House of Commons

Constitutional Affairs Committee

# Legal aid: asylum appeals

## Fifth Report of Session 2004–05

### *Volume II*

*Oral and written evidence*

*Ordered by The House of Commons*
*to be printed 25 January and 15 March 2005*

**HC 276-II**
Published on 23 March 2005
by authority of the House of Commons
London: The Stationery Office Limited
**£12.00**

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# Oral evidence

## Taken before the Constitutional Affairs Committee

## on Wednesday 9 February 2005

Members present:

Mr A J Beith, in the Chair

Peter Bottomley
Mrs Ann Cryer
Ross Cranston

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*Witnesses:* **Roger Smith,** Director, JUSTICE, and **Emma Saunders**, Tribunal Team Leader, Refugee Legal Centre, examined.

**Chairman:** Mr Smith, Director of JUSTICE, it is very nice to see you again. Ms Saunders, from the Refugee Centre, it is very good to have you with us. There might be at least one interest to declare.
**Ross Cranston:** I am a barrister and recorder.

**Q1 Chairman:** We have been doing some work on this issue for some time and things are coming to a crunch. An announcement from the Government could be upon us any day. We are therefore quite anxious to get at what has been a moving target. Perhaps we could start by establishing what in your view are the advantages and disadvantages of retrospective funding for applicants challenging decisions of the Asylum Immigration Tribunal?
***Roger Smith:*** I think there are three potential problems with these proposals as a whole and retrospectivity is at the core of them. First of all, it seems to me little short of bizarre that in this tiny corner of the Legal Aid scheme—a scheme which to both parties' credit has been in the process of a significant reform which you can date back to probably the mid-Eighties and which has been relatively coherent about establishing quality standards and establishing contracting—we now have, and I do not particularly like it, in the criminal area experiments with competitive tendering on the basis of a quality floor and notional preferred suppliers whose quality is safely assured to the providers. Although politically charged, you have the announcement of a totally different regime which is completely out-of-sync with what is going on elsewhere and does not really make sense with what is happening elsewhere and with the general trend of policy. Secondly, you are MPs, you will know that asylum is a major political issue and you will have your own views on substantive asylum provisions and whether they should be tightened or not. However, what is happening here is really somewhat sinister because what you are getting are provisions which could be construed and might well be intended to be chilling and intimidatory of the professionals who are acting for clients. It seems to me perfectly proper for a Government to say it wants to tighten the appeals system, it is properly proper for the Government to have a public debate about asylum law as a whole, but it is improper to put improper barriers to the rights of individuals to appeal through such procedures as there be. Thirdly, I think there is a final concern which links with a wider picture that you will be very much concerned with as the Constitutional Affairs Committee, which is that as the Constitutional Affairs Department builds its momentum and builds its identity to what extent does it remain the champion of justice, that was the Lord Chancellor and his Department and to what extent are we seeing it recasting itself as the handmaiden of the Home Office?

**Q2 Chairman:** Why do you think this is being done in this particular area of law? Is it because there are more cases without merit in this particular area of law, asylum and immigration? Is it because of the political significance of the issue that you mentioned earlier? Is it a stalking horse for the introduction of this kind of thing much more widely across the Legal Aid provision? What do you think?
***Roger Smith:*** It is bizarre if it is a stalking horse because it is completely contrary to the rest of the way policy goes. I think you could take two different views. You could say, like the Criminal Defence Service Bill that you looked at previously, this is another example of short-term shoddy policy making by a department that shows it is not really up to the task and cannot hold to a long-term look at development of Legal Aid policy, although it keeps on saying it is and promises a fundamental review. It is noticeable that after your report and other comment the Criminal Services Bill was significantly revised and ended up in the form that it should have been presented in. Secondly, you could take a conspiracy-type view, which is that the word has gone out that this is an unpopular group and let us get asylum seekers any which way. I would not choose between the two, both are pretty unattractive.
***Emma Saunders:*** The Refugee Legal Centre would certainly not agree with the proposition that there is a problem with unmeritorious appeals. We forwarded to the Committee some of our statistics. If we are looking at higher level appeals here from initial adjudicator decisions, I think our statistics show that we enjoy significant levels of success in that I think some 70% of our applications for leave are granted. So when challenging those initial adjudicator decisions as arguably flawed for error of

law 70% of the applications are granted. That is double the national average. We would say the reason that there is this discrepancy is that there is increasingly a shortage of good quality providers and when an individual does have a quality provider, such as the RLC, the results are clear. There are a lot of very meritorious cases that we see still without representation that we are not able to accept ourselves, we do turn people away. We would certainly take issue with the notion that this is a system that is being abused by appellants in any significant way at all.

