# Asylum and Immigration Tribunal - Amendments to the General Civil Contract

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Dear Madam

**Asylum & Immigration Tribunal – Amendments to the General Civil Contract**

I write in response to the Legal Services Commission's consultation paper on this topic.

The LSC is familiar with the work and professional standing of the Immigration Law Practitioners' Association. It was established in 1984, and is dedicated to encouraging high standards in the practice of immigration law. We have a current membership of 1,225, comprising barristers, solicitors and other practitioners regulated by other professional bodies. We have members who work in private practice and in the not for profit sector, and who engage in all areas of immigration law, commercial and publicly funded. Many undertake, or until recently have undertaken, publicly funded appeal work. It from this perspective and background of experience that this submission is made on behalf of our members, their clients and potential clients.

ILPA is opposed root and branch to the retrospective funding proposals, and is disappointed that the LSC has seen fit to give the appearance of pre-empting the Department of Constitutional Affairs' consultation process by rushing to publish implementation plans before the conclusion of that process, and thus before the final version of what is to be implemented is known.

The government's proposals are currently under scrutiny by the House of Commons Constitutional Affairs Committee, with oral evidence due next week. In his invitation for written evidence the Committee Chair, the Right Honourable Alan Beith MP, said:

> "We are aware of concerns that these proposals may have a negative effect on genuine asylum seekers and may discourage solicitors from lodging genuine appeals on behalf of clients. It is vital that any changes proposed by the Government to prevent abuse do not stop people with bona fide cases gaining access to justice."
>
> (CAC News Release 10/12/04)

ILPA shares those concerns, and believes that the LSC should too. We remain hopeful that the democratic and consultation processes will result in radical changes to the proposals.

Meanwhile, our answers to the consultation questions are:

*Q.1. Do you agree with the proposal to fund review and reconsideration under existing CLR arrangements?*

a. We do not agree with the proposal as it now stands. It may ultimately be immaterial whether the funding is administered as a special arrangement under CLR or as an aspect of licensed work, but what matters is that applications for review and reconsideration should, as a matter of principle, be funded in a manner commensurate with High Court licensed work. To do less would indeed smack of using lesser rates of pay to achieve "ouster by the back door".

b. In any event we understand that assurances have already been provided to the Bar Council in consultations with the DCA and the LSC that that there will be no attempt to reduce present fees on High Court proceedings, and that any risk premium will be additional.

*Q.2 Do you agree that the costs of experts and interpreters should be outside the retrospective payment scheme?*

Yes, but why stop there? Why should not all disbursements reasonably incurred be outside the retrospective scheme? Why, for example, should disbursements for GPs' reports, or unusual but necessary copying costs, such as would be allowed on assessment by the Supreme Court Costs Office, be at risk?

*Q.3 Do you agree with the proposal for a higher rate for CLR where a s.103D order is made and if so do you agree with the proposed uplift of 25%?*

a. As already indicated, we believe that applications for review and reconsideration work should be funded no less favourably than certificated work. The same basic prescribed rates (which as the LSC is well aware are higher than the "uplifted" rates now proposed under CLR) should apply, with the same facility to seek enhancements for work done with "exceptional competence, skill or expertise", or "exceptional dispatch" or where the case involved "exceptional circumstances or complexity" [Regulation 5, *Legal Aid in Civil Proceedings (Remuneration) Regulations 1994].*

b. If the obnoxious retrospective aspect of the proposals is, despite all protest, to stand then ILPA reluctantly accepts that it will be appropriate to offset its effects with a risk premium, but for review and reconsideration applications that should be a premium on top of the base indicated above, not calculated by reference to existing CLR rates which have no applicability to High Court work. This is consistent with the basis on which the Lord Chancellor presented the scheme to Parliament, and with assurances already given to the Bar Council.

c. There may be an argument for reverting to CLR rates for the AIT consideration itself, as at present when cases are remitted to the IAT by the High Court or Court of Appeal, but under the retrospectivity proposals the costs risk will persist back in the AIT so the risk premium should be added to the applicable rates through out. It is not clear from the draft amended Specification whether this is what is presently intended.

