



ILPA RESPONSE TO MINISTRY OF JUSTICE CONSULTATION ON FUNDING IMMIGRATION AND ASYLUM LEGAL AID IN THE FIRST-TIER TRIBUNAL AND UPPER TRIBUNAL

Introduction

ILPA is a professional association with some 1,000 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 training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder and advisory groups including the Legal Services Commission Civil Contracts Consultative Group and the specialist immigration groups under it.

Matters of concern to ILPA about the proposed arrangements for Legal Aid funding of immigration and asylum cases in the new Tribunal

We have two particular concerns about the proposed arrangements, the first of which was clarified by the Legal Services Commission at their Immigration Representative Bodies meeting on 19 August 2009, at which a Ministry of Justice representative was present, and may therefore be dealt with very briefly.

1) Judicial Review claims transferred from the Administrative Court to the Upper Tribunal

As we understand it, the only Judicial Review claims which will for the time being be susceptible to transfer from the Administrative Court to the Upper Tribunal are those relating to 'fresh claims', i.e. Judicial Reviews of a decision by the Home Office that representations which have been submitted on the Claimant's behalf do not meet the requirements of paragraph 353 of the Immigration Rules and thus do not constitute a fresh claim for asylum / human rights protection. There is no statutory right of appeal against such a decision. The remedy is Judicial Review.

By the point at which a legally aided Claimant issues his / her claim in the Administrative Court, s/he will have in place a Community Legal Service Funding ('CLS') certificate.

We are grateful for confirmation from the Legal Services Commission¹ that in cases in which the claim is transferred to the Upper Tribunal the case will continue to be funded on the basis of the CLSF certificate.

¹ Confirmation provided by Fiona Hannan, Head of Immigration Policy, Legal Services Commission at the Immigration Representative Bodies' Meeting on 19 August 2009.

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Our position is that such a case certainly should continue to be funded on the basis of a CLSF certificate, which of course affords higher hourly payment rates for the solicitor and Counsel instructed. The fact of the case being transferred to the Upper Tribunal does not by any means indicate that the case is legally 'straightforward' nor that the case is susceptible of conduct by a less experienced solicitor and counsel. It is extremely important that work in relation to fresh claims litigation should continue to be adequately remunerated in order to guarantee continuing access to a high standard of representation for clients.

2) Funding of unsuccessful applications for permission to appeal to the Upper Tribunal

The consultation documents explain that the system of immigration judges making funding orders under s.103D Nationality Immigration and Asylum Act 2002 in respect of what are under the present system applications for 'Review and Reconsideration' is to be abolished².

In place of this system the position will be that applications for permission to appeal which are granted will be funded (as of course will the subsequent substantive appeal) whereas applications for permission to appeal which are refused will not be funded. It is clear from the draft amendments to the immigration specification that there will be no discretion in this respect:

11.56 In relation to all other cases not listed in 11.54, [other than fast track and applications from UKBA] where an application for permission to appeal to the Upper Tribunal has been granted (either by the First tier Tribunal or the Upper Tribunal) then you may claim your reasonable costs for work associated with the application.

*Where an application for permission to appeal to the Upper Tribunal has been refused **then you may not claim your costs** from us.*

[Emphasis added].

Thus the discretion of the immigration judge (as exists under the present system) is to be replaced by a contract term which provides for no such discretion. We object to the removal of discretion to fund unsuccessful applications. We accept that under the present system it is usually the case that unsuccessful applications to the Asylum and Immigration Tribunal for Review and Reconsideration will not attract a s.103D funding order, but the important point is that the discretion to fund an unsuccessful application is there, so that work undertaken by solicitors and counsel on a sound basis and in good faith may be remunerated if it would be manifestly unfair not to do so.

² See Nationality Immigration and Asylum Act 2002, s.103D as inserted by Asylum and Immigration (Treatment of Claimants) Act 2004, s.26 (6); crucially: s.103D (1) 'On the application of an appellant under section 103A, **the appropriate court may order** that the appellant's costs in respect of the application under section 103A shall be paid out of the Community Legal Service Fund...' [Emphasis added].

There ought to be discretion to recognise 'near miss cases', as well as cases which have been affected by a change in the law. For example an application for permission to appeal may be submitted because the solicitor and counsel form a view in good faith that the immigration judge has erred in law in relation to the application of existing country guidance. It is possible that by the time the application for permission to appeal is considered, the country guidance may have been overturned (e.g. by the Court of Appeal). For solicitors dealing with a large number of clients from the same country to which the Country Guidance relates, this could impact on a significant number of cases and the losses could be considerable.

It may be that the number of cases which will be affected by the removal of discretion to fund unsuccessful applications would be relatively small, but it hardly needs repeating that those undertaking publicly funded work in immigration and asylum are already feeling the extreme financial pressure attendant on the graduated fixed fee regime, and specifically are already absorbing significant losses on appeal work where the hours and profit costs incurred on a case fall just short of the 'exceptional' threshold (which we continue to maintain is set too high). We do not think in the circumstances it is asking for very much that decisions about funding unsuccessful applications should rest with the immigration judiciary and should not be incorporated as an inflexible contract term as is proposed.

Alternatively, and with a view to minimising bureaucracy, there could be a default provision that where permission is granted (either by the First tier Tribunal or Upper Tribunal) then the matter will be funded without the need for a costs order, but where permission is refused (either by the First tier Tribunal or the Upper Tribunal) the Judge could consider at the point of refusing permission whether there were good reasons (such as the 'near miss / change in the law' cases referred to above) for the application to be funded nevertheless, and if so make an order for funding. Another approach could be that following a refusal of permission the legal representative could apply to the Tribunal for a funding order, although it would seem more efficient and straightforward for the matter to be dealt with by the Judge refusing permission. These approaches would again be far preferable to and much fairer than the inflexible regime being proposed.

Retaining discretion to fund unsuccessful applications for the reasons outlined above would be consistent with the approach the Government previously thought fit, as highlighted by the Asylum and Immigration Tribunal in *RS (Funding – meaning of 'significant prospect')Iran*³. The Tribunal cited Baroness Ashton of Upholland's assurance to the House of Lords that:

'Every case must be dealt with on an individual basis, but representatives who pursue meritorious cases can expect to be paid. I can also assure the noble Lords that an unsuccessful outcome will not automatically lead to costs being refused. That is not how the scheme has been designed. The test the Tribunal must apply will be based on the prospects of success and the information that was available to the representative when the application was made'⁴.

³ [2005] UKAIT 00138

⁴ At paragraph 14

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ILPA
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