**Q3 Chairman:** You are not saying that nobody abuses the system or pushes the appeal system beyond the limit of what might be thought objectively reasonable, are you?
***Emma Saunders:*** The word abuse is a highly charged one. The system at present only allows individuals to go further if they are granted permission to do so. I think this point was made very well by Mr Justice Ouseley when he gave evidence before you in the context of the last Bill.[1] By definition, if a case is granted permission for it to be taken higher it cannot be seen as abusive. Going back to our statistics, if 70% of applications that are submitted by us as a good provider are granted there are 30% that are unsuccessful, but I do not think that could be argued as abusive.

**Q4 Chairman:** Is there not a further factor in the assumption in that the longer you are here the less likely you are ever to be removed and therefore if you can pursue the case through the legal system for as long as possible you are thereby, even if you lose, enhancing your chances of staying?
***Emma Saunders:*** It is very important to state that no representative can pursue a case that is hopeless through the system. As it stands at the moment there are stringent checks and balances and not least there are professional obligations on the part of professionals, so cases have to be continually subjected to a merit scrutiny as they proceed through the process. For example, if there is a political about-turn in the country of origin that renders a case unarguable a good representative would be under a professional obligation to advise they could no longer represent. So it is certainly not the practice of any good provider to spin out cases because quite simply professionally it is anathema for them to do so. As to there being a very small minority doing so, obviously it is outside my immediate knowledge because, as I say, that is simply not how we work.

**Q5 Ross Cranston:** I guess that figure is quite striking, is it not? Okay, fine, you get 70% in terms of your applications for permission, but if the national average is 35% and you are running a practice with conditional fees, you would be out of business, would you not?
***Emma Saunders:*** I am sorry, do you m ean us as the Refugee Legal Centre?

**Q6 Ross Cranston:** No. If that is the national average and you are only going to win 35% of cases, you are in real trouble.
***Emma Saunders:*** The Refugee Legal Centre, even on a 70% analysis, would be in real trouble as I think we have endeavoured to set out before you. The concern of the organisation is that we regularly see people who have been badly let down by representatives. So I would not accept that 35%, although it is not particularly high, is necessarily reflective of the quality of cases. It is a very real concern that people are being let down by perhaps mediocre advice or just simply insufficient advice.

**Q7 Ross Cranston:** And that is after all the steps taken by the Law Society and so on to try to increase the quality.
***Emma Saunders:*** The Accreditation Scheme is a very new proposal. I think it is fair to say it would be impossible to gauge its success yet.

**Q8 Peter Bottomley:** If there were a 25% risk premium on a 70% success rate you will still get back less than 100% of your costs, will you not?
***Emma Saunders:*** Yes, quite significantly less. It is a slightly complicated analysis and I will not go through it now, but if there is any aspect of our statistics that is unclear I would be happy to clarify it later on.

**Q9 Peter Bottomley:** For the record, if you have more than a two-thirds success rate with a 25% risk premium you cannot get back all your costs, can you?
***Emma Saunders:*** No.

**Q10 Ross Cranston:** I was going to ask you about the analogy of conditional fee agreements because you say in your submission that you do not think that that is the proper analogy, but even under the Government's proposals you are sometimes going to get your costs and you are sometimes going to be paid even though you have not won. So there is not a strict analogy, is there, between conditional fee agreements?
***Emma Saunders:*** Our reading of the regulations that are proposed under the Statute is such that it would be an exceptional case that does not win and that is granted funding.

**Q11 Ross Cranston:** If it was a generous test and let us say you go into the High Court and you are then sent back to the adjudicator who says, "Sorry, you're not going to win", you can still get paid, can you not? Even though you lose, you are not excluded from being paid as long as you meet the test, are you?
***Emma Saunders:*** Yes, assuming the test is a fair one. This is even assuming that conditional fees are a good idea.