d. We reiterate that any risk uplift should be additional to a basic fair

remuneration scheme for review work. If the aim is not ouster by the back door, why should a practitioner bringing a judicial review in one area of law be paid at licensed rates with no risk and the possibility of enhancement, while the immigration practitioner bringing an equivalent challenge must do so at risk only to receive, if anything at all, less even than the basic prescribed licensed rate plus the added insult of being told that this is a "premium"?

e. In summary, we believe that applications for review and reconsideration should be remunerated at licensed rates, with potential enhancements, regardless of whether or not administered under CLR. If retrospectivity survives the consultation process we believe that the risk premium should be without prejudice to the availability of Regulation 5 enhancements. It should be added on top of the licensed rates for review applications and on top of the applicable rate (whether the licensed or the CLR rate) for AIT reconsiderations. In those circumstances only we would agree that a 25% risk premium may be acceptable, albeit we understand it to be below the level of uplift in many Conditional Fee Agreements in cases where the risk is arguably more calculable.

*Q.4 Do you agree with the proposal to have one Upper Cost Limit for both CMRH and the substantive AIT hearing?*

a. Yes, provided that extensions continue to be available on a case by case basis, that extension applications are dealt with rationally and promptly, and that the LSC does not quibble about waiting times, which are likely to be highly variable especially during the early days of listing arrangements for Case Management Review Hearings.

b. The "additional costs" contemplated in 12.4.1(8) of the proposed amended Specification to "consider the merits of an application for review" are woeful. Is the "one hour" intended to include advising the client (who will inevitably be distressed at having lost the appeal, anxious about the future and eager to take things further), in addition to absorbing what may be a lengthy determination, any perusals necessary to check the determination against the evidence and legal submissions made, consideration of the current law on any points arising and in appropriate cases instructing counsel to advise? This is simply unrealistic in any case whatsoever, and certainly provides no incentive for practitioners to accept the cases of previously unrepresented, or poorly represented, appellants at review application stage. The LSC should not collude in placing any such obstacle in the way of access to justice.

c. It is equally unrealistic to expect counsel to be prepared to advise for £88.80 in London (or, presumably, £97.75 outside London where solicitor's hour to be deducted from the £150 maximum is slightly cheaper) regardless of the complexity of a case or the degree of prior familiarity with it.

d. This contemplated parsimony is all the more objectionable when placed in the context of how much depends on the quality of the merits assessment at this stage, not only for the client, but also for the practitioners who are to take the risk of no further payment should they be bold enough to advise applying for a s.103A review and later be found to have been not right enough to qualify for a retrospective costs order.

*Conclusion*

The Legal Services Commission must be acutely aware of the difficulties faced by conscientious immigration practitioners facing the blizzard of recent funding changes and restrictions. Exacerbating those difficulties is no way to raise standards, or to enable the Commission to fulfil its function of providing effective legal services in this highly contentious area of law.

In the past year some highly regarded firms have given up the unequal struggle and abandoned publicly funded immigration work altogether. Others are reluctantly reducing the size of their departments, while talented individuals are, equally reluctantly, making individual career choices that will take them away from publicly funded immigration work. The present proposals are set fair to accelerate this process leading not only to the loss of even greater numbers of experienced practitioners, the quality of whose work is recognised by the LSC, but also the diversion of potential new talent. As a result we anticipate an increasing dearth of competent immigration practitioners in future - the very opposite of the result to which the LSC has previously asserted that it aspires.

Additionally, while the full impact of the ill-thought out and hastily implemented accreditation scheme is yet to be felt, organisations in both the private and not−for−profit sectors fear grave recruitment problems after 1/4/05 and are already reeling under the costs, in both time and money, incurred so far in fees, staff training and other expenses associated with the examinations. The retrospective funding proposals at the derisory risk rates proposed may well prove to be the last nail in the coffin for many.

If the Legal Services Commission is serious about wishing to continue to offer quality services to vulnerable clients in this area of law it needs to try to stop the rot now by putting its whole weight behind resistance both to the retrospective funding proposals, and to the suggestion that work in this area be funded less favourably than review work in other areas of law.

Yours faithfully

**Rick Scannell**
**Chair**