, she hampers the very system that has been built for her review. Therefore, we recommend that a more stringent approach is taken by the Tribunal with regard to non-compliance by the Secretary of State, including regarding the admissibility of late material. The Tribunal also has powers under rule 9 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chambers) Rules 2014 to make an order in respect of costs if a person has acted unreasonably in bringing, defending or conducting proceedings,[4] which operates in conjunction with section 29 of the Tribunal, Courts and Enforcement Act 2007 for wasted costs against legal or other representatives.[5] If the current procedure is to continue in the online system, the Tribunal should consider whether the Secretary of State has acted unreasonably in her defense of the appeal, and consider an order for unreasonable costs of its own initiative. In legal aid cases, it will of course be public funds that are at risk of being wasted. We are in no way encouraging the Tribunal to make frequent wasted or unreasonable cost orders, and are alive to the chilling effect frequent orders may have on legal representatives, who are likely to become overly cautious or conservative. Nevertheless, we encourage the MoJ and the Tribunal to consider what reasonable action can be taken, to limit the protracted and

[4] In *Cancino (costs – First-tier Tribunal – new powers)* [2015] UKFTT 00059 (IAC) it was held in the head note that '[o]rders for costs under Rule 9 will be very much the exception, rather than the rule and will be reserved to the clearest cases'. In Presidential Guidance Note No.2 of 2018, *Further guidance on wasted costs and unreasonable costs and on the correct approach to applications for costs made in proceedings before the First-tier Tribunal (IAC)* <https://www.judiciary.uk/wp-content/uploads/2018/07/costs-guidance-2018.pdf> (accessed 30 November 2021), states at paragraph 2.7(viii), 'in every case the Secretary of State must undertake an initial assessment of the viability of defending an appeal within a reasonable time following its lodgement. Where this does not result in a concession or withdrawal or something comparable, this duty, which is of a continuing nature, must be discharged afresh subsequently'.

[5] There are also several wider ranging powers to impose orders or charges on the Secretary of State, her representatives, and their employees contained in clauses 75 and 76 of the Nationality and Borders Bill, as amended in Public Bill Committee, page 76 <https://publications.parliament.uk/pa/bills/cbill/58-02/0187/210187v1.pdf> (accessed 25 November 2021).

rigid nature of the online procedure resulting from the Secretary of State's failure to comply with directions, in furtherance of the overriding objective.

Question 2: For each of the differences identified in answer to question 1, what do you consider to be the impact of those differences on your work?

Due to the extensive front-loading of preparation under the new system and the length of the process, overall, practitioners have noted that they do more work under the online system than they did under the previous paper-based system.

Previously, counsel would typically be instructed at shorter notice to represent an appellant at an appeal hearing. They would draft a skeleton argument (if they wished to use one) at the same time as the preparation for the oral hearing. They would have had a conference with any present instructing solicitor, appellant, and witnesses, prior to the hearing. Ordinarily, counsel would only need to prepare for the appeal, and become acquainted with the appeal bundle once, shortly before the appeal hearing. A skeleton argument would be served very commonly on the morning of the hearing itself, or, in accordance with directions, shortly before the hearing.

Conversely, under the online system, advocate members note that they must often prepare for an appeal multiple times. They may have an initial conference with an instructing solicitor and/or appellant. They then prepare when drafting an ASA. Many months or even a year may elapse between the service of the ASA and the appeal hearing. Before the appeal hearing, an advocate must refresh their memory. If significant time has passed, this will require the advocate to re-read the bundles in their entirety, which - in the case of large bundles - can take several hours. It is the circumstances at the date of the hearing which are relevant to the determination of the issues in the appeal. If, due to the passage of time since the appellant's bundle and ASA were served, circumstances have changed, these must be addressed through the provision of further evidence, potentially an updated Witness Statement and medico-legal, expert, or other reports, and, if necessary, an addendum skeleton argument. There may also be a change in circumstances in the country of origin, with Afghanistan being a clear and recent example of this. Uploading evidence results in a new consolidated bundle with new page references, to which judges often expect the ASAs and counsel to refer. Cross referencing page references from the original bundle served with the ASA is time consuming.

Equally, if the Secretary of State does maintain her decision following her review, but for further reasons, then this may need to be addressed in further evidence in the appellant's bundle, resulting in a new consolidated bundle, which may need to be cross-referenced in an updated, amended or addendum ASA or Reply to the Respondent's Review.

If the decision is withdrawn, there is no need to proceed to a substantive hearing. However, it is crucial that the Secretary of State does not delay in making a decision following withdrawal. Once a decision is withdrawn, an appellant is left in limbo anxiously awaiting the outcome of the decision. If there are lengthy delays, an appellant may have been better served - in terms of achieving a quicker outcome -

if the appeal had been granted following a substantive hearing. Therefore, it is highly important to collect the data that we have requested, to examine how, if at all, the new online system for withdrawal results in delaying resolution of cases for appellants.

Whilst members note the online system to be much slower than the paper-based system and the delay to result in part of the aforementioned additional work, it is difficult to conclusively attribute this to the shift in systems as the shift was implemented during the COVID-19 pandemic. Once more, this was not an ordinary sample of data upon which to base a Call for Evidence.

Members have also identified issues[6] that have resulted from the divide between cases that were online, and those that were offline or paper-based:

Example 1: Difficulty changing the legal representative in an appeal through MyHMCTS resulted in the case being taken offline. This results in additional work when the appeal is pulled by Arnhem House, with delays and chasing of bundles. From one of our members, we understand that a new 'paper' appeal reference is provided in addition to the original 'online' appeal reference, which can also cause confusion.

