House of Commons

Constitutional Affairs Committee

Legal aid: asylum appeals

Fifth Report of Session 2004–05

Volume I

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Report, together with formal minutes

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The Constitutional Affairs Committee

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1 Introduction

1. As we noted in our previous report *Asylum and Immigration Appeals*[1] the Government has launched three major reforms in the asylum and immigration field over the past few years. In that report, the Committee particularly criticised the proposed 'ouster clause', which would have taken from applicants the right to ask the superior courts to review any deportation or removal decision. The Government subsequently removed that clause from the *Immigration Asylum (Treatment of Claimants) Act 2004*. At about the same time, however, the Government introduced another provision into the Act as an enabling power in respect of legal aid amending the *Nationality, Asylum and Immigration Act 2002*.

2. Section 103D of the 2002 Act provides that the Secretary of State may make regulations relating to the payment of legal aid in asylum appeals, particularly in respect of the amount of the payment, and also to restrict the payment by reference to an appeal's prospects of success at the time when it was made.

3. In November 2004, the Government launched a 6 week consultation entitled *The Asylum and Immigration Tribunal—The Legal Aid Arrangements for Onward Appeals*.[2] The consultation paper sought views on the proposed draft *Community Legal Service (Asylum and Immigration) Regulations 2005*. Those new draft regulations set the framework for the legal aid arrangements in England and Wales for the review and reconsideration of appeal decisions made by the new Asylum and Immigration Tribunal (AIT), which is to be launched on 4 April 2005. The draft regulations set out the circumstances in which a costs-order for publicly funded legal services could be made in relation to proceedings beyond the first appeal against an immigration decision.

4. The proposals contained within that document are controversial. They raise three main issues.

- The new legal arrangements to be introduced will introduce a system of **retrospective funding** for challenges against the decision of the AIT, with legal aid being awarded at the end of the process when the appeal decision has been reconsidered. The result of this would be that lawyers would have to bear the risk that they would not be paid for their work if they pursued a case which the Tribunal ultimately decided was of insufficient merit;

- The threshold which a claimant's lawyers would have to meet to obtain funding requires **far more than reasonable (i.e. 50 %) prospects of success**. In contrast, the current 'before the event test' for the grant of either Controlled Legal Representation (CLR) for appeals to the Immigration Appellate Authority or a civil certificate is whether there is a 50% prospect of success;

- Even if the High Court grants the review (i.e. is of the opinion that the application is of sufficient merit) and the matter is then reconsidered by the AIT, the decision about costs will relate to the costs before the AIT as well and will be referable to the success

1 Constitutional Affairs Committee, *Asylum and Immigration Appeals*, Second Report of Session 2003–4, HC 211–I

2 Department for Constitutional Affairs, *The Asylum and Immigration Appeal Tribunal—The Legal Aid Arrangements for Onward Appeals*, CP(L) 30/04, November 2004

before the AIT. Consequently, even where a High Court judge was of the opinion that a case merited reconsideration, a more junior judge at a later date could disallow all costs, both of the High Court application and of the subsequent reconsideration. It is only after reconsideration by the AIT that lawyers acting for an appellant would know if they were to be paid at all, despite their success in persuading a High Court judge of the merits of the case.

5. In its consultation paper, the Department originally proposed two alternative formulations for the 'after the event' test for merit. Those were:

a) Option 1: A test framed in terms of whether a case had significant prospects of success. The DCA indicated that the effect of such a test would be a high risk that funding would not be awarded if a case were unsuccessful at review stage. There would be a correspondingly low risk of funding not being awarded in cases in which reconsideration was ordered. There would be limited financial incentive for suppliers to pursue weak applications because funding would not be awarded for applications which were unsuccessful at the review stage (save in the most exceptional circumstances). Suppliers who withheld material information from the process would also be penalised. It is unlikely, even when reconsideration had been ordered, that funding would be awarded if information had knowingly been withheld. This should reduce the volume of weak review applications reaching the Tribunal and the Administrative Court.[3]

b) Option 2: A test framed in terms of whether a case was very likely to succeed or had very strong prospects of success. The DCA state that this test is a high risk test for suppliers. Even if the application had been successful at the review stage there would be a much greater risk that funding would not be awarded in comparison to Option One. Balanced against that, those suppliers who are running strong, meritorious cases with significant prospects of success would be likely to be paid.[4]

6. Following an exchange of letters between the Minister and the Chairman of this Committee and a number of submissions from the judiciary and the professions, the Committee announced that it would be holding an inquiry into these proposals.

