

How visitors and lawyers may work together

1. This note has been written to accompany a discussion among coordinators of visitors groups during the 2008 Coordinators' Conference to be held in Birmingham on 4th and 5th June 2008.

Understanding each others' roles:

2. The key point on working together – whether this be active working in partnership on a particular case, or simply avoiding stepping on someone's toes – is to understand each others' roles.
3. Many lawyers may be unfamiliar with the role of a visitor. There is a risk that lack of familiarity leads to a degree of unnecessary suspicion as to the role a visitor may in practice be playing with regard to the lawyer's client. A different risk is that lack of familiarity may lead a lawyer to have unreasonable expectations of the role of a visitor. These risks may work both ways – a visitor may have unreasonable suspicions or expectations of a lawyer.
4. It is necessary to recognise the very vulnerable position in which those in detention find themselves. Awareness of the isolation of detainees and the consequent vulnerabilities can only accentuate the concerns previously expressed. A key outcome of the discussion, therefore, ought to be to ensure a keen awareness of the respective roles of visitors and lawyers, including responsibilities and limitations.

The role of the lawyer:

5. It is easier for me to speak of the role of the lawyer. Obviously, it is the role with which I am familiar. Also, it may be the more clearly defined role of the two.
6. Lawyers have a number of duties, and at times they may need to balance these as these duties may compete. Lawyers' duties include duties to clients, duties to courts and duties in respect of public funds. In brief:

- Lawyers should treat their clients' with respect, act on their clients' instructions, treat those instructions as in confidence, provide their clients with full and honest advice as the relevant law, options and prospects of success, and keep their clients informed of progress on a case. Although lawyers are not obliged to undertake legal aid work, where legal aid may be available a lawyer ought to inform his or her client, or potential client, of that fact. If a lawyer is acting privately (i.e. is charging a fee to the client) he or she ought to advise the client of the fee, or likely fee, having regard to the possible duration of the work the lawyer is undertaking.
- Lawyers owe a special duty to a court to ensure that the court is not misled. This may extend to an obligation to ensure that a court is aware of any caselaw (decisions or judgments) that are not in favour of the lawyer's client's case. This also extends to ensuring that a court is not deceived by the evidence given by a witness, including the lawyer's client.
- Lawyers undertaking legal aid work have particular obligations in respect of legal aid. Legal aid is generally subject to means and merits testing. This means a lawyer must be satisfied that a client's means (financial resources) are such that he or she is entitled to legal aid. Lawyers must also ensure that there is sufficient value in the work the lawyer is asked or proposes to do to merit (justify) a grant of legal aid. The merits test works differently depending on whether the lawyer is undertaking advice work, assisting a client with their case before the Home Office (UK Border Agency), representing the client at an appeal before the AIT or representing the client before the higher courts (e.g. with an appeal to the Court of Appeal against the AIT or judicial review). With appeals and judicial reviews there must be a sufficiently good chance that the case will be successful – albeit that legal aid may be granted if the case is unclear (though the client's eligibility for legal

aid will need to be reassessed when the prospects of the case become clear).

7. In recent years successive legal aid reforms have imposed constraints upon lawyers undertaking legal aid work. There are now serious tensions between a lawyer's duty to his or her client and, where the lawyer is undertaking work on legal aid, the obligations or constraints upon the lawyer from the Legal Services Commission and the legal aid arrangements. A constructive relationship between a visitor and lawyer (whether working in partnership, or simply being aware of each other's relationship with a particular detainee) may help to mitigate some of these tensions – and *vice versa*.
8. Clients have duties to lawyers also. It is vital to the client-lawyer relationship that it is founded upon trust and confidence. Breaches of this trust and confidence by a client may fundamentally and irrevocably break the relationship.