Example 2: For those left without legal representatives, the dual systems can prove complex. In one case, a member informed us that the lack of response between previous representatives and the Tribunal resulted in the appeal being cancelled. After correspondence with the Tribunal the appellant was advised to submit a new 'out of time' appeal.

Example 3: MyHMCTS cases and 'legacy' cases lodged under the prior paper-based system have different reference numbers and cannot be linked through MyHMCTS.

Example 4: Where a case had been taken offline, the Tribunal did not have the documents uploaded on MyHMCTS prior to the appeal being taken offline.

Example 5: MyHMCTS does not permit linking appeals where there has been a gap between the dates of refusal decisions. For example, a husband who made an in-time long residence human rights claim under paragraph 276B of the Immigration Rules is refused first; his wife's human rights claim is refused some months later. Paragraph 2 of the Presidential Practice Statement No. 2 of 2020: Arrangements During the COVID-19 Pandemic, which came into effect on 22 June 2020, required that his appeal be lodged using MyHMCTS, as his appeal did not then need to be linked to any other appeal, as he was represented by a qualified person, and as it was practicable to do so. Therefore, the husband must first lodge in-time on MyHMCTS. Upon receipt of the wife's refusal, the husband's appeal must be taken offline and must be re-lodged with, and linked to, his wife's appeal through the paper-based method. This leaves the husband in a precarious position under section 3C of the Immigration Act 1971. He must seek assurances from the Tribunal that his appeal will be considered to have been lodged in-time to engage section 3C, as the date will be taken as the date of lodging the appeal through MyHMCTS rather than the date of re-lodging the paper-based forms.

[6] We acknowledge that there may have been improvements to MyHMCTS since these issues arose. However, the examples are based on the evidence we have received.

Question 3: Please explain how case management review hearings were used prior to the online system, and how they are being used as part of the online system.

Under the prior paper-based system, often case management review hearings were used to request evidence or to make arrangements for the substantive hearings. They were often requested in more complex cases, e.g. where there was a trafficking claim, related family law case, complicated procedural history and/or a particularly vulnerable witness. They were and could be used in particular to discuss whether or how a vulnerable witness could give evidence with reference to the Practice Direction and Presidential Guidance. They were also used to vary grounds of appeal, provide amendments to the reasons in support of the grounds of appeal or the appealed decision, particulars of any witnesses to be called or whose written statement or report was proposed to be relied upon at the full hearing, and any directions that the Tribunal was requested to make.[7]

It is difficult to attribute to what extent any changes in case management review hearings since March 2020 can be attributed to the shift in systems from online to paper-based, and to what extent they are confined to issues arising from COVID-19. Immediately following lockdown, almost all hearings were adjourned to case management review hearings. Thus, there were a huge number of case management review hearings immediately following the introduction of the system. However, it is noted that such hearings in certain cases may be less necessary in the current online system, if directions are complied with and a full exchange of evidence and the respondent's review is carried out prior to the substantive hearing.

2. THE APPEAL SKELETON ARGUMENT

We understand that the MoJ is '*specifically interested in the requirement for an appeal skeleton argument to be produced as part of the online system. Anecdotal evidence has described this requirement both as "new work" but also as "pulled forward work" and we are keen to get a wide range of views on what impact this requirement has had.'*

Question 4: Please explain whether, and if so, at what stage, appeal skeleton arguments were used prior to the introduction of the online system.

Previously, of course, there was no requirement to produce an ASA, although skeleton arguments were good practice as per paragraph 7.5 of the Practice Directions. We would differentiate between the skeleton arguments under the paper-based system and ASAs under the online system as they must meet different requirements.

[7] Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (18 December 2018) para 7.3-7.4.

A skeleton argument, under the paper-based system, needed only to comply with paragraph 7.5(iii) and 8.2(e) of the Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (18 December 2018), by 'identifying all relevant issues including human rights claims and citing all the authorities relied upon' and defining and confining 'the areas at issue in a numbered list of brief points and each point should refer to any documentation in the bundle on which the appellant proposes to rely (together with its page number)'.

Some representatives would draft skeleton arguments and include them as part of the appellant's bundle; some advocate prepared them as a matter of course; and other advocates would not prepare a skeleton argument at all. A skeleton argument was often a great aid to the Tribunal, particularly where the grounds of appeal were brief. Ordinarily, unless ordered, skeleton arguments were prepared and served very near to the date of the substantive hearing, and, if possible and so directed, 5 working days before the full hearing. Skeleton arguments were also routinely accepted on the morning of the hearing.

By contrast the ASA contains a far higher level of prescription as to content and style (see Directions to Represented Appellants (Presidential Practice Statement No 2 of 2020)):

> *2.3 Appeal Skeleton Argument. Not later than 28 days after the respondent's bundle is provided, or 42 days after the Notice of Appeal, whichever is the later, the appellant must provide an Appeal Skeleton Argument ("ASA").*
>
> *2.4 The ASA must contain three sections: (1) a brief summary of the appellant's factual case; (2) a schedule of issues; (3) the appellant's brief submissions on those issues which should state why the appellant disagrees with the respondent' s decision with sufficient detail to enable the reasons for the challenge to be understood.*
>
> *2.5 The ASA must:*
> *• be concise;*
> *• be set out in numbered paragraphs;*
> *• engage with the decision letter under challenge;*
> *• not include extensive quotations from documents or authorities;*
> *• identify but not quote from any evidence or principle of law that will enable the basis of challenge to be understood.*

Question 5: What do you consider the role of the appeal skeleton argument to be under the online system?

Notably, under the new system there are no detailed grounds of appeal that are lodged with the appeal through MyHMCTS. However, ASAs are often done far in advance of the hearing.

