House of Commons

Constitutional Affairs Committee

Immigration and Asylum: the Government's proposed changes to publicly funded immigration and asylum work

Fourth Report of Session 2002–03

Volume I

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The Constitutional Affairs Committee

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Summary

On 5th June this year the Lord Chancellor's Department (now the Department for Constitutional Affairs (DCA)) issued a consultation paper on proposed changes to publicly funded immigration and asylum work. We decided, following the Lord Chancellor's invitation, to conduct a brief inquiry to examine these proposals, concentrating in particular on the proposals to set maximum limits on the amount of public funding available in individual cases.

In conducting this inquiry, we have had to work within a number of constraints. In order to accommodate the Government's timetable we worked within a truncated timescale. In addition, following the conclusion of oral evidence, the DCA submitted a memorandum setting out an "alternative approach", which changed significantly from its original proposals. The Home Secretary also made an announcement which will have important implications for legal aid expenditure in this field. Whilst we have attempted, within the time available, to take account of these developments, it is wrong that we were not able to test the merits of the Government's revised proposals with our witnesses in oral evidence.

The Government's original proposals were hurried and not obviously thought through and its "alternative approach", proposed to us at almost the very last stage, is unhelpfully vague. We conclude that the Department needs to undertake serious further work before it is able to put any sensible proposals on the table. It is the nature of that work which forms the basis of our detailed recommendations below. Until that work has been undertaken, and a properly considered package of reforms is brought forward, we recommend that the Government place a moratorium on the time and funding limits for publicly funded asylum and immigration work. We believe there should be no delay in addressing the issue of quality representation.

We accept that there is a need to make sure that the mechanisms are in place to ensure that the money is being spent properly and that quality can be guaranteed. But whilst we recognise the competition for resources in the legal aid budget, we do not consider that the Government's original proposals—namely, to place stringent caps on the time and costs that could be spent on individual cases—would have achieved this result. For these reasons:

- We strongly support the proposals for a new accreditation scheme
- We welcome the Department's recognition that the system needs to be more flexible than originally proposed, and the elements of "earned autonomy" for some suppliers of recognised high standard, although the Government needs to spell out the details of the revised proposals
- We welcome the Government's revised proposal to allow extensions in "genuine and complex" cases on application to the Legal Services Commission (LSC) for prior authority on a case-by-case basis, although we recommend that the category of "genuine and complex" cases be sufficiently broadly defined to meet the issues we have raised

- We recommend that attendance by representatives at Home Office interviews be allowed in cases where the representative is able to justify his or her attendance (as currently required by the LSC). We further recommend that the costs of such attendance not be included within be threshold for Legal Help, but that it be claimable separately
- We welcome the recent announcement by the LSC that it proposes to consult further as to when experts' reports can be commissioned and as to the proposed maximum fees. We strongly recommend that it also consults on its revised proposals for interpreters' costs.
- We recommend that provision be made where necessary for conferences with counsel to take place before the day of the hearing (rather than at the hearing, as originally suggested by the LSC)
- We recommend that, on a change of legal representation, a fresh Advice Limit or threshold should be allowed where justified.

Many of the respondents to the consultation, and our witnesses, have referred to the problem of poor quality decision-making by the Home Office in the first instance. There is also widespread concern about the low level of Home Office representation at appeals—around 35%—which can result in unnecessary appeals to the Immigration Appeal Tribunal. These are issues to which we hope to return in our main inquiry into Asylum and Immigration Appeals.

1 Introduction

Background

1. On 5th June this year the Lord Chancellor's Department (now the Department for Constitutional Affairs (DCA)) issued a consultation paper on proposed changes to publicly funded immigration and asylum work.[1] The consultation completed on 27 August and the Department received 260 responses. Once finalised, it was proposed that the new measures would be introduced from January 2004.

2. This consultation came at a time when we were already looking at certain issues connected with publicly funded immigration and asylum work in the context of a broader inquiry into the asylum and immigration appeals system.[2] We were invited by the Lord Chancellor to examine the consultation proposals. We therefore decided, before proceeding with the broader inquiry, to conduct a brief inquiry into the particular proposals contained in the consultation paper, with the intention of reporting before the Government announced the results of its consultation.

3. We heard oral evidence at two meetings: firstly from the Parliamentary Secretary at the Department for Constitutional Affairs, David Lammy MP, and the Chief Executive of the Legal Services Commission (LSC), Clare Dodgson; then from representatives from the Law Society, the Immigration Law Practitioners Association (ILPA), and the Refugee Legal Centre; and from the Chairman of the Council on Tribunals and the Immigration Services Commissioner. Following the conclusion of oral evidence, we received further joint memoranda from the DCA and LSC. The first was submitted on 23rd October and the second, which set out revised proposals, on 24th October. Additionally, we were given access to all the written submissions sent to the Department in response to the consultation, and received a number of letters sent directly to us by interested parties. We are very grateful to all our witnesses, who gave evidence to us at very short notice. We also wish to thank our specialist advisers, Chris Randall and Dr Robert Thomas.

4. Our specialist advisers have produced a memorandum of detailed commentary on further aspects of the Department's revised proposals. It has not been possible for us to consider all these points in the one working day available to us since we received the revised proposals, but we are printing it as an appendix to our report so that it can be considered by the Department.

1 *Public Consultation on Proposed Changes to Publicly Funded Immigration and Asylum Work* (LCD, June 2003), CP 07/03, from here on referred to as DCA consultation paper

2 The inquiry into Asylum and Immigration Appeals was announced on 28 February 2003. Our press notices are available on the Committee's website, available at www.parliament.uk

2 The Government's proposals

Introduction to public funding for immigration and asylum work

5. There are three main strands of legal aid expenditure in connection with immigration and asylum work:

(1) *Legal Help (LH)*

Legal Help covers immigration and asylum cases up to the Home Office decision, and continues after that to be used to fund the ongoing administration of cases, such as dealings with the National Asylum Support Service, reporting to immigration, etc. It is subject to a means test and a fairly low threshold merits test called the "sufficient benefit test"[3].

[Current] initial financial limit: £2000 asylum/Article 3 claims[4]; £500 immigration—extendable upon request by the LSC, subject to audit by the LSC when the case has been completed.

(2) *Controlled Legal Representation (CLR)*

Controlled Legal Representation covers asylum and immigration appeals before the Immigration Appellate Authority (IAA), and is subject to the same means test, but a more stringent merits test.[5]

[Current] initial financial limit: £1500 asylum and immigration (£2,500 for a limited number of suppliers)—extendable upon request by the LSC, subject to audit by the LSC when the case has completed.

(3) *Certificates of public funding (CPF)*

Certificates of public funding cover judicial review, statutory review, and appeals to the Court of Appeal. The grant of funding by this method is subject to a more generous means test, but a more stringent merits test.

[Current] initial financial limit: usually set at £1500 initially for an emergency certificate—extendable upon request by the LSC.

All the above limits include attendances and preparation, letters and telephone calls, travel and waiting, disbursements, but not VAT. There are fixed hourly rates for these different

3 The "sufficient benefit" test is satisfied if there is sufficient benefit to the client, having regard to the circumstances of the matter (including the personal circumstances of the client) to justify work being carried out

4 Article 3 of the European Convention on Human Rights (scheduled to the Human Rights Act 1998) provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". It may be invoked to prevent a State from removing a person to a country where he would be at a real risk of being subjected to such treatment. Such a claim may be made *in addition* to a claim for asylum because the obligation under Article 3 is wider than the obligations under the 1951 Refugee Convention relating to asylum seekers

5 The merits test is broadly a more than 50% chance of success

types of work under Legal Help and Controlled Legal Representation, the latter being marginally more generous than the former.

6. The second strand of funding—Controlled Legal Representation—was first introduced in January 2000. Before then legal aid was *not* available for representation before the IAA,[6] the reason being that the tribunal system was intended to be accessible without the need for legal representation. As a result of the growing complexity of asylum and immigration work, the Government agreed to extend legal aid to include representation in this field.

7. At the same time, legal aid was made subject to tighter regulation by the LSC through 'contracting'. This tighter regulation has restricted legal aid work to specialised (franchised) firms and organisations who satisfied certain quality criteria and who work under a contract with the LSC. Suppliers are restricted to a given number of matter-starts[7] each year. The combination of the limits on expenditure per matter, which suppliers must approach the LSC to exceed, and the limits on the numbers of matter starts per supplier, gives the LSC far greater control and information over its expenditure than it had prior to 2000. This knowledge will increase over the years as older (pre 2000) cases are completed, and reporting obligations on suppliers are increased.

Disbursements

8. The current financial limits for legal aid (listed above) cover profit-costs and disbursements. Disbursements are the incidental expenses incurred by the supplier. In the field of asylum and immigration, such expenditure will most commonly be required for interpreters, expert reports and medical reports and, since 2000, counsel's fees.

The proposals for consultation

9. The consultation paper issued in June 2003 contained four main proposals:

i. **A maximum limit for initial advice under Legal Help** equivalent to:

- 5 hours work in asylum cases
- 3 hours work in non-asylum cases
- maximum limits would be set for interpreters' costs and other disbursements[8]

ii. **A maximum limit for appeals work under Controlled Legal Representation**:

- equivalent to 4 hours work to prepare for the appeal
- in addition, it would be possible to claim the necessary time for attending the hearing

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6 However, as the Department has stated "prior to the introduction of CLR, solicitors were able to undertake the preparation of appeals to the adjudicator and Tribunal under advice and assistance (which was subsequently replaced by Legal Help from January 2000). The only aspects of work that were not funded under advice and assistance were the costs of providing representation at the hearing itself". Ev 28

7 "Matter start" is a technical term used by the LSC to describe each new matter, or work, that a supplier is authorised to start under its contract with the LSC

8 The proposed limits for disbursements are set out in the LSC's *Draft Immigration Specification,* referred to below

- the maximum fee for applying for leave to appeal would be limited to £150.00
- maximum limits would again be set for interpreters' costs and other disbursements[9]

iii. **A Unique File Number** which would be the same as the Home Office reference number and which would remain with the applicant even if they changed solicitor.

iv. A new system of **accreditation** (separate from that administered by the Office of the Immigration Service Commissioner and that already run by the Law Society) to be administered by the Law Society. Practitioners reaching advanced levels of accreditation would be eligible for enhanced fees (although still subject to the proposed limits on time and disbursement costs).

10. Also issued for consultation, by the Legal Services Commission, was a "draft immigration specification".[10] This document set out the LSC's view of how the DCA proposals might impact on the standard contract for immigration and asylum work (contained within the General Civil Contract). Once finalised, these proposals were intended to be the new contractual terms for suppliers in asylum and immigration work.

Our inquiry

11. On Friday 24th October, following the conclusion of our oral evidence sessions, we received a further joint memorandum from the DCA and the LSC setting out an alternative approach, which differed significantly from the original proposals.[11] On the same day, the Home Secretary announced that, in order to clear the backlog of asylum cases "in the most cost-effective way", up to 15,000 asylum applicants "who sought asylum in the UK before 2nd October 2000" would be granted permission to stay in the UK.[12] As a significant proportion of these cases will have had some or all of their appeals outstanding, the Home Secretary's 'amnesty' is expected to make significant—but as yet unquantified—savings to legal aid expenditure.[13] Although one would expect that the DCA would take account of these potential savings when drawing up its own proposals for legal aid, it has made no mention of it, either in its first memorandum (submitted on 23rd October) or its second memorandum, which was submitted on the same day as the Home Office announcement.

