ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

Comments on Draft Immigration Span Guidance from October 2007

1. General comments

a. Does the necessity for such lengthy, complicated guidance (31 pages, ending with the promise of yet further guidance on reporting travelling and waiting) not give the LSC/DCA cause to pause and reflect on whether something might be fundamentally wrong with the proposed scheme?

b. An alternative explanation for the complexity is that this is an attempt to fit the new scheme into an existing system of coding which is inappropriate for the purpose. It also highlights the near impossibility of computer software providers being able to mimic the scheme within their time recording and costing modules, risking placing suppliers in breach of the requirements of the contract in their information gathering, and potentially returning many of them to manual production of claims.

c. Paul Benjamin's covering e-mail of 7 June rightly points out that the Specification itself is still in draft, and implies that it could change in the light of consultation responses. We hope so, but ILPA was informed by an e-mail from Fiona Hannan, also on 7 June, that there is no guarantee of the Specification being finalised in time for us to have it for training in July. We therefore fail to see how, if there is a real possibility of change, there can be any question of the final version of these codes being sent to the printer on 22 June for inclusion in the Master Pack. Are relations between the profession and the LSC not already at a low enough ebb without encouraging yet more cynicism about the genuineness of the consultation process? If the Specification is not yet finalised then the Codes cannot be finalised.

d. The Codes ought not to be finalised without a proper opportunity for comment by representative bodies on a final draft, after publication of the final Specification. Asking us to comment now may be useful to the LSC in getting us to do some of the graft in checking the codes and guidance, but it is not a substitute for proper consultation.

e. A proper opportunity for comment would be longer than the 6-7 working days now allowed, Mr Benjamin's e-mail having been circulated after 4.30pm on 7 June and requesting a response by 18 June on 35 pages of dense, highly technical material. Apologies from the LSC for tight timescales no longer cut any ice. The timescale is entirely in the hands of the LSC/DCA. If the LSC

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cannot prepare for October implementation without imposing such truncated timescales then it should inform the DCA accordingly and defer implementation, not corrupt the consultation process and damage its relationships with suppliers and their representatives even further than they are damaged already.

f. Throughout both of these guidance documents the term "post October" is used as if "post" means "during and after". It does not. It simply means "after". Drawing a distinction between "pre October" and "post October" leaves a black hole where October itself should be. What is evidently meant by "post October" is actually "post September" or "from 1 October", or "in and after October". The LSC should say what it means precisely, especially in such fundamental and technical documents.

2. The draft "Immigration Specific Guidance" (the 31 page document):

a. "Important Note":

i. If assigning the correct Matter Type is "essential" then it is remarkable that the Guidance still contains no definitions to distinguish "asylum" and "immigration". As ILPA has already pointed out in our Specification consultation response, the contract Office Schedule of Matter Starts defines "Asylum" as "a matter involving a claim that it would be contrary to the United Kingdom's obligations, under the Refugee Convention [or] Article 3 of the Human Rights Convention, for the claimant to be removed from, or required to leave, the United Kingdom". The SPAN guidance should confirm that this definition also applies to Matter Type codes, and should expressly acknowledge that it does not only include initial or "fresh" asylum claims, but also includes applications for further or indefinite leave to remain for recognised refugees, and for those with HP or DP where Article 3 is engaged. This is essential to ensure that correct (ie asylum) fixed fees are claimed and paid in "post October 2007" cases of this type.

ii. The "Important Note" lists 4 questions that providers are to ask themselves. The point made in our preceding paragraph needs to be taken in order to enable them to answer the first, "Is it an asylum or immigration case?" If it is an asylum case, then the 2nd question is wrong. The issue in an asylum case will not be whether "the case" whose costs are now being claimed commenced before, on or after 1 October 2007, but whether the original asylum application to the Home Office was made before, on or after that date. It is not very encouraging that even at this late stage, less

than 4 months from proposed commencement, the LSC itself seems to have so tenuous a grasp of its own scheme.

b. Matter Type Part I Codes

i. Cases commenced Pre October 2007

1. The heading (both in the SPAN document itself and in the Specific Guidance) is misleading because these codes are not applicable to bail claims in pre October 2007 cases. The 4 page SPAN document should be complete and accurate in itself so the words "except for Bail" should be added to this heading.

