ILPA response to the Proposals for the 'retrospective public funding' of onward appeals from the single tier Asylum & Immigration Tribunal from 1/4/05

Clerk of the Constitutional Affairs Committee
Committee Office
House of Commons
Millbank
London SW1P 3JA

conaffcom@parliament.uk

24 January 2005

Dear Sir/Madam

Proposals for the 'retrospective public funding' of onward appeals from the single tier Asylum & Immigration Tribunal from 1/4/05

I write in response to the invitation to submit written evidence on these proposals, to which ILPA is opposed for the reasons given in our submission to the Department of Constitutional Affairs' consultation in December, a copy of which is attached. It is, however, somewhat longer than the submission now invited, so what follows is an amended and shortened version, which I hope will assist.

Introduction to ILPA:

1. ILPA 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.

Summary of our position:

2. The retrospective funding proposals will cause injustice, and have a deleterious effect on appellants, on conscientious practitioners, on the administration of justice and on the future development of immigration and asylum law, because:

    a. Injustice will result if appellants cannot find competent representation,

which will be the inevitable result if good practitioners are unable to afford to take on onward appeal work. This is too high a price, especially when the abuses that these proposals are purportedly designed to correct are already being brought under control by other means.

b. The proposal to oust access to the higher courts did not find favour with parliament and was withdrawn, but the present proposals smack of ouster by the back door by blocking access to those whose representatives dare not risk the costs consequences of seeking to challenge determinations of the AIT.

c. The present Tribunal does not always get the law right, and it is unrealistic to suppose that the new one will be any less fallible. The quality of decision making will inevitably deteriorate if it is not robustly tested, not only where obvious errors have been made but also in more marginal cases and in cases where the law is, or should be, open to development. Practitioners need the security, which those representing the Secretary of State enjoy in any event, of knowing from the outset that such cases will be funded subject, as at present, to a continuing duty to keep the merits under review. The public interest needs to be protected from the stultification of the law that will ensue if only the most obviously erroneous AIT decisions are ever challenged on behalf of appellants.

The present position and safeguards against abuse of legal aid:

3. The government should have more confidence in the Legal Services Commission (LSC) than these proposals imply. The LSC has already, from 1/4/04, increased the stringency with which it tests, and requires its supplier practitioners to test, the merits of immigration appeals and judicial reviews. Through the process of supplier audit, and now through the compulsory accreditation scheme which will be fully in force on 1/4/05, it continues to weed out practitioners it finds to be incompetent. It should be trusted to deal with applications for public funding for onward appeals from the AIT just as it deals with other applications, before the event, but subject to continuing merits review. It is particularly inappropriate to consider tinkering with this principle now, less than a year after the present immigration funding structure was introduced and before the accreditation scheme is fully in force so there has been no opportunity at all to assess the impact of these combined measures.

4. The government should also have more confidence in judges, who already have powers to make wasted costs orders and to refer cases to the LSC in cases so manifestly weak that they should never have been brought, or where information has been withheld. Indeed where the LSC itself is judged to have been at fault orders can be made under s.11(4)(d) of the *Access to Justice Act 1999* for the Commission to pay respondents' costs. It is better that real punitive costs orders be imposed when actually deserved than that practitioners be intimidated by uncertainty into failing to challenge difficult cases to the detriment both of their clients and of the development of the law.

Respect for judicial decision making:

5. The government should also trust judges not to be easily misled into

granting permission for unmeritorious onward appeals. ILPA can conceive of no justification for a scheme in which honest practitioners might be denied payment in a case which the judiciary, either at AIT or Administrative Court level, had deemed to merit the grant of permission. Remedies for the dishonest are already to hand and should be used. The rest of us, for the sake of our clients, our businesses and our employees, need the certainty of knowing that we will be fairly remunerated for an honest job competently done.

6. Draft procedure rule 27(6) provides that an immigration judge may make an order for reconsideration only if satisfied that the Tribunal may have made an error of law AND either there is a real prospect that the Tribunal would decide the appeal differently on reconsidering or there is some other compelling reason why the decision should be reconsidered. If a judge is satisfied that this high threshold has been met then, in that class of case at least, practitioners should surely be certain of payment without more, provided there has been no dishonest misrepresentation.

7. This approach is consistent with David Lammy's statement to Parliament during debate on the 2004 Act that:

> "We are keen to continue to discuss how we should define in regulations the scope of a meritorious case. On that basis, we wanted to include cases in which the lawyer was right to bring the case, but was not successful in acting on the applicant's behalf. Let us leave the technical discussions . . . to the legal profession and the DCA."