12. We were invited by the Lord Chancellor to examine his original proposals. To fit in with the Government's timetable, we have had to do so on a very truncated timescale. It is therefore extremely regrettable that—despite repeatedly promising to submit a written memorandum to our inquiry—the DCA did not disclose its revised proposals at an earlier stage. Had it done so, we would have been in a position to test the merits of the new

9 The proposed limits for disbursements are again set out in the LSC's *Draft Immigration Specification,* referred to below

10 *Draft Immigration Specification* and *Draft Immigration Not-for-Profit Specification* (LSC, June 2003)

11 Appendix 1

12 Home Office Press Notice, 24th October 2003

13 When asked, in an exchange of emails, to put a figure on the potential legal aid savings, the DCA stated that "it is difficult to calculate savings precisely … But a large majority of [the] 12,000 [applicants] have already been through the initial decision making and appeals stages—which of course reduces the legal aid savings which will flow from this measure"

proposals with the Department and our other witnesses when they appeared before us for oral evidence. It is all the more regrettable that the DCA's tardy memorandum failed to take any account of the very significant implications of the Home Secretary's announcement. The combination of these factors put us in an extremely difficult position when we came to consider our report. Our evidence, together with the consultation responses, was based wholly on the Government's original proposals. In addition, the DCA's expenditure forecasts, which are crucial to the justification for the proposals, have now been overtaken by the Home Secretary's announcement.

13. The DCA has given the impression, during the course of this inquiry, of considerable confusion on this matter. Its original proposals were hurried and not obviously thought through. The alternative approach, proposed to us at almost the very last stage, is unhelpfully vague. The Home Secretary's announcement of October 24th appears to have taken the DCA by surprise and, as a result, the potential savings which will flow from it have yet to be determined and factored into the equation. **We conclude that the Department needs to undertake serious further work before it is able to put any sensible proposals on the table. It is the nature of that work which forms the basis of our detailed recommendations below. Until that work has been undertaken, and a properly considered package of reforms is brought forward, we recommend that the Government place a moratorium on the proposed time and funding limits to publicly funded asylum and immigration work. We believe there should be no delay in addressing the issue of quality representation.**

14. We have concentrated in this report on the Government's original proposals for setting maximum limits on the amount of public funding available for individual asylum and immigration cases. However, we have also taken account of the alternative proposals (despite the limited time in which we had to do so) and we have made references to them, where appropriate, in our report. The original proposals for a unique file number and a new accreditation scheme (which have not been revised significantly) do not appear to have given rise to much objection in principle, albeit that some concerns have been expressed about how they will work in practice. **We strongly support the proposals for a new accreditation scheme. We trust that the Department will address the concerns as to the detail of the scheme appropriately.**

3 The concerns

Are the measures necessary?

15. Before we come to consideration of the further work which needs to be done, we first consider the Government's justification for its original proposals to cap public funding for work in this area.

The Government's justification for imposing a cap on public funding

16. The main purpose of the Government's original proposal was avowedly to control legal aid expenditure in this field, which has risen significantly over the past three years. The consultation paper states:

> The legal aid costs of providing advice and representation in immigration and asylum work (including judicial reviews) have risen from £81.3m in 2000–2001 to £129.7m in 2001-2002 and £174.2m in 2002–2003. A number of factors have increased expenditure on legal aid for immigration and asylum, some of which are beyond the control of the LSC. These factors include continued increases in the number of asylum seekers, the increased rate at which cases are processed by the Home Office, the corresponding increase in appeals dealt with by the Immigration Appellate Authority (IAA) from 19,395 appeals determined in 2000 to 64,125 in 2002 and the effects of the dispersal policy. With the introduction of funding for representation before the IAA and IAT (Immigration Appeals Tribunal) it was anticipated that there would be a rise in total spend however these factors together do not account for the dramatic acceleration in only the last three years in the costs of public funding in this area of law. Average costs continue to rise and the LSC estimate that average costs per matter start have increased by 93% from 2000–2001 to the present date.[14]

17. In its submission to the Committee's main inquiry into immigration and asylum appeals, the Legal Services Commission set out a similar list of cost drivers.[15] In that submission, the LSC stated that the "average costs of claims have risen during contracting. We estimate the current rate of increase to be at 12% a year."[16] However, this appears to contradict the Department's figure of a 93% increase since 2000–2001 mentioned in the consultation paper (see above).

18. In answer to a Parliamentary Question about the responses to the consultation, Lord Filkin, Parliamentary Under-Secretary at the Department for Constitutional Affairs, said:

> The noble Lord is quite right … that the proposal to put a cap on the level of legal aid expenditure on individual asylum cases did not meet with strong support from

14 DCA consultation paper, para 3

15 AIA 21, para 50, published on the Committee's website, available at www.parliament.uk. The submission, which is undated, was sent to the Committee on 6 May 2003

16 AIA 21 para 50(vi), published on the Committee's website, available at www.parliament.uk

> lawyers. That was perhaps not surprising. Nevertheless, it opens up a serious issue that must be looked at by the Government and by the legal profession as to how one copes with the fact that legal aid expenditure on immigration and asylum has doubled since the year 2000 and that the average cost of each case of legal aid has doubled since the year 2000… Of course, as ever, we are giving serious thought to the responses. But there is no doubt that government have to act in this area in order to fulfil their responsibility both to the taxpayers in giving value, to ensure that the legal aid system is protected for the benefit of others and to ensure that there is a fair hearing for people who claim asylum in our country.[17]

19. We recognise the competition for resources, including in the legal aid budget.

Respondents' concerns

20. Respondents to the consultation acknowledged the increasing expenditure on legal aid for immigration and asylum. However, they have identified a number of other costs drivers, which are either not mentioned, or not fully explained, in the consultation paper. Examples include:

- The fact that the increased rate of decision-making in asylum cases by the Home Office has been part of a drive to clear the backlog of cases; it has therefore led to a concentration of costs which would otherwise have been spread out over a longer period
- The introduction of stage billing in April 2002, which they suggest resulted in a "pull-forward" of costs into 2002–2003 that would otherwise have been paid in subsequent years
- The implementation of the Human Rights Act in October 2000, which has increased both the complexity of immigration and asylum procedures and the range of matters on which applicants may legitimately seek advice
- Increases in the hourly rate payable to contracted firms in London. The total increase in hourly rate since the beginning of contracting has been just under 19%
- Home Office practices, including the practice of inviting applicants based in London to attend a substantive interview in either Liverpool or Leeds
- The IAA's practice of listing appeals away from where either the appellant or their representative is based, which adds to the costs under Controlled Legal Representation
- The introduction of support, administered by the National Asylum Support Service (NASS), which has created a significant increase in workload for legal advisers and practitioners and which has, in turn, been exacerbated by the inefficient administration of NASS

17 HL Deb, 10th September 2003, cols 295–6

- An increase in workload when preparing an appeal as a consequence of Practice Directions issued by the IAA. For example, the IAA now requires the production of skeleton arguments, witness statements and case history chronologies in all appeals.[18]

21. Respondents also suggested that it could be reasonably predicted that, in the absence of any new measures, costs will reduce substantially in forthcoming years. The Refugee Legal Centre and other organisations, such as ILPA, have listed a number of cost-reducing factors which need to be taken into account. These include the following:

- The "pull-forward" of costs into the year 2002-2003 as a result of the introduction of stage billing will not distort costs for this and subsequent years
- The number of asylum applications is set to fall by 35% from the number in 2002
- The projected number of decisions for the year 2004 (based on application targets which the Home Office is meeting) will fall by over 50% from the peak years of 2000 and 2001
- Government figures give a strong indication that the number of appeals will peak this year. Thereafter, there will be a reduction in the volume of appeals of well over 50%
- The continued expansion of legal service provision in dispersal areas will reduce costs
- The increase in the scope of non-suspensive appeals, now covering 24 countries, is also likely to reduce expenditure under Controlled Legal Representation.

The Home Secretary's announcement of 24th October—that up to 15,000 long-standing asylum cases will be granted permission to stay—will serve as another, and potentially very significant, cost-reducing factor. This is in addition to his earlier announcement proposing to replace the two-tier Immigration Appellate Authority with a single tier appellate system,[19] which will also serve to further reduce the legal aid expenditure on asylum and immigration cases. However, the potential savings that would result from these proposals has not yet been quantified for us by either the Home Office or the DCA.

22. Many of the respondents to the consultation, and our witnesses,[20] have referred to the problem of poor quality decision-making by the Home Office in the first instance. In addition, there is widespread concern that the Home Office is often unrepresented at the appeal before an adjudicator.[21] As Nick Oakshott, from the Refugee Legal Centre, has said, this "can result in unnecessary appeals to the Immigration Appeal Tribunal".[22] He explained:

> In essence, the Home Office, because of their resources, cannot appear in every adjudicator appeal and in the event that they lose the case and the appellant wins the case, they sometimes put in an appeal to the Immigration Appeal Tribunal saying

18 Submissions from, amongst others, ILPA,the Refugee Legal Centre and the Medical Foundation

19 Home Office Press Notices 12th April, 22nd May and 27th October 2003

20 Both to this inquiry and our main inquiry into Asylum and Immigration Appeals

21 Submissions from, amongst others, JUSTICE, Immigration Advisory Service, Refugee Legal Centre and the Council of Immigration Judges

22 Q 49

> that the adjudicator got it wrong. We say that that is an inappropriate way to go about it and it is better to appear in front of the adjudicator and deal with it first time around rather than waiting for the appellate tribunal.[23]

The Chairman of the Council on Tribunals, Lord Newton, told us that the rate of attendance by Home Office presenting officers has increased over the last three months to around 35%.[24] On behalf of the Refugee Legal Centre, Nick Oakeshott—like many other organisations—has suggested that "front-loading cases appropriately will save money".[25] These are issues to which we hope to return in our main inquiry.

23. In its memorandum of 24th October, the DCA has stated that it wants "to explore a system where further improvements in decision-making by the Home Office will allow a reduction in Legal Help. This involves re-thinking the levels of legal aid in the context of Home Office decision-making".[26] We certainly support any moves to improve the quality of initial decision-making, but from the evidence we have seen it appears that there is a long way to go before such improvements will allow a reduction in Legal Help.

Concerns about quality

24. In addition to the rising costs of legal aid, the Government is also concerned about "the quality of work undertaken by a significant minority of immigration suppliers". The consultation paper states that "regular audits and peer review by the Legal Services Commission have highlighted over-claiming and issues regarding the quality of the advice given". The Minister emphasised the need to obtain value for money in this area. He said that, in the context of rising expenditure, "we need to make sure that we have the mechanisms in place to ensure that that money is being spent properly and that, at the same time, we are guaranteeing quality".[27] It is on that basis that the Government has proposed to introduce a new accreditation scheme, which will apply to those providing advice on immigration and asylum matters through public funding.