7. The Government made an initial submission to the Committee in which it commented that:

> The DCA is currently in the process of analysing the responses received to the consultation on the regulations. The DCA is very aware that the scheme has caused concern amongst stakeholders. To ensure that the aim of discouraging weak applications can be achieved without compromising the principle of access to justice, it is important that time is taken to carefully consider the responses received and how the necessary balance can best be achieved. When decisions have been taken on the detail of the scheme further evidence will be submitted to the Committee.[5]

3 *ibid*

4 *ibid*

5 Ev 47, para 1

8. The details of the proposals were marginally amended over the course of our inquiry; the Department told us of the relevant changes in subsequent memoranda discussed below.

9. We have received a number of written submissions in response to our call for evidence. We also took oral evidence from the witnesses listed on page 20. We are grateful to all who contributed oral and written evidence. We thank our special adviser, Mr Chris Randall, a solicitor at Bates, Wells and Braithwaite.

2 Retrospective funding

10. Despite the fact that the new Asylum and Immigration Tribunal is scheduled for implementation in April 2005, the proposed new arrangements for funding appeals were finalised at a very late stage. On 23 February 2005 the Department produced a final submission to the Committee. On the same day, the Department laid Regulations before the House setting out its preferred option (Option 1). The Department's submission made two other substantive amendments to the proposals. It indicated that suppliers would be paid at the lower CLR rate for applications before the High Court and that the Department were proposing a 35% risk premium for suppliers willing to undertake cases under this scheme (see section 4 below).

11. The Department has acknowledged that a large number of changes have already been implemented over the past year, many of them in order to reduce abuse. These include the following:

- Introducing a financial threshold of five hours for the initial decision-making process, which can only be exceeded with prior authority of the Legal Services Commission (LSC);
- Ensuring that no legal aid work is undertaken in asylum appeal cases without prior approval from the LSC;
- Introducing exclusive contracts for clients subject to Home Office fast track processes to reduce unnecessary changes of solicitor;
- Applying financial funding limits to individuals irrespective of how many times they changed suppliers and introduction of the Unique Client Number to help track clients and reduce unnecessary duplication of work;
- Removing from the scope of legal aid the attendance by a legal representative at the Home Office interview apart from in exceptional circumstances;
- Responsibility being taken over by the LSC from the Home Office for the funding of the Immigration Advisory Service and Refugee Legal Centre which means that £15m of public funds is now focused on clients that meet the LSC eligibility criteria;[6]
- Introducing a compulsory accreditation scheme for all lawyers who undertake publicly funded immigration work.

12. **Given the host of recent Government initiatives in response to the issue of asylum and immigration, we are unhappy that practitioners have not been given the opportunity to absorb previous changes before another controversial funding policy is introduced. The background of constant change means that it will be difficult to see which initiatives are successful. The continual introduction of funding restrictions is likely to deter practitioners from representing people in immigration and asylum appeals.**

6 Ev 48–49, para 4

13. Following the enactment of the *Asylum and Immigration (Treatment of Claimants) Act 2004*, the Government moved from a two stage appeal process, subject to a statutory review by the court, to a single tier (to be known as the Asylum and Immigration Tribunal), which, following the removal of the 'ouster clause', would be subject to review by the court.

14. The Government's proposals to introduce retrospective funding to legal aid would only apply in the context of asylum and immigration appeals. Its use is unprecedented. The system has not been previously trialled. The Department has indicated that in its view the asylum and immigration jurisdiction is unique in that there is an incentive for an appellant to delay proceedings, since by doing so he or she will not be removed from the country. Appeals which are exercisable from the UK do generally have suspensive effect postponing any power to remove. The Department states that:

> Under the current process appeals are handled within a multi-tiered structure. It has the potential to be time consuming and open to systematic abuse both within the Immigration Appeal Tribunal's jurisdiction (IAT) and through access to the higher courts. Under the current process it can take 65 weeks from the receipt of the asylum application by the Immigration and Nationality Directorate (IND) through to promulgation of the IAT's determination following a substantive hearing.[7]

The Department has admitted that:

> The introduction of a single tier of appeal coupled with a new system of higher court oversight will reduce the opportunities for the process to be exploited. Processing times will be faster and cases will reach finality sooner. Not only is this in the interests of the taxpayer, but also the genuine asylum seeker.[8]

15. The initial concern raised by the Department overlooks three important points. First, as it has acknowledged, the asylum and immigration appeals jurisdiction is being fundamentally changed, since a tier of appeal will be removed upon the establishment of the AIT (although it is still possible to apply for a limited review). This is a substantial change and also affects the validity of a number of other statistics presented by the Department. Second, incentives for delay are not limited to asylum and immigration proceedings; they can be found in other areas of law.[9] Third, there is a significant number of immigration appeals where the appellant is abroad and there is therefore no incentive to delay.