A lawyer will surely always be "right to bring" a case for which an immigration or High Court judge has granted permission after application of the prescribed high test, subject only to the continuing duty to review merits in the light of new information.

Shortage of good representation and encouragement of the unscrupulous:

8. Competent publicly funded immigration practitioners are already in short supply, a problem that has been exacerbated during the past year. The stringent funding regime introduced on 1/4/04 may have been aimed at the unscrupulous and incompetent, but the margins of profitability have become so tight that a number of highly regarded firms have bowed out of the work, while others are protecting their businesses by restricting the amount of publicly funded work they take on. The funding uncertainty built into the present proposals will discourage them still further. Publicly funded immigration law properly practiced is simply not profitable enough to allow us to absorb these potential losses.

9. We fear not only that appellants will be abandoned by their representatives at onward appeal stage, but also that they will find it even more difficult than now to find legal representation in appeals from the outset. This is partly because of the generally discouraging effect of the proposals on practitioners who may already be struggling financially, but also because conscientious practitioners may be unwilling to take on cases knowing that they will not be able to afford to see them through in the event of an unfavourable initial AIT determination.

10. The less conscientious will have no such scruples, and in some cases presumably will also not scruple to use the proposed scheme as an alibi for refusing legal aid and exploiting appellants to raise funds they cannot afford to fund their onward appeals privately - precisely the kind of conduct that ILPA deplores and understood the government also wished to stamp out. That will be better done by keeping the funding of these appeals within the current regime, especially in the light of the current and future developments in the LSC's regulatory powers and practices.

Demoralising the profession:

11. The government should not underestimate the demoralising effect on conscientious immigration practitioners of the implication that they uniquely among lawyers are incapable of fulfilling their duties to their clients, the court and the legal aid fund without being subjected to a special regime predicated on the premise that they need to be bullied by the threat of non-payment into recognising the need to "rigorously assess the merits of a case before deciding to pursue it", as the DCA consultation paper put it.

The view of the Appellate Authority:

12. We understand from the Chief Adjudicator, who addressed our AGM in November, that the Appellate Authority has made clear to the government the high value that it places on competent representation before it. No doubt, if these proposals go through with the consequent reduction in available competent representatives that we predict, the AIT will do what it can to mitigate the damage for unrepresented appellants, but that can only be at the expense of longer hearings and more court time – a false economy indeed.

The proposed alternative thresholds and the wishes of Parliament:

13. In our response to the DCA we provided answers to various specific questions raised in that consultation. I do not repeat them all, but refer the Committee to the attached full version of our DCA submission. I do, however, here summarise our main comments on the proposed alternative tests for funding, as follows:

14. The wish of parliament to preserve immigration appellants' right of access to the higher courts is not well served by these proposed arrangements at all, although of the 2 options proposed the 1st, whether a case had *significant prospects* of success, is clearly the lesser evil. But neither this test, nor retrospective funding in any guise, is necessary to achieve the aim of penalising practitioners who knowingly withhold material information, as has been implied by the DCA. There are already adequate mechanisms in place capable of ensuring that such malpractice is not remunerated (see paragraph 4 above).

15. Neither option is consistent with the statement of David Lammy to the House of Commons that:

> ". . . even if an applicant has been unsuccessful in making their claim, their case may have established important case law that defines a particular group or community and will have a bearing on immigration and

asylum cases. In such circumstances it would be right for lawyers to receive funds."

This statement was made on 12 July during debate on the House of Lords' amendments to what is now the 2004 Act so it was on this basis that parliament voted to accept the broad thrust of the government's proposals replacing its previous attempt to oust the higher courts' jurisdiction. It would thus be contrary to the wishes of parliament for any criteria to be applied that could result in lawyers being deprived of funding in test cases, whether ultimately successful or not.

Practical difficulties:

16. The adverse impact already indicated on appellants, practitioners, their businesses, their clients, the ability of the Legal Services Commission to provide competent suppliers in adequate numbers to meet demand from potential clients and the impact on the AIT of rising numbers of unrepresented appellants will all arise to some degree under either option, as will the difficulty for the judge of performing the highly artificial and philosophically challenging exercise of travelling back in time after the event to assess what the prospects of success had been before the review began. There may be an additional difficulty in option 2 in that, if it is to succeed in its aim of denying funding even in some cases that had succeeded at review stage, it must involve one judge impliedly criticising another, but penalising only the hapless practitioner.