25. A large majority of respondents to the consultation support in principle the proposal for a new accreditation scheme as a means of helping to ensure that suppliers provide an acceptable standard of service. During this inquiry, our witnesses were unanimous in their view that quality issues have to be addressed. Although some improvements have already been made, the standard of advice and representation provided by some suppliers remains poor.[28] Judith Farbey, from ILPA, told us:

> ILPA would strongly welcome any moves to kick bad practitioners out of the market and there is no doubt about it, that those practitioners are the ones who are keeping the costs up. I think that that comes about really as follows…"right first time" is the way forward. "Right first time" means resources first time, but it also means that we have to have solicitor, counsel and anybody else doing a good, meticulous and

23 Q 52

24 Q 140

25 Q 49

26 Appendix 1, para 22

27 Q 1

28 Qq 65–68

> thorough job both when sending the application off to the Home Office and when appearing in front of adjudicators. ILPA would strongly welcome and would indeed be more than willing to co-operate with any moves to improve the quality of representation which is, on the whole, lamentable.[29]

Effect of capping on the appeal system as a whole

26. Witnesses expressed concern about the potential effect of the original proposals on the conduct of immigration and asylum appeals before the Immigration Appellate Authority (IAA). These concerns stem from the alleged inability of practitioners to offer a satisfactory service within the proposed time limits, which we discuss in further detail below. The Chairman of the Council on Tribunals, Lord Newton, told us that there was a balance to be struck. He favoured "the availability of the advice at the early stages to try to eliminate the risk of things going wrong and going wrong up the system".[30] He suggested that "if you cut corners at early stages or reduce the flow of advice at early stages [then], other things being equal, you may lead to much more expenditure later…[at] a more expensive part of the appeal process".[31] He added:

> I think it follows from what I have said that a restriction which risks, at any rate, less legal support being available at hearings or less well-prepared legal advice being available at hearings must carry the risk of removing some of the advantages of having good quality advice in keeping the decision-making process moving.[32]

27. A similar point has been made by the Office of the Immigration Services Commissioner (OISC), whose job is to ensure that immigration advisers, who are otherwise unregulated, are fit and competent and act in the best interests of their clients. In response to the consultation, the OISC said:

> advice given to proper competence standards supports the deliberative and decision making process, at first instance within the Home Office and on appeal. It supports the obvious need to get decisions right first time and avoid the need for costly proceedings later. Where cases go to appeal, well presented arguments benefit an effectively run adjudication and appeals process.[33]

28. In his submission to the Committee's main inquiry on asylum and immigration appeals, the Chief Adjudicator stated that:

> appeal hearings are best conducted and the system operates most fairly when both sides are represented. … Taken over all the quality of representation available to appellants has been improving, particularly as the OISC regime and the Legal Services Commission Contracts System have come into play. A likely result of any

29 Q 65

30 Q 132

31 Q 143

32 Q 132

33 The OISC's response to the consultation, para 26

> significant restriction in the representation available before adjudicators will be longer hearings and fewer cases will be able to be decided.[34]

29. The potential effect of the Government's original proposals was set out by the Law Society:

> poorly presented asylum appeals will have a direct impact on the costs of the IAA. We suspect that more appellants will be unrepresented forcing adjudicators to take a more inquisitional role, extending hearing time. The appearance of more litigants in person will also lead to more adjournments.[35]

The Government's response

30. In oral evidence before us, the Minister was unable to put a figure on the benefits which would accrue from the proposals. Although he claimed that the proposals would result in very significant savings on the legal aid budget for asylum and immigration cases—provisionally estimated at around £30-£40 million[36]—he was unable to tell us how much of that saving would have been made anyway, as a result of the factors outlined above, were no action to be taken.

31. However, in a subsequent memorandum submitted on 23rd October, the Department told us that public spending on asylum and immigration work was not expected to fall beyond the current level as a result of those other factors—the "no change" option—over the next three years. This is said to be due to three factors. Firstly, "although asylum applications are decreasing, there remains a higher level of decisions both at the initial decision level, and at the appeal stages…as the backlog is reduced". Secondly, it has been "assumed that the average costs [will] continue to rise at the current rate of 12% per annum". Thirdly, "although asylum applications are decreasing, and are forecast to continue decreasing, immigration and nationality cases are forecast to increase".[37]

32. The Department acknowledge that as there are proportionately fewer immigration cases to asylum cases, the last factor is not expected to have a "significant impact".[38] In relation to the second factor, we would question the basis of the Department's assumption that average costs will continue to rise at 12% per annum given that, in its memorandum to the Committee, the Department goes on state that "it is difficult to predict with accuracy what would happen to average costs if it were to take no action".[39]

33. The Department has forecast that if no action were to be taken, the asylum and immigration legal aid budget would have risen, by the end of next year, from £174.2m in 2002-03[40] to £192m in 2005-06.[41] However, we question the robustness of these figures.

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34 AIA 2, published on the Committee's website, available at www.parliament.uk

35 The Law Society's response to the consultation, p 10

36 Q 10

37 Ev 32

38 *Ibid*

39 *Ibid*

40 The figure given in the DCA consultation paper, para 3

41 Ev 31

The first (and principal) factor is a result of the continuing backlog, but the projected increase in expenditure to clear the backlog has since been overtaken by the Home Secretary's announcement of 24th October that he will grant permission to stay to up to 15,000 asylum applicants who made their applications before 2nd October 2000. As the DCA's memorandum makes no mention of the Home Secretary's announcement, we can only assume that it was not taken into account when these expenditure forecasts were made.

34. In its further memorandum, submitted on 24th October, the DCA and LSC stated that they remained "firmly convinced that there is waste in the legal aid system…and [that] continued action to improve controls is necessary" for the following reasons:

> The great majority of asylum seekers have representation at the initial decision-making stage, irrespective of whether their case is likely to be successful or not. In the first quarter of 2003, some 26% of cases were granted either refugee status (about 7%) or exceptional leave to remain (19%). From 1 April this year, exceptional leave to remain was replaced by humanitarian protection/discretionary leave to remain. The figures for the second quarter of this year show that the proportion of applicants granted refugee status remained at 7%, but those granted humanitarian protection/discretionary leave fell to 7%, making 14% overall. Of those whose cases are turned down initially, about 77% appealed in 2002. The current success rate before the adjudicator is about 21% of those who appeal.[42]

The memorandum refers to the use of "poor quality outdoor clerks" to represent applicants at interview and the fact that two interpreters are often present. It also refers to the reduction of legal aid expenditure for judicial review or statutory review proceedings following the removal of devolved powers to self-grant emergency certificates.

35. There appears to be a shift in the Department's position. Whereas the original proposals were justified in the consultation paper chiefly by reference to the steep rise in legal aid expenditure over the past three years, the revised proposals have been presented solely on the basis that there is a need to remove "waste" from the legal aid system. **Broadly speaking, we accept that, in the words of the Minister, there is a "need to make sure that we have the mechanisms in place to ensure that [the] money is being spent properly and that, at the same time, we are guaranteeing quality". However, we do not consider that the Government's original proposals would have achieved this result. Such stringent constraints on time could only have impacted adversely on quality and might, in turn, have lead to greater cost and inefficiencies further up the appeals process.**

36. **We welcome the fact that the Department is now proposing an alternative approach, as set out in its memorandum of 24th October, although the precise impact of the new proposals remains unclear. We support the Government's continuing drive to improve the quality of work undertaken by suppliers in this field, which involves getting rid of the bad and encouraging the good.**

37. We now go on to consider what changes need to be made to the proposals to ensure that they can be implemented effectively.

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42 We take this to mean that the overall success rate, including initial decision-making and adjudication stages, is currently running at around 35%

Will the limits on time and disbursement costs allow a proper standard of work?

38. The overwhelming majority of those who responded to the consultation were of the view that the limits on time and disbursement costs were too low and would not allow an appropriate standard of service to be offered to clients in immigration work, but particularly in asylum cases. Typical comments offered by consultees on the proposals included:

> "ILPA is opposed in principle to the idea of maximum time limits, but in any event believes that those proposed are absurdly and irrationally short" *(Immigration Law Practitioners Association)*
>
> "if these proposals come through in their present form, [practitioners] will not be able to act within the standards, both ethical and professional, which are set down by the Law Society and indeed the Bar Council" (*Judith Farbey, ILPA*)[43]
>
> "In our experience the proposed maximum time limits for immigration and asylum work are not sufficient to provide a competent service. This is particularly so in asylum cases, which often involve taking lengthy instructions through an interpreter. The use of an interpreter effectively halves the time a representative can spend providing advice." *(Office of the Immigration Service Commissioner)*
>
> "the proposed time limit is wholly unrealistic" (*Law Society*)
>
> "even advanced practitioners cannot whiz through taking statements and so on within the five-hour period" *(Alison Stanley, Law Society)*[44]
>
> "Not only are these limits wholly inadequate, but we are also opposed in principle to the notion of 'capping'." (*Refugee Legal Centre*)
>
> "The Medical Foundation does not consider that such a rigid capping of expenditure can possibly adequately fulfil the individual needs of each client. This is particularly so in the case of our own patients…this proposal will jeopardise the ability of torture survivors to articulate their claims to asylum through recounting past abuse." *(The Medical Foundation)*
>
> "The imposition of time limits will have a serious and detrimental impact on individual clients and groups of clients. Client groups with asylum problems who have no knowledge of English present particular problems, as interpreters are required at legal interviews, which can last up to three hours, and again at SEF [45]interviews that can also last up to three hours. This allows no time for preparation, composing witness statements, drafting representations and answering client's questions. Some clients, especially those who have suffered physical or mental trauma, find it impossible to relate their accounts of their experiences at an initial single interview. And restricting work at this stage to five hours is unrealistic if the

43 Q 57

44 Q 57

45 The self-completed Statement of Evidence form

> requirements of SQM[46] and the OISC are to be observed." *(Immigration Advisory Service)*

Comparison with the current time standards issued by the LSC

39. Respondents, including ILPA, have pointed out that the maximum limits originally proposed represent a very considerable departure from the time standards currently recommended by the LSC and set out in the General Civil Contract.[47] The current guidance issued by the LSC for asylum work allows:

- *Taking initial instructions:* 2 hours (up to 4 hours in complex cases)
- *Completing the political asylum questionnaire:* 4 hours

We pause to note that this already adds up to more than the proposed maximum time limit of 5 hours for initial advice.

- *Advising, preparing and attending Home Office interview*: 6 hours (plus travelling and waiting time)
- *Preparation and lodging of appeal to adjudicator:* 1 hour extension (ILPA has noted that additional time may well be required in many cases)
- *Preparation of an appeal before the adjudicator*: 4 hours (but significant extensions of up to 8-12 hours may be justified in complex cases—ILPA has noted that up to 25-30 hours may be needed for a very difficult case)
- *Consider merits, advise, prepare and lodge application for leave to appeal to IAT:* 2 hours
- *Application for judicial review (now statutory review) of refusal of leave to appeal to the IAT:* 2 hours.
- *Preparation for appeal before IAT:* 2 hours (the guidance states that "extensions beyond 4 hours… would not be common even in complex cases").

The time standards above represent guidance only and the LSC allows flexibility for more complex cases. There is similar, albeit less generous, guidance for immigration cases.

40. In its response to the consultation, the Refugee Legal Centre commented that:

> In July 2003, the LSC issued a response to its consultation on the Draft NFP[48] Contract, where time guidance for asylum work was proposed at a much more generous level than is proposed in the DCA Consultation Paper. The LSC noted in its response that, judging by consultation responses, this was by far the most contentious of its proposal. It further noted:

46 The LSC's specialist quality mark

47 General Civil Contract (Solicitors), Contract Specification—Immigration (LSC, Sept 2003) pp 239–240

48 Not-for-Profit

> *"However we emphasised that the guidelines were not intended to be rigid. We recognised that they were only a starting point and that individual cases may take more or less time. Factors such as the complexity of the subject mater, novel points of law or the particular characteristics or needs of the client, such as learning difficulties, insufficient knowledge or special vulnerability could lead to these time being significantly exceeded."*[49]
>
> Furthermore, Legal Help upper casework limits proposed for asylum were 40 hours for full Specialist Quality Mark (SQM) holders and 30 hours for Controlled Legal Representation.[50]

41. It may thus be seen that the proposals in the consultation documents represent a very considerable change of view on the part of the Government and the Legal Services Commission as to what constitutes an acceptable standard of practice.

