ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

Paul Newell
Immigration Policy Team
Legal Services Commission
12 Roger Street
London WC1N 2JL
immigration.services@legalservices.gov.uk

9 May 2006

Dear Paul

Consultation on CLR performance indicator

ILPA is disappointed that you seem determined to press ahead with this scheme without regard for the serious ethical issues raised not only by us in our previous response to the consultation but also by others, including some of those who contributed to the discussion at the stakeholders' meeting on 24/4/06.

Is the LSC content to lose suppliers who are not prepared to protect their "performance indicators" by turning away clients with borderline cases? Or is it working on the ghastly assumption that we will all put our contracts before our professional integrity? If not, then the guidance in this latest consultation paper will need to be clarified and modified as indicated below.

So, without recanting one word of our previous response, our replies to the questions now raised are:

1. Yes, we agree that the outcomes identified for onward appeals, Legal Panel appeals, fresh applications and UASC should be excluded from the Performance Indicator. We add that:

    a. We do not agree that the expression "fail to meet the standard" should be employed in this context at all. Work on these cases should be part and parcel of the standard the LSC expects of its suppliers.

b. In relation to onward appeals you seem to indicate that a case will be excluded from the PI not only if it succeeds on reconsideration but also or alternatively if a s.103 order for public funding is made. We hope it is correct that this is intended to include every case where a s.103 order is made, even if the reconsideration is ultimately unsuccessful.

c. If a public funding costs order is enough to get a case excluded from the PI at reconsideration stage, why should not the same apply to cases going to the High Court and Court of Appeal? This guidance indicates that it is only the ultimately successful appeal that would result in an initial negative CLR result being retrospectively excluded from the Performance Indicator, but surely this should apply to any onward appeal meritorious enough to warrant public funding.

d. You *still* have not proposed an endpoint code to record success under CLR where the appellant has won in the AIT but the respondent is appealing to the Court of Appeal. Logically we ought to be able to stage claim on code Q in all cases, including onward appeals, where the ultimate outcome is not known when CLR ends. Current guidance, however, is strictly that cases going to the Court of Appeal are to be reported as concluded. So where the onward appeal is by the appellant that will, at least for the time being, count against the supplier's PI as a code "X" report, so we obviously also need a positive code that will allow success in the AIT to count in the supplier's favour, even if the respondent is appealing to the Court of Appeal.

e. On the other hand, if you were to permit the use of stage claim code Q in all onward appeals it would avoid the difficulties that we can foresee in the current proposals in which outcomes for PI purposes will be retrospectively revised long after the original CLR report, and often in a later PI assessment period.

f. We agree that a fresh claim should potentially have the effect of excluding a previous negative outcome from the PI, but

    i. We fear for the practical difficulties of applying this principle fairly if reliance is placed solely on the Home Office recording fresh claims. A fresh claim might well still be awaiting acknowledgement by the end of the LSC's relevant monitoring period for CLR PI purposes. If that is so, and if the supplier can satisfy the LSC on enquiry that the fresh claim is *prima facie* justified, then the benefit of the doubt should be given and the original outcome excluded from the PI despite the Home Office delay.

    ii. If the Home Office does agree to record a fresh claim then that in itself should be enough to exclude the previous negative outcome, regardless of the substantive outcome of the fresh claim. If the

fresh claim is dismissed that will give rise to a new outcome report, a fresh right of appeal and, if CLR is granted, a new statistic for the Performance Indicator. To reinstate the old one into a later monitoring period would be both illogical and a distortion of the statistics.

iii. We accept that there is some conceptual difficulty in that a fresh claim by definition depends on new facts and evidence not available at the time of the original appeal, so a good fresh claim might follow a case that originally had no prospect of success. But the difficulties for the LSC in seeking to discriminate between one category of fresh claim case and another seem to us to be even greater, provided of course that when considering excluding a fresh claim case the Account Manager is satisfied that in the original appeal the supplier applied the CLR merits test and prepared the case competently.

iv. The guidance does not make clear whether the potential exclusion of fresh claim cases is to relate only to cases where the original supplier makes the fresh claim. We foresee greater difficulties if the fresh claim is made by a different supplier. If instructions are transferred because the original supplier sees no merit in a fresh claim then it may be fair enough for that supplier to be stuck with the original outcome. But sometimes clients transfer at that stage because they understandably but unfairly lack confidence in suppliers who they perceive as having lost their appeals, so the original supplier loses the opportunity of pursuing the fresh claim, and indeed may never become aware of the outcome. The LSC, however, has the capacity to track outcomes from supplier to supplier via the Unique Client Number. Do you envisage using that capacity proactively to inform original suppliers of subsequent outcomes in such circumstances? It all seems very complicated, and completely unnecessary if only you were adopt the overall approach advocated below in response to your question 4.

2. Circumstances in which the "S" endpoint code would appropriately be used include:

   a. The Home Office withdraws a notice of intention to deport with the effect that previous leave to remain, or previous exemption from immigration control, continues but nothing is "granted".

   b. The Home Office withdraws removal directions wrongly issued in respect of an EU national or the dependant of an EU national, resulting in the continuation of Treaty rights but no "grant".

c. The appellant leaves the UK and the appeal (which might otherwise have been won on its merits, and which preserved the legality of his/her position until departure became feasible) is deemed abandoned.