Under the new system, some of our members note that the ASA is prepared earlier in the process, with collaboration between representatives and counsel. Under the ordinary directions, service of the ASA and the appellant's bundle triggers the Secretary of State's review, which may result in the withdrawal of the decision. It is written with an aim of encouraging a concession from the respondent, and not merely written for directing a First-tier Tribunal judge to relevant evidence and law as was the case for skeleton arguments under the paper-based system. Whilst it is, therefore, a useful tool far earlier in the appeal process, please note our comments above regarding delay in service of the respondent's bundle delaying service of the ASA and the respondent's review. As the ASA need only be served 28 days after the respondent's bundle (or 42 days after the Notice of Appeal), whichever is later, the review and listing process can be detained by late service of the respondent's bundle.

We have also heard instances of the Tribunal rejecting ASAs on the generic basis that they contain case law or submissions on vulnerability, despite the fact that they are relevant to the appeal. For example, we have heard from a member of an instance in which the Tribunal directed that an ASA be redrafted as a Tribunal caseworker (with delegated powers) was unaware that in some ASAs it is impossible not to refer to case law, for example, such as to *HJ (Iran) v Secretary of State for the Home Department (Rev 1)* [2010] UKSC 31 in LGBTQ+ appeals. Paragraph 2.5 of the Directions to Represented Appellants (Presidential Practice Statement No 2 of 2020 is inconsistent. It suggests that an ASA can contain quotations from documents or authorities, so long as they are not 'extensive'. However it also states to 'identify but not quote' from any evidence or principle of law. It would be more effective for the Standard Directions to state that an ASA should not quote general principles of law, but to make clear that it does not prohibit any other quotations deemed helpful by the person drafting the ASA.

The MoJ and Tribunal should consider whether ASAs would benefit from greater flexibility in their content and format, as was the case with skeleton arguments under the paper-based system. Particularly, it should be considered whether First-tier Tribunal judges would benefit from, or welcome, more detailed written submissions than would be possible in a very concise ASA.

Question 6: Do you have evidence of any instances under the online system in which an appeal skeleton argument was not required or was not produced? If yes, please summarise your experiences and explain why an appeal skeleton argument was not required or produced.

We did not have any instances of this under the online system amongst the members who provided evidence.

Question 7: Can you describe whether, and if so, how, an appeal skeleton argument under the online system differs between asylum and non-asylum immigration cases?

It is not useful in our opinion to draw an artificial distinction between asylum and non-asylum immigration cases. They differ on a case by case basis. This broad stroke distinction between types of cases is not helpful in explaining any differences in their length, complexity, or the time it would take to draft an ASA.

Certain asylum cases *may* involve less quoted law than non-asylum immigration cases, but they may need to make extensive references to the evidence including from the country of origin. However, this is to be attributed to the complexity and evolving nature of human rights case law and does not mean that one skeleton argument which may be more evidentially heavy and one which may be more legally complex is deserving of a higher or lower fee. Furthermore, many asylum cases additionally raise non-asylum human rights grounds for appeal, and cases that were initially 'non-asylum' may subsequently raise protection grounds; thus, the distinction between the two can clearly be eroded.

Question 8: How long (in hours) does an appeal skeleton argument take in asylum and non-asylum cases? Do you have any examples/evidence to support this?

We reiterate our answer in relation to Question 7 regarding the unhelpful and arbitrary distinction which is sought to be drawn between asylum and non-asylum immigration cases. The preparation of an ASA is entirely case specific, and the length of time it would take to prepare an ASA depends on a range of factors including:

- size of the appellant and respondent's bundles, including whether there is expert country or medical evidence, other medical reports or extensive country evidence;
- the procedural history of the case (for example, whether it is a fresh claim[8] and whether there were any previous determinations[9] or decisions);
- the complexity and novelty of the legal argument;
- the number of issues in dispute;
- the factual complexity;
- the experience of the representative preparing the ASA;
- the country of origin, including whether there is extant and up-to-date Country Guidance case law as well as Home Office CPINs; and
- the extent to which the person drafting the ASA was previously involved in preparation of the appeal, such as in a client conference or advising on the evidence in the appellant's bundle.

There is no set of data from our members, across a wide spectrum of cases that would represent the factors enumerated above, that can be provided at short notice regarding the hours it takes to prepare an ASA under the online system. Additionally, given the distinct pandemic circumstances and the number of legacy cases still in the system, such data may not provide an accurate basis for future

[8] Immigration Rules, para 353.

[9] If there was a previous hearing, the principles in *Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* * [2002] UKIAT 00702 [39] apply and require a rigorous evaluation of any prior determination and the evidence that was before that adjudicator.

projections. Whilst we have received anecdotal evidence of non-complex cases ranging from four to ten hours of preparation, and complex cases regularly taking at least ten hours and up to 30 hours, we have not conducted a formal survey. We strongly recommend against the MoJ using limited evidence to inform any new fee structure. The MoJ should endeavour to collect all relevant data before assuming any specific or average number of hours it would take to prepare an ASA.

We understand that the LAA may not have data regarding the length of time it takes to prepare an ASA, as the fee for preparation may not be broken down into its constituent parts. In cases where counsel is instructed, we understand from our members that there may be a counsel's fee note recording the length of time spent drafting an ASA. However, if, for example, there is a conference with counsel shortly prior to their drafting the ASA, then counsel is likely to have already read the papers in preparation for the conference, reducing the time subsequently needed draft an ASA, whereas if counsel were coming to the case cold, they would need to read the papers as part of the process of drafting the ASA; hence, the drafting fee cannot be considered in isolation. We also understand that representatives other than counsel who draft their own ASAs may have a note of the length of time it has taken to prepare an ASA for a specific case. However, we would caution against relying upon any survey of data that is insufficiently wide to encompass and reflect the range of factors that can result in various lengths of time to prepare ASAs in different cases.