42. In response to these criticisms, the Minister made three points. Firstly, he suggested that the "five plus four" limit was based on "what is roughly the mean average for… a typical case".[51] Secondly, he suggested that a significant part of the hours allowed by LSC in its current time standards related to the interview and travel and waiting time.[52] Thirdly, he reiterated that the consultation had been undertaken on the basis of allowing exceptions to those maximum limits in appropriate cases.[53] This statement was apparently based on paragraph 28 of the consultation paper, which stated simply,

> We recognise that there will be exceptions to any maximum costs scheme. In particular, we propose to allow additional time and costs to cover applications for bail and advice in connection with a client's detention.

together with question 5, which asked whether there was a need to include other exceptions to the maximum limits. The LSC's *Draft Immigration Specification* proposed that an additional 30 minutes would be allowed to advise clients in relation to their right to apply for bail or temporary admission[54] and a further 2 hours would be allowed to prepare an application for bail.[55]

Suggested alternatives

43. Some respondents have put forward alternative figures, based on what they believe to represent a reasonable time limit in an average case. For example, Alison Stanley told us that, based on its own survey, the Law Society were of the view that 10–15 hours "would probably be acceptable in straightforward asylum cases" at the initial stage, with 15 hours

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49 The General Civil Contract (Not for Profit) 1st April 2003—Response to consultation by Legal Services Commission, July 2003

50 AIA 24A, published on the Committee's website, available at www.parliament.uk

51 Q 15

52 Q 15

53 Q 14

54 *Draft Immigration Specification*, para 3.2

55 *Ibid,* para 4.2

for "an ordinary appeal", excluding the advocate's preparation time, conferences with counsel, travel and the hearing itself.[56] However, when we heard from the Minister, he said:

> Some [practitioners] have asked for 15/20 hours and I can indicate here that we are not in that ball park and I have been quite clear to them that we are not in that ball park. [57]

44. Alison Stanley, from the Law Society—like many respondents[58]—was, in any event, opposed to the notion of an absolute limit. She told us that in some cases, it had taken up to 20, 30, 40 or 50 hours of time to complete the necessary work. She therefore believed that it was "impossible…to put a ceiling on how much time is necessary in the most complex of cases".[59] Judith Farbey, from ILPA, also said:

> We are very concerned that there must be an opportunity to ask for an extension. Manifold circumstances can arise during the process of an application for asylum or indeed during an appeal which are unforeseeable. There will of course be complex cases where cogent representations can be made to the Legal Services Commission for an extension and we think that the ability to apply for an extension is vital.[60]

45. Many respondents suggested there would be a real difficulty in identifying a 'straightforward case', given the nature of the work, to which a standard cap might reasonably be applied. The complexity of individual cases, the many and varying personal experiences of the client, and changing country conditions all contributed to this difficulty.[61]

46. The Immigration Services Commissioner suggested that, whilst the "the principle of capping expenditure was fundamentally right", the Government had adopted the wrong approach by proposing to cap "an individual point of delivery of service in this difficult area". He outlined an alternative approach, which he believed would be "worthy of exploration". In his view, the cap would be better placed on accredited firms (ie under the new accreditation scheme) and should be "based upon an allocation of the number of cases which they would have to do within an overall sum". [62] Alison Stanley also suggested that "it would be sensible to allow some form of devolved powers to those firms that have already demonstrated that they are working within an appropriate level of service, the category one and category two firms".[63]

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56 Q 58

57 Q 20

58 Including the Refugee Legal Centre and ILPA

59 Q 59

60 Q 50

61 Qq 116, 119

62 Q 129

63 Q 50. The LSC ranks suppliers into three categories. This is explained in its memorandum to our main inquiry (AIA 21), which is published on the Committee's website, available at www.parliament.uk

Our conclusion

47. As many of our witnesses and respondents to the consultation pointed out, there was no attempt in the consultation paper to justify the figures given, or to explain why there had been such a change to the standards expected by the LSC, beyond the need to cut expenditure. We found the Minister's answers on this point wholly unconvincing.[64] The original proposals in the consultation paper have all the appearance of having been put together in a rush and, as a result, the overwhelming response from practitioners has been that the proposed limits are unrealistic for all but the most straightforward cases.

48. The alternative approach proposed by the DCA and LSC in their memorandum of 24th October suggests that the Department has conceded that there should be more exceptions available. The memorandum proposes financial thresholds, rather than caps,[65] which may be extended with prior authority from the LSC "in genuine and complex cases where there is a real prospect of success". It also proposes that "a limited number of firms, where we are confident work is to a high standard, would be allowed devolved powers to self-grant extensions up to a higher figure". However, no indication is given as to where the financial thresholds will be set, nor is there is any explanation as to what would constitute a "genuine and complex" case. **The Government needs to spell out the details of the revised proposals.**

49. **We welcome the Department's recognition that the system needs to be more flexible than originally proposed, and the elements of "earned autonomy" for some suppliers of recognised high standards. We recommend that the Department bring forward details of the proposed financial thresholds, which should be based on a proper review of the time spent on cases of varying complexity carried out by competent advisers.**

50. Nick Oakeshott, from the Refugee Legal Centre, provided us with a long list of the sort of cases where exceptions should be made which included "illiterate clients, clients with limited education, clients with learning difficulties, minors, cases where age is disputed, trafficking cases often involving issues of sexual abuse, clients with mental health issues, clients who have been tortured, raped or are suffering physically and mentally as a result of their experiences, clients with families where individual statements are required to be prepared, clients with witnesses for appeal hearings, clients with a substantial body of documentary evidence and detained clients".[66] He said that, although it was a long list, none of the suggestions was without merit.[67] However, we would agree with ILPA that it would be counter-productive to establish a complicated list of exceptions, because time would need to be taken to identify whether or not a case fell into one of those exceptions. **We therefore welcome the Government's revised proposal to allow extensions in "genuine and complex cases" on application to the LSC for prior authority on a case-by-case basis. We recommend that the category of "genuine and complex" cases be defined sufficiently broadly to meet the issues which we have raised. The LSC should publish guidance on the sort of circumstances in which it would be willing to grant an**

64 Qq 2–13

65 The meaning of "threshold" is not defined in the DCA's memorandum. In this context, it appears to mean caps with exceptions

66 Q 72

67 Qq 72,73

extension. It may be appropriate for extensions under Legal Help to be based on a more stringent merits test than for the original application.

Are there specific aspects of advice and appeal work which will not be covered within the proposed limits on time and disbursement costs?

51. In addition to these general criticisms of the capping regime originally proposed, several organisations have suggested that there are specific aspects of appeal work which will not be covered by the proposed limits on time and disbursement costs. For example, ILPA has stated that the proposed limits will not allow time to prepare for an appeal before the IAT after permission to appeal has been granted or time to update a case where there has been delay and time to prepare for adjourned and remitted hearings. The responses suggest that there is more widespread concern that the limits will not cover the attendance by representatives at the Home Office interview and are not sufficient to cover the full cost of interpretation/translation, expert reports and conferences with counsel. It is to these issues that we now turn.

Attendance at interviews

52. In the current General Civil Contract (Solicitor) Contract Specification, the LSC explain that a representative is required to "justify attendance each time" but that assistance at interview is "normally reasonable".[68] However, the consultation paper states that "what is not guaranteed is that within the maximum fee scheme a representative will be able to claim the costs of attending with the client at either a screening or substantive interview". This is justified on the basis that:

> Evidence from audits conducted by the Legal Services Commission shows that in a significant number of cases work undertaken at the Legal Help stage does not benefit the client or advance his or her case. These is evidence of attendances at substantive interviews with the Home Office by clerks with little or no experience who often fail to take full and complete notes of the interview. These clerks will rarely intervene in the interview process and are unable to advice clients regarding their cases. We believe that in the majority of cases, attendance by the representative at these interviews is unnecessary, of no benefit to the client and a waste of public funds.[69]

53. The *Draft Immigration Specification* issued by the LSC states that "we would not expect to see attendance at interviews in routine cases. Time, including travel and waiting, spent in accompanying clients to interviews will form part of the relevant Advice Limit". This suggests two things. First, that there may be justification for claiming the costs of attending interview in exceptional cases, for example where the issues involved are particularly complex. Secondly, the cost of attending an interview must be claimed as part of the maximum five-hour fee limit.

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68 These extracts are cited in a joint opinion on the legality of the proposals by Michael Fordham and David Pievsky of Blackstone Chambers, commissioned by the Refugee Legal Centre

69 DCA consultation paper, para 21

54. Once again, respondents to the consultation strongly objected to this proposal. JUSTICE argued that "Home Office policy creates an effective Catch 22" because "as the recently adopted Protocol applying to all interviews conducted by caseworkers in the Immigration and Nationality Directorate (IND) makes clear, a representative's role is limited to observing the interview only… It allows representatives to attend provided that they don't interfere with the proceedings."[70] Therefore, the only reason that attendance at interview does not add as much value as it might otherwise is because Home Office policy says it may not.

55. The Immigration Services Commissioner was firmly of the view that attendance by a representative was "necessary" in most cases.[71] The Chairman of the Council on Tribunals, Lord Newton, indicated that he was "sympathetic" to that view because "anything that can help to improve the quality of the basic decision…is going to reduce costs further up the scale".[72] Nick Oakeshott, from the Refugee Legal Centre, believed that it would be "more costly" overall if costs were cut at such a "crucial" stage. He told us that:

> The interview is one of the most crucial aspects of the case and it is as a result of what is written down on the interview record that the Home Office will in effect make the decision in the asylum application. It is not usually the same person who makes the decision who is the person who does the interview, so it is very important what is written down and if there are disputes arising about what has been said at the interview, then that is very time-consuming in the appeal because time will have to be spent going through the interview notes and getting instructions from the client and presenting those to the court as to what it is that was actually said and what answers were given. This is particularly crucial because in these cases often the credibility of the client is the deciding factor, so our view is that it is very important that attendance at interview by an appropriately trained and supervised individual along with, if necessary, an interpreter will make the process a better one.[73]

56. In a joint opinion on the legality of these proposals (commissioned by the Refugee Legal Centre), Michael Fordham and David Pievsky of Blackstone Chambers state:

> We have difficulty with the logic of this. The suggestion appears to be that it would be in a case with special features, requiring extra care and attention by the representative, that attendance at the interview within the 5 hour [limit] would be expected. We think this illustrates the practical problems with the [maximum limits] and their rigidity. It is surely precisely in a case with special features, requiring extra care and attention by the representative, that attendance at the interview within the 5 hour [limit] would be impossible, because the 5-hours will be needed; or would be damaging to the care and attention prior to the interview, being reduced so as not to use up the 5-hours.[74]

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70 JUSTICE's response to the consultation paper, para 18

71 Q 119

72 Q 120

73 Q 100

74 The opinion was appended to The Refugee Legal Centre's response to the consultation

57. On that basis, we are not persuaded that it is reasonable to refuse to fund the cost of attendance by a representative in all but exceptional cases. It seems clear that a representative can add value at the interview stage and, therefore, a cut in legal aid expenditure at this stage may be outweighed by an increase in costs at later stages when Home Office decisions are appealed. In any event, it appears perverse to include attendance at interview within the five-hour limit. As the authors of the RLC's legal opinion point out, it is precisely in a case with special features, requiring extra care and attention by the representative, that attendance at the interview within the five-hour limit would be both necessary and virtually impossible.

58. We share the Minister's concern that "if we are paying out of the public purse at this stage then that has to add value" and we would agree that attendance by an "outdoor clerk" or unaccredited adviser may not do so.[75] However, we are concerned that the Department has not taken fully into account the concerns of our witnesses and other respondents on this issue. In its memorandum of 24th October, it has stated:

> Extensions are only likely to be granted, on application to the LSC, in genuine and complex cases where there is a real prospect of success. In such cases attendance at interview may be authorised in exceptional circumstances, but only by the case-worker or the firm's immigration supervisor, not an agent or outdoor clerk. Once the accreditation scheme is implemented other accredited representatives will be allowed to attend. Attendance at interview will always be permitted for fast track processes such as those operated at Oakington and Harmondsworth.[76]

This indicates that the Department remains of the view that funding for attendance at interviews should be the exception rather than the norm.

59. **We believe that the problem—that such attendance is often of "no benefit to the client"—can be addressed by a stricter application of the LSC's existing guidance that it is for the supplier "to justify attendance each time".[77] We therefore recommend:**

- **that attendance at interview be allowed in cases where the representative can satisfy the LSC's guidance; and**
- **that such attendance not be included within the financial threshold for Legal Help, but that it be claimable separately.**

We further recommend that, as now suggested by the DCA, once the new accreditation scheme has been established, it would be reasonable to refuse public funding for attendance at interview by unaccredited advisers. In the meantime, we suggest that money could be better saved by holding interviews either within or closer to the locality of the applicant and thereby reducing the cost of travel.