[1] *Note by witness:* Second Report of Session 2003–04, *Asylum and Immigration Appeals* (HC 211-II), Q106ff

**Q12 Ross Cranston:** The test is quite a high test.
***Emma Saunders:*** Yes.

**Q13 Ross Cranston:** There are the two options, but what would be the appropriate test in your view? Would it be the existing 50:50 test?
***Emma Saunders:*** I think it should mirror the CLR test under Legal Aid. 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 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, ie that there should be proper scrutiny of a case raising important human rights issues? What it will mean is that you are denied a first fair hearing, but unless you can state your case as an absolute certainty you are not given redress, you are not given the opportunity to have that first fair hearing again.

**Q14 Ross Cranston:** I think we could argue about that. Mistakes are made and that happens in all areas of justice. You might argue in this area it has more significant ramifications. Let us say we did not make an exception in this area, we just operated in the normal way but we imposed the sort of significant prospect of success test, would that be acceptable?
***Emma Saunders:*** We would have very real concerns that it is just ill-suited to this area of justice. It is very difficult for providers to assess at the outset the prospects of success in a case that usually hinges on the uncorroborated testimony of very vulnerable individuals. Quite often that vulnerability will render them not very good witnesses in a conventional sense. It is very rare that there are other witnesses to back them up. It is very rare that there is additional objective evidence other than an analysis of general country conditions. Providers should not be forced into predicting out-comes of success, as at the moment they are not required to do so: it is entirely right given what is at stake and given the difficulty of predicting when you have such a vulnerable evidential base on which to go forward.

**Q15 Ross Cranston:** We come back to the 35% figure. That is the thing that worries me. Say you had a prospective test and say it was the existing 50:50 test, how does the Legal Services Commission operate so as to avoid this figure of 35% success? If you were stood in their shoes, how are you going to do it? I think you made the point there are still problems in terms of the quality of representation.
***Emma Saunders:*** Yes. Certainly there are some very good and very committed people and some less committed ones. The Legal Services Commission has audit powers. It is able to keep statistics on the success rates of individual representatives and if there are representatives who are consistently misjudging the likelihood of success in cases then it should target its powers in looking at those representatives rather than sending a cannonball into the sector.

**Q16 Ross Cranston:** So they have to be tougher?
***Emma Saunders:*** Where appropriate, yes, because we think that the applicants themselves would benefit if there was targeted scrutiny. If the Refugee Legal Centre is achieving 70%, we would suggest that that probably is mirrored in the good providers. So perhaps it is just a case of making the less good people better.

**Q17 Ross Cranston:** And the 35% is only an average.
***Emma Saunders:*** Exactly.
***Roger Smith:*** There are three ways you can deal with the quality issue and I do not think anybody would justify the taking of a case which was totally unwarranted. You do not get Legal Aid for that under the civil scheme, you can not get it under the criminal scheme. It seems to me that it is a reasonable policy objective to knock out cases which are totally unwarranted and where the lawyer involved really understands there is no chance, indeed the client may do as well. That seems a reasonable policy objective. There are three ways of doing that. One is the way the civil Legal Aid traditionally did it and still does, ie on a reasonable prospect of success and Emma is saying that in these kinds of cases it is extremely hard to judge because you do not know how your client is going to deliver. There are all sorts of uncertainties about that, but you can do it on that basis and provided you accept the difficulties of doing that, that is only hearing one side. You also have to bear in mind that everybody agrees that initial decision making by the Home Office is not very good.

