

10 January 2007

**BRIEFING: debate on the future of Legal Aid on 11 January**

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ILPA is a professional association with some 1200 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through teaching, provision of high quality resources and information. ILPA is represented on numerous government and appellate authority stakeholder and advisory groups.

**The DCA proposals on legal aid for asylum and immigration cases:**

The proposal is for fixed fees, "graduated" by add-ons for certain specified eventualities, and with some types of case (eg unaccompanied children and detainees) excluded from the scheme. The basic scheme would mean that all cases of a particular type would attract the same fee regardless of the complexity or true time and cost expended, subject to an exceptionality threshold beyond which the supplier could claim the "true" hourly cost (at rates which have received no cost of living increase since April 2001). The DCA states that this will lead to greater efficiency, and expects legal aid suppliers to offset the cost of complex cases against those that are more straightforward: the concept known as "swings and roundabouts".

**Limited amelioration of the starkness of the basic scheme:**

The level of the exceptionality threshold was proposed as 4 times the fixed fee. In response to consultation there is an indication that the multiplier might be reduced to 3, but this would still leave suppliers at financial risk as soon as costs in any case reached the fixed fee as there could be no certainty that they would pass a x3 or x4 threshold, and there can be no certainty at all that they will have sufficient cases costing so far below the fixed fee as to balance the loss.

As to the cases excluded from the fixed fee scheme, no details have yet been made available of the block contracts for which tenders are to be invited for the cases of unaccompanied children and detainees. ILPA has seen the briefing circulated by Bail for Immigration Detainees (BID) for this debate and we share the concerns there expressed, which are not repeated here.

**What should legal aid provision ensure?**

ILPA believes that legal aid provision must as a matter of principle ensure an adequate supply throughout the country of high quality advice and representation. Failure to meet this standard not only betrays the very principles on which the legal aid scheme was founded, but also has practical consequences, including the transfer of the burden of seeking to advise and assist asylum-seekers (and others subject to immigration control) elsewhere in the community (including to MP's surgeries).

**Problems with “swings and roundabouts”:**

There are fundamental problems with this concept as it applies in the current proposals:

Firstly, offsetting complex cases against more straightforward cases only works if both the fixed fee and the exceptionality threshold are set appropriately. By ILPA’s reckoning neither setting is currently satisfactory, and the proposals will tempt suppliers to cherry-pick the more straightforward cases and settle for inadequate investigation and preparation of cases. This is because the fixed fee is too low, and work beyond that encompassed within the fee is very unlikely to be paid for, because the exceptionality threshold is set at so high a level. For the conscientious supplier, very few (possibly no) cases will work out cheaper than the fixed fee; and even those that do will not be very much cheaper. Many cases will be significantly more costly than the fixed fee, but they may not exceed four (or even three) times the fixed fee.

Secondly, offsetting will not work in an environment where there is substantial divergence of expertise and experience among legal aid suppliers because either: (i) the more expert are disadvantaged by being expected to take on the greater share of the complex cases; or (ii) an even distribution of complex cases means some suppliers undertaking cases beyond their competence.

Thirdly, where there is such divergence of complexity (so that offsetting is expected to operate across a very wide margin), it is inevitable that some suppliers will choose to cherry-pick to exploit their profit margins. This will create the risk that those with more complex cases will either go without representation or be inadequately represented, because conscientious representatives will not be able to shoulder the financial burden of taking on the complex cases, which the less conscientious chose to avoid.

**Accreditation in itself is no answer to these concerns:**

The DCA and Legal Services Commission (LSC) appear to believe that problems of quality have been solved by accreditation, which was introduced for suppliers in immigration and asylum in 2004. However, accreditation merely requires that a would-be supplier demonstrate a certain level of knowledge by passing exams. It neither requires that supplier to prove a higher level of expertise (suitable for some complex cases) nor does it ensure that the general knowledge demonstrated translates into providing good advice and representation for real people. Whatever the view of the LSC and DCA, ILPA has no doubt that there remain significant quality issues, even amongst accredited suppliers – a view which may well be shared by MPs.

**Interpreting & translating costs:**

Although the DCA is considering this again, currently it is proposed that, unlike any other area of civil legal aid, fixed fees for asylum (not immigration) work will be taken to include these costs. This is plainly undesirable. It will incentivise further cherry-picking of clients who speak some English or certain languages, which a supplier can offer “in-house”, rather than others; it will encourage the use of English where it is not appropriate; it will encourage the use of family members (including children) or friends to interpret (and hence lead to ~~non~~ disclosure of torture, rape and other matters of which a person may feel ashamed); and it will discourage suppliers from getting documents translated.

**Travel and waiting:**

The fixed fees for conducting appeals are to include travel and waiting time at the Asylum and Immigration Tribunal (AIT). This will penalise some suppliers and unfairly reward others, depending on the accessibility (affecting travel time) or workload (affecting waiting time) of the particular AIT centre they service.

Moreover, AIT listing practices and Home Office failings (including not having a file), which may extend waiting time, will seriously prejudice some suppliers, for reasons wholly out of their control.

**Generally:**

ILPA provided the DCA with a detailed response to the consultation last year, having first consulted our membership on the proposals. It is available on our website:

<http://www.ilpa.org.uk/>.

Our many concerns remain. It is plain to us that there are already serious inadequacies in legal aid supply in immigration and asylum (both in terms of quantity and quality); and the proposals seem destined to greatly increase those inadequacies. The LSC appears to think these inadequacies imaginary, but every other interested party recognises them to be profound. Finally, we note that the LSC has provided us with a wealth of financial and other data in response to our requests for information as to how these proposals have been worked out. We have shared this information with others; and neither we nor they have discerned any meaningful correlation between the data provided and the setting of the level of fixed fees.

The DCA has put back the timetable for implementation of these proposals in immigration and asylum to October 2007. That is welcome as far as it goes, but the continued reiteration that no more money is to be made available reduces hope that this will result in sufficiently profound reconsideration. It is claimed that the current proposals are “costs neutral” against a projected spend on asylum and immigration legal aid of £68m for 2007/8, but the LSC has admitted that the figures are not based on historical case costs: and the actual costs of asylum and immigration legal aid cases for 2005/6 was £102m. We have yet to see any figures capable of justifying the £68m “costs neutral” claim, and have grave doubts that it will be possible within that parameter to fix the fees and set the exceptionality threshold at a level that will enable suppliers to renew their contracts with the LSC without risking the viability of their businesses.

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