75 Q 26

76 Appendix 1

77 General Civil Contract (Solicitors) Contract Documentation (LSC, Sept 2003) p 233

Disbursements

60. The Consultation Paper states that maximum limits will be set for interpreters' costs and disbursements at the appeal stage. The *Draft Immigration Specification* issued by the LSC sets out the levels at which those maximum limits are proposed to be set:

Legal Help (ie initial advice stage):	£250.00
Appeal stage:	£350.00 (or £450.00 if the representative has to travel to visit the client, eg because of detention)

The *Draft Immigration Specification* also states that extensions to the disbursements limits may be applied for in exceptional circumstances and that an extension is likely to be granted:

a) if the disbursement must be incurred to comply with a direction of the IAA or IAT

b) where the Medical Foundation … has agreed to prepare a report on the client's behalf

c) where DNA/blood testing is required.[78]

61. Responses to the consultation suggested that the proposed limits on disbursements were just as inadequate as the proposed limits on hours. According to the Law Society, current rates for consultant psychiatrist reports and country expert reports range between £500 and £700.[79] The Medical Foundation charge £400 for a medico-legal report and £600 if a report requires a visit by a doctor to a removal centre.[80] In its response to the consultation, ILPA has commented:

> one typical solicitor from among ILPA's members provided us with a sample of their caseload from Spring 2003. This shows that an average of £734 had been spent on disbursements. On asylum cases, the average was £833. 56% of cases, all relating to asylum, had exceeded the combined total of £600 allowed under the new Draft Specification. Of those, 84% had been successful in their claims (ie had been granted ELR or refugee status at first instance, or had won their appeals before Adjudicators).

62. Judith Farbey, also from ILPA, suggested that "there needs to be a division between interpreters and other forms of disbursement". In her view, "expenditure of legal aid money on interpreters is absolutely vital".[81] On the other hand, she indicated that whilst "good experts can win appeals", not all expert reports are of sufficient quality. In particular, she noted that in some cases general practitioners are asked to comment on matters which are simply beyond their expertise, such as the client's mental health. In other cases the expert may be under-instructed by a poor practitioner.[82]

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78 *Draft Immigration Specification* (LSC, 2003) para 2.10(6)

79 Law Society's response to the consultation paper

80 Ev 33

81 Qq104–105

82 Q 106

63. In response to the consultation, Richard McKee, an adjudicator at the IAA, stated that:

> It has become routine for appellants to be given an appointment with a psychiatrist shortly before the hearing. They will tell the psychiatrist that they feel traumatized and depressed. The psychiatrist will then produce a report, costing £200–£300, diagnosing Post-Traumatic Stress Disorder and Depressive Illness. There are a small number of consultant psychiatrists who are regularly instructed to do this work, but as their reports are usually written after just one consultation with the patient, and are almost entirely reliant upon what the patient tells them, they are of little evidential value. However, they are then used to support arguments that the appellant cannot be removed from the UK because his mental health would be jeopardized. Tightening up on disbursements should lead to a reduction in the handing up of these 'routine' reports, which are of financial benefit to their authors but of little use to the courts.[83]

64. In its subsequent memorandum of 24th October, the DCA and LSC stated:

> On interpreters, it is proposed to pay a set hourly rate for attendance but to restrict payments for travel or waiting time. The LSC will investigate doing away with separate interpreters at the interview. The LSC will also move to requiring all suppliers to use interpreters who are accredited with or members of recognised bodies such as the Institute of Linguists.[84]

We note, however, that in its memorandum to our main inquiry (submitted in May 2003) the LSC stated that it had:

> approached the Institute of Linguists to discuss the possibility of all contracted suppliers having access to their register of accredited interpreters. Unfortunately we have been unable, to date, to agree a cost effective price with them and we are considering further options.[85]

On experts reports, the memorandum of 24th October, stated:

> The LSC will issue rules as to when experts' reports can be commissioned and will set maximum fees. This will form a separate consultation this autumn.[86]

65. From the evidence we have seen, we accept that there may be unnecessary expenditure on disbursements, particularly on psychiatric reports. However, the LSC has made no attempt to justify the limits which it has set and the figures present the appearance of having been plucked out of the air. It is regrettable, given the importance of interpretation in the asylum and immigration field, that we were not able test the reactions of our witnesses to the revised proposals. **We recommend that revised limits for disbursements be set, based on a thorough review of the reasonable costs which are likely to be incurred on disbursements in a typical case. The LSC should also examine the responses to consultation carefully to ascertain whether further circumstances in which**

83 Richard McKee's response to the consultation

84 Appendix 1

85 AIA 21, published on the Committee's website, available at www.parliament.uk

86 Appendix 1

authorisation for extensions would be likely to be granted should be made explicit. However, we would agree that it is important to draw a distinction between the cost of interpretation/translation and other costs. If the applicant does not speak English, it would not in our view be reasonable to restrict the availability of an interpreter.

66. **We welcome the recent announcement by the LSC that it proposes to consult further as to when experts' reports can be commissioned and as to the proposed maximum fees. We strongly recommend that it also consults on its revised proposals for interpreters' costs.**

67. We also have concerns about the proposal that circumstances where the Medical Foundation—as opposed to any other expert organisation—has agreed to prepare a medical report should be amongst those where authorisation is likely to be granted. The Medical Foundation is a very highly regarded organisation which does a great deal of valuable work, but its priorities are in therapeutic work, not in report-writing, and these priorities should not be distorted by the role it would be likely to be called on to play should the proposals be introduced in this form. The Medical Foundation has pointed out that it has already been placed "in one way or another" in the position of "gatekeeper to special treatment" under other schemes, such as the provision of NASS (National Asylum Support Service) support and the fast-track procedure at Oakington Removal Centre. It is therefore disturbing to learn that the Medical Foundation was not formally consulted by the Department before this proposal was made, and we see this as further evidence of the hurried and ill-thought out nature of these proposals.[87] **In our view, it would not be helpful to the Medical Foundation, or to potentially qualifying applicants, for it to be the principal or only gateway to additional public funding for disbursement costs. We therefore recommend that the Medical Foundation not be specifically referred to in the list of exceptions to the maximum disbursement limits.**

Conferences with counsel

68. Concern was expressed by consultees about the implication of the proposals for conferences between barristers and their clients in immigration cases. In its response to the consultation, the Bar Council stated that it had received a letter from the Head of Civil Contracting Policy at the Legal Services Commission, Patrick Reeve, stating:

> The four hours includes all preparation. The hearing costs would be for the advocacy and travel and waiting. Clearly the advocate will have to take the client's instructions at the hearing and this will be included as part of the hearing costs and not in the four hours preparation.[88]

69. ILPA's Best Practice Guide states that "briefing counsel at the last minute before your client's appeal is completely against your client's best interests… since it is not uncommon for conferences to require further work to be carried out or enquiries made."[89] There is therefore a question as to whether this provision would actively discourage best practice in providing a service to clients. There is also a question over whether there are in practice

87 Ev 33–34

88 Bar Council's response to the consultation

89 *Making an Asylum Application—A Best Practice Guide*, p 108

any benefits to be gained from it. Referring, in its response to the consultation, to the correspondence between the LSC and the Bar Council, ILPA states

> it is the view of many ILPA members that it is not possible for counsel to present an appeal professionally without a conference in advance of the date of the hearing … If it is the case, as the LSC has claimed, that the hearing costs will include holding the conference on the day of the hearing, it is far from clear what is gained financially by this. It is no more expensive to hold the conference in advance than to do so on the day of the hearing. Indeed, as noted above, holding the conference on the day may lead to adjournments which could have been avoided had the conference been held in advance.[90]

70. The Minister's responses when this question was put to him were, once again, unhelpful. When asked whether it was his intention to create a situation where conferences would normally held as part of the hearing on the day rather than in advance, he said:

> What we have got to be clear on is that five plus four plus the hearing itself, which can run to three or four hours, is a commitment at that stage (if it gets to that stage) to the person seeking asylum of two working days. The responses that we have received in that area have to be considered in that context. That is as far as I would want to indicate on that. Much of the work will have been done prior to the hearing and that appeal stage. The work will have been done prior to getting to the point of appeal and then there is a determination within the four hours and that must be a determination for lawyers involved as to how they want to best use that time.[91]

It was then put to him that, if conferences were normally to be held as part of the hearing on the day, there was a risk that would lead to demands for adjournments. He responded:

> In practice, if people are moving through the system more quickly—and they are, because let us remember that part of the appeal figure at the moment represents some of the backlogs that we will have got rid of by November—then the determinations are more determinations of law than determinations of fact, and I think that would have a bearing on what further information is necessary at appeal stage.[92]

71. The choice will be either to hold the conference in advance of the hearing and deprive the client of time which would otherwise have been available for other preparation; or to hold it immediately before the hearing and have it included in the hearing costs. In practice, particularly given the stringent nature of the "five plus four" formula, we consider that the majority of clients are likely to take the latter option. This would appear to result in little financial benefit to the public purse, and may lead not only to unnecessarily poor service being offered to the client, but potentially also to avoidable inefficiencies in the appeal system. In its subsequent memorandum of 24th October, the DCA indicated that "professional disbursements…will not count towards this threshold". If "professional disbursements" is a reference to counsel's fees, this would resolve the problem. If this is not

90 ILPA's response to the consultation, paras 133, 138

91 Q 35

92 Q 36

the case, **we recommend that provision be made where necessary for conferences with counsel to take place before the day of the hearing.**

Changing legal representative

72. The consultation paper argued:

> There is evidence of duplication of work. Although in 2002 there were 85,865 asylum claims, the LSC issued over 158,000 new matter starts in immigration. It is recognised that the figure of 158,000 will also represent starts in non-asylum matters and that there will also be legitimate reasons why some clients need to change representative. However, this does not explain the position entirely and there is evidence of clients 'shopping around' for advice and of suppliers continuing to pursue unmeritorious cases through public funding.[93]

73. To address this problem, the *Draft Immigration Specification* issued by the LSC states:

> The Advice Limits for both Legal Help and Controlled Legal Representation represent the total work that can be undertaken in relation to a particular matter regardless of the number of times the client changes representative.
>
> Where a client changes supplier, the new representative must bear in mind that subject only to the exceptional circumstances set out below, any legal aid costs incurred by the previous representative form part of and count towards the relevant Advice Limit. Therefore any new representative will only be able to assist a client under Legal Help or CLR using any remaining balance of hours transferred from the previous supplier.
>
> …It is therefore essential that a supplier establish either from the client or the Home Office whether previous advice or assistance has been given. It is then the responsibility of the supplier to contact the previous representative to establish the level of any costs incurred to date. This information is required because the new representative will only be able to claim costs for the balance of any casework time remaining under the relevant Advice Limit.
>
> *Exception*
>
> The exception to this will be where the client has obtained poor or negligent advice from a previous representative and the matter has been reported to the OSS or the OISC. In these circumstances the new representative should record this on the file along with the appropriate OISC or OSS reference number and they can then undertake work to the value of the Legal Help or CLR Advice Limit.[94]

74. The Office of the Immigration Service Commissioner (OISC) has particular concerns about these proposals and states that it "received no prior notification of [the proposal to link funding to recorded complaints] from the LSC". The OISC believes that the proposal

93 DCA consultation paper, para 5

94 *Draft Immigration Specification*, (LSC, 2003) para 2.2

"may encourage the lodging of unfounded complaints as the only means of obtaining further advice".[95]

75. The OISC also has concerns about:

> the suggestion that clients "shop around" for advice. Clients who change their legal representative may do so for very good reasons, including their belief that their existing legal representative has provided poor advice. The OISC encourages those seeking advice who believe they have received poor advice to change their representative. Indeed, the LSC agreed during the production of the leaflet "Legal Advice for People who are Detained by the Immigration Service", which the OISC produced in partnership with the LSC and a number of other organisations, that the leaflet should suggest to clients that they should change their legal representative if they believe that their current adviser is providing poor advice or a poor service.[96]

76. Judith Farbey, from ILPA, also made the point that one has to distinguish between 'shopping around' and changing legal representation because of 'genuine grievances' with the previous solicitors. She said that a change of representation could turn a case around.[97] In its response to the consultation paper, ILPA has suggested that the "mechanism suggested on transfer of files…seems to be completely unworkable". In particular, ILPA questions:

