Immigration Law Practitioners' Association (ILPA) submission to the CAC Inquiry into the implementation of the Carter Review.

> *"Good practice takes time and trouble, but is never wasted. It shows in the standing and reputation of practitioners, in the respect in which opponents and tribunals hold them, and above all in the satisfaction of doing a job well. In the end, by avoiding disasters, it also saves money."* Lord Justice Sedley, Foreword, *Best Practice Guide to Asylum & Human Rights Appeals*, Mark Henderson, ILPA 2003.

Introduction

About ILPA

1. ILPA is a professional association with some 1200 members, including 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 high quality advice through teaching, provision of resources and information. ILPA is represented on numerous government and appellate authority stakeholder and advisory groups, and has provided oral and written evidence to the Constitutional Affairs Committee in the past.

2. Our response is limited to the proposals for contracting immigration and asylum work. We have answered those questions of most direct relevance to this area.

Overview

3. We recognise that the writing is on the wall and that graduated fees and block contracts are coming. Our assessment of the proposals, however, is that they are not fit for the purpose of maintaining a sustainable base of high quality, publicly- funded immigration and asylum practitioners.

4. We do not consider that the proposals are costs-neutral in respect of advice and representation. The proposed fees, which have not been calculated by reference to the historical cost of delivering work to the LSC's existing quality standards, would significantly reduce remuneration to those suppliers who are not prepared to cherry-pick the simplest cases to the detriment of potential clients with complex cases.

5. ILPA has consulted its members on the financial aspects of the proposals. Responses thus far from members with "devolved powers" (i.e. those who have been recognised by the LSC to work to the desired standard) indicate that the average time spent on asylum cases, up to initial Home Office decision, is between 11 and 20 hours per case. The proposal is to pay £550, said to equate to 8 hours, but which will include interpreting and translating costs as well as travelling and waiting time. Hourly rates in immigration and asylum have in any event seen no cost of living increase since April 2001.

6. The proposed remuneration levels for asylum are predicated on a case passing seamlessly through the New Asylum Model process. This is not even fully rolled out yet. We are very sceptical. The proposals take no account of the so-called "legacy cases" and "fresh claim cases" that make up a significant part of members' caseloads.

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7. We conclude from our consultations with members[1] that there is a real risk that suppliers will decide drastically to reduce their publicly-funded casework, or to leave the field entirely, because they see no prospect either of making the work pay or of reconciling the proposed levels of remuneration with the professional duties to client and to court that they accept in taking on any case. Doing a case well is a key part of motivation for continuing to work in this very difficult field.

8. If the aim is a cap on the overall spend on legal aid, it would be useful to see estimates of how much of that spend is the result of Home Office conduct of cases, not to mention the pace of legal change in this field. One proposal is to apply the "polluter pays" principle to costs wasted by Home Office dereliction in the conduct of appeals.

8. It is proposed that the LSC's budget be tapped to fund "advice" sessions at the Asylum Screening Unit. According to the LSC's tender for New Asylum Model contracts in Solihull[2] these will provide "pre-application information", but "the advice provided will be generic". The Home Office should pay for this information service.

Recommendations:

- **The AIT be given power to order payment into the legal aid fund when the Home Office causes delays and adjournments by turning up without files, failing to comply with directions or is otherwise the cause of wasted costs.**
- **The legal aid budget should not be used to fund generic Home Office information but be reserved for individual advice and representation.**

Whether the timetable for implementation suggested in Lord Carter's Report is realistic?

9. The proposed timetable for implementation of the changes in immigration and asylum does not derive from Lord Carter's Report. Immigration and asylum were expressly excluded from his review because of "the detailed recent review" which brought about the 2004 changes (Carter Report 1.16). He did not exclude immigration and asylum from "the procurement strategy to 2010", but envisaged "a move towards" a graduated fee scheme (Carter Report, Chapter 10) He did not propose the sudden imposition of a new scheme, with everything done and dusted by April 2007, in which the fees have not been calculated on the basis of what it costs to advise and represent clients in accordance with the LSC's own contract standards.

10. As described, those doing publicly-funded immigration and asylum work have grave concerns about their ability to survive under proposed regime. Even those would welcome the reduction in bureaucracy that a graduated regime could bring have concerns about the amounts of the proposed fees. Organisations will need to make decisions as to whether to continue in the field well in advance of April 2007, the proposed date for implementation, if only to give adequate notice of redundancies, if they opt out. This problem will not be resolved by treating year one of the scheme [as proposed] as the pilot – too many suppliers will be irretrievably lost by then.

11. If the overall aim of these proposals is to encourage larger organisations offering a multiplicity of services, then that is simply not achievable by next April.

12. The LSC has stated, in response to an ILPA Freedom of Information request about its calculations, that it has not based the proposed fees for immigration and asylum on

[1] See also the survey by the Law Society, the results of which are posted on its website
[2] http://www.legalservices.gov.uk/docs/cls_main/Early_Advice_Proposition.pdf

historical data because this is not reliably available. All cases, however, have been reported to the LSC in the same way within 3 months of closure (or reaching a specified stage) since April 2004, so data is being accumulated by them.