16. In our view, it is wrong to blame all the delays on the appellant. In our previous report on asylum appeals[10] we noted that much of the delay was due to the failure of the Home Office to take initial decisions in a reasonable time and to poor initial decision making. In that context, we note the recent report of the Public Accounts Committee *Improving the speed and quality of asylum decisions* in which they concluded that up to £500m might have been saved if the Home Office had been able to put in place sufficient staff and infrastructure to meet the significant rise in asylum applications in 1999 and 2000. Instead

7 Ev 47, para 3

8 Ev 49, para 5

9 See, for example: Constitutional Affairs Committee, *Family Justice: the operation of the family courts*, Fourth Report of Session 2004–05, HC 116–I, in which we discuss the use of 'tactical delays' in family proceedings

10 *op cit*

the Government allowed backlogs to accumulate while decisions were awaited, making the eventual removal of unsuccessful claimants more difficult.[11]

17. The new Appeals Procedure Rules impose even shorter time limits than those currently in force. There is a ten working day time limit to appeal against an initial refusal and a requirement on the court to list the case within 28 days in most cases, with a 10 day time limit to apply for reconsideration. A case can only be reconsidered once. Thus where a claim was found to be abusive and rejected after a first appeal, it would not add substantially to the time spent dealing with a case.

18. When considering whether there is a need for these proposals, it is also worth noting that there is already in force a scheme whereby a High Court judge, on an application by way of Statutory Review, can indicate to the Legal Services Commission that a case with no merit has been brought before it. The LSC then has discretion as to whether to pay the supplier. Furthermore, since the April 2004, no appellant can receive CLR, unless it has either been granted by the LSC, or granted by one of the very few suppliers who have been granted devolved powers by the LSC.

19. JUSTICE were one of a number of witnesses who raised substantial objections to the proposed new funding mechanisms and particularly highlighted the fact that it is only appellants in asylum and immigration cases who have been targeted, stating that "if the DCA seriously believed that this was the way to proceed, why is the method of retrospective decision not applied throughout the Community Legal Service scheme?"[12]

20. In its paper in response to the Department's consultation exercise, JUSTICE goes on to note that:

> If firms conducting asylum work are operating inappropriately, why does the [Legal Services] Commission not properly carry out its responsibilities for ensuring that the scheme is working properly? Why is a potentially penalising provision being introduced when the same objective could be achieved more conventionally and effectively.[13]

21. Concerns were raised by witnesses who argued that the introduction of retrospective funding amounted in effect to a gamble by the provider, in many cases either a small business or a charity. Citizens Advice summarised the problem in its submission, when it commented that:

> Citizens Advice Bureaux with Immigration contracts will be asked to bear the risk of not being paid for their work if they pursue a case which the Tribunal or Court hearing it decides is without merit. The Department for Constitutional Affairs says the purpose is to "encourage lawyers to assess the merits of a case thoroughly and reduce the number of weak challenges of AIT decisions". Most Citizens Advice Bureaux Trustees are not going to agree to their staff doing work that they may or may not get paid for. By their very nature, Citizens Advice Bureaux have to monitor

11 See Committee of Public Accounts, *Improving the speed and quality of asylum decisions*, Fourth Report of Session 2004–5, HC 238, p 5, Conclusions and recommendations

12 JUSTICE response to the DCA Consultation Paper CP(L) 30/04

13 *ibid*

> their finances very closely; there is little margin for error with budgets and Trustees could not approve work that had this level of risk attached to it. We anticipate that firms of solicitors will take a similar approach.[14]

22. **Retrospective funding is only being proposed in asylum and immigration cases. Its introduction is likely to have a negative impact on appellants and lawyers, since the uncertainty involved will mean that even good quality suppliers may have to make a commercial assessment of the level of risk they are taking and may well refuse to represent some clients who have reasonable cases.**

14 Ev 21, para 2

3 The merits test

23. Following the Department's submission on 23 February 2005, it became apparent that the Government had chosen to implement the 'Option 1' merits test, which considers whether a case has "significant prospects of success". As mentioned above, this would require far more than the current 'before the event' test which requires that a case to have a 50% prospect of success.