Dangers of fettering judicial discretion:

17. The discretion of Administrative Court judges to award funding should not be fettered in any case where the court is satisfied that it is reasonably likely the AIT made an error of law, even if an order for reconsideration is not made because the judge is not satisfied on the 2nd limb of what is now the draft regulation 6.b test (significant or very strong prospect that the appeal would be allowed upon reconsideration). The health of the AIT, no less than that of any other Tribunal, will benefit from regular High Court scrutiny of the legality of its decisions. Lawyers should not be discouraged from bringing legal challenges for fear that their honest judgement as to the materiality of an error may ultimately differ from the conclusion of the judge, where it is accepted by the judge that there was indeed an error of law. This is not to say that the materiality of an error is not to be taken into account in assessment of a case for public funding at the outset, just as it is now, but simply to say that honest lawyers should not be financially penalised when they have been proved right on the law. After all, a finding that does not avail the appellant in a particular case may well be instrumental in preventing the AIT from repeating the error and causing material injustice in other cases. It is as distasteful to contemplate the prospect of lawyers being punished for achieving this as it is to contemplate the discretion of the Administrative Court in this area being undermined.

The proposed "risk premium":

18. Practitioners in this as much as any other area of law need to be able, so far as the vagaries of practice allow, to plan financially for their businesses. Indeed the LSC requires its suppliers to have 3 year business plans, annual

budgets and quarterly variance analyses. Rational planning is simply not possible on the basis of “can I afford to take on this marginal case and risk not getting paid on the off-chance that a stronger case *might* come along next week on which I am *likely* to be paid”. We need to know that if we make honest competent assessments we will be paid a fair rate for all our work, not premium bonanzas for occasional wins. It is not necessary to introduce the notion of a "risk premium" to justify paying reasonable rates for review work. We see no reason why those rates should be less than prescribed rates for certificated work, with similar provision for enhancement where justified, even if administered as an aspect of CLR (see also paragraph 23 below).

The public interest and the needs of appellants:

19. Appellants deserve to have their cases assessed by competent practitioners who can access funding in each appropriate case, not dependant on the happenstance of how many other relatively strong or marginal cases they have that might pay off with a risk premium. Under the special contracts for Civil High Cost Cases enhanced rates are paid if the prospects of success are borderline but the case is being taken on because of its overwhelming importance to the client, or in the public interest, and it could not be expected that practitioners would take it on at commercial risk. By contrast here we have the prospect of being offered inducements to take on only those cases which are near sure fire winners.

20. The concept of costs risk in public law cases, especially where the stakes for the individual are as high as they invariably are in immigration and asylum cases, is not to be equated with the risk in financial damages cases. This is a distinction recognised in the differential rates paid under the Civil High Cost Case contracts, and one that should not be lost.

Merits, financial eligibility and remuneration – comparison with CLR:

21. The damage likely to be done by the retrospective funding proposals will be exacerbated if the merits test differs from that currently applied in Controlled Legal Representation (CLR) in immigration appeals. The CLR test was elaborated with effect from 1/4/04 and is now well understood. ILPA has some concerns that a minority of practitioners may be protecting their own position by wrongly refusing CLR in marginal cases for fear of the costs consequences on audit if the LSC later takes a different view, but appellants in such cases at least have the protection of an appeal to the LSC. Under the present proposals there will be no such protection in a case where the practitioner is not prepared to take the risk of an onward appeal based on an untried merits test.

22. The effect of the draft financial regulations is to extend the CLR financial eligibility test to Legal Representation before the High Court, instead of the more flexible criteria now applicable in legal aid certificate cases. This is regrettable because it will exclude from eligibility those appellants on the financial margins who would have qualified for a certificate subject to a financial contribution under the present arrangements.

23. CLR remuneration rates are lower than the prescribed rates in certificated work, and do not have the same flexibility for enhancement. Parliament

intended the new review procedure to replace of existing arrangements for access to the higher courts, so it should be remunerated in essentially the same way, and bills assessed in the same way. Whether this is done under the aegis of special arrangements under CLR or otherwise is probably immaterial. What matters is that once granted, so long as the merits continue to justify it, the supplier should be confident of being paid at a reasonable rate, commensurate with other higher court work, and that the interests both of suppliers and of the legal aid fund are protected by a fair process of bill assessment by the LSC.

24. In conclusion, ILPA opposes the current proposals because they are unnecessary to prevent abuse, but will result in injustice and risk stultifying the law.

Yours faithfully

Rick Scannell

Chair of ILPA