13. Our recommendations are made, not in the spirit of postponement at all costs of unwelcome developments, but in recognition that fixed fees are coming and with the desire to achieve a scheme that not only is capable of working, but also is capable of being perceived by suppliers now as workable and worth giving a chance, rather than one that they shun now, for fear of being driven out of business later.

Recommendations:

- **Full implementation is deferred until at least April 2008 and is preceded by EITHER a tailored fixed fee scheme (as was done in all other areas of civil law) OR a pilot period in which the level at which a case may be removed from the scheme as "exceptional" is reduced to twice the fixed fee. Either way, this period should be used to accrue relevant data on costs in immigration and asylum cases, and on the experience in practice of fixed fees in this area of law.**
- **The LSC conduct a detailed "case mapping exercise" based on a review of work done by quality providers (i.e. those with "excellent" Peer Review ratings or otherwise rated by their peers as the best providers in publications such as *Chambers* and enlist the assistance of a number of Level 1 and Not For Profit organisations (allowing adequate time for the exercise) in deriving realistic figures for fees.**

What benefits might be generated for defendants and others by adopting these proposals? Also what impacts/disadvantages might result from implementation?

14 The only potential benefits we perceive are not for clients but suppliers. These are:

- A potential reduction in bureaucracy because suppliers will not be involved in lengthy negotiations with the LSC about financial extension applications. This could, however, be off-set by the need to hold a multiplicity of block contracts and by the failure of the scheme to take into account that, for example, clients pass from being detained to non-detained at different stages in a case and have needs for advice on the effects of immigration status on support and welfare.
- A potential reduction of risk because suppliers will not be subject to an annual audit of sample files, at which, if they have spent over 10% more than the LSC thinks reasonable on the files audited, an equivalent percentage of LSC payments can be clawed back across all files.
  But this benefit will be obliterated if the level of "exceptionality" at which a case is lifted out of the fixed-fee scheme, is set at four times the fixed fee as is proposed. There would always be uncertainty while working on a complex case as to whether the exceptionality level would be reached, or whether, if not, the bulk of the work would go unremunerated. For example, at the first stage of asylum Legal Help, if costs are £2,200.01, they could be claimed in full; if they are £2,200 they could not, and only the basic £350 could be claimed – a £1,650 loss on one case. This promises far too high a level of uncertainty for providers.

15. The main disadvantages we perceive for clients are:
    - High quality providers will leave the field. Clients will find it more difficult to get high quality advice. Insufficient work will be able to be done on cases to

ensure that clients can put their case and win – with consequences include return to persecution or torture, and separation of families.
- Insufficient work will be able to be done on the multiplicity of problems people face related to their immigration status, for example detention and destitution. They will be deprived of their liberty for longer, and will be hungry and without accommodation for longer.
- The specialist immigration bar will be destroyed so clients will be deprived of that source of legal advice on novel and complex points of law in both asylum and non-asylum cases.

16. We perceive disadvantages for the administration of justice, at both Tribunal and higher court levels, from reducing the base of quality representatives, whether at solicitor and caseworker level or at the Bar. There will be longer hearings at the AIT because more appellants are unrepresented, and yet more applications to the higher courts. There will be a risk to the future development of the law, because the chances of test cases being overlooked will be increased by the pressure on providers who remain in the system.

What impact the proposals will have on different communities (such as Black and ethnic minority and rural communities)?

17. We deal here with both communities and particular groups.

18. The proposed fixed fee for asylum (although not immigration cases) includes interpreting and translating fees. This is unworkable and discriminatory. We understand that the basis of this proposal is that interpreting is likely to be needed in almost all asylum cases. We understand that an attempt has been made to estimate the number of hours of interpreting likely to be required in an average asylum case, and the fixed fee has been calculated accordingly. If this is so, it reduces the number of putative casework hours to a level that is wholly unacceptable and well below that required by good, let alone best, practice. It has a disproportionate effect on clients in detention or hospital, or otherwise unable to travel, because interpreters' travelling time must also come out of the fixed fee. It offers no rationale for making the fixed fee inclusive of translation costs, which vary hugely depending on the amount of documentation a client provides. We fear that the proposals will encourage unacceptable practices including:
    - Organisations favouring English speaking clients, or clients who speak languages offered in-house, with the result that clients speaking other languages will find it even harder to find representation than they do now.
    - Minimal use of interpreters, for example skimping on time spent reading back statements, or using the interpreter only for statement taking and not for advice giving or instructions updating as the case progresses.
    - Reliance on friends or family members to interpret. Among the effects of this bad practice: it militates against disclosure of rape or other humiliation, and against admission of previous fabrication or other unheroic conduct. At worst it can lead to the use of children as interpreters.

19. Exclusion of travelling time from all cases would make it significantly more difficult for some groups of vulnerable clients to secure representation than at present e.g. the disabled and prisoners, bearing in mind that it is only services for those held in the main immigration removal centres, not prisons, which are to be provided outside the fixed fee regime.