> how the second representative can be expected to know whether it may be appropriate to make a report to the OSS/OISC until s/he has examined the case in some detail, something which will take time and for which s/he will not be paid. [98]

77. Alison Stanley pointed out that "there is already a requirement that whenever someone has previously had public funding, the adviser, be they solicitor or not-for-profit, has to justify it on the file and if not, they are not paid". She said that "part of the problem is that that rule is not being applied sufficiently rigorously by the Legal Services Commission".[99]

78. When asked what empirical evidence he had to support the Government's view that people were abusing the system by changing advisers, the Minister said:

> What we know is that in 2002 we had round about 85,000 asylum applications. At the same time we had 109,000 new matter starts. That suggests people moving more often than would be the case in other areas of law, and so we have to continue to drive quality. I might also say that 80% of decisions are not granted by the IND at that initial stage and 80% of appeals fail. That is another imperative in looking at the system and ensuring that we are getting value for money at every stage.[100]

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95 The OISC's response to the consultation

96 *Ibid*

97 Q 82

98 ILPA's response to the consultation paper, para 161

99 Q 83

100 Q 31

79. However, the Chief Executive of the Legal Services Commission said:

> From [our]… point of view the starting point is to stop the bad advice. Get it right first time, whether it is legal or non-legal advice.[101]

80. We agree with the view of the LSC that the starting point should be to stop the bad advice. However, we do not believe that applicants should be penalised for having received bad advice. Nor do we believe that a fresh time allocation should be based on a reported complaint to the OISC or Office for the Supervision of Solicitors (OSS). As the Commissioner acknowledged, this may encourage the lodging of unfounded complaints. **We recommend that, on a change of legal representation, a fresh Advice Limit or threshold should be allowed where justified. In our view this should be assessed by the LSC, according to appropriate criteria, on a case-by-case basis. We consider that it is neither helpful nor appropriate to require that a complaint first be lodged with the OISC or OSS.**

Charging clients when the time limits expire

81. The *Draft Immigration Specification* for solicitors' contracts, issued by the LSC, states that practitioners will be allowed to charge their clients on a private basis once the maximum limits have been reached.[102]

82. In response, Alison Stanley, from the Law Society, said:

> In no other area of publicly funded law is there the suggestion that if somebody has a decent case they could get some of it paid for by the state and after that they pay for it themselves. I think it is objectionable on that basis that if people have a decent case it should be publicly funded if they cannot afford to pay for it themselves. I think you have to remember who these people are. They are people who are precluded from working, they are on NASS support, which is about 75% of benefits, they have no spare money. It is impossible to see how they would be able to raise funds in order to pay privately for representation. In the past when there was no Legal Aid available for representation at appeals money was found for representation, but those were for people who may have lived in the country for many years. The process was so much slower, they would inevitably be working by then and they may well have had family or community members who might support them just because they have been here for a lot longer. We are in a different world now with the speed with which cases are dealt with.[103]

83. Nick Oakeshott, from the Refugee Legal Centre, said:

> The provision for charging clients is not contained within the proposed changes for the not-for-profit contract, understandably so, but that provision would not apply to us and therefore there would be an aggravated impact for us in terms of not being able to get this extra resource. Moreover, it seems to us that this provision is

101 Q 31

102 *Draft Immigration Specification* (LSC, 2003), para 2.3

103 Q 111

> reflective of the fact that the caps are simply too low. If the caps were appropriate why would you need to charge a privately paying client to supplement them?[104]

84. ILPA goes on to argue that if work is necessary, and a client has been assessed as being eligible for any public funding at all, the LSC should pay for it; it would be as wrong to charge a client privately for unnecessary work as it would be for the taxpayer to fund that work. This point is even more compelling when one compares the average cost of a solicitor undertaking privately paid work (Alison Stanley quoted £120 per hour) and the legal aid rate (which, at its lowest, is £57.35).[105] **In our view, the proposal to allow solicitors to charge clients on a private basis, once the maximum cost limits are reached, is not an acceptable solution to the problems presented by capping or thresholds. Many applicants will be unable to afford legal advice and representation at private rates and those who could may be vulnerable to exploitation by unscrupulous advisers.**

104 Q 111

105 Qq 96, 98

4 The impact on supply

85. There was a widespread view amongst respondents to the consultation that the original proposals would result in a large number of practitioners leaving publicly funded immigration and asylum work. Respondents also suggested that those most likely to remain would not be the high-quality providers, but those who were content to do sub-standard work. This, it was suggested, went against the grain of the work which the Legal Services Commission and others had been doing to try to raise standards in this area. As Nick Oakeshott, from the Refugee Legal Centre, said:

> [T]here have been efforts to improve the quality of practitioners, especially the Legal Services Commission's efforts to finance the training of new practitioners in dispersal areas and the funds that they have put forward in respect of that. I think that there is a risk with equating poor practitioners with expense and using the blunt instrument [of capping]…to try and address that because there is a risk that the blunt instrument is in fact a sledgehammer and squashes the decent practitioners as well and that will not be good for anybody.[106]

86. Alison Stanley, from the Law Society, gave us some indication of the likely scale of the problem:

> The Law Society conducted a survey of immigration practitioners and nearly half, 48%, said that they would give up conducting publicly funded immigration asylum work for professional reasons because it was impossible to work under the present cap. ILPA, the Immigration Law Practitioners Association, had a meeting when the consultation first came out and 56 of the 60 firms that were represented at that meeting also indicated that they would consider pulling out of the system. That is extremely worrying because in our view that would leave only the poorest practitioners who would think they could do a decent job in the capped hours that are…left in the system.[107]

87. Responding earlier to written questions put by the Committee in connection with its wider inquiry into the immigration appeals system, the DCA stated that:

> It is right to say that a number of reputable firms carrying out immigration and asylum work have indicated that they are not able to do an effective job within the five hour cap on work prior to the initial Home Office decision and a four hour cap on preparation for appeals. The Immigration Law Practitioners Association (ILPA) has made the argument that incompetent firms which merely wish to make money out of the system will not have a difficulty with the five hour cap.
>
> It may well be that the most expensive firms some of which are of good quality, will not continue in the contracting system. However there is a trade off here between quality and cost. If all asylum clients went to the most expensive firms which take longest to complete a case the cost of funding lawyers would cease to be affordable.

106 Q 66

107 Q 56

> There are many firms which have been judged to be of an acceptable standard and which are likely to adapt to working these proposals or to any compromise solution which emerges following consultation. As the numbers of asylum seekers is falling, a certain degree of loss of supply can be accommodated.[108]

This view was reinforced by the Minister's comments in oral evidence to us.[109]

88. The DCA's revised proposals were submitted too late for us to test the reactions of our witnesses to its alternative approach. We were unable to explore whether, as a result of the new proposals, there was now a reduced risk of practitioners leaving publicly funded work in this field.

89. **It is almost impossible to assess the likely effects of what the Government is now proposing because of earlier policy announcements—the effects of which have not been quantified—and further announcements after the conclusion of our oral evidence sessions. The Government's proposals have now been modified in potentially helpful, but still far from specific, ways. It is therefore difficult, not only for us but also for all the interested parties affected, to assess what the consequences are likely to be—and we are not at all convinced that the two Departments have succeeded in doing so, or even attempted to do so. In what we recognise to be a difficult area of policy-making, vigorous efforts need to be made to ensure a "joined-up" approach.**

108 AIA 34, published on the Committee's website, available at www.parliament.uk

109 Q 17

Conclusions and recommendations

1. We conclude that the Department needs to undertake serious further work before it is able to put any sensible proposals on the table. It is the nature of that work which forms the basis of our detailed recommendations below. Until that work has been undertaken, and a properly considered package of reforms is brought forward, we recommend that the Government place a moratorium on the proposed time and funding limits to publicly funded asylum and immigration work. We believe there should be no delay in addressing the issue of quality representation. (Paragraph 13)

2. We strongly support the proposals for a new accreditation scheme. We trust that the Department will address the concerns as to the detail of the scheme appropriately. (Paragraph 14)

Are the measures necessary?

3. Broadly speaking, we accept that, in the words of the Minister, there is a "need to make sure that we have the mechanisms in place to ensure that [the] money is being spent properly and that, at the same time, we are guaranteeing quality". However, we do not consider that the Government's original proposals would have achieved this result. Such stringent constraints on time could only have impacted adversely on quality and might, in turn, have lead to greater cost and inefficiencies further up the appeals process. (Paragraph 35)

4. We welcome the fact that the Department is now proposing an alternative approach, as set out in its memorandum of 24th October, although the precise impact of the new proposals remains unclear. We support the Government's continuing drive to improve the quality of work undertaken by suppliers in this field, which involves getting rid of the bad and encouraging the good. (Paragraph 36)

5. The Government needs to spell out the details of the revised proposals outlined in the memorandum of 24th October. (Paragraph 48)

6. We welcome the Department's recognition that the system needs to be more flexible than originally proposed, and the elements of "earned autonomy" for some suppliers of recognised high standards. We recommend that the Department bring forward details of the proposed financial thresholds, which should be based on a proper review of the time spent on cases of varying complexity carried out by competent advisers. (Paragraph 49)

7. We welcome the Government's revised proposal to allow extensions in "genuine and complex cases" on application to the Legal Services Commission (LSC) for prior authority on a case-by-case basis. We recommend that the category of "genuine and complex" cases be defined sufficiently broadly to meet the issues which we have raised. The LSC should publish guidance on the sort of circumstances in which it would be willing to grant an extension. It may be appropriate for extensions under Legal Help to be based on a more stringent merits test than for the original application. (Paragraph 50)

Are there specific aspects

8. We believe that the problem—that a representative's attendance at the Home Office interview is often of "no benefit to the client"—can be addressed by a stricter application of the LSC's existing guidance that it is for the supplier "to justify attendance each time". We therefore recommend:

- that attendance at interview be allowed in cases where the representative can satisfy the LSC's guidance; and
- that such attendance not be included within the financial threshold for Legal Help, but that it be claimable separately.

We further recommend that, as now suggested by the DCA, once the new accreditation scheme has been established, it would be reasonable to refuse public funding for attendance at interview by unaccredited advisers. In the meantime, we suggest that money could be better saved by holding interviews either within or closer to the locality of the applicant and thereby reducing the cost of travel. (Paragraph 59)

Disbursements

9. We recommend that revised limits for disbursements be set, based on a thorough review of the reasonable costs which are likely to be incurred on disbursements in a typical case. The LSC should also examine the responses to consultation carefully to ascertain whether further circumstances in which authorisation for extensions would be likely to be granted should be made explicit. However, we would agree that it is important to draw a distinction between the cost of interpretation/translation and other costs. If the applicant does not speak English, it would not in our view be reasonable to restrict the availability of an interpreter. (Paragraph 65)

10. We welcome the recent announcement by the LSC that it proposes to consult further as to when experts' reports can be commissioned and as to the proposed maximum fees. We strongly recommend that it also consults on its revised proposals for interpreters' costs. (Paragraph 66)

11. In our view, it would not be helpful to the Medical Foundation, or to potentially qualifying applicants, for it to be the principal or only gateway to additional public funding for disbursement costs. We therefore recommend that the Medical Foundation not be specifically referred to in the list of exceptions to the maximum disbursement limits. (Paragraph 67)

Conferences with Counsel

12. We recommend that provision be made where necessary for conferences with counsel to take place before the day of the hearing. (Paragraph 71)

Changing legal representative

13. We recommend that, on a change of legal representation, a fresh Advice Limit or threshold should be allowed where justified. In our view this should be assessed by the LSC, according to appropriate criteria, on a case-by-case basis. We consider that it is neither helpful nor appropriate to require that a complaint first be lodged with the Office of the Immigration Services Commissioner or the Office for the Supervision of Solicitors. (Paragraph 80)

Charging clients when the time limits expire

14. In our view, the proposal to allow solicitors to charge clients on a private basis, once the maximum cost limits are reached, is not an acceptable solution to the problems presented by capping or thresholds. Many applicants will be unable to afford legal advice and representation at private rates and those who could may be vulnerable to exploitation by unscrupulous advisers. (Paragraph 84)

The impact on supply

15. It is almost impossible to assess the likely effects of what the Government is now proposing because of earlier policy announcements—the effects of which have not been quantified—and further announcements after the conclusion of our oral evidence sessions. The Government's proposals have now been modified in potentially helpful, but still far from specific, ways. It is therefore difficult, not only for us but also for all the interested parties affected, to assess what the consequences are likely to be—and we are not at all convinced that the two Departments have succeeded in doing so, or even attempted to do so. In what we recognise to be a difficult area of policy-making, vigorous efforts need to be made to ensure a "joined-up" approach. (Paragraph 89)

Appendix 1

Evidence submitted by the Department for Constitutional Affairs and the Legal Services Commission

Immigration and asylum: the government's proposed changes to publicly funded immigration and asylum work

Introduction

1. This memorandum is submitted jointly by the Department for Constitutional Affairs (DCA) and the Legal Services Commission (LSC).

