# ILPA response to the Ministry of Justice Consultation Proposals for reform of civil litigation funding and costs in England and Wales

The Immigration Law Practitioners' Association (ILPA) is a professional association with some 900 members (individuals and organisations), the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous Government, including UK Border Agency and other 'stakeholder' and advisory groups.

ILPA has responded to questions which are relevant to the work of its members and its aims and values.

Conditional Fee Arrangements have so far not played a major role in funding immigration cases. That is firstly because many cases are decided by tribunals without the power to award costs and secondly, because the complexity and difficulty of the issues and the fast developing law makes many cases borderline and generally makes it far more difficult than other categories of case to predict the result. That has an obvious effect on the availability of insurance.

Sir Rupert's final report was delivered before there was any contemplation of cuts of the drastic sort now proposed to legal aid. Given those proposals, with which ILPA disagrees, as set out in our response to the Ministry of Justice consultation, then however challenging it is to make Conditional Fee Arrangements work in particular categories of case, every option must be explored. ILPA is very concerned that the proposals, especially in relation to inability to recover a success fee, may stamp out any prospect that Conditional Fee Arrangements may be of any significant assistance in funding cases where damages are not claimed. The proposals may therefore have a particularly detrimental effect in the context of cuts to legal aid which were not contemplated when the report was published.

ILPA must also emphasise its concern in relation to judicial review about any dilution of Sir Rupert's proposals to protect claimants especially if those proposals that favour defendants are implemented without dilution. This would wholly undermine the legitimacy of any change.

**Question 1: Do you agree that CFA success fees should no longer be recoverable from the losing party in any case?**

Answer: No.

ILPA considers that success fees should continue to be recoverable from the losing party. As presently proposed, legal aid would be withdrawn from appeals to the Court of Appeal in immigration cases. In such cases and generally for litigants of moderate means who do not quality for legal aid, recoverable success fees make representation on a Conditional Fee Arrangement more viable and contribute to protecting access to justice.

It does not follow from criticism of the size of some success fees said to have been claimed that there should be no ability to claim any success fee from the losing party.

**Q 2 – If your answer to Q 1 is no, do you consider that success fees should remain recoverable from the losing party in those categories of case (road traffic accident and employer's liability) where the recoverable success fee has been fixed?**

Answer: This is not within ILPA's area of expertise.

**Q 3 – Do you consider that success fees should remain recoverable from the losing party in cases where damages are not sought e.g. judicial review, housing disrepair (where the primary remedy is specific performance rather than damages)?**

Answer: Yes.

Many immigration representatives work on low margins due to the inability of most migrants to pay substantial fees. That is especially the case for those who perform legal aid work in light of the cuts of recent years.[1] Those margins will inevitably be lower still as a result of any further legal aid cuts as currently proposed.

Most immigration cases will not involve a claim for damages.

The ability to claim a recoverable success fee may be critical to the ability of many immigration representatives to provide representation. No alternative is proposed, presumably because there is no alternative. In many cases migrants will have no means to pay success fees and will be in no better financial position at least initially if their claim succeeds than if it fails. Migrants are less likely than average to have capital to draw upon or family able to provide funds to pay a success fee.[2]

The nature and complexity of immigration judicial reviews and appeals in the higher courts is such that the result is commonly difficult to predict, making success fees more important to the viability of Conditional Fee Arrangements than in categories of case where the result is easier to predict.

---

[1] See ILPA's response to the Ministry of Justice consultation on the legal aid cuts, 14 February 2011 and particularly Annexe 3 (remuneration rates) thereto.

[2] See for example **T***he changing pattern of earnings: employees, migrants and low-paid families* Richard Dickens and Abigail McKnight for the Joseph Rowntree Foundation, 29 October 2008 and related publications produced as part of their work.

**Question 4 – Do you consider that if success fees remain recoverable from the losing party in cases where damages are not sought, a maximum recoverable success fee of 25% (with any success fee above 25% being paid by the client) would provide a workable model?**

Answer: This would provide a considerably more workable than a model in which no success fee could be recovered. It would reduce the threat to access to justice and increase the viability of representation on Conditional Fee Arrangements in cases where damages are not sought. However, a 25% success fee is appropriate for categories of case where success rates are around 80%. That is not the case in immigration yet these cases are so important, especially where human rights are involved, that it would be wholly unacceptable were claimants whose prospects of success were significantly less than 80%, but better than evens, to be denied representation. For the reasons set out above, many migrants will not have funds to pay even part of a success fee. ILPA would therefore propose a cap of at least 50%. Consideration should also be given to a variable cap which depends upon the stage at which the case concludes. However, ILPA repeats that any recoverable success fee in cases where damages are not sought is clearly preferable to none.