20. There are proposals for unaccompanied children's cases to be outside the fixed fee regime and contracted to specialist providers. It is not, however, clear whether this group will include those whose age is disputed. Such cases are complex, requiring the supplier to ensure that the client has the benefits of all safeguards accorded to a child, while the Home Office treatment of the child as an adult (i.e.as liable to detention, with the claim processed as that of an adult) must be contested as well as age proved.

21. The contention that immigration cases are cheaper than asylum cases may be true for applications within the rules. But much of the caseload for publicly-funded immigration work involves complex applications outside the rules for vulnerable people who will be disproportionately affected. This will also disproportionately affect the settled ethnic minority communities, who are most likely to have family members requiring complex immigration and entry clearance applications.

22. Clients with complex welfare needs will have severe difficulties because it is proposed that the fixed fee covers 30 minutes of welfare advice, and that other welfare work will have to be done under a welfare or housing contract. Not all immigration providers have these. Where work can be referred to a welfare or housing specialist they will often need to work closely with the immigration practitioner, each contributing their specialist expertise.

Recommendations

- **See above re calculation of fixed fee levels.**
- **Interpretation and translation be remunerated separately for asylum cases.**
- **Travel and waiting time sit outside the fixed fee. Statistics should be kept on these, which could then be used to make the case for the AIT to reform its listing practices so that travel time can in some circumstances be divided between cases listed on the same day but so that they do not clash.**
- **Provision be made for clients detained in places other than immigration removal centres, e.g. in prisons.**
- **Existing representatives be allowed to retain conduct of cases when their clients are detained and remunerated at an hourly rate for the work done.**
- **The exemption for unaccompanied children cover all age-disputed cases.**
- **The attempt to come up with a one-size-fits-all fixed fee for asylum and immigration, predicated on standard procedures, be abandoned, either through a lower threshold for exceptionality, or through different fee levels for those passing through standard and non-standard procedures.**
- **Immigration practitioners to be able to provide welfare work on immigration and asylum cases, paid at the welfare fixed fee.**

What impact any or all of the recommendations will have on legal aid providers?

23. See above. If we consider just London suppliers and the London Bar, travelling time to the AIT at Hatton Cross can be more than two hours each way. Waiting time is unpredictable. A 2-3 hour hearing can thus easily occupy 7-8 hours on the day of the hearing alone, disregarding the advocate's preparation time. A fee of £350 (£250 in immigration cases) is proposed. Taking the higher, asylum, figure, on current rates four hours travel would be remunerated at £121.20, putatively leaving £228.80 (or £128.80) of the fixed fee to cover conference, preparation and advocacy. It is not at all unusual for at least five hours to be required for conference and preparation, including preparation of the skeleton argument (required by Tribunal directions in asylum cases and good practice in all). So a three-hour asylum appeal would be remunerated at about £28.60 an hour for the substantive work (less if there is waiting time at court). This is even lower than the

hourly rate currently allowed for travelling and waiting time, and will not be balanced by large numbers of "simple" cases requiring shorter preparation and advocacy. Very simple and hopeless cases do not pass the merits test for public funding in the first place.

24. Those tied into block contracts will be vulnerable to pressure from the LSC to accept changes to their contracts. Concern has already been expressed, for example by Bail for Immigration Detainees in their report *Working against the clock: inadequacy and injustice in the fast track system* July 2006 that block contracting for fast-track detained work has resulted in firms protecting their costs by improperly declining to represent at an appeal where the prospects of success are borderline, or failing to give other assistance (for example representation at bail hearings) to clients whom they have declined to represent at appeal.

How the proposals will affect firms of differing size, structure and practitioner mix?

25. We realise that the aim is to encourage larger organisations offering a multiplicity of services. As stated, such changes take time to achieve. Organisations cannot change composition overnight. There are specialist firms with a reputation for tackling the most complex cases, and barristers specialising in particular areas. The notion seems to be that firms take on people to do "simple" cases to offset costs. It is wholly unclear how a barrister, or even a chambers, is supposed to offset. Even if a chambers takes on a junior barrister to do the simplest of appeals, how does this assist the colleague who is consistently underpaid for doing complex cases at the fixed rate?

26. Home Office policies change. Availability of accommodation is a key determinant of the location of asylum-seekers accommodated at public expense. Larger firms may be better placed to offset costs, but may be less able to adapt when, for example, the Home Office moves people away from their area.

27. Provision for block contracting will tie a limited number of firms into particular areas of work. In immigration and asylum demand for high quality services exceeds supply. This the LSC acknowledges for certain areas outside London and disputes for London – we invite London-based MPs to consider their own caseload and draw their own conclusions.

28. Short timescales and lack of local knowledge mean that many clients are not in a position to make informed choices. So the result is not the market envisaged by Carter but rather cartels controlled by the LSC, which, on current evidence, is more likely to use its position to urge providers to cut costs, than to maintain quality.

Whether the measures proposed will promote the provision of high quality advice and support the effective and efficient operation of the justice system?

29. We believe that they will not, for all the reasons stated above.

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2 October 2006