We do not consider that any of these should be measured as unsuccessful outcomes. Indeed we cannot at present envisage any unsuccessful outcomes in CLR cases for which code "S" (as opposed to E or R) would be appropriate. Can you? We believe it follows that Code "S" should be measured as a successful outcome, or at least initially excluded from target with the possibility of adding it back as a successful outcome in appropriate cases in discussion with suppliers who certainly deserve credit for their work in achieving any of the example outcomes cited above.

3. That would leave only one outcome code, "X", to be measured as unsuccessful. All the others that are not excluded (assuming you accept our point about "S") are measured as successful so, as far as we can see, there are no others to be excluded.

4. As to the application of contract sanctions:

   a. In the 20-40% PI band, the implication of the wording of your paper is that suppliers' "opportunity to demonstrate to their Account Manager that there is justifiable reason for their performance being below 40%" is confined to the opportunity to have onward appeals, Legal Panel appeals, fresh claims and UASC appeals excluded from target. What is needed is the opportunity to show, case by case, that the merits test was correctly applied to the grant and continuation of CLR and that the appeal was prepared for and presented at hearing competently. That being so, the accident of a run of bad luck in the disposition of the assigned immigration judges, or appellants or witnesses failing to come up to proof despite being properly prepared, should be capable in itself of constituting a "justifiable reason" for a below 40% success rate. A variation for such reasons would be statistically insignificant for PI purposes because it was caused by variables unconnected to the merits of the case or the competence of the supplier.

   b. It remains an irreducible arithmetical fact that 100% of cases with a 50% or better chance of success could be lost through no fault of the supplier, and the smaller the supplier's case load the more statistically likely is that result. So, for example, if the NAM proposals succeed in producing fewer appeals it will become more and more necessary, if CLR is to survive at all, to take a rational rather than a pseudo-statistical approach. In ILPA's view that approach should be taken to the application of the Performance Indicator from the outset if the LSC aspires to keep its remaining quality suppliers on board.

   c. It is not completely clear whether a supplier who is able to show justifiable reason for performing at below 40% will be treated as if they were

meeting the target and hence as eligible for a 2007/8 contract, or whether despite having shown justifiable reason they will be issued with contract notices. If the latter then the ethical issues previously raised by ourselves and others will loom very large indeed. What does the LSC expect a supplier subject to a contract notice requiring an "improvement" to 40% or above to do when faced with a run of borderline cases of overwhelmingly importance to the clients? ILPA is clear about where its members' professional duties lie. If you will not construct this guidance in such a way as to respect that then we fear that you really will lose some high quality suppliers.

d. It appears from the wording of this paper that suppliers in the 20% and below PI band will have no opportunity to discuss the reasons with their Account Managers, and will simply lose their contracts without more ado. Why? Why should they not have the opportunity to discuss the reasons for their outcomes in the light of the potential exclusions of onward appeals, Legal Panel appeals, fresh claims and UASCs, and along the lines we have indicated above? That might at least be capable of bringing them into to the 20-40% band and thus qualify for a temporary contract and the chance to aim for further improvement. If it does not then, provided the approach outlined at 4.a above has been followed, we would accept that the poor performance is apparently culpable and justifies termination of contract.

e. As to targets for post 2007/8 contracts ILPA has no comment on the proposed measurement period, but strongly urges that the approach to giving opportunities to justify below target scores that is outlined above should always be followed, so that suppliers willing to take on important borderline cases are not unduly discouraged.

5. We believe that the devolved power to grant CLR should be reinstated to all suppliers, subject to the caveats we have already made about the responsibility of the LSC to monitor refusals as well as grants. The incompetent supplier who grants CLR in cases with no merit will soon fall foul of the Performance Indicator, but the LSC needs to take more rigorous steps to seek to ensure that some suppliers do not grant CLR in difficult but meritorious cases for fear of adversely affecting their Performance Indicators. At the stakeholders' meeting on 24/4/06 you stated that the LSC does not have the software to put into effect ILPA's suggestion of last year that suppliers be required to submit a CW4 explaining every refusal of CLR regardless of whether the client appealed. But it does not require any software to require suppliers to do this. What you do with it is a different matter, but under the current proposal you purport to have the intention and capacity to query unusually high CLR success rates so surely the existence of those CW4s, even uncomputerised, would aid in discussions with suppliers for whom this became an issue. It would certainly deliver to everyone the news (and we fear that it would be news to many) that the LSC cares as much about CLR being wrongly refused as it does about it being wrongly granted.

6. Our most heartfelt general comments on the guidance are indicated in the opening paragraphs of this letter, and reflected especially in our responses to questions 4 and 5 above. I hope they will be taken on board and the necessary modifications made before the formal documentation is issued. If you cannot do this and still meet the timetable you set out of issuing the documentation 6 weeks prior to implementation on 1/7/06 then surely the implementation date could be put back to 1/8/06 by the simple expedient of adjusting your data assessment period from July-November to August-December. The issues are too important to be sacrificed to an artificial deadline or to administrative convenience.

Yours sincerely

Chris Randall
Chair of ILPA

PS I would be grateful if your staff could note for future reference that the name of the ILPA EC member with responsibility for legal aid is Vicky Gued**a**lla, not Gued**e**lla. E-mails from your office do not reach her because they are wrongly addressed. Her e-mail address is vg@deightongued**a**lla.com. She does not have an ilpa.org e-mail address. Thank you.