



Ms K Finlay  
Department of Constitutional Affairs  
Asylum & International Legal Aid  
3.15, 3<sup>rd</sup> Floor Selborne House  
54 Victoria Street  
London SW1E 6QW

By e-mail to [Karen.Finlay@dca.gsi.gov.uk](mailto:Karen.Finlay@dca.gsi.gov.uk)

26 January 2007

Dear Ms Finlay

**Consultation on proposed amendments to the Community Legal Service (Asylum & Immigration Appeals) Regulations**

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

We continue to oppose the principle of retrospective funding, but plainly this consultation is not a re-opening of that issue. Within the context of the s.103 regime we do not in principle oppose the proposed technical amendments, but have the following comments:

**Discontinued reconsideration cases and the High Court:**

Your covering letter states that the proposed amendments give judges in the Asylum and Immigration Tribunal, "or where appropriate the High Court", power to make costs orders in discontinued cases. It seems to us, however, that the amended regulations accord no such power to the High Court, but rather deprive it of the power it previously had under regulation 5(5) which is proposed to be deleted. The effect of the proposed amendments appears to be to transfer all such power to the Tribunal by virtue of new regulation 6(1A).

You say that the intention is to give effect to section 8 of the 2006 Act which amended sections 103D(2)-(3) of the 2002 Act, but section 8 makes no amendment to the power of the appropriate court (ie the High Court in England and Wales) to make orders in respect of section 103A applications. It amends only the ambit of the Tribunal's power in that regard to include orders "in respect of the preparation for reconsideration", whether the reconsideration was ordered by itself or by the appropriate court. We can therefore follow the logic of the proposed amendments to regulation 6 giving effect to this in respect of the Tribunal, but not the logic of the deletion of regulation 5(5) or of the assertions in your letter about the High Court's powers in discontinued cases.

The High Court's power to make s.103 costs orders at all derives from section 103D(1) which restricts it to making orders in respect of the costs of an *application* for reconsideration, not as you assert for work done in preparing for a reconsideration that does not take place. Existing regulation 5(5) specifies that the section 103D(1) power is exercisable by the appropriate court in cases where "it has made an order for reconsideration, but no reconsideration of the appeal takes place". It is this that the proposed amendments would delete, with the result, it seems to us, of depriving the High Court of such power as it currently has in respect of the *application* costs in discontinued cases without amplification of its powers in respect of subsequent *preparation* costs.

It may be that regulation 5(5) is felt to be otiose now that the Tribunal is to have power to make orders in discontinued cases, regardless of which court made the reconsideration order. That we could follow, and would not oppose. We remain, however, puzzled, and therefore troubled, by the repeated assertions in your letter that the proposed amendments give power to the High Court to make costs orders in cases that do not proceed. Please elucidate. If we have construed the regulations and proposed amendments incorrectly please explain how the effect you assert in respect of the High Court is being achieved, and clarify the circumstances in which it would now be appropriate for the High Court, rather than the Tribunal, to make a s.103D costs order in a discontinued case.

**Potential costs claim delays:**

One disadvantage to practitioners that could arise from the proposed amendments is delay in being able to claim their costs in discontinued cases. At present, as you say, the Legal Services Commission, as an interim measure, allows costs claims to be submitted on discontinuance. Under the amendments this will no longer be possible unless and until the Tribunal makes a s.103D(3) costs order. Practitioners will thus be at the mercy of however long it might take the Tribunal to determine their costs order applications in these cases. We trust that the Department of Constitutional Affairs will make the Tribunal aware of this consideration, and encourage the allocation of judicial resources to minimise delays.

I look forward to hearing from you.

Yours sincerely

**Chris Randall**  
**Chair**



Department for  
Constitutional Affairs  
Justice, rights and democracy

Ms K Finlay  
Asylum & International Legal Aid  
3.15, 3rd Floor  
Selborne House  
54 Victoria Street  
London SW1E 6QW  
T 020 7210 1490  
F 020 7210 8780  
E Karen.Finlay@dca.gsi.gov.uk  
[www.dca.gov.uk](http://www.dca.gov.uk)

RICHARD MILLER – LAPG  
GREG LEWIS – LAW SOCIETY  
ANNE GRAHAM – LAW SOCIETY  
SIMON GARROD – BAR COUNCIL  
SUSAN ROWLANDS - ILPA

21 December 2006

### **Consultation on proposed amendments to the Community Legal Service (Asylum & Immigration Appeals) Regulations**

I am writing to consult you on changes we are proposing to make to the Community Legal Service (Asylum & Immigration Appeals) Regulations 2005, and attach a draft of the amending Regulations for your information. These Regulations refine and clarify aspects of the legal aid arrangements introduced by section 103D of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), they do not make any substantive changes to the operation of the scheme.