2. Codes IALH & IAAP

   The guidance under each should have one more line: "Including applications for FLR/ILR where 1951 Convention or Article 3 issues are at stake".

3. Asylum Code IAAP

   a. The guidance should specify that this code is always applicable in respect of appeals that arose from initial asylum *applications* made before 1 October 2007, regardless of whether the *appeal* arose before, on or after 1 October 2007, and regardless of whether the provider was instructed before, on or after 1 October 2007.

   b. It should also specify that it applies to all appeals arising from applications for FLR/ILR in cases engaging the Refugee Convention or Article 3 where the initial asylum application was before 1 October 2007.

   c. Footnote 8 repeats the LSC's view that Controlled Work must end when leave is granted to appeal to the Court of Appeal, but no justification from statute or rules has yet been provided for this. The issue has been raised by ILPA before, but no explanation has been forthcoming. There are often matters that are outside the scope of the funding certificate (parallel applications, reporting issues, gathering of further evidence not admissible in the appeal) that justify the continuation of legal help funding. Ending it is potentially highly prejudicial to appellants, and cannot be imposed merely through guidance when it is not in the rules.

4. Immigration Code IMAP

   a. CLR does not constitute a new matter start when a provider is already advising on the matter under Legal Help. It follows that this

code applies to all appeals arising from applications made before 1 October 2007 where the provider was instructed in the matter under Legal Help before 1 October 2007, even when the appeal arises on or after 1 October 2007. This should be clarified in the guidance.

b. In respect of footnote 11 please see our comments on footnote 8 at 3.c above.

ii. Cases commenced under the Graduated Fee Scheme

1. "Important Note" and footnotes

Here we enter the dizzying realm of exceptions to exceptions. Please refer back to our first general comments about the complexity of the scheme, and of these codes and guidance.

2. Asylum Codes IALA, IALB, IACA & IACB

a. The guidance should state that these are applicable to FLR/ILR applications (and appeals arising from them) engaging the Refugee Convention and/or ECHR Article 3 where the initial asylum application was made on or after 1 October 2007. It should also remind suppliers that hourly rates apply in such cases where the initial asylum application was made before 1 October 2007, and that in those circumstances codes IALH and IAAP should be used.

b. Alternatively, if "post October 2007" FLR/ILR refugee/Article 3 cases are to be added to the list of cases outside the GFS then the guidance should say so clearly at this point, and refer suppliers to the IAXL and IAXC codes.

c. Footnote 19 states that the £100 payable for consideration of the merits of a review application includes disbursements. The LSC document entitled "Final Immigration and Asylum Fee Schemes" published in March 2007, however, stated at 2.20 that "the costs of all disbursements . . . in both immigration and asylum cases will be excluded from the fees and may be claimed as separate payments". This is echoed at 11.22 of the draft Immigration Specification. We accept that under the Hourly Rates heading at 11.40(c) the Specification does say "£100 inclusive of disbursements" in respect of pre-ASU work and advice on reviews, and that ILPA failed to pick up on and point out this anomaly in its Specification consultation response. Nevertheless it is an anomaly, being consistent with neither the GFS arrangements nor current hourly rate LH arrangements. Every argument, including the argument about discrimination, that was deployed against including interpreting disbursements in asylum fixed fees cases, applies with equal force here.