**Q18 Chairman:** We have observed that ourselves.
***Roger Smith:*** A lot of people have said it. I am glad that you have as well. That is acknowledged and that is one of the root problems in this whole area, that the Home Office have not been up to it in years. They are getting better but they have not got there yet. You can apply the civil Legal Aid type of test, reasonable prospects, with allowance for the judgment you have to make as a lawyer, ie you do not hear the other side and you do not know what is going on from their point of view. Alternatively, you can go the way that all the rest of civil Legal Aid policy as it was is going, which is towards a contracted preferred supplier with a whole series of quality criteria coming into the Commission's judgment on whether you are a good provider or not. On that basis I have no doubt that the Refugee Legal Centre or the other practitioners you are going to hear from, who are well known in the field, would pass with flying colours, and you would cut out those

you might think would be abusing the system. This is the most illogical way of doing that because you are giving an uplift on cases which should be taken. If this thing works perfectly it will cost the government more, because you only get the uplift on cases which it was reasonable to take, either because they won or it was subsequently regarded that they were reasonable. It is not just a question of retrospectivity—and you may be coming to this—it is also uncertainty, you just do not know whether you are going to be paid for them and that de-stabilises the finances, making it tricky for the RLC and making it worse for private providers.

**Q19 Ross Cranston:** You do not know with conditional fee agreements.
***Roger Smith:*** Yes, that is right. Conditional fee agreements raise a whole lot of other issues; there are ethical issues about them that I think have not been properly explored.

**Q20 Ross Cranston:** They are working successfully in other areas.
***Roger Smith:*** That takes you to the economics of the insurance market and so on. It is almost not proper for Government, it is silly for Government to pay a premium when it does not need to do so.

**Q21 Peter Bottomley:** If we can go through the stages, if someone wants to make an appeal the advice centre lawyer has to decide whether, having heard one side of the case, it is worth taking forward, and they ought to take the approach of at least is it as likely as not that it would be justice to take it forward. The second stage comes in when they get some idea of what the Home Office has to say, the other side of the case so to speak, because they are the only two places where the evidence comes from the appellant and presumably from the Home Office. Is there a stage where there is reconsideration by the adviser or lawyer representative, having heard the other side, to say we cannot take it further because the evidence is such that you cannot do it? Would it not be more sensible to have a system where you depend on reasonably experienced advisers, who are always likely to come into the field, who can actually do the first stage and the second stage and then start asking why, if it goes on, there are still more cases than not that do not succeed when the appeal is actually heard?
***Emma Saunders:*** I am not sure I quite understood the question.

**Q22 Peter Bottomley:** The first thing we heard is that if an appellant comes to seek advice a decision has to be taken by the adviser as to whether it is worth taking on at all, and they can only do that on what they hear from the appellant because they have not necessarily got everything from the Home Office; they make a judgment, is this a runner? The second question then, when you know all that the Home Office have to say, is to make a decision, "Now we have heard all that the Home Office have to say, you have not got a chance and I am not going to do it." That, presumably, is a lower cost than actually having gone to a hearing.
***Emma Saunders:*** Yes. As I said earlier, we are under a contractual duty, under the terms of our contract with the Legal Services Commission to review the merits at any significant stage and in any event if there is a change of circumstances. To take your example, an individual comes in and says "I would like you to represent me in my claim for asylum"—and initially you will only have their side of the story. Once they are then served with their refusal by the Home Office that will set out the reasons for refusal. Putting to one side for the moment the quality of those decisions not being high at all, if it does raise real problems for that individual and that individual is not able to answer those, then the provider or the Refugee Legal Centre would say "We are sorry, matters have moved on, there is not merit now in pursuing this." Equally, continuing through the system, the individual goes to the hearing in front of the adjudicator and perhaps the evidence comes out differently or badly, particular points are made by the Home Office, there is even a change in circumstances, again when it comes to the higher appeals team in the Refugee Legal Centre we automatically merits-test every case at that stage to see whether or not we think it is proper to then pursue it to the higher tribunal. It should be said about 35% of cases at that point we do merits-test out, because we decide, perhaps because of the way the evidence has been at the hearing, perhaps because of a change of circumstances in the political situation, whatever it may be—

**Q23 Peter Bottomley:** It is no longer a runner.
***Emma Saunders:*** It is no longer a runner, it would no longer be in our interest, professional or otherwise, to pursue the case.