24. Some of our witnesses were willing to accept the concept of retrospective funding, if an appropriate test were established. In his evidence, Mr Justice Collins commented that:

> I have no objection in principle to retrospective public funding provided that it is subject to proper limitations. It should only apply to renewed applications to the High Court and not to applications to the tribunal. It is entirely inappropriate for the tribunal to exercise such a power nor should it depend upon the ultimate outcome of any reconsideration by the tribunal. It should only be exercised by the High Court and should depend upon whether the renewal succeeds in persuading the High Court to remit the case back to the tribunal or send it to the Court of Appeal. Neither of the tests proposed is appropriate. Each is pitched at far too high a level. A real prospect of success (which is the existing test for granting permission to appeal) should be the test applicable and that the Court should have a wide discretion.[15]

25. This approach was also accepted by Ms Emma Saunders who gave oral evidence representing the Refugee Legal Centre. She also highlighted the difficulty in assessing what amounted to 'success', noting that:

> I think it [the merits test] should mirror the CLR test under Legal Aid [reasonable prospects of success]. I think it is quite important for the Committee to think through the process and the way it will operate and the point at which the costs penalty stance comes in. Let us say you have an appellant who has a hearing before an adjudicator and the adjudicator quite simply gets it wrong. In arguing that there is an error of law one would hope that one would get to the next hurdle of a reconsideration hearing. Assuming that the adjudicator decision was not salvageable, as is the case with many cases that are remitted, that individual has effectively been denied a first fair hearing and at the reconsideration stage it is proposed that they would then have their case heard afresh as they should have had in the first place. Why is it that an individual who has been failed by the system at that very first instance level should not be put back into the position Parliament intended them to be…[16]

26. The Department was unable to meet this point. In oral evidence, the Minister, Baroness Ashton of Upholland, stated that:

> I accept that [normally, if you are successful first time round on the appeal, you get paid], but I think what I am trying to argue, and again, as a non lawyer perhaps if I

15 Ev 19

16 Q 13

> look at it in other aspects of life, when you are trying to design a system to get the best from that system, if you make sure that what is put forward as being evidence for why this should be reviewed again, at the end of that process the person in charge of that process, in a sense the judge, says, "Yes, actually it was", and payment is made. It is not no win no fee, but it does perhaps discourage any possibility that someone might not put all the information forward at the time or perhaps put it forward in a particular way.[17]

27. This ignores the fact that when the High Court considers whether to remit a case back to the AIT, it judges whether there has been an error of law by the Tribunal, not whether all the information was put forward by the appellant at the time of the original decision.

28. When presented with the fact that success rates are low in other types of case (for example in the criminal context, only between 9.9% and 11.8% of appeals against conviction were successful between 2000 and 2004).[18] The Minister was equally unconvincing, indicating that:

> It is very hard for me to make the analogy across to criminal law because, not being a lawyer and not being responsible for that area of policy, I do not know why the system is designed in the way it is. I am sure there are very good reasons why it is designed in the way it is.[19]

29. The Minister also accepted that the Department did not necessarily envisage that even well regarded suppliers would continue to be remunerated at the current rates, regardless on the impact on their business model, and that some borderline cases could be turned away at the 'filter mechanism' stating that:

> I thought the most interesting piece of evidence that you had for me was the success rate around the Refugee Legal Centre, which is 70%, and how close they were to a figure that would, I think, be very good, but it is not that I look at it in terms of how do the lawyers do as well as they do now. I think it is much more for me in terms of making sure that cases that go forward for the applicant have merit and that we get to a point of fewer and fewer cases that clearly do not have any merit. There will always be those on the borderline—I completely accept that—and there will be cases that go to the filter which are rejected.[20]

30. **The introduction of a retrospective merits test to legal aid funding would be an unprecedented step. The Government has not explained why all persons who apply for judicial review in a regular hearing are considered 'successful' when they obtain reconsideration, whereas those who demonstrate an error of law by the Asylum and Immigration Tribunal (AIT) before a High Court judge in asylum and immigration proceedings may be considered 'unsuccessful'.**