2. The LSC's evidence to the Lord Chancellor's Department Select Committee Inquiry into Asylum and Immigration Appeals was submitted in May 2003 (published on the Committee's website, available at www.parliament.uk). It sets out the background facts and issues concerning the provision of legal aid to asylum seekers throughout the asylum process, and the steps taken by the LSC to improve quality and control costs.

3. Further analysis of the issues is set out in the DCA Consultation Paper "Proposed Changes to Publicly Funded Immigration & Asylum Work" (CPO7/03, 5 June 2003). Our main proposals in that document were:

- The introduction of a Unique File Number for each case. Through the use of the unique file number we will be able to monitor costs of individual cases and also monitor any duplication of work. We believe that unnecessary duplication of work has significantly contributed to the massive acceleration in costs of providing asylum and immigration advice.

- Allowing each client up to a maximum number of hours of legal advice in connection with his or her immigration or asylum case (5 hours for legal help and 4 hours for representation at appeal). The maximum hours or costs limit would attach to the client throughout their case and in the event that the client transfers representative then the new representative would only be funded to provide the remaining balance of the client's allocated hours of legal advice. Maximum limits would be imposed for disbursements.

- These changes would be introduced from January 2004**.** We emphasised that we would seek to make the client more aware of his or her rights to and any limits on legal advice through the use of leaflets which would be available in the principal languages and we would require suppliers to ensure that clients were aware of any maximum limits on the publicly funded advice they could receive.

- To address continuing issues of poor quality advice, we also proposed to introduce a system of accreditation. We proposed that accreditation will apply to all those providing advice on immigration and asylum matters through public funding. Subject to any transitional provisions then payment out of public funds would only be made to individual advisers who are accredited.

- In order to develop quality representation in the area of asylum and immigration, we therefore proposed to recognise the provision of exceptional, quality advice by the introduction of enhanced fees to those suppliers who offer clients a consistently high level of service and who have obtained advanced levels within the accreditation scheme. The accreditation system would have four levels. We proposed that the accreditation scheme will be introduced from January 2004, and will be compulsory from December 2004.

4. The Consultation paper was issued on 5 June and the consultation closed on 27 August. 260 replies were received. There were serious concerns with the proposals to put a rigid limit on the amount of time spent on immigration and asylum cases to 5 hours for legal help work and 4 hours for appeals. Respondents felt that the imposition of these caps would drive out many good representatives from publicly funded work. In general, they feared the caps would encourage the use of standard prepared statements; that they did not allow flexibility for complex and difficult cases that arise; and that reputable good quality suppliers would simply not be prepared to undertake work under these conditions.

5. Respondents felt that this would cut across the efforts to increase the availability of quality assured providers by introducing compulsory accreditation. Despite this, there was general support for a move towards a more robust accreditation scheme with accreditation of individuals, rather than firms, and the idea of enhanced rates being available to accredited providers. There were also calls for a more clear, fair and rapid system for the removal of unscrupulous or incompetent suppliers if they are found to be under performing.

6. There was widespread approval for the single identification number for asylum applicants, although some respondents commented that there were often delays in the allocation of individual reference numbers by the Home Office, so caution was advised when deciding which number should be used.

7. Respondents also made many suggestions about where savings might be achieved and were critical of some Home Office systems and procedures. The Committee has been provided with a summary of the responses to consultation.

8. In parallel the LSC issued draft contract amendments for consultation which were designed to show in detail how the package of measures would be implemented. That consultation closed at the same time as the main consultation.

9. During and since the consultation, both the DCA and the LSC have had discussions with a range of practitioners in the field and with their representative bodies, as well as considering the formal written responses.

Accreditation

10. Broadly speaking, there was support for the proposal to introduce a compulsory accreditation scheme for all publicly funded immigration and asylum casework. The main concern was that the time limits also proposed in the paper would not allow for good quality work to be done and an accreditation scheme would therefore not achieve its aim. This is addressed below. Respondents also commented on the need to ensure that the

LSC's scheme is based as far as possible on existing schemes run by the Office of the Immigration Services Commissioner (OISC) and the Law Society Immigration Panel.

11. The LSC has since published a more detailed paper, which has been discussed with the OISC, the Law Society and the Advice Services Alliance. We have agreed that there will be three levels of accreditation to reflect varying degrees of competence and experience. These levels are similar to the OISC's levels and the Law Society's Immigration Panel requirements. We propose that all advisers will sit a written examination, conduct a mock interview and draft a statement as well as submit a portfolio of work for discussion at interview. Publicly funded work will be restricted at the more junior levels until advisers have successfully completed the assessments outlined above.

12. At present we are finalising the details of the skills and competences required for each level of accreditation and, subject to final decisions on whether to go ahead, will then invite the Law Society to recruit assessment organisations. We would hope to have these in place by the end of December and the scheme ready to start from April 2004. Due to the high number of advisers that will require accreditation we expect that we will not be able to restrict publicly funded work to accredited advisers only until 12 months later.

Unique file number

13. There was also support for the introduction of a Unique File Number in principle. This will enable better control of duplicated work and unjustified changes of solicitor. Many respondents expressed concern about practical problems in obtaining a unique client number from the Home Office. At present there is not always a client reference number allocated on registration of an asylum claim. This would be preferable as it would enable the LSC to track asylum applications from the outset. Discussions with the Home Office are exploring this further. However, it seems that Home Office is prepared to ensure that all its initial decision letters bear the Home Office client reference number. As it is proposed that the first claim for payment to the LSC cannot be submitted in cases which proceed to a decision until after that decision has been made, it will be possible to submit the reference number with the claim. This could be brought in for next April, if not earlier. The LSC will anyway expect all firms to check whether a client has received previous legal advice for their case, as that will count towards the limits on advice described below. If firms fail to take reasonable steps to check whether the client has received previous legal advice, the LSC may disallow costs.

Limits on work

14. Most respondents were firmly of the view that the times proposed were insufficient to deal with genuine and complex cases, and made no allowance for exceptional cases, particularly those including traumatised asylum applicants who had difficulty in communicating the facts of their case. The evidence that many good suppliers would cease carrying out the work if no flexibility is allowed is convincing. With regard to disbursements, all respondents stated that the proposed limits were too low with many expert reports being in the region of £500 to £750. On other issues, NASS was viewed as a particularly complex area of work and most respondents felt that this work should not be restricted only to those lawyers with a welfare benefits contract - due to a lack of supply of such lawyers. In fact this is not the intention, and no changes are proposed to current rules.

In non-asylum cases, most respondents did not accept that immigration application forms were simple form filling. They referred to the length and complexity of the forms and the ability of many clients to complete them without legal advice. In addition, many expressed concern about non-English speaking clients who required interpreters. Attendance by legal representatives and interpreters at substantive asylum interviews was a major issue with most respondents claiming this is necessary and referring to existing best practice.

15. On the other hand, both DCA and LSC remain firmly convinced that there is waste in the legal aid system. The great majority of asylum seekers have representation at the initial decision-making stage, irrespective of whether their case is likely to be successful or not. In the first quarter of 2003, some 26% of cases were granted either refugee status (about 7%) or exceptional leave to remain (19%). From 1 April this year, exceptional leave to remain was replaced by humanitarian protection/discretionary leave to remain. The figures for the second quarter of this year show that the proportion of applicants granted refugee status remained at 7%, but those granted humanitarian protection/discretionary leave fell to 7%, making 14% overall. Of those whose cases are turned down initially, about 77% appealed in 2002. The current success rate before the adjudicator is about 21% of those who appeal.

16. Furthermore, too many suppliers send poor quality outdoor clerks to attend asylum interviews whose presence adds little value. There are often two interpreters present, one provided by the Home Office and one by the lawyer.

17. Since April 2003, lawyers seeking to commence judicial or statutory review proceedings have had to apply to the LSC for a certificate of funding, rather than use their devolved powers to self-grant emergency funding. The effect of this has been that the proportion of applications for certificates for immigration and asylum cases granted by the LSC has fallen from 83% in 2002/03 to 34% this year. This supports the view that there is waste in the system and continued action to improve controls is necessary.

An alternative approach

18. Although no final decisions have been made, the DCA and the LSC see the need for an alternative approach, which is intended to bear down heavily on expenditure on applicants whose cases are unlikely to succeed.

19. The thinking of the DCA and the LSC is as follows:

i. There should be a financial threshold for preparation time allowed for the generality of cases up to the initial decision for asylum cases. Once this threshold is reached, suppliers will only be allowed to proceed with prior authority of the LSC. A threshold for preparation time will also be applied to asylum appeals, requiring LSC authority to exceed. A threshold would also apply to non-asylum immigration cases. Professional disbursements and VAT will not count towards this threshold. A limited number of firms, where we are confident work is to a high standard, would be allowed devolved powers to self-grant extensions up to a higher figure.

ii. Extensions are only likely to be granted, on application to the LSC, in genuine and complex cases where there is a real prospect of success. In such cases attendance at interview may be authorised in exceptional circumstances, but only by the case-worker or the firm's immigration supervisor, not an agent or outdoor clerk. Once

the accreditation scheme is implemented other accredited representatives will be allowed to attend. Attendance at interview will always be permitted for fast track processes such as those operated at Oakington and Harmondsworth.

iii. On interpreters, it is proposed to pay a set hourly rate for attendance but to restrict payments for travel or waiting time. The LSC will investigate doing away with separate interpreters at the interview. The LSC will also move to requiring all suppliers to use interpreters who are accredited with or members of recognised bodies such as the Institute of Linguists.

iv. The devolved power to grant legal representation for appeals will be removed in all cases other than those where the LSC is confident that the supplier has a good track record in bringing cases which succeed. Applications will have to be submitted to the LSC, which will deal with them as quickly as possible. Appeals against refusal of legal aid will continue to be allowed, but these will be considered on the papers only. In some cases where legal aid is refused, suppliers will have to file the appeal against refusal of the asylum claim before an appeal against refusal of legal aid can be determined. In these cases, retrospective funding will be allowed if legal aid is subsequently authorised.

v. The LSC will also limit choice of representative in locations where fast procedures are in operation to dedicated or duty representatives authorised under contract. This will prevent touting and poaching of clients at centres such as Oakington and Harmondsworth.

vi. The LSC will issue rules as to when experts' reports can be commissioned and will set maximum fees. This will form a separate consultation this autumn.

20. Subject to approval being given for this package, the intention would be to implement the proposals on the new thresholds in January 2004. The restrictions on choice of representative in locations where fast procedures are in operation, use of interpreters and removal of devolved powers to grant representation for appeals would come in for the new three-year contracts from April 2004.

Further developments

21. The asylum and immigration system is a shared responsibility between the Home Office and the DCA. This is reflected in a shared budget for asylum and immigration—the Single Asylum Fund—and a joint Programme Board to manage the asylum process. Joint programme arrangements have been in place for the last three years and the single budget from the start of the 2003/2004 financial year. They reflect the reality that an effective and fair asylum and immigration system must be considered as a single system, not as a series of discrete operations. Nevertheless the differing roles and duties of the Home Secretary and the Secretary of State for Constitutional Affairs, and of their two respective Departments, are recognised and maintained within this structure.