Moreover, we maintain that this is not the appropriate time, given all of the circumstances including the global pandemic, to gauge the duration of time it would take to prepare an ASA and assume this to be standard. Even following a return to normality after the pandemic, we maintain that the drafting of an ASA is entirely case and person specific, and representatives should be appropriately remunerated on hourly rate basis for time spent drafting. A cap on the fee paid for drafting an ASA may result in representatives only drafting for the pro-rated amount of time entailed in that cap or being unable to take cases subject to a cap due to financial viability. This would lower the quality of preparation and representation, and defeat the purpose of the ASA in the online system which is to provide a succinct but helpful explanation of the facts, issues, and submissions in the appellant's appeal with which the Tribunal and the Secretary of State can meaningfully engage.

Independent of drafting an ASA, advocates must also carry out preparatory work for which there needs to be legal aid provision. For example, due to the protracted nature of the new online process, it may not necessarily be the same advocate who does all of the front loaded work. Furthermore, a different advocate may attend each listed hearing in that case. Therefore, time must inevitably be spent by each new advocate to familiarise themselves with the case and evidence. Additionally, advocates, external counsel in particular, are often instructed to comment on expert and witness evidence; this requires additional hours of work beyond the time taken to draft an ASA. As we state below in relation to Question 14, this work does not fall under the work that ought to be remunerated through 'additional payments for advocacy services: substantive hearing' and 'additional day substantive hearing' fees. Those fees are solely for work on the day of the hearing, and there must be separate provision for fees to adequately pay for preparatory work. As we explain in detail in relation to Question 13, the fairest way for this remuneration to be paid would be on an hourly rate basis.

Question 9: Anecdotally we understand that the requirement for an appeal skeleton argument may have resulted in Counsel being more routinely instructed in appeal cases. What are your views on this understanding?

We do not have sufficient evidence to provide a view on the MoJ's anecdotal understanding.

As above, barrister members have noted that they are often instructed earlier in the process, sometimes to prepare an ASA, sometimes even earlier to provide advice on submission of the appeal and evidence once a refusal letter is received. However, we do not have any data to suggest that counsel is more 'routinely instructed'. The evidence from our members shows that it is the timing of counsel being instructed, rather than its routineness that has altered under the online system. Additionally, as stated in relation to Question 1, not every organisation will instruct external counsel to draft an ASA as it can be drafted by the instructing representative.

In any case, we do not consider this question to be probative or relevant to ascertaining an appropriate legal aid fee structure or determining the efficacy of the online system.

Question 10: Can you describe whether, and if so, how, an appeal skeleton argument under the online system differs between cases that result in a substantive hearing and cases that do not? Please also comment on whether this differs between asylum and non-asylum cases that result in a substantive tribunal hearing.

Once more, we do not consider the distinction between asylum and non-asylum cases to be helpful.

We do not have any evidence of any differences between ASAs in cases that result in a substantive hearing and those that do not. Please note our comments above regarding the necessity of the Secretary of State to meaningfully engage with the review process if cases are to be resolved through withdrawal of the decision, prior to the substantive hearing. The quality of the ASA, if it is a factor, is not the only relevant factor in determining whether a substantive hearing is necessary.

3. TRIBUNAL HEARINGS

Question 11: Do you consider that the introduction of the online system has had an impact on the work necessary to prepare for a substantive hearing? If so, please explain how and why.

Our response in relation to Questions 1 and 2 is repeated. As above, the online system has impacted when work is conducted, and whether work must be repeated due to the gap between the initial preparation, the review, and the date of the substantive hearing. This feeds into the need to provide further evidence to prepare for the substantive hearing, amend or draft addendum ASAs, and familiarisation with a bundle or bundles multiple times. As new evidence is added, a new consolidated bundle is created with new page references. It should be considered whether the bundles can have predetermined separately paginated sections, such as A, B, and C (as they do in the Family Court[10]), where new evidence can be added at the end of the relevant section so as not to disrupt prior page references in ASAs and such that the rest of the page numbers for the later sections stay undisturbed. It is important the MoJ and the Tribunal consider examples from other jurisdictions to ensure that the system in the immigration tribunals is as efficient as possible.

Additionally, barrister members note that they do not have access to MyHMCTS to download the consolidated bundle. It must be sent by those instructing them. If the bundle is very large, this can result in difficulties in both sending and receiving it. If all parties in a hearing (particularly, a remote hearing) are not in possession of the same set of documents, this can cause delays on the day of the substantive hearing as documents must be linked or forwarded, and then reviewed, before the start of the hearing. This problem is often compounded if documents must be sent to presenting officers, as the Home Office's email system prevents receipt of large attachments. This cannot be resolved easily, as it can in a hearing in person, through a photocopy of a document being made or a missing document being shown to other parties or witnesses.

The early ASA is a double-edged sword. It can result in early withdrawal, but it requires preparation at both the time of its drafting and preparation prior to the substantive hearing. This does not pose a problem if practitioners are remunerated at hourly rates, but it is problematic if the substantial extra work is not recognised in a fixed fee. The MoJ should consider and collect evidence to decide whether the ASA deadline should be detached from the deadline for submission of the appellant's and respondent's bundle. For example, it could be served after a consolidated bundle has been formed but prior to the respondent's review. The ASA and the respondent's review could then be added to the end of the consolidated bundle. We do not have sufficient data to come to a view on this matter, but it is important that the MoJ and Tribunals continuously re-examine whether changes in directions can result in efficiency in the process and the avoidance of duplication of work, whilst maintaining the aim of ensuring that the Secretary of State reviews and withdraws decisions that need not be heard at a substantive hearing.