**Q24 Chairman:** You have given us quite detailed written evidence about the potential impact of this on the service that you provide. Assuming things were to go as you feel they might go, and discounting for the moment the prospect that the premium might go down to the surprising extent Mr Smith suggested, where the Government is actually losing money on the whole operation and it is costing them more, what would you as an organisation have to consider doing, if the Government went ahead with its plans as so far described?
***Emma Saunders:*** We would consider very carefully whether, in good conscience, we could remain within the system. If we were having to say to individuals, who we believed have a real prospect of success, having been refused by an adjudicator, that nevertheless we were not able to take the risk with our funding of representing them further, there is a five day time limit in which to refer out and our experience shows it is very difficult to refer cases out in any event once they reach higher stages because there is a shortage of good quality providers. If, ultimately, as we think to be the case, we would be leaving people high and dry, as an organisation we would have to question whether the system really

was delivering justice at all and, if not, as would appear to be the case, whether we in good conscience could continue to act for people in a very partial way.

**Q25 Chairman:** How would you resolve that? Would you pack up and go home or would you say we do not go beyond the appeal stage?
***Emma Saunders:*** That would obviously be a matter for discussion with the organisation and trustees, but it would be a very, very difficult decision to make and we would be very fearful that it would leave already increasing numbers of people who are badly served or not served at all by representatives, even more vulnerable without our services.

**Q26 Chairman:** Thank you both very much, unless there is anything you especially want to add.
***Roger Smith:*** Just to say that with the Centre what you have got is an ultra-proper provider who is delivering a service which everybody accepts is high quality, under a contract situation, and the question to ask it seems to me is why does the Commission not get the same level of success out of its other providers. There will be particular reasons for that; other providers will act for particular communities which are more difficult and so on, but in a sense here is a provider, we accept the provider is not an abusive provider, is not swinging the system in any kind of way, you are getting a reasonable result—70% is not a bad result in any area of law, I think most lawyers would be happy with a 70% success rate just as a crude indicator of personal success—and contracts are the way to do that. That was how they had been sold to the rest of the system and you just do not need to go to the uncertainties of retrospective payment.

**Q27 Peter Bottomley:** The dilemma that the Refugee Legal Centre might anticipate is essentially the same one that the Government should be facing, which is saying to someone who is more likely than not to be successful in appealing, in practice you cannot appeal. That is essentially what it comes down to, is it not?
***Emma Saunders:*** Yes.
**Chairman:** Thank you very much indeed. We have some more witnesses and I am going to invite them to come to the table.

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*Witnesses:* **Mark Henderson,** Bar Council, **Vicky Guedalla,** Executive Committee, Immigration Law Practitioners' Association and **Alison Stanley,** Immigration Law Committee, Law Society.

**Chairman:** Mr Henderson from the Bar Council, Ms Guedalla from the Immigration Law Practitioners' Association and Ms Stanley from the Immigration Law Committee of the Law Society, thank you very much for joining us this morning. You have heard the progress of evidence so far, which has been very informative, and I am going to invite Mrs Cryer to question you.

**Q28 Mrs Cryer:** What proportion of appeals which are currently being brought are completely without merit would you say?
***Alison Stanley:*** If I can try to answer, that is an incredibly difficult question to answer because I do not think the statistics are there. There will be appeals brought by individual appellants who are not receiving public funding who are doing it themselves, or who are paying privately, although certainly in asylum I think that is going to be the distinct minority because the vast majority of asylum seekers are not working and do not have the funds to pay for legal representation. I do not think the statistics are there, because I am not sure that the appellate authority distinguishes between publicly funded cases and privately funded cases or litigants in person. It is a very interesting question and I am not sure that we know the answer to it.
***Vicky Guedalla:*** I can only say from my experience in the past year that I have needed to withdraw CLR in two cases where I had originally granted it because it emerged in the course of events that they were in fact without merit. That is only two.

**Q29 Mrs Cryer:** Out of how many?
***Vicky Guedalla:*** In about 50.

**Q30 Mrs Cryer:** Two out of 50 that you have come across?
***Vicky Guedalla:*** Yes.

**Q31 Mrs Cryer:** If appeals are being brought that are entirely without merit, this would appear to indicate that the Legal Services Commission's assessment of a case's merits is an inadequate safeguard. In those circumstances, how would you address any potential abuse of the system?
***Vicky Guedalla:*** I am not sure that that premise is right because, as Alison said, you have no statistical way of distinguishing between the publicly funded and the not publicly funded cases. I notice, for example, that in the DCA's own evidence to you it is conceded that in the past financial year since the current, more rigorous checks were introduced on 1 April last year, publicly funded appeals have had a higher success rate than previously, so it appears that the measures already in place are beginning to bite.