The first change is to give effect to the provisions of section 8 of the Immigration Asylum & Nationality Act 2006. This amends sections 103D(2) and 103D(3) of the 2002 Act. It provides that section 103D(3) applies where the Tribunal has been ordered to reconsider its decision on an appeal rather than where it has decided the appeal following reconsideration. The amendment allows representatives to be granted CLS funding by the appropriate court for work done in preparation for a reconsideration hearing that does not then proceed. This may be because the Home Office concedes the appeal, the appeal has to be treated as abandoned or where the appellant withdraws the appeal.

Regulations 2 and 3 give judges in the Asylum & Immigration Tribunal, or where appropriate the High Court, the power to make a costs order for work that representatives have done preparing for a reconsideration that has been ordered but in the event doesn't take place. Under the current provisions, at the reconsideration stage, funding can be awarded for costs incurred in making the application and also in



INVESTOR IN PEOPLE

relation to the work carried out for reconsideration. However, the AIT's powers to award costs at the reconsideration stage are only triggered once the reconsideration has taken place.

This created a potential problem in relation to cases which were withdrawn or conceded after a reconsideration was ordered but before it took place, where the representative had already carried out some preparatory work. In these cases, as an interim measure, the LSC has permitted legal representatives to submit their claims for costs where appeals are discontinued. The costs are then subject to assessment by the LSC. The proposed amendment now brings this category of case into the s103(D) legal aid arrangements and therefore legal representatives will need to ensure that they obtain a funding order to cover these costs.

Under the new provision representatives will be able to be granted CLS Funding by the appropriate court for work done in preparation for a reconsideration hearing that has been ordered but which does not then proceed. The Tribunal will be able to make an order for costs covering work in applying for and preparing for the reconsideration, as well as for the reconsideration itself. Before making an order the Tribunal must be satisfied that, at the time the application under s103A of the 2002 Act was made, there was a significant prospect that the appeal would be allowed on reconsideration. This is the same test that the Tribunal currently applies when making an order under section 103D after a reconsideration hearing has taken place.

Draft Regulation 4 amends regulation 7 to clarify the scope of the powers of the Tribunal to review a decision not to make an order under section 103D of the 2002 Act. It does not make any substantive changes, but merely clarifies that the review procedure is available in situations where the Tribunal has made an order covering only counsel's fees or only supplier's fees.

The proposed amendment in Regulation 5 requires the High Court or the Tribunal to give reasons where it makes an order covering only counsel's fees or only supplier's fees. This reflects the existing requirement under Regulation 6(4) for the Tribunal to give reasons where it decides not to make an order under Section 103D.

We also propose to take the opportunity to clarify that where there has been a change of representative, or more than one representative is instructed in the course of immigration review proceedings, a funding order will cover the costs incurred by each representative unless specified otherwise. Although it has always been the intention that this would be the case, we consider that it would be useful to have this clarified in the Regulations.

As these changes do not substantively alter the current legal aid arrangements, we propose only a short consultation. We plan to implement the changes in April and as they are subject to the affirmative resolution procedure we will need to leave sufficient time for debate in Parliament. Please therefore send your responses by post or e-mail to me at the above address by **Friday 26 January 2007**.

Unless you express confidentiality in your response, we may make your response available under the Open Government Code.

**Ms K Finlay**  
Asylum & International Legal Aid Strategy Branch  
DCA HQ

---

DRAFT STATUTORY INSTRUMENTS

---

2007 No.

**IMMIGRATION, ENGLAND AND WALES**

**LEGAL SERVICES COMMISSION, ENGLAND AND WALES**

**The Community Legal Service (Asylum and Immigration Appeals) (Amendment) Regulations 2007**

*Made* - - - - 2007

*Coming into force* - - 2007

These Regulations are made in exercise of the powers conferred upon the Secretary of State by section 103D(4), (5) and (6) of the Nationality, Immigration and Asylum Act 2002(a).

The Secretary of State has consulted in accordance with section 103D(7) of that Act.