[10] The Family Procedure Rules have a prescribed format for bundles, see Practice Direction 27A - Family Proceedings: Court Bundles (Universal Practice to be Applied in the High Court and Family Court). Paragraph 4.2 contains sections for: (a) preliminary and any other case management documents required by any other practice direction; (b) applicants and orders; (c) statements and affidavits; (d) care plans; (e) experts' reports and other reports; and (f) other documents, divided into further sections as may be appropriate <https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_27a> (accessed 30 November 2021).

Question 12: Do you consider that the introduction of the online system has had an impact on what happens on the day of the substantive hearing itself? If so, please explain how and why.

Our members note that there are fewer adjournments on the day of the substantive hearing, fewer skeleton arguments served on the day, and fewer surprises (for example, that the Secretary of State intends to withdraw, or as to her evidence). Additionally, more appeals are effective on the day. However, lists can still collapse if the Secretary of State fails to undertake a meaningful review until the day of the hearing and her representatives withdraw the decision at the last minute.

As an aside, a specific concern that our members had was regarding the consolidated appeal bundle. The transformation to the online system means that bundles are printed far less often. Therefore, our members note that an additional screen is required for representatives to adequately represent appellants. Specific hearing rooms should be provided with additional screens for representatives (and judges), in which they can plug their electronic device (laptop, tablet etc), to enable advocates to have one screen for their notes of the proceedings, and another screen for their bundle. Our members note that they have to often carry two laptops, or a tablet and a laptop. One reason for this is that they must often show an appellant a specific document in the bundle during the course of the hearing and effectively navigate two bundles whilst simultaneously making notes and referring to a skeleton argument for oral submissions. Needing multiple screens in order to represent an appellant adversely affects legal aid advocates of lower incomes, and particularly those who are starting out in their careers, who struggle to afford this expensive technology. The Tribunal should provide a full digital infrastructure to support the digital system in the hearings centres.

4. IMMIGRATION LEGAL AID FEES

Question 13: Please provide evidence as to whether the previous controlled legal representation fee structure of stage 2a and stage 2b payments based on whether a case went to a hearing, would be suitable for asylum and immigration appeals using the online system?

On the basis of evidence we have received from members, the previous controlled legal representation fee structure of stage 2a and stage 2b payments (based on whether a case went to a hearing) is unsuitable for asylum and immigration appeals using the online system. It is not possible to shoehorn the old fee structure for controlled legal representation into the new system, which requires the frontloading of preparation.

We have previously detailed our concerns regarding the impact of stage 2a and 2b cases in our statement of 18 May 2020:

'We are concerned about the impact of the new fee on these cases which do conclude without a hearing (currently 'stage 2a'). There will not be a hearing fee, but there is likely to be a Case Management Review Hearing (CMRH), however ignoring any additional payments, and assuming that the legal help file has reached the escape claim fee threshold, the difference in the escape claim fee threshold between the current and new fees is both stark and concerning.

Currently, the fixed fee for stage 2a is £227 and the new asylum fixed fee is £627 (referred to as 'stage 2c'). This means that the amount of work that needs to be billed in order to reach the escape claim fee threshold and be paid at hourly rates has been increased from £681 (three times the fixed fee of £227) to £1,881 (three times the fixed fee of £627). Under the current scheme (excluding any additional payments for the purpose of simplicity) a stage 2a file which had accrued work valued at £682 to £1,880 would be paid at hourly rates. Such a file will now receive £627.

Comparison of payments made under the existing and new fixed fee:

Value of work done	£300	£400	£500	£700	£1,000	£1,500	£1,800	£2,000
Payment under existing scheme (stage 2a)	£227	£227	£227	£700	£1,000	£1,500	£1,800	£2,000
Payment under new scheme (stage 2c)	£627	£627	£627	£627	£627	£627	£627	£2,000

Although the new payment appears more generous when you look at the lower value cases, the reality is that under CCD the majority of files will exceed the new fixed fee and will therefore lose out financially as a result of this change.

This will inevitably deter people from taking on the more complex cases, which require the most work, as that is a very high threshold to meet, and otherwise they risk falling into the gap between the fixed fee and the escape claim fee threshold in which all of that work will go unpaid.

Appellant's Skeleton Argument

Further, under the new CCD system, the appellant's skeleton argument must be prepared and submitted at an early stage. At the stage where the appellant's skeleton argument is required, it is unlikely that the lawyers will know whether or not the case will reach the escape fee threshold (and therefore be paid at hourly rates). If the decision is withdrawn as a result, there is no fee specifically available for the appellant's skeleton argument, either under stage 2a or

under the proposed new stage 2c. Therefore, at the point that the appellant's skeleton argument is required, there is no indication of what fee may be available to counsel. When ILPA raised this with the MoJ, we were told that the LAA does not dictate what element of payment is made by solicitors to barristers, and that payment to counsel is always a matter to be determined between them. This does not reflect the reality of how the current system works, where there are specific fixed fee additional payments which are to be allocated to counsel, including for CMRHs and for substantive hearings. In practice it has always been the case that the £302 hearing fee is paid to barristers on a fixed fee case, and the standard fixed fee is to cover the solicitor's work.

The new scheme simply provides an additional £400 to the standard fixed fee for an appeal without a hearing. Representatives should not be expected to devise a new fee splitting procedure internally and the new fee does not allow for any fair way to do so. Due to the way that the CCD process has been designed, the vast majority of the work is now done at the start of the appeal. Previously, the appeal would be likely to go to a full hearing, and the firm would have received £567 for this work (for asylum), and the barrister £302 for the hearing. Now, where the solicitor has prepared the case in full and the barrister has drafted the skeleton argument at an early stage as required under CCD, the total fee available is £627.