**Question 5 – Do you consider the success fee should remain recoverable from the losing party in certain categories of case where damages are sought, for example complex clinical negligence cases? Please explain how the categories of case should be defined.**

Answer: ILPA considers that a success fee should be recoverable in false imprisonment cases. Although damages may be moderate, the ability to bring such claims is constitutionally important: they are an important means by which the rule of law is safe guarded. Such claims are already extremely difficult on Conditional Fee Arrangements and would become even more so were no success fee recoverable.

**Question 7 – Do you agree that the maximum success fee that lawyers can charge a Claimant should remain at 100%.**

Answer: Yes

**Question 8-10**

These are questions about personal injury claims which are outside ILPA's area of expertise.

**Question 11 – Do you agree that ATE insurance premiums should no longer be recoverable from the losing party across all categories of civil litigation?**

Answer: No

If Qualified One way Costs Shifting is introduced, then After The Event insurance premiums covering the other side's costs need no longer be recoverable. In the absence of Qualified One way Costs Shifting in any particular category of case, then After The Event premiums must continue to be recoverable in that category of case to protect access to justice for litigants who cannot afford insurance and for whom the risk of an adverse costs award will otherwise be an insurmountable barrier to practical access to the court.

**Question 12 - If your answer to Question 11 is no, please state in which categories of case ATE insurance premiums should remain recoverable and why.**

Answer: In any category of case to which Qualified One way Costs Shifting is not applied, and especially in any case where there is commonly a disparity of resources and individuals' human rights may be at stake.

**Question 13: - If your answer to Q 11 is no, should recoverability of ATE insurance premiums be limited to circumstances where the successful party can show that no other form of funding is available?**

Answer: In principle, ILPA does not object to this, but it is concerned that the risk and cost of disputes about this criterion may make it undesirable.

**Question 14 – Do you consider that ATE insurance premiums relating to disbursements only should remain recoverable in any categories of civil litigation?**

Answer: Yes.

Many migrants will be unable to afford such disbursements. The cuts to legal aid and steps to restrict recoverable success fees mean that immigration representatives are highly unlikely to be able to fund these disbursements. Expert reports are regularly crucial in cases involving Article 8 of the European Convention on Human Rights (right to private and family life) cases, especially those involving children and may effectively determine the case.

If Qualified One way Costs Shifting is introduced, then After The Event insurance premiums will be greatly reduced as they insure only the claimant's disbursements and not the defendant's costs and will not be disproportionate to the benefits they bring in ensuring access to justice.

**Question 15 – If your answer to Q 14 is yes, should recoverability of ATE insurance premiums be limited to non-legal representation costs such as expert reports?**

Answer: Yes, as the proposals assume that lawyers will work on Conditional Fee Arrangement agreements.

**Question 16 – If your answer to questions 14 or 15 is yes, should recoverability of ATE insurance premiums relating to disbursements be limited to circumstances where the successful party can show no other form of funding if available?**

Answer: See question 13.

**Question 17 – How could disbursements be funded if the recoverability of ATE insurance premiums is abolished?**

Answer: The only realistic alternative for funding such disbursements in immigration cases is for legal aid to be available to fund them.

**Q 18 – Do you agree that, if recoverability of ATE insurance premiums is abolished, the recoverability of the self-insurance element by membership organisations provided for under section 30 of the Access to Justice Act 1999 should similarly be abolished?**

Answer: No comment.

**Question 19 – Do you agree that in principle successful claimants should secure an increase in general damages for civil wrongs of 10%?**

Answer: Yes, although ILPA considers that an increase of 10%, especially in cases where moderate damages are awarded, is inadequate to cover the cost of reasonable success fees.

**Question 20 – Do you consider that any increase in general damages should be limited to CFA Claimants and legal aid Claimants subject to a SLAS?**

Answer: No.

**Question 21**

**Do you agree with the proposal to introduce an additional payment, equivalent to a 10% increase in damages, where a Claimant obtains judgment at least as advantageous as his own Part 36 offer?**

Answer: Yes, in order to make the penalty and incentive for claimant and defendant more equal.

**Question 22 – Do you agree that this proposal should apply to all Claimant Part 36 offers (including cases for example where no financial remedy is claimed or where the offer relates to liability only?)**

Answer: Yes, but the 10% sanction would have to relate to costs and not to damages in non-monetary claims.