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17 Q 70

18 The Court of Appeal Criminal Division, *Review of the period October 2003–September 2004*, Lord Chief Justice Woolf and Lord Justice Rose

19 Q 74

20 Q 78

31. **We believe the level of the test is, in any event, set too high. It might be acceptable for lawyers not to be paid if the case they brought was entirely without merit, or had never had more than a 50% prospect of success. By raising the threshold it is likely that legitimate appellants will be disadvantaged. Unless a case is completely clear cut, it is difficult to see how lawyers will always be able to make an accurate assessment that a case had "significant prospects of success". Lawyers considering whether applicants face possible human rights concerns, if deported, should not have to gamble on funding decisions.**

4 Impact on suppliers

32. It is clear from the evidence above that the Government does not appear to have considered adequately the impact of these proposals on suppliers. In its evidence to the Committee, the Legal Aid Practitioner Group indicated that:

> Private practice solicitors working in this field are running businesses, and must take sensible commercial business decisions. Those working for non-profit making organisations must still cover the costs of the organisation and cannot afford to work for nothing. Few other businesses are required to work speculatively in this manner, and those that do can generally name their own price to attach to the commercial risks of doing so. Furthermore, such organisations generally know very clearly in what circumstances they will or will not get paid. Such clarity is absent in the proposed new system.[21]

33. In its submission, the Bar Council indicated that it was profoundly surprised and concerned to find in the Department's consultation document a reference to High Court proceedings being funded through CLR rather than being funded as licensed work as is at present the case with statutory review and all other publicly funded judicial review proceedings. It went on to indicate that:

> Drafting review applications to the High Court is essentially judicial review drafting, requiring the same knowledge of public law and the same drafting expertise, and there is no basis whatsoever to fund it differently from other judicial review work. Standard CLR preparation rates are often less than half that charged by experienced practitioners on judicial review and statutory review to the High Court. The effect of moving to standard CLR fees would be that the proposed 25% 'uplift' is applied only after cutting the basic hourly rate in half. Any move to reduce barristers' present hourly rates before applying the risk premium would conflict with the representations made by the Lord Chancellor to Parliament concerning payment of a premium. The Bar Council therefore welcomes the clear assurance that has been provided to it in meetings with the DCA and LSC that this bizarre result was unintended and that there will be no move to reduce present fees on High Court proceedings before applying the risk premium. It is entirely unnecessary to fund High Court proceedings by CLR rather than the present arrangements simply to permit for retrospective application of the merits test (which the Bar Council was told was the thinking behind the suggestion in the consultation paper). This could be achieved quite straightforwardly in relation to licensed work. The present funding arrangements for assessment of fees in respect of licensed work are tried and tested, and as indicated above, no concern has been raised about their operation. The Bar Council has indicated that it is happy to work with the LSC on ways of avoiding the upheaval of seeking to create an equivalent assessment system under CLR.[22]

34. In evidence to the Committee, however, the Department announced that:

21 Ev 37, para 5

22 Ev 28, paras 24–27

> Work for the review and reconsideration stages of the process will be paid for as part of Controlled Legal Representation (CLR). Under the current system work done at the adjudicator and IAT stages is paid for as part of CLR and High Court work is claimed as Licensed work. In line with the introduction of a single tier of appeal it is considered appropriate to administer funding for the new process through one scheme.[23] [emphasis added]

35. Since the CLR rate is currently lower than the rate for licensed work it would therefore appear that despite the assurances previously given, fees will be reduced before the risk premium is applied.

36. In its consultation paper, the Department indicated that a "risk premium will be added to mitigate the risk associated with taking forward review and reconsideration work under the new scheme."[24] Following the consultation exercise, the Department has announced that the risk premium has increased from the original proposal (a 25% uplift, which it had consulted on) to an uplift of 35% on successful cases. In written evidence, Baroness Ashton added that:

> It will be the case that the rates paid under the Controlled Legal Representation scheme (CLR) prior to the 'uplift' are lower than the rates currently paid for High Court certificated work. However, only the review stage of the new process would currently attract funding under High Court certificated rates. The reconsideration stage would be payable at basic CLR rates. Under the new arrangements there will be an uplift to CLR rates for work which is undertaken over both the review and reconsideration stages of the onward appeals process. Therefore, when considering the appeal work undertaken as a whole the rates overall are higher than the current payments.[25]

37. It seems plain that, under a retrospective funding policy, providers will not be paid in some cases. When this is taken in conjunction with moves to lower the payable rate for some work, it is likely that remuneration for this type of work will decrease overall.

