Helen Johns
Department for Constitutional Affairs
Public Legal Services Department
3rd Floor, Post Point 2C
Selborne House
54-60 Victoria Street
London SW1E 6QW

FAX 0207 210 8780
Email Helen.johns@dca.gsi.gov.uk

10 January 2005

Dear Madam

The Asylum and Immigration Tribunal – The Legal Aid Arrangements for Onward Appeals

This is the response of the Immigration Law Practitioners' Association to this consultation.

As requested, I begin with a summary of who we represent. We were established in 1984 and 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.

ILPA wishes to place its responses to the 12 consultation questions into the context of our profound opposition to the principles both of a retrospective test for funding and of a merits test which differs from that applied in other types of publicly funded immigration cases and other categories of law. That opposition derives from the following considerations:

a) Injustice will result if appellants cannot find competent representation in onward appeals. This price is too high, especially when the supposed excesses these proposals are designed to correct are already being brought under control by other means.

b) The government's proposal to oust access to the higher courts did not find favour with parliament and was withdrawn, but the present proposals smack of ouster by the back door by blocking access to those whose representatives dare not risk the costs consequences of seeking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, with the best will in the world, 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 in onward appeals, not only in cases 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 of knowing from the outset that such cases will be funded subject, as at present, to a continuing duty on both solicitors and counsel 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.

d) The government should have more confidence in the Legal Services Commission than these proposals imply. The LSC has already, from 1/4/04, increased the stringency with which it tests, and requires its suppler 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.

e) 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 an order could be made under s.11(4)(d) of the *Access to Justice Act 1999* for the Commission to pay the respondent's costs. It is better that representatives, and even the LSC itself, should risk real punitive costs orders where such consequences have actually been shown to be merited 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.

f) 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.

g) Draft AIT 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. It is ILPA's view that if a judge is satisfied that this high threshold has been met then, in that class of case at least, practitioners should be certain of payment without more, provided there has been no dishonest misrepresentation.

h) 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.

i) Competent publicly funded immigration practitioners are already in short supply, and this problem 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.

j) 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 it is 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 simply be unwilling to take on cases in the knowledge that they will not be able to afford to see them through to the end in the event of an unfavourable initial AIT determination.

k) 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 to wish 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.

l) The damage likely to be done by the retrospective funding proposals will be exacerbated if the merits test differs from that currently applied for Controlled Legal Representation in immigration appeals. That 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 as we understand them 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.

m) 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".

n) We understand from the Chief Adjudicator, who recently addressed our AGM, 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.

We turn now to the consultation questions:

Question 1. **Do you agree that the exemption categories for the new arrangements are appropriate?**

Comments: a. Yes, but our recognition of their appropriateness in no way reduces our opposition to the proposed arrangements themselves.

b. We are also concerned that the value of the exemption for seeking advice on whether to apply for a review will be undercut by the time limits for applying for permission for onward appeals in the draft procedure rules (5 days in all cases where the appellant is in the UK), especially in view of the anticipated shortage of competent practitioners willing to take on such cases at risk, as explained above.

Question 2. **Do you agree with the transitional arrangements proposed?**

Comments: Yes, subject to the same caveat as above, and subject to our having deciphered them correctly. We take them to mean:

(i) that the new regime is to apply to applications for review of adjudicators' determinations already promulgated but where no application has yet been made for permission to appeal to the IAT prior to 4/4/05, and

(ii) that all other cases pending at higher than adjudicator level on 4/4/05 will continue under the previous funding arrangements.

Question 3. **Which test – Option 1 or Option 2 – best achieves the aims of the new arrangements and the wishes of Parliament?**

Comments: a. As indicated above, we do not think that the wish of parliament to preserve immigration appellants' right of access to the higher courts is well

served by these proposed arrangements at all, but of these 2 options the 1st is clearly the lesser evil.

b. We stress however that neither this test, nor retrospective funding in any guise, is necessary to achieve the aim of penalising practitioners who knowingly withhold material information. It is disingenuous to suggest this, as the commentary on option 1 does. Please refer especially to our points (d)-(f) above. There are already adequate mechanisms in place capable of ensuring that such malpractice is not remunerated.

c. The commentary on option 2 is also disingenuous in suggesting that the fact that suppliers running strong cases would be "likely" to be paid can in any way be "balanced against" the prospects of no funding in other cases that judges had assessed as meritorious at review stage.

d. 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. It must be assumed that 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. So it would 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.

Question 3. **Are there any practical difficulties that each option is likely to cause, and do you have any suggestions as to how they might be overcome?**

Comments: a. The practical difficulties outlined above in terms of the impact on 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.

b. Similarly the practical 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 would arise on either option. 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.

Question 5. **Should any additional circumstances in which the Administrative Court may award funding be added to the regulations?**

Comments: a. The wording of the consultation paper does not accurately reflect the draft regulation. Paragraph 6.(3)(a)(ii) provides for the High Court to make an order where its decision to dismiss an application is based on "a change in *any relevant* circumstances since the application was made" [our emphasis]. Why does the consultation paper reduce this to "a change in the appellant's circumstances"? The version in the draft SI is clearly preferable.

b. Be that as it may, however, we consider this attempt to restrict the discretion of the High Court to such an extent to be obnoxious and otiose. What purpose do the criteria in 6.(a) serve that is not sufficiently served by 6 (b)? Is a High Court judge really not to be trusted to work out that subsequent changes in the law or in relevant circumstances need to be borne in mind when assessing what the merits of an application were at the time it was made? That assessment is subject to all the difficulties inherent in so artificial a task in marginal cases, but these are not alleviated by the spelling out of such obvious exceptions as in 6.(a).