**Question 23 – Do you agree that the proposal should apply to incentivise early offers?**

Answer: Yes.

**Question 24 – Do you consider that the increase should be less than 10% where the amount of the award exceeds a certain level?**

Answer: No comment.

**Question 25 – Do you consider that there should be a staged reduction in the percentage uplift as damages increase?**

Answer: No comment.

**Question 26 – Do you agree that the effect of *Carver* should be reversed?**

Answer: Yes.

**Question 27 – Do you agree that there is merit in the alternative scheme based on a margin for negotiation as proposed by FOIL? How do you think such a scheme should operate?**

Answer: No, it is unnecessarily and undesirably complicated.

**Question 28 – Do you agree with the approach set out in the proposed rule for qualified one way costs shifting (QOCS) (paragraph 135 – 137)? If not, please give reasons.**

Answer: Yes, so long as the proposed rule is interpreted and applied in the manner indicated at paragraph 136, and there is clear guidance to that effect. That is necessary in order to prevent those of moderate means being deterred by uncertainty about how the rule will be applied.

**Question 29 – Do you agree that QOCS would significantly reduce the claimant's need for ATE insurance?**

Answer: Yes as insurance would be required only for disbursements.

**Question 30 – Do you agree that QOCS should be extended beyond personal injury? Please list the categories of case to which it should apply, with reasons.**

Answer: Yes.

Qualified One way Costs Shifting must apply to judicial review and to appeals from the Upper Tribunal to the Court of Appeal (to the benefit of the individual whether s/he is appellant or respondent).

ILPA strongly supports Sir Rupert's recommendation that Qualified One way Costs Shifting should apply to judicial review. The requirement of permission (which does not exist in other categories) is an adequate safeguard against unmeritorious claims. There can be no justification for treating judicial review claimants more harshly than other categories of claimants in this regard. Any dilution of Sir Rupert's recommendation while at the same time accepting those recommendations that favour defendants (in particular in as to recoverability of the success fee) would wholly undermine any balance in the proposals as they apply to judicial review and constitute a serious threat to access to justice.

**Question 31 – What are the underlying principles which should determine whether QOCS should apply to a particular type of case?**

Answer: Qualified One way Costs Shifting will ordinarily be appropriate where there is a disparity in resources, which will be the case where an individual is litigating the State unless that individual is conspicuously wealthy.

**Question 32 – Do you consider that QOCS should apply to (i) claimants on CFAs only or (ii) all claimants however funded?**

Answer: (ii) All claimants however funded.

**Question 33 – Do you agree that QOCS should cover only claimants who are individuals? If not, to which other types of claimant should QOCS apply? Please explain your reasons.**

Answer: No, disparity of resources is commonly an issue for Non-Governmental Organisations bringing judicial review claims as well as individuals. Such claims often raise important points of public interest, including in the field of immigration. The alternative of Protective Costs Orders has disadvantages which Qualified One way Costs Shifting avoids. The position of wealthy organisations can be addressed through the proposed costs rule (Question 28).

**Question 34 – Do you agree that, if QOCS is adopted, there should be more certainty as to the financial circumstances of the parties in which QOCS should not apply?**

Answer: Yes. See our response to question 28. Guidance about the meaning of 'conspicuously wealthy' would be helpful so that claimants of moderate means are

not unnecessarily deterred by a misconceived fear of an unaffordable adverse costs order.

**Question 35 – If you agree with Q 34, do you agree with the proposals for a fixed amount of recoverable costs (paragraphs 143 - 146)? How else should this be done?**

Answer: It does not follow from the answer to question 34 that there should be fixed amounts of recoverable costs in cases where the claimant has not acted unreasonably and is not conspicuously wealthy. ILPA strongly opposes any such proposal and in the alternative, any figure should be as low as possible.

**Section 2.7 – Alternative Recommendations on Recoverability**

**Question 36 – Do you agree that, if the primary recommendations on the abolition of recoverability etc are not implemented, (i) Alternative Package 1 or (ii) Alternative Package 2 should be implemented?**

Answer: ILPA considers that Alternative Package 1 is clearly preferable to the primary recommendations for the reasons set out in answer to previous questions. It permits limited recoverable success fees and After The Event premiums in particular circumstances. Package 2 is less clearly preferable to the primary recommendations. Although recoverable success fees will facilitate representation, inability to afford insurance premiums will be viewed as precluding litigation by some claimants.