38. The Department also consulted on how the risk should be shared as between solicitors and barristers acting for an appellant. A number of groups have also argued that if these proposals are accepted, an adequate appeal mechanism needs to be available for lawyers, to challenge a decision not to award funding. ILPA have indicated that:

> There should also be a right of appeal to an external body against the Tribunal's decision if funding is refused following an oral hearing. If nothing else this will militate against the risk of unfair inconsistency in decision making by different Tribunals. Recourse might be had, for example, to the Legal Services Commission's Funding Review Committee if it were felt undesirable to establish a wholly new entity for this purpose.[26]

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23 Ev 57

24 *op cit*

25 Ev 58

26 ILPA's response to the DCA Consultation Paper CP(L) 30/04

39. It went on to add that it is "important that both barristers and solicitors each have rights of review so that rights of one are not dependent on whether or not the other chooses to apply, and to protect the position of each in cases where their interests do not coincide".[27]

40. In its written evidence to us, the Department acknowledged this problem, stating that:

> The regulations include provision for decisions on funding following reconsideration to be challenged on application to the Tribunal. In response to the consultation responses received this right can be exercised by either the supplier or by counsel. An oral hearing can be requested, which can be granted at the Tribunal's discretion. Consultees have expressed concern about the Tribunal's impartiality to review its own decisions. The regulations therefore prescribe that reviews must be conducted by a different senior Tribunal judge to the judge that made the original funding decision. The costs of making a successful review application will be paid as part of the overall costs payable under section 103D.[28]

41. This does not entirely answer the question posed, since where the President of the AIT were to make an order, it would presumably be reconsidered by a subordinate judge. Moreover, if the practitioner has to incur further potentially unrecoverable costs in pursuing a subsequent appeal to the tribunal, it might be viewed as throwing good money after bad. In particular, practitioners will not be able to appeal to an alternative body on a costs related point, but will instead be reliant on a differently constituted panel from the same tribunal. Given the small size of this jurisdiction, this may not give the appearance of fairness and should be reconsidered.

42. **We are concerned about the impact on suppliers which will result from the implementation of these proposals. Most suppliers in this area are small businesses or charities who may struggle to cope with an unexpected drop in income. The move to reduce fees to CLR rates before introducing the risk premium seems to be another attempt to reduce spending on this area of law. It is not clear that the Department has answered the concerns of practitioners about risk sharing and appeals relating to costs.**

27 *ibid*

28 Ev 57

5 Conclusion

43. It is a laudable aim to reduce the number of unmeritorious cases in the system. There are alternatives to this untrialled scheme. In evidence to the Committee, the Department indicated that:

> Regular audits and peer review by the Legal Services Commission highlighted over-claiming and issues regarding the quality of advice given. This is where the LSC have identified unnecessary or duplicate work completed by suppliers when their bills have been audited. There was also evidence that there was duplication of work occurring. In 2002, there were 85,865 asylum claims yet the LSC issued over 156,000 new matter starts in immigration. Whilst this figure also represented non-asylum matters, and cases where clients had changed representative for legitimate reasons, the position was not entirely explained. There is anecdotal evidence that clients were shopping around for advice and suppliers continued to pursue unmeritorious cases under public funding.[29]

44. Given that it is usually the LSC which authorises expenditure on asylum appeals on the basis that such cases have reasonable prospects of success, it seems apparent that if appeals are being brought that are entirely without merit, the LSC must share some of the blame. A possible solution would be for the LSC to withhold funding at first instance from suppliers who are bringing cases which appear to be without merit, rather than pursue a retrospective scheme.

45. **If the Government does pursue the idea of retrospective funding, and if both appellants and suppliers are not to be adversely affected we conclude that the merits test will have to be set at a lower level. Where an appellant has reasonable prospects of success in demonstrating that the AIT has made an error of law and the result of that decision would be that he or she could be deported to face death, torture or other degrading treatment, he or she should not be denied justice by a funding scheme which proposes the requirement to demonstrate more than this. The Government dropped the 'ouster clause' which restricted appellants' access to the courts. It is important that the legal aid system should not be used to restrict legitimate appeals.**