3. Immigration Code IMLA

Footnote 22 about CMRHs is irrelevant, and presumably a mistake. This would, however, be a good place for the LSC to acknowledge that the guidance on Home Office interviews at footnote 16 under IALA does not apply to immigration cases. The statutory exclusion from scope of attendance at Home Office interviews applies only to asylum claims. In the rare event that the Home Office were to call a non-asylum applicant for interview there is absolutely nothing in the Access to Justice Act or regulations to prevent the provider being remunerated for attendance at the interview, subject to costs benefit.

iii. "Post October Claims Outside/Excluded from the Graduated Fee Scheme"

This is another misleading heading, because these codes also apply to Bail in all cases, whether commenced before or after 1 October 2007. The words "and all Bail claims" should be added to the heading on both documents.

c. Matter Type Part II Codes

i. IBAI

1. The time recording system of a supplier reporting in or after October 2007 on a bail matter commenced before 1 October 2007 where the bail work has been concurrent with an appeal under the same CLR form will not have been set up to record the bail preparation time separately from the appeal preparation time prior to 1 October 2007. What, if any, transitional arrangements are there to take account of this?

2. Footnote 36 should make clear whether the short term holding facility at Colnbrook is part of the exclusive contract or not.

ii. ICOA

1. It is not stated whether or not this code should also be used for advice to a new client who is applying to the AIT for leave to appeal to the Court of Appeal which is not "following and unsuccessful Reconsideration hearing", but is direct to the Court of Appeal from an initial 3 judge panel.

2. The explanation of when not to use the code should also include cases where no s103 costs order is needed (transitional and successful appeals) and that are therefore to be coded IRHO.

iii. IFRA & IFRB

1. The guidance should state that IFRA does not only apply when the fresh application is "subsequently" lodged, but also when the client (or previous representative) has already lodged the application and the provider accepts instructions to make further representations.

2. Presumably the obverse is that IFRB would apply if a provider gave advice on a claim already lodged to the effect that there was no merit in pursuing it.

iv. IGOL & ILL

1. The guidance under these two codes is confusing and contradictory. IGOL applies to those, whether asylum seekers or not, who are seeking leave to enter. By definition they have not already "been given leave to enter/remain in accordance with the terms of the Immigration Act 1971 prior to making an application". That does not necessarily make them illegal entrants who should attract code ILL. If the application is made at the port of arrival it does not even make them attempted illegal entrants, unless attempted deception was used. The first paragraph of the guidance under ILL should therefore be deleted, or amended substantively.

2. The Span Guidance itself (the 4 page document) states that "the matter type must reflect the most significant legal issue dealt with during the case". It is rare, and in asylum cases virtually unknown, for the fact that a client has "specifically been termed an 'illegal entrant' by the Secretary of State" to be the "most significant legal issue" in the case. The most significant legal issues will invariably be the application for leave to enter/remain and/or detention issues. Is the ILL code actually serving any useful purpose?

v. IIRC

The guidance should be amended to make clear whether it applies only to matters for clients detained at the start of the matter or also to those detained at any time during the conduct of the matter.

vi. IJRA

What is meant by the reference to "responding to pre-action protocol letters"? That is an action of a Defendant, not a Claimant, in a potential

judicial review. Our clients are not public bodies so, by definition, can never be Defendants.

vii. IMER

Footnote 45 makes further reference to the inclusion of disbursements in the £100 payable for considering the merits of a review application. Please refer to our comments on footnote 19 above.

viii. IRHO / IRAR

1. In cases going to the Court of Appeal, these codes, like the current codes, only capture the position as RAR/CLR ends. It strikes us as ironic that, for all the complexity of this coding system, the LSC still has not been able to incorporate a means of recording the final outcomes of such cases, rather than the interim one at the end of RAR. So it remains the case that, following Court of Appeal determination or remittal, suppliers will still need to keep manual records to enable them to demonstrate their actual success rate.

2. We have indicated above, with reference to footnotes 8 and 11 under the Part 1 Matter Types for pre October 2007 cases, other objections to the proposition that all Controlled Work should end when a case goes to the Court of Appeal. We accept that from a supplier's funding point of view the position is different under the GFS as proposed because Legal Help will perforce already have closed when CLR began, and stage 2b/CLR includes no provision for payment for work parallel to a public funding certificate. So a new LH matter start will be required for such work. Please confirm that this is so. In asylum appeal cases would it count as immigration matter start, unless it amounted to preparation of a potential fresh claim? Has the LSC taken this into account in calculating likely numbers of Matter Starts?

d. Stage Reached and Outcome Codes

i. Stage Claims – cases commenced pre October 2007

1. IR

We previously understood Stage Claims to be mandatory, but it appears from this guidance, and from footnote 56, that in respect of fresh asylum applications 2 discretionary stage claims are available: "*may* be made in respect of a fresh asylum claim made before 1 October 2007",

and "*can* be made at the point a fresh asylum application is made . . . *and* at the point a decision is made . . . [our emphases]. Express clarification should be provided.