Role of the visitor:

9. The role of a visitor may inevitably depend upon his or her experience and qualifications; and may differ from one visitor's group to another or from one detainee to another. What is likely to be at the heart of any particular role, however, is providing support (in broad terms – that may be emotional support, friendship etc.); and the key to the role is to ensure that the detainee (and visitor) are clear about how far that supporting role does or does not extend.
10. Some visitors may be OISC registered. Others will not be. If a visitor is not OISC registered, he or she is in law prohibited from giving advice or making representations in relation to a person's claim to asylum (or indeed application or potential application to be granted permission to stay in the UK). To do either of these things is a criminal offence. Giving evidence in support of a detainee's claim is not the same as making representations. However, where this is not done through a lawyer there may be a fine line between making representations and giving evidence (and a visitor should think carefully how to

present evidence in such circumstances; as well as about what evidence he or she can properly give – i.e. what is within his or her knowledge and expertise).

11. Whether a visitor is OISC registered or not, it is important that the visitor is aware of any legal representation a detainee may have. A visitor who is engaged in advising or assisting a detainee with the same matter upon which a lawyer is acting for the client risk breaking the relationship between client and lawyer.

How the work of a visitor may support the work of a lawyer:

12. Rather than seeking to map out an arrangement that may seem unfamiliar to some or unreasonable to others, I have done little more than bullet-point some thoughts below which might be developed in the discussion:
 - Client contact. Detainees are isolated, and lawyers (certainly legal aid lawyers) will likely have less contact with clients than in previous years because of new legal aid arrangements.
 - Identifying client needs with which the lawyer can help or which are relevant to the case on which the lawyer is acting. Less client contact means lawyers have less opportunity to develop as close a relationship with their client as they might or ought. The client may disclose less to the lawyer because of this; and the lawyer may become aware of less.
 - Client's expectations. The visitor may be in a position to assist a detainee to understand the limit and reach of expectations the client can reasonably have in respect of his or her lawyer.
 - Identifying and acting on client needs with which the lawyer cannot help or which are not relevant to the case on which the lawyer is acting. Detainees may have several, pressing concerns related to their detention which will neither advance the detainee's asylum (or other) claim nor advance any application for bail. (Note that assessing

whether something truly falls within this description may be difficult, particularly in relation to bail.)

Problems the visitor may face:

13. Again, I have not sought to map out the range of problems that a visitor may face but have below bullet-pointed some thoughts which might be developed in discussion:

- Assisting a detainee to find a lawyer. Finding lawyers is undoubtedly often difficult. Having access to some networks may help (e.g. RLG, Medical Justice, FNPN). Having basic information to hand may assist a lawyer in making a decision whether he or she is able to assist (e.g. what stage of the asylum process is the detainee, what is the detainee's nationality, is removal imminent?). Having access to the full file will likely assist a lawyer.
- Problems with a current legal representative. There may be difficulties in assessing whether a problem is real or perceived, whether the lawyer is at fault or whether a client's expectations are unreasonable. Even when sure that a problem is real, it may be difficult to decide what to do about the problem because any action may break the client-lawyer relationship and obtaining alternative legal representation may not be straightforward. Complaints about lawyers may be made to the OISC. Complaints about solicitors may be made to the Solicitors' Regulatory Authority (SRA); but if the complaint is made to OISC, the latter body ought to refer the matter to the SRA in any case. Simply that a problem is real may not suggest that a complaint is the best way to deal with it. Contacting the lawyer (with the detainee's consent) may be necessary. The lawyer may not be able to discuss a case because of his or her duty of confidentiality; but this does not preclude a lawyer listening to a concern and, where appropriate, remedying a problem (e.g. by providing information to a detainee, contacting a detainee, investigating a concern as to the detainee's mental health).

- Complaints against/to other authorities (e.g. UK Border Agency, IRC management, health centre management). There may be concerns about the impact a complaint may have on the way a detainee is treated. Complaints ordinarily ought not to be made on behalf of a detainee without the informed consent of the detainee.

Conclusion:

14. The aim of this paper is not to fully identify or conclude discussion on the issue of how visitors and lawyers may constructively work together. It aims to highlight some of the key issues relating to this topic; and to provide a foundation for further discussion.

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