If that £627 was split to reflect the fact that the firm has done basically the same amount of work that would have been done for a full appeal hearing, that would leave an additional amount of just £60 for counsel to draft the appellant's skeleton argument. This is an extremely low fee particularly when it is considered that in this scenario the skeleton argument would have been successful in persuading the SSHD to concede the appeal. It is not financially viable for barristers to accept doing work which would in practice amount to an hourly rate that is under the minimum wage in most cases. Equally if that £627 was split so as to reflect the fact that counsel has done at an earlier stage all the preparatory work that would have been done for a full appeal hearing, this would mean that firms would receive less for appeal preparation than they currently do. Neither are financially viable options, and it follows that these changes will have a substantial negative effect on access to justice.

Practitioners are reporting that some Tribunal judges are taking the position that if a barrister is not prepared to do the work, then the solicitor or caseworker must do it instead. No one should be obliged to work for free, and the damage that will be caused to the sector through such a stance is obvious. We are aware of the Tribunal threatening to dismiss an asylum appeal next week for non-provision of the appellant's skeleton argument. This is not a situation that any lawyer should be placed in – carry out unpaid (or very poorly paid at best) work, or else your client's appeal will be dismissed.'

Furthermore, we maintain that the distinction drawn, in Tables 4(a) and Table 4(c),[11] between asylum and non-asylum immigration appeals, is unreflective of the work that must be carried out, which can

[11] The Civil Legal Aid (Remuneration) Regulations 2013, Schedule 1. In Table 4(c) this distinction is drawn for substantive hearings.

be equally challenging and complex in these cases. This fee regime can leave those representing in non-asylum appeals insufficiently remunerated in these cases. As we have asserted above, we can see no proper basis for this distinction. A lack of information about the preparation time for immigration appeals should not result in the assumption that they are deserving of lower fees.

Legal aid practitioners must be adequately remunerated if they are to fearlessly represent the best interests of their clients without allowing financial pressures to compromise the level of preparation, representation, and client care that they can provide in the reasonable time allotted by the fee. Due to the increased front-loaded work in the new system, if the same number of representatives have conduct of the same number of cases, they would have less time to devote to each case, which can result in poorer quality work, missed deadlines, and decreased client care. It is in the interests of justice that higher quality work is produced, and there is better representation before the tribunals. The legal aid system cannot be built on an expectation that practitioners are willing to work pro bono, and supplement their loss-making legal aid work with other higher paying (likely, privately funded) work. Insufficient remuneration will lead to an increase in unrepresented appellants, due to providers' inability to afford carrying out the work, or due to providers' lowered capacity through taking on other work.

The Secretary of State for the Home Department, Priti Patel, has been critical of the appellate system and recently stated that the asylum system was a 'complete merry-go-round'[12] that has been exploited and 'a whole sort of professional legal services industry has based itself on rights of appeal, going to the courts day-in day-out at the expense of the taxpayers through legal aid'.[13] This is denied. However, the real implications of a fixed fee delimiting the work that can be done will certainly create a 'merry-go-round': if appeals are not prepared well in the First-tier Tribunal, the more likely it will be that there will be a point of law by either side to appeal to the Upper Tribunal, who may need to remit to the First-tier once more. Equally, the poorer the preparation of an appeal the first time around, the stronger the merits of a fresh claim on further evidence. The way to avoid ever entering the 'merry-go-round' is through ensuring there is high quality preparation and representation, which must be adequately remunerated, from the outset. In our Introduction to this Call for Evidence, we have requested data regarding the percentage of appeals which are successfully appealed to and allowed by the Upper Tribunal. If there are fewer appeals in the Upper Tribunal under the online system, this will result in savings for the Tribunal, Home Office, and LAA.

Our position has been that the only equitable approach is to apply hourly rates to remunerate practitioners for all cases started under the online system. In the absence of an hourly rate, we recommended a new bolt on fee for the ASA, akin to the present bolt on for the substantive hearing.[14]

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[12] Vikram Dodd , Rajeev Syal and Harriet Sherwood, 'UK-born extremists pose main threat, says top counter-terrorism officer' *The Guardian,* 17 November 2021, <https://www.theguardian.com/uk-news/2021/nov/17/priti-patel-criticised-for-asylum-merry-go-round-claim-about-liverpool-suspect> (accessed 27 November 2021).

[13] Aletha Adu, 'Research says Priti Patel is wrong over attack on asylum system "merry-go-round"' *Mirror,* 17 November 2021 <https://www.mirror.co.uk/news/politics/priti-patel-attack-asylum-merry-25479334> (accessed 27 November 2021).

[14] ILPA, 'ILPA's statement on the new immigration and asylum legal aid fixed fee' 18 May 2020, <https://ilpa.org.uk/ilpa-statement-re-new-legal-aid-immigration-and-asylum-fixed-fee/> (accessed 27 November 2021).

However, we would also join the General Council of the Bar of England and Wales in recommending that the Lord Chancellor considers remunerating advocacy on an hourly-rates basis.[15] As an example of the failure of adequate remuneration, two lengthy days of advocacy in a complex asylum appeal would result in a payment of £463, and in an immigration appeal only £398, if the hearing is adjourned to a third day it will only attract a further payment of £161. These fees are the same regardless of how long the hearing lasts on the day, how far advocates must travel or wait before they are heard, and how long they spend preparing for the hearing itself. This will particularly and adversely affect junior members of the Bar who are not independently wealthy. This in turn affects social mobility and diversity at the Bar, which eventually has a knock on impact on the constituent members of the judiciary. Therefore, we join the Bar Council in recommending that the MoJ consider provision for cases to escape the standard fees for advocacy.