2. IO

   a. The "IO - -" stage claim descriptor in the 4 page SPAN document and the guidance on page 19 of the long document should both be amended to include reference to the circumstances in which page 29 of the "Specific Guidance" says it must be used in bail cases. It is a recipe for confusion to have incomplete descriptors. It is certainly to be hoped that the drop down electronic menu for this code has been amended to include a reference to bail.

   b. *Why not* allow this code to be used for cases going to the Court of Appeal so that the same CLR continues if the appeal is remitted, and the LSC gets an accurate final report at the true end of the proceedings?

ii. Stage claims – cases commenced "Post October 2007"

1. IR

   a. "Matter Continuing under Stage 2/CLR" only makes sense in connection with GFS cases, but it is stated that these codes are to be used for all "post October" cases, GFS or not. What would "Stage 2" mean in an hourly rate case? Obviously an IR stage claim on submission of a fresh asylum application (where the original asylum claim was before 1 October 2007 but the fresh claim was made on or after 1 October 2007) does not mean that one is moving on to "Stage 2/CLR". The words "or hourly rate LH" should be added to the descriptor against this code in the "post October 2007" box in the 4 page document, and to the heading against the code on page 21 of the longer guidance, and the drop down menu on the electronic CMRF.
   b. Please refer to our comments at d.i.1 above about the apparently new discretion accorded to stage claims in fresh asylum application cases. The "*can*" in footnote 63 seems to extend this to "post October 2007" cases too.

2. IM & IQ

   a. What is a "Concurrent Application"? Concurrent with what?

   b. Does "CLR Continuing on Concurrent Application" mean anything other than "CLR Continuing"? CLR is for appeals, not applications, other than bail applications. What is the point of this change to the current descriptor for stage code IM?

c. Similarly for code IQ. What is the difference between the proposed definition "CLR Completed LH Continuing on Concurrent Application" and the present definition "CLR completed, LH continuing"?

3. IO

a. How does the £100 payment for consideration of merits get triggered?

b. Does the £100 also get paid for consideration of a determination where the appeal has been successful but the Home Office applies for reconsideration? How would that be coded?

iii. Completed Matter Claims

1. Why are references to the exceptions for bail consistently relegated to foot notes rather than put fair and square in the body of the guidance, especially parts of the guidance deemed so important as to merit bold type? Why not say here "**Only one Completed Matter Claim should be made in each case *except where bail work is being claimed***"?

2. IK

We repeat the objections to the obligation to close a matter both on legal help and CLR at this stage, and to the fact that we have to continue to keep manual records of the final outcome of the appeal in order to adjust LSC records of our success rates. It also inflates the statistics of the numbers of clients helped by CLS funding.

3. IA

Some successful applications for leave to remain on the basis will result in limited leave, and some in indefinite leave to remain. If marriage is to be cited as an example under IA it should, for the sake of accuracy, be worded "a successful application to remain in the UK *permanently* on the basis of marriage".

4. IB/IC

Why is refugee status coded with other limited leave to remain, rather than with humanitarian protection and discretionary leave? It gives the impression that the divisions in the coding are arbitrary and of little importance beyond just recording success or failure.