22. As part of this shared responsibility the DCA and the Home Office continually monitor the performance of the system, in particular against targets set under the asylum Public Service Agreement. The two Departments are currently examining the initial decision-making stage of the asylum process, with particular regard to the role that legal aid and

publicly funded practitioners play. Officials are examining a number of inter-related issues. These include the possibility of making changes to the current process to maximise effectiveness, efficiency and economy. Officials will also examine the role that legal aid plays in achieving high quality decision-making processes. In principle we want to explore a system where further improvements in decision-making by the Home Office will allow a reduction in Legal Help. This involves re-thinking the levels of legal aid in the context of Home Office decision-making.

23. This work may lead to changes in the way that legal aid for asylum seekers is delivered. If the Government concludes that such changes are desirable, there may need to be changes to the scope of legal aid. That requires regulations under the Access to Justice Act 1999 subject to the affirmative procedure. Consequential change to contracts would also require consultation with the professions and a period of notice. This work is not yet concluded, but the Committee should be aware that the Government's proposals on the control of legal aid before the appeal stage may be further amended as a result of this work.

24. The LSC will involve asylum lawyers as the work progresses to make sure that the most capable lawyers are confident that they can deliver a good legal aid asylum service to their clients.

Department for Constitutional Affairs

Legal Services Commission

24 October 2003

Appendix 2

Memorandum by Chris Randall and Robert Thomas, Specialist Advisers to the Committee

Comments on the Late Memorandum Submitted by the Department for Constitutional Affairs on the Government's proposed changes to publicly funded immigration and asylum work

Introduction

On Friday 24th October 2003, the Department for Constitutional Affairs (DCA) and Legal Services Commission (LSC) submitted a memorandum to the Committee, which contains important new material on the subject of the Committee's current enquiry into legal aid in immigration matters. It is surprising to see such a radical shift in the DCA/LSC proposals following on so quickly from their evidence to the Committee. If these matters were under consideration at the time, it is difficult to understand why were they not put before the Committee for examination, and made available for comment upon by other witnesses.

On the same day, the Home Secretary announced that 15,000 principle asylum applicants whose cases pre-dated the Human Rights Act coming into force in October 2000 would be granted permission to stay in the UK. A significant proportion of these cases will have had some or all of their appeals outstanding. This will have a significant effect on the appeal backlog and therefore the legal aid budget. It is surprising to see that this not flagged up in the DCA's projections as to cost.

The new memorandum

The most important new material divides into two parts:

i. A proposed amendment to the 'hard cap approach' set out in the consultation (paras 18–20); and

ii. A threat to remove legal help from initial decision-making in asylum cases (paras 21–24).

There is also some ground-clearing in relation to other issues which we will address first, following the paragraphs of the new memorandum.

Para 13 Unique file number

The proposal here still does not seem to deal with the client who seeks advice about whether to make an application, and decides not to do so—there is therefore never an application to the Home Office, and no Home Office reference is ever generated. Nor does it deal with entry clearance applications, where a lot of work is done before the file reaches the Home Office (and the unique number is generated). The fact that some payments are linked with Home Office decisions does not deal with these particular problems either.

Para 15 Statistics

The statistics are noted. However, it remains the case that in 20- 25% of Home Office refusals, the Home Office decision is overturned. This does not inspire confidence in an area where decisions are of such import to clients. The reliance on the new DL/HL figures is a little disingenuous—just because the Home Office have decided that a 12% tranche of cases no longer qualify for subsidiary protection does not change the nature of those cases from meritorious to unmeritorious. Also there may yet be a knock-on effect on appeals from the DL/HL provisions, which it is too early to identify, given the recentness of the policy change.

Para 16 Interviews

This comment still does not address the fact that it is the Home Office's own protocol which restricts the role of representatives at interview. It does not address how interviews would change in the absence of representatives. It is also important to bear in mind that with the proposed widening of the non-suspensive appeal jurisdiction many applicants will not have an in-country appeal to put right matters which have gone awry at interview. A poor interview, unchecked by the representative, will be followed closely by removal, and a useless appeal exercised from the country of origin.

At the moment no time is allowed to a representative to make representations after an interview if the interview was preceded (as, at the moment it normally is) by the submission of a Self Completed Statement of Evidence Form. At the very least, the Home Office should, where attendance at interview is excluded, be required to re-instate the possibility of making representations for a short period after the interview.

At para 19 (ii) it is suggested that attendance will be allowed at the various fast-track establishments. While this is to be welcomed in itself, the logic for this is not clear. After all, the current failure rate of appeals at Harmondsworth is 294 out of 300. Representation at interview did not change much there, it seems. It is arguable that it is in the more borderline cases—which generally are not Harmondsworth material—that representation at interview is more important.

For non-suspensive appeals, for the reasons set out above, there is a good argument as to why representation at interview should be allowed. But, assuming they are to be expanded in number, why is it only to be allowed at non-suspensive appeals at Oakington?

Para 18 An Alternative Approach

i. It appears that disbursements will no longer be subject to a cap per se. This is to be welcomed.

ii. The introduction of a 'soft cap' for profit costs is also to be welcomed, so far as it goes. The next and crucial question is—how soft is that cap to be? Para 19 (ii) suggests that extensions may be granted by the LSC:-

'In genuine and complex cases where there is a real prospect of success'

This phrase raises a number of questions:

- A. What does *'genuine'* mean in this context? It is not clear what this adds to the definition.
- B. What does *'complex'* mean? The word is already used in the GCC in an immigration context. Is the same meaning to be given here?
- C. Is this the introduction of a new [third] merits test, to be implemented much earlier in the procedure than the CLR merits test? How will they relate? The terms of this new test needs to be set out clearly, and then consulted upon.
- D. Is the extension only to be in terms of an attendance at interview, which is allowed *'in exceptional circumstances'* or are there to other reasons for granting extensions to the threshold? In any event this approach to interviews does not engage with the widely expressed opinion that it is impossible to predict in advance in which cases interviews will go wrong. The LSC have decided to ignore this inconvenient fact in this new proposal.

iii. Interpreters—the requirement for suppliers to use only externally accredited interpreters is to be welcomed—however this will add considerably to the disbursement bill. It should be confirmed by the Home Office that their own interpreters will be of the same standard. In the absence (as posited) of both a representative and independent interpreter at interview, the need for well-qualified Home Office interpreters becomes even more important. If the Home Office interpreter does not do a proper job, there will be no-one from the applicants side who will know.

iv. The taking in-house of Controlled Legal Representation decisions by the LSC is not unexpected. The fact that any appeal against a refusal by the LSC to fund a case will be a paper appeal only is very worrying. The LSC will need to be able to demonstrate its independence in these circumstances. We may see a growth of a satellite Judicial Review industry challenging the LSCs decisions to refuse to fund appeals.

Further developments—para 21–24

This material causes us grave concern.

The Home Office are the initial decision-makers in immigration cases, and the respondent to any appeals. There is a clear political imperative in reducing the volume of applicant numbers. Government has made this clear. A high refusal rate, sustained on appeal, will, arguably, assist in the Government in achieving this political end not least via a deterrent effect on future applicants. The Home Office therefore have an interest in applicants failing at appeal. Given the added concerns about rising costs, they also have an interest in cases failing as early as possible, and in appeals regimes with limited, or no effective, appeals.

In that context, one would hope to see the organization which funds applicants representation, doing so at arms length from the Home Office. This appears to be less and less the case. One might also think that Government might be in favour of retaining legal aid for initial applications, in order for lawyers to assist the Home Office in coming to the

right decision at an early stage. Regrettably that is not the case, and these proposals make that abundantly clear.

There is a shared budget for asylum and immigration, the SAF. Suppliers already have concerns, expressed in this consultation process, about the LSC's commitment to quality, given its volte-face from earlier guidance for immigration cases. Now it is suggested that the current determination process may be further changed to maximize *'effectiveness, efficiency and economy'* (para 22). It is of concern, in passing, that fairness and justice are not mentioned here. It is further stated that *'Officials'* (from which department we do not know) will examine the role that legal aid plays in achieving high quality decision-making. It is suggested that improved Home Office decision-making will allow for a reduction of Legal Help.

This raises a number of fundamental issues.

Home Office administration and the quality of its decision-making was widely and rightly attacked in the consultation responses. It is hard to emphasize how far in practice Home Office procedures would have to improve to reach a standard where they could command such confidence that LH to applicants could be cut, even if it were in principle thought to be a good idea. But in fact the principle clearly points in the other direction. This is for a number of reasons:-

i. The powers of the Home Office are already very substantial. To reduce LH at the initial stage, in such a contentious, difficult, and important field would be quite wrong. The Council on Tribunals has already suggested, in the context of appeals that the balance has swung too far towards the executive. This proposal is to posit a giant leap further in that direction.

ii. Good quality legal representation assists the Home Office in reaching the correct decision early on ['front-loading' or 'right first time']. This proposal seems to adopt the view that legal advice provides no help to decision-makers at all.

iii. It should be recalled that a negative initial decision will lead more and more to an (ineffective) out of country appeal. Such applicants might never receive legal advice before their removal, under these proposals. There will be no opportunity for the unrepresented applicant to receive legal assistance to put right those matters which have gone wrong in their application, before they are once again in the country from which they fled.

There are no other areas of administrative decision-making concerning similarly important areas of peoples lives, where it is suggested that those about whom decisions are made who are impecunious, should have no legal assistance, because of the trustworthiness of the decision-maker. It should be emphasized that an asylum claim concerns matters of fundamental human rights, including the right to life, and that an incorrect decision could result in death or torture as well as a failure to adhere to international legal obligations.

Arguably the LSC should be playing a role of defending the position of the applicant against the encroaching powers of the executive. Unfortunately, it appears to be doing the opposite. The effect of the single budget appears to have been to co-opt the LSC into the executive, just at the time when applicants most needed it to stand firm against it.

It is of yet more concern that such fundamental changes could be introduced merely by regulation. The Committee has a particular responsibility in these circumstances to look at these matters further, whether in the context of this investigation, or a future one.

Para 24 suggests that lawyers will be involved in these developments as they progress *'to ensure they can deliver a good legal aid service to their clients'* (para 24). This makes a welcome change to the complete, and telling, lack of involvement in the LSC's proposals considered by the Committee thus far. But it does appear to rather beg the question as to whether such a service could be delivered in those circumstances.

Chris Randall & Robert Thomas

Specialist Advisers to the Constitutional Affairs Committee

28 October 2003

Formal minutes

Tuesday 28 October 2003

Members present:

Mr A J Beith, in the Chair

Mr Peter Bottomley
Ross Cranston
Mrs Ann Cryer
Mr Hilton Dawson
Mr Clive Soley
Keith Vaz
Dr Alan Whitehead

The Committee deliberated.

Draft Report [Immigration and Asylum: the Government's proposed changes to publicly funded immigration and asylum work], proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 89 read and agreed to.

Conclusions and recommendations read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Fourth Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Two papers were ordered to be appended to the Report.

Ordered, That the Appendices to the Report be reported to the House.

Several papers were ordered to be appended to the Minutes of Evidence.

Ordered, That the Appendices to the Minutes of Evidence be reported to the House.

Ordered, That the provisions of Standing Order No 134 (Select Committees (Reports)) be applied to the Report.

[Adjourned till Tuesday 11 November at 9.00am

Witnesses

List of written evidence

Reports from the Constitutional Affairs Committee

The following reports were produced by the Committee under its previous name, Committee on the Lord Chancellor's Department

Session 2002–03

First Report	Courts Bill	HC 526
	Government response	*Cm 5889*
Second Report	Judicial Appointments: lessons from the Scottish experience	HC 902
	No Government response expected	
Third Report	Children and Family Court Advisory and Support Service (CAFCASS)	HC 614
	Government response	*Cm 6004*