As detailed in ILPA's aforereferenced statement of 18 May 2020, regarding the (now revoked) Civil Legal Aid (Remuneration) (Amendment) (Coronavirus) Regulations 2020, with a proposed fixed fee of £627 for an asylum case (raised from £227), the escape claim fee threshold to be paid at an hourly rate increased from £681 to £1,881. Files that exceeded the fixed fee of £627 but failed to reach the escape claim fee threshold, would result in a payment of £627 only. Such a fixed fee basis was clearly unfair for representatives, as it would result in a lack of payment for work conducted. Equally, such a rigid approach to fixed fees for advocacy is liable to result in unfairness.

One of our members, who provides regional publicly funded and not for profit legal advice, has noted that the hourly rate system - which entails auditing, clawback, detailed notes, and further training of staff - can be a complex system to navigate for smaller and less well resourced providers, particularly those outside of metropolitan areas. Each time the system changes, the MoJ will be aware that providers must re-train their staff and this opens the door to mistakes being made. It is important that the system is easily navigable so that the focus of providers can remain on providing representation rather than negotiating a rigid legal aid system overburdened by bureaucracy, without sacrificing the adequate remuneration of providers.

The difficulty with the fixed fee is that it encourages representatives to work within its limits, rather than doing what is necessary to prepare the case fully. Given the low fixed fee sum, it is difficult to see how it is viable for firms to do anything other than the bare amount of work that that fixed fee would reasonably remunerate.[16] This may fall below the work that is necessary in all of the circumstances of the case. However, it is a matter of survival for representatives in legal aid. A low fixed fee, such as that

[15] The Bar Council, 'Bar Council response to the Legal Aid Agency's consultation on the Amendments to the Standard Civil Contract (Immigration) 2018' 1 September 2020 <https://www.barcouncil.org.uk/uploads/assets/95100f46-0400-4571-ac616971c0343ef7/Bar-Council-response-to-LAA-immigration-and-asylum-consultation.pdf> (accessed 27 November 2021). Currently, advocates are only paid a maximum of £302 for the first day of a substantive asylum hearing, £237 for the first day of a substantive immigration hearing, and only £161 for any additional day of a substantive hearing, per table 4(c) of The Civil Legal Aid (Remuneration) Regulations 2013, Schedule 1, Part 1.

[16] Jo Wilding, *Droughts and Deserts: A report on the immigration legal aid market* (2019) page 15 <https://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf> (accessed 27 November 2021): 'There is a real risk that, far from inflating demand, some providers are capping the extent of in-case demand they will meet for each client'.

proposed in stage 2c of £627 for an asylum case or £527 for a non-asylum case,[17] would make legally aided work financially unviable for practitioners, who would need to turn away this work. The fixed fee also contains no uplift for inflation. Last year, the immigration Bar united in refusing to accept instructions under the new fee model, as it was not economically viable, particularly for the junior Bar, and thus posed a threat to the profession.[18] Therefore, the introduction of a low fixed fee would erode access to justice, a fundamental pillar of the rule of law and our democratic society.

Question 14: Please describe what type of work you consider to be remunerable under the 'additional payments for advocacy services: substantive hearing' and 'additional day substantive hearing' fees.

As answered in relation to Question 13, we recommend that consideration is given to remunerating advocacy on an hourly-rates basis. If a fixed fee for advocacy is to be maintained, we encourage the MoJ and LAA to consider whether it adequately remunerates representatives for the entirety of their time spent on the day of the hearing, including travel and waiting time.[19] We do not consider it appropriate for the 'additional payments for advocacy services' in substantive hearings to cover any other preparation or conference that takes place before the day of the hearing. It should only cover work carried out on the day of a hearing, in relation to the listed hearing, including conferences before and after the hearing, advocacy, and communication with any instructing representative following the hearing.

5. PUBLIC SECTOR EQUALITY DUTY

Question 15: Please provide evidence on the protected characteristics and socio-demographic differences of individuals who are using the online system, both legal aid clients and legal aid providers, including instructed Counsel?

[17] The Civil Legal Aid (Remuneration) (Amendment) (Coronavirus) Regulations 2020, reg 2(2) inserting stage 2c to Table 4(a) of the Schedule 1, in Part 1 (Civil Standard and Graduated Fees) in the Civil Legal Aid (Remuneration) Regulations 2013.

[18] Young Legal Aid Lawyers, 'New Legal Aid Rules Will Reduce Access to Justice for Asylum Seekers and Migrants' 5 June 2020 <http://www.younglegalaidlawyers.org/sites/default/files/YLAL%20Legal%20Aid%20Fixed%20Fees%20Briefing%20.pdf> (accessed 27 November 2021).

[19] Currently, paragraph 8.73 of the 2018 Standard Civil Contract Immigration Specification states, 'Where applicable, Standard Fees for advocacy services set out in the Remuneration Regulations are payable at the end of Stage 2 (as described in Paragraph 8.72), in addition to the appropriate Standard Fee, for each relevant attendance. When claiming for advocacy work the following rules apply: (a) advocacy fees are payable whether the relevant advocacy services are carried out by you or Counsel and whether remotely or in person; (b) only one advocacy fee for a substantive hearing in the First Tier Tribunal may be claimed per Matter; if such a hearing goes into a second day, either part heard or re-listed, an additional day's substantive hearing fee may be claimed for the second and each subsequent day; and (c) advocacy fees are inclusive of time for travel and waiting'.