5. IC

a. In the guidance when *not* to use this code, the strange expression "permission to enter or remain is given only as a temporary measure pending the conclusion of a case" is used. What on earth does this mean? We know what "limited leave to enter" and "limited leave to remain" mean. We also know that the grant of either certainly *would* be coded IC, and that neither of them is by any means the same thing as "temporary admission", which we suspect may be the term the LSC is groping for here. Has NIAT really not had any input into these codes? Please amend to "temporarily admitted pending the conclusion of the case" if that is what is meant.

b. Similarly, what does "a spouse temporarily granted leave to enter" mean? There is no such term in UK immigration law as "temporary leave to enter". If what is meant is "granted limited leave to enter or remain . . .." then please say so.

6. IG

The second part of this heading is meaningless in the context of appeals. The wording of the guidance is garbled and nonsensical. Only the decision maker (Secretary of State or ECO), not the Court of Appeal or AIT, can "withdraw the original decision". The High Court in judicial review could quash a decision and order a fresh one, but this code has nothing to do with judicial review. Neither the AIT nor the Court of Appeal in a statutory appeal has the power to order a fresh decision. Their power is to dismiss, allow or remit the appeal. This heading and guidance both need rewriting. Such shoddy inaccuracy inspires absolutely no confidence whatsoever in the LSC.

e. Bail Claims

i. While it may be helpful to have a separate section of guidance for bail claims, especially as they are now, for the first time, to be reported separately from substantive case claims, we reiterate the various observations made above to the effect that the bail code guidance also needs to be integrated into the guidance as a whole and, especially, into the basic 4 page SPAN document listing the codes.

ii. We reiterate our question about transitional provisions for cases where bail has run concurrent with the appeal under CLR, and been time recorded accordingly in providers' accounting systems prior to 1 October 2007, but the costs claim is made after 1 October 2007.

iii. Are separate LH and CLR forms are to be signed for bail matters where the bail work commences on or after 1 October 2007, or are we to make the entries on separate lines of the CMRF under the separate bail Matter Type codes for claims under the same Matter Start as for the substantive matter?

iv. If separate forms are to be signed, what account has been taken, or will be taken, of this in the assignment of Matter Starts?

v. If separate forms are to be signed for new bail work from 1 October 2007, please clarify the transitional arrangements for ongoing bail work commenced before 1 October 2007 in the is respect also.

vi. We are told specifically in the Bail section of the guidance that Matter Type II code IBAI is to be used for all bail claims "including where the bail work was undertaken as part of a substantive matter claim prior to October 2007". There is no such express statement in this section about the I-X-Matter Type Part I bail codes, but the introduction to the "post October" Part I section on page 8 implies that these codes are to be used for Bail claims generally. So which is it? Are the Part I bail codes for all bail claims, or only for those commencing on or after 1 October 2007?

vii. The guidance states that where CLR is granted after a negative decision solely to make a bail application the legal help must be reported as completed. This needs clarifying as there may be other matters on which the person requires advice outside of the bail application. Or is it intended that a new legal help form must be signed in all such circumstances?

viii. Why is a first bail renewal a new matter start?

f. Additional Payments under the GFS

ILPA continues to dispute that there is any statutory basis for excluding attendance at non-asylum interviews from the scope of Legal Help, subject to satisfaction of costs/benefit criteria.

g. Claiming for Exceptional Cases

i. How can the system automatically calculate whether a case meets the exceptional case criteria when the system does not ask us to report VAT separately? Or is the exceptionality threshold to be calculated gross? Please clarify.

ii. When, how often and at what stages can we make the exceptional cases claims? Will there be deadlines? When are the forms to be published?

iii. Why is it necessary for suppliers to have to mimic the calculations and submit a separate claim if the LSC is already generating that information?

Why does the LSC not simply set up its system to trigger the payments, or to trigger invitations to suppliers to submit for assessment cases that its system has automatically calculated to meet the criteria?

h. Claiming for Travel and Waiting

In respect of non-exclusive contract detention cases this guidance repeats the "maximum of 3 hours per return journey" as if this were fixed and settled, but it is one of the points in contention in the consultation on the Specification. We trust that it is one of the aspects of the Specification that might be changed, and that this will be reflected in the further guidance about claiming travel and waiting time that is promised.

Immigration Law Practitioners' Association ***18 June 2007***