In accordance with section 112(6) of that Act, a draft of this instrument has been laid before Parliament and approved by resolution of each House of Parliament.

Accordingly the Secretary of State makes the following Regulations:

**Citation, commencement, scope and interpretation**

1.—(1) These Regulations may be cited as the Community Legal Service (Asylum and Immigration Appeals) (Amendment) Regulations 2007 and shall come into force on [XXXX] 2007.

(2) These Regulations have effect only in relation to appeals decided in England and Wales.

(3) In these Regulations, references to a regulation by number alone refer to the regulation so numbered in the Community Legal Service (Asylum and Immigration Appeals) Regulations 2005(b).

**Amendments to the Community Legal Service (Asylum and Immigration Appeals) Regulations 2005**

2. In regulation 5—

---

(a) 2002 (c.41). Section 103D was inserted by section 26 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 (c.19) and amended by section 8 of the Immigration, Asylum and Nationality Act 2006 (c.13).

(b) S.I. 2005/966.

- (a) in paragraph (2), omit “subject to paragraph (5)”; and
  - (b) omit paragraph (5).
3. In regulation 6—
- (a) after paragraph (1), insert—
    - “(1A) The Tribunal may only make an order under section 103D(3) where—
    - (a) it has reconsidered its decision on an appeal; or
    - (b) an order for reconsideration has been made but the reconsideration does not take place or is not completed because—
      - (i) the appeal lapses, or is treated as abandoned or finally determined, by operation of an enactment; or
      - (ii) the appeal is withdrawn by the appellant, or is treated as withdrawn because the respondent withdraws the decision or decisions to which the appeal relates.”;
  - (b) in paragraph (3), for “does not allow and appeal”, substitute “dismisses an appeal on reconsideration”;
  - (c) after paragraph (3), insert—
    - “(3A) If an order for reconsideration is made but the reconsideration does not take place or is not completed the Tribunal must not make an order under section 103D(3) unless it is satisfied that, at the time when the appellant made the section 103A application, there was a significant prospect that the appeal would be allowed upon reconsideration.”; and
  - (d) in paragraph (4), after “paragraph (3)” insert “or (3A)”.
4. In regulation 7—
- (a) in paragraph (1), for “not to make an order under section 103D(3)” substitute—
    - “—
    - (a) not to make an order under section 103D(3); or
    - (b) to make a section 103D order under regulation 8(2).”;
  - (b) in paragraph (2), omit “not to make an order”; and
  - (c) in paragraph (5)(b), for “decision not to make an order” substitute “original decision”.
5. In regulation 8, after paragraph (2) insert—
- “(2A) Where paragraph (2) applies the High Court or Tribunal must give reasons for its decision.
  - (2B) Where an appellant has been represented by more than one supplier or more than one counsel in the course of immigration review proceedings, a section 103D order shall, unless it provides otherwise, have effect as an order for the payment of the costs incurred by each supplier and of the fees of each counsel while he was instructed to represent the appellant in the proceedings.”.

Signatory text

Address  
Date

*Name*  
Parliamentary Under Secretary of State  
Department

**EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations amend the Community Legal Service (Asylum and Immigration Appeals) Regulations 2005 (“the Principal Regulations”).

Section 8 of the Immigration, Asylum and Nationality Act 2006 (c.13) makes amendments to section 103D of the Nationality, Immigration and Asylum Act 2002 (c.41), under which the Principal Regulations were made. Those amendments extend the power of the Asylum and Immigration Tribunal to make an order under section 103D(3) for the payment of an appellant's costs out of the Community Legal Service Fund. Section 103D(3) no longer limits that power to cases where the Tribunal has completed the reconsideration of an appeal.

Regulation 2 removes provisions of the Principal Regulations which are no longer required as a result of the amendments to section 103D. Regulation 3 amends the Principal Regulations to specify the circumstances in which the Tribunal may make an order under section 103D(3) without having completed the reconsideration of an appeal. Regulation 4 clarifies the scope of the review procedure under the Principal Regulations in light of the amended powers of the Tribunal. Regulation 5 makes provision for the situation where a section 103D order is made and the appellant has changed representative during immigration review proceedings, and requires the tribunal to give reasons where it makes an order excluding either counsel or solicitor's fees.

These Regulations have effect only in relation to appeals decided in England and Wales.

A full regulatory impact assessment has not been produced for this instrument as it has no impact on the costs of business.