c. We note that the question does not ask for comment on the alternative wordings in 6.b of the draft regulations. It seems plain to ILPA that "reasonably" and "significant" are to be preferred to "very strongly" and "very strong". It would be to bring the historic jurisdiction of the High Court into disrepute if regulations made for short-term political and financial reasons were to prevent its judges from exercising the court's supervisory role in cases where it is reasonably likely that an unlawful decision has been taken and that injustice may result.

d. ILPA believes that 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. 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. A culture of "the law is immaterial because it would have made no difference anyway" ought not to be encouraged. Lawyers should not be discouraged from bringing legal challenges for fear that their honest judgement as to the materiality of an error in the circumstances of the particular case 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 purposes 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 on the law 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.

e. These considerations wider than but consistent with David Lammy's 12 July statement quoted above at response 3d. If the court's discretion on costs is to be circumscribed at all then parliament's wishes require, at the very least, a proviso with the effect that lawyers bringing test cases are to be paid.

Question 6. **Do you agree with the proposed arrangements for review?**

-

Comments: a. No. A decision to refuse funding under this scheme will be detrimental to the practitioner not only financially but also professionally, being a slur on a professional judgement. There should therefore be a right to make oral representations.

b. There should also be a right of appeal to an external body against the Tribunal's decision if funding is refused following an oral hearing. If nothing else this will militate against the risk of unfair inconsistency in decision making by different Tribunals. Recourse might be had, for example, to the Legal Services Commission's Funding Review Committee if it were felt undesirable to establish a wholly new entity for this purpose.

c. Whatever the process, practitioners should be paid their costs of bringing successful reviews at the same rate as that allowable for the substantive work.

Question 7. **What time limit should be set for applying for a review of a funding decision?**

-

Comments: a. We see no reason why, in the unhappy event that this scheme goes through, the time limit should differ from the 14 days from receipt of decision that is allowed for challenges to Supreme Court Taxing Office assessments *provided* there is, as in the SCTO, a right to attend to make oral representations. If not, any time limit (and we agree that it would sensible to have one) should be extended to 28 days for fuller preparation of the paper submission.

-

b. There should of course be a requirement for the Tribunal to give full and case specific reasons in the first place for any adverse funding decision.

Question 8. **Should barristers have a right to apply for a review of funding decision independently of a solicitor?**

-

Comments: 1. If the model of the SCTO is followed then the solicitor would have a time-limited duty to inform counsel of the adverse decision and s/he would then have the opportunity to prepare submissions. It seems immaterial, and a matter for the practitioners in question, whether those should be submitted via the solicitor or directly, provided that they are submitted within the time limit and the Tribunal takes all representations received into account.

2. It is in event important that both barristers and solicitors each have rights of review so that rights of one are not dependent on whether or not the other chooses to apply, and to protect the position of each in cases where their interests do not coincide.

Question 9. **Are the arrangements for risk-sharing appropriate, given the aims of the new legal aid arrangements?**

Comments: We are not sure that we understand the implications of this question. It is our understanding that neither solicitor nor barrister would be paid anything if funding were not awarded. Is that what is meant by "equal risk"? If the solicitor's costs would otherwise have been higher or lower than the barrister's fees is that still an "equal risk"? Or is it in contemplation that a solicitor who had acted on counsel's advice might be protected and the barrister alone be deprived of fees? Or that counsel's fee be exempt from risk as a disbursement analogous to the fee for an expert? What of the position of the barrister who advises on the review application on the basis of the information then available but who, for whatever reason, is not instructed in a subsequent rehearing? None of this is satisfactory, and these manifest difficulties serve further to illustrate the unfairness and unworkability of the entire proposed scheme.

Question 10. **Would a risk premium ensure that this work is cost effective for suppliers?**

Comments: a. No, and the question misses the point, both practically and in principle.

b. Suppliers need to be able, so far as the vagaries of legal practice allow, to plan financially for their businesses. Indeed the Legal Services Commission requires solicitors 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* 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. We are serious professionals with responsibilities to our families and our staff, not gamblers.

c. The point of principle is that all clients 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 they are gambling might pay off with a risk premium.

d. It is striking that this suggestion is the diametric opposite of the only other place in which the concept of something akin to a "risk premium" operates in legal aid funding, namely in the civil certificate arrangements for Very High Cost Cases. In those cases enhanced rates are paid to solicitors and barristers 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 take on such cases 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.

e. 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 personal injury damages cases. This is a distinction already recognised by the Commission in the differential rates paid under the Civil High Cost Case contracts, and one that should not be lost.

f. 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.

Question 11: **Are the proposals for the treatment of disbursements appropriate?**

Comments: Yes, so far as they go, but why are they limited to this class of disbursement? Why should not all disbursements reasonably incurred be payable?

Question 12: **Do you agree with the suggested amendments to the CLS regulations and the Funding Code Criteria and Procedures?**

Comments: a. CLR rates are lower than the prescribed rates in certificated work, and do not have the same flexibility for enhancements to be sought on assessment of the bill as in certificated work. Parliament intended this review procedure to stand in place of the previous 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.

b. The effect of the draft financial amendment regulations is to extend the Legal Help/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 on the financial margins who would have qualified for a certificate subject to a financial contribution under the present arrangements.

In conclusion, I reiterate ILPA's belief that the present proposals if not radically altered will have a deleterious effect on our members, on their clients and potential clients, on the administration of justice and on the future development of immigration and asylum law.

Yours faithfully

Rick Scannell
Chair of ILPA