**Question 37 – To what categories of case should fixed recoverable success fees be extended? Please explain your reasons.**

Answer: Fixed recoverable success fees in cases where damages are not sought would be preferable to the primary recommendations (see our response to Question 4).

**Question 38 – Do you agree that, if recoverability of ATE insurance remains, the Alternative Packages of measures proposed by Sir Rupert should also apply to the recovery of the self-insurance element by membership organisations?**

Answer: No comment.

**Question 39 – Are there any elements of the alternative packages that you consider should not be implemented? If so, which and why?**

Answer: Some elements of each package are more detrimental than others and ILPA would design a different package but they are presented as packages and it is assumed that the more detrimental aspects are intended to balance those more favourable.

**Section 2.8 – Proportionality**

**Question 40 – Do you agree that, if Sir Rupert's primary recommendations for CFAs are implemented, a new test of proportionality along the lines suggested by Sir Rupert should be introduced?**

Answer: No.

A new test is undesirable and impractical. A value cannot and should not be placed on cases involving expulsion and the right to a legal status. The new test may also lead to additional disputes about costs.

**Q 41 – If your answer to Q40 is no, please explain why not and what alternatives would you propose to achieve the objective of ensuring that costs are proportionate?**

Answer: The present rule strikes the right balance between access to justice and controlling costs.

**Question 42 – How would your answer to Q40 change if (i) Sir Rupert's alternative recommendations were introduced instead, or (ii) no change is made to the present CFA regime? Please give reasons.**

Answer: It would not change in either event.

**Question 43 – Do you agree that revisions to the Costs Practice Direction, along the lines suggested (at paragraph 219), would be helpful?**

Answer: They may reduce the adverse consequences of a change to the proportionality rule, but the best position is to make no change.

**Question 44 – What examples might be given of circumstances where it would be inappropriate to challenge costs assessed as reasonable on the basis of the proportionality principle?**

Answer: In immigration amongst other areas.

**Section 2.9 – Damages-Based Agreements (Contingency Fees)**

**Question 45 – Do you agree that lawyers should be permitted to enter into Damages-Based Agreements (DBAs) with their clients in civil litigation?**

Answer: Yes.

**Question 46 – Do you consider that DBAs should not be valid unless the claimant has received independent advice?**

Answer: No. No indication is given of who would provide the independent advice and how this would be funded.

**Question 47 – Do you consider that DBAs need specific regulation? If so, what should such regulation cover?**

Answer: Specific regulations may be appropriate in particular categories of case.

**Question 48 – Do you agree that, if DBAs are allowed in litigation, costs recovery for**
**DBA cases should be on the conventional basis (that is the opponent's costs liability should not be by reference to the DBA)?**

Answer: Yes.

**Question 49 – Do you consider that where QOCS is introduced for claims under CFAs, it should apply to claims funded under DBAs?**

Answer: Yes.

**Question 50 – Do you consider that the maximum fee lawyers can recover from damages awarded under a DBA in personal injury cases should be limited to (i) 25% of damages excluding any damages referable to future care or losses as proposed, or (ii) some other figure? Please give reasons for your answer**

Answer: This is not within ILPA's area of expertise.

**Question 51 – Do you consider that in personal injury claims where the solicitor accepts liability for paying the claimant's disbursements if the claim fails, the maximum fee should remain at 25%? If not, what should the maximum fee be? Should the limit be different in different categories of case?**

Answer: This is not within ILPA's area of expertise.

**Question 52 – Do you consider that there should be a maximum fee that lawyers can recover from damages in non-personal injury claims? If so, what should that maximum fee be, and should the maximum fee be different in different categories of case?**

Answer: ILPA has no comment beyond recognising that different caps may be appropriate for particular categories of claim.

**Question 53 – How should disbursements be financed by claimants operating under DBAs?**

Answer: No comment.

**Section 2.10 – Litigants in Person**

**Question 54 – Do you agree that the prescribed rate of £9.25 per hour recoverable by litigants in person should be increased? If not why not?**

Answer: Yes.

**Question 55 – Do you agree that the rate should be increased to (i) £16.50 per hour, (ii) £20 per hour or (iii) some other rate (please specify)?**

Answer: No comment.

**Question 56 – Do you agree that the prescribed rate of £50 per day for small claims be increased? If so, to what figure?**

Answer: No comment.

Sophie Barrett-Brown
Chair
ILPA
14 February 2011