29 Ev 48

Conclusions and recommendations

1. Given the host of recent Government initiatives in response to the issue of asylum and immigration, we are unhappy that practitioners have not been given the opportunity to absorb previous changes before another controversial funding policy is introduced. The background of constant change means that it will be difficult to see which initiatives are successful. The continual introduction of funding restrictions is likely to deter practitioners from representing people in immigration and asylum appeals. (Paragraph 12)

2. Retrospective funding is only being proposed in asylum and immigration cases. Its introduction is likely to have a negative impact on appellants and lawyers, since the uncertainty involved will mean that even good quality suppliers may have to make a commercial assessment of the level of risk they are taking and may well refuse to represent some clients who have reasonable cases. (Paragraph 22)

3. The introduction of a retrospective merits test to legal aid funding would be an unprecedented step. The Government has not explained why all persons who apply for judicial review in a regular hearing are considered 'successful' when they obtain reconsideration, whereas those who demonstrate an error of law by the Asylum and Immigration Tribunal (AIT) before a High Court judge in asylum and immigration proceedings may be considered 'unsuccessful'. (Paragraph 30)

4. We believe the level of the test is, in any event, set too high. It might be acceptable for lawyers not to be paid if the case they brought was entirely without merit, or had never had more than a 50% prospect of success. By raising the threshold it is likely that legitimate appellants will be disadvantaged. Unless a case is completely clear cut, it is difficult to see how lawyers will always be able to make an accurate assessment that a case had "significant prospects of success". Lawyers considering whether applicants face possible human rights concerns, if deported, should not have to gamble on funding decisions. (Paragraph 31)

5. We are concerned about the impact on suppliers which will result from the implementation of these proposals. Most suppliers in this area are small businesses or charities who may struggle to cope with an unexpected drop in income. The move to reduce fees to CLR rates before introducing the risk premium seems to be another attempt to reduce spending on this area of law. It is not clear that the Department has answered the concerns of practitioners about risk sharing and appeals relating to costs. (Paragraph 42)

6. If the Government does pursue the idea of retrospective funding, and if both appellants and suppliers are not to be adversely affected we conclude that the merits test will have to be set at a lower level. Where an appellant has reasonable prospects of success in demonstrating that the AIT has made an error of law and the result of that decision would be that he or she could be deported to face death, torture or other degrading treatment, he or she should not be denied justice by a funding scheme which proposes the requirement to demonstrate more than this. The Government dropped the 'ouster clause' which restricted appellants' access to the

courts. It is important that the legal aid system should not be used to restrict legitimate appeals. (Paragraph 45)

Formal minutes

Tuesday 15 March 2005

Members present:

Mr A J Beith, in the Chair

Peter Bottomley	Mrs Ann Cryer
Ross Cranston	Dr Alan Whitehead

The Committee deliberated.

Draft Report [Legal aid: asylum appeals], 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 45 read and agreed to.

Conclusions and recommendations read and agreed to.

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

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

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

A paper was ordered to be appended to the Minutes of Evidence.

Ordered, That the Appendix to the Minutes of Evidence taken before the Committee be reported to the House.

[Adjourned till Wednesday 16 March at 9.30am

Witnesses

(See Volume II)

Wednesday 9 February 2005

Tuesday 1 March 2005

List of written evidence

(See Volume II)

Reports from the Constitutional Affairs Committee

Session 2003–04

First Special Report	Protection of a witness – privilege	HC 210
First Report	Judicial appointments and a Supreme Court (court of final appeal)	HC 48
	Government response	*Cm 6150*
Second Special Report	Government Response to the Fourth Report on Immigration and Asylum: the Government's proposed changes to publicly funded immigration and asylum work	HC 299
Second Report	Asylum and Immigration Appeals	HC 211
	Government response	*Cm 6236*
Third Report	Work of the Committee 2003	HC 410
Fourth Report	Civil Legal Aid: adequacy of provision	HC 391
	Government response	*Cm 6367*
Third Special Report	Further Government Response to the Second Report on Asylum and Immigration Appeals	HC 868
Fifth Report	Draft Criminal Defence Service Bill	HC 746
	Government response	*Cm 6410*

Session 2004–05

First Report	Freedom of Information Act 2000 — progress towards implementation	HC 79
Second Report	Work of the Committee in 2004	HC 207
Third Report	Constitutional Reform Bill [*Lords*]: the Government's proposals	HC 275
	Government response	*Cm 6488*
Fourth Report	Family Justice: the operation of the family courts	HC 116