We understand that the MoJ is required to consider the need to eliminate discrimination, advance equality of opportunity and foster good relations between different people in shaping policy, delivering services and in relation to your own employees.

We do not have sufficient evidence to respond to this question. However, please note our comments regarding the necessity for advocates to have two screens to properly represent appellants in the Tribunal. We are concerned that this will adversely affect young legal aid advocates who are not from privileged socio-economic backgrounds and who may be paying off significant student debt. It may particularly affect advocates of certain genders and ethnic minority backgrounds who earn less than their counterparts. The Bar Council's recent November 2021 report has detailed the comparative difficulty that individuals from ethnic minority backgrounds and women find in earning potential and in pursuit of careers at the Bar: 'Data in the report categorically and definitively evidences, in quantitative and qualitative terms, that barristers from all ethnic minority backgrounds, and especially Black and Asian women, face systemic obstacles to building and progressing a sustainable and rewarding career at the Bar'.[20] Needing multiple screens in order to represent an appellant may pose a further impediment to their entry and continued practice in this area of the law. A lack of social mobility and diversity at the Bar will likely impact the diversity of the judiciary.

Although we represent practitioners, we have concerns regarding the impact that the online system may have on legal aid funded appellants. Many appellants in immigration and asylum cases are particularly vulnerable, suffer from mental health issues, have complex needs, and have differing levels of education and familiarity with this type of technology. The online system, insofar as it delays their case, can add to these issues. Additionally, receipt of a link and attendance at remote hearings without face-to-face in-person interaction may be more difficult for the more vulnerable, not least since body language cannot be used in the same manner to ease their mind and convey meaning. We are particularly concerned regarding the effect of the online system on unrepresented appellants and have provided an example above, in relation to Question 2, of the difficulties they face in being moved between the online and paper-based systems. We recommend that the MoJ conducts research into the impact of the online system and remote hearings for appellants.

6. ADDITIONAL EVIDENCE

Please share any additional views, with supporting evidence, in relation to the online system that are not covered by the questions above but that you would like to be considered as part of this Call for Evidence.

Legal aid providers are suffering from a cash flow crisis, due in part to payment in arrears, which has only been exacerbated by delays in tribunal proceedings during the COVID-19 pandemic with a drop in

[20] The Bar Council, *Race at the Bar: A Snapshot Report* (November 2021) page 2 <https://www.barcouncil.org.uk/uploads/assets/d821c952-ec38-41b2-a41ebeea362b28e5/Race-at-the-Bar-Report-2021.pdf> (accessed 27 November 2021).

income to many providers.[21] The sparsity of providers specialising in immigration and asylum law, resulting in geographical cavities in legal aid provision, has been well documented by Dr Jo Wilding.[22] This is exacerbated by the fact that under the current system it is not possible to make an early claim for profit costs in hourly-rate appeals. We would recommend that the LAA and the MoJ revisit the system. It would be sensible to permit providers to make an 'early claim', similar to that under Legal Help, following the respondent's review. At this point, it will be clear whether the respondent intends to defend the appeal. If she does, it may be many weeks or months before the appeal is heard and decided. Under the current system, providers cannot claim profit costs, unlike disbursements, until the appeal has concluded. Therefore, it may be a long time before providers are paid, yet they are expected to pay counsel's fees, which are part of their profit costs save for the fixed fee for advocacy, and invoices for disbursements such as experts. As an additional recommendation, disbursements could be billed once cases reach a particular stage in addition to the specific timeframes stipulated in the Standard Civil Contract Immigration Specification.[23]

As above, we have recommended that further consideration is given to whether the deadline for ASAs can be detached from the deadline to serve the appellant's and respondent's bundles, and to consider an hourly-rate and escape fee mechanism for advocacy.

Whilst we appreciate that this Call for Evidence is made in efforts to make relevant necessary inquiries before any decisions are made regarding changes to the legal aid fee regime for the online system, we would respectfully assert that further data and consultation is required before any systemic changes are made. In the interim, the status quo hourly rate should be maintained, and its extension to other areas, such as advocacy, should be placed under consideration.

2 December 2021

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[21] This is acknowledged in The Westminster Commission on Legal Aid, *Inquiry into the Sustainability and Recovery of the Legal Aid Sector* (October 2021) <https://lapg.co.uk/wp-content/uploads/The-Westminster-Commission-on-Legal-Aid_WEB.pdf> (accessed 27 November 2021) at page 26: 'We heard evidence about the difficulties in sustaining areas of legal aid practice where certain types of work have been removed from scope. These problems have been exacerbated over the past year with the drop in income for many providers caused by the lockdowns and delays or halts to certain types of court and tribunal proceedings'.

[22] Jo Wilding, *Droughts and Deserts: A report on the immigration legal aid market* (2019) <https://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf> (accessed 27 November 2021); J. Wilding, M. Mguni, T. Van Isacker, *A Huge Gulf: Demand and Supply for Immigration Legal Advice in London* (2021) <https://www.phf.org.uk/publications/a-huge-gulf-demand-and-supply-forimmigration-legal-advice-in-london/> (accessed 27 November 2021).

[23] Currently, paragraph 8.104 of the 2018 Standard Civil Contract Immigration Specification states, 'You may submit a Claim to us in respect of unpaid Controlled Work disbursements (not including Counsel's fees). You may only apply under Paragraph 8.98 if at least 3 months have elapsed since the start of the Matter and, if you have become entitled to make a Controlled Work Claim (as defined at Paragraphs 8.59 and 8.96 for Standard Fee and Hourly Rates Matters respectively) or have previously applied for payment under this Paragraph 8.98, at least 3 months have elapsed since that entitlement arose or the application was made.'