**Q32 Mrs Cryer:** And that the Legal Services Commission are getting it right in their assessment of cases?
***Vicky Guedalla:*** Again, I cannot give you the statistics but it is certainly my impression that that is so.
***Mark Henderson:*** You were positing a bad provider bringing appeals that have no merits; under the system that has just come into place that could not happen because those providers that have not

proved themselves are not given devolved powers to assess the merits. We also have accreditation which will only start to bite later this year, so all these measures should remove the particular problem that you speak about. Certainly, from the Bar's point of view, we had noticed steady improvement in the quality of instructions and the work being done on these appeals, though that is now threatened by the legal aid changes that are taking place.

**Q33 Mrs Cryer:** Of course, you have already said it may not be a bad provider, it may just be that it is a misled provider in that you have uncovered reasons for not going ahead. Have you anything to say about that, about the number of people who mislead their representative?
***Mark Henderson:*** My experience reflects that of Vicky's. Very few clients are found to have sought to persuade their representative to take the case forward on a false basis. When that is discovered—and it usually will be—then the representative must and normally will cease to act, and that person will not get any further public funding. It is important to say that the legal aid changes which are being proposed now will not address that problem because they specifically recognise, as must be fair, that a practitioner can only act conscientiously on the information that he has or should reasonably have learned.
***Alison Stanley:*** Can I just add in on that point about the client who wilfully misleads the representative, one of the other changes that was introduced back in April last year was a unique file reference number which follows the client around.

**Q34 Chairman:** Our recommendation.
***Alison Stanley:*** Exactly so. It is working; obviously, with asylum, the Home Office reference number is normally given very rapidly and so, for example, entirely anecdotally, just last week we were misled by an individual who claimed to be under 18 and then admitted, after at least three days of very strict questioning by a colleague, that in fact he was over that age and indeed had spent some time in another European country, so entirely leading us up the garden path. We obviously stopped acting for him and he will not get representation from anybody else because his unique file reference number will follow him around and the LSC will not permit further funding. That aspect of it, therefore, is working to stop what I think is probably a very small number of individuals who are wilfully trying to run the system.

**Q35 Chairman:** I am not sure that this follows through to the stage at which you are operating, but certainly from our observations of initial interviews in post—in India, for example—we found that people quite often undermined their cases by giving false information, under the mistaken impression that this was what you had to say in the circumstances. I am talking about information that was not actually relevant to the merits of their case, but which fatally undermined the entry clearance officer's perception of their honesty, and it appeared to be because they felt they had to show that they had got the money for air tickets or whatever it was. These were generally people of very little education making what appeared to be genuine family applications to join other members of the family. Has that kind of thing ceased to be a factor at the stage you are dealing with? Are you dealing with, when it happens, the real wilful deceiver?
***Vicky Guedalla:*** Either the wilful deceiver or the panicking exaggerator. All of this is an argument for access to high quality representation at every stage of the process. If it gets as far as appeal and there are attempts to deceive, then it is more likely to be flushed out by me or by Alison and her colleagues than if there is no such access to quality, ethical advice, and our anxiety is that these proposals, coming on top of the other rigorous clampdowns recently, are going to drive more and more high quality practitioners out of publicly funded immigration work, and are going to have an effect which is the reverse of what is the Government's expressed intention.

**Q36 Mrs Cryer:** What sort of impact do you think the new proposals, if implemented, would have on appellants?
***Vicky Guedalla:*** If it has the effect that we think it is going to have on the availability of quality practitioners, it is going to have the effect that more and more appellants and would-be appellants are going to be unable to find high quality representation. They are going therefore to be driven into the arms of the unscrupulous who still, despite all efforts, are out there in the community, the less scrupulous or less bold practitioners who are afraid to take on their cases at risk under this scheme may take them on for money, so it may backfire in that way as well.
***Mark Henderson:*** We are very concerned that these measures will enable the Government to do by the back door what it failed to do through the front door during the passage of the 2004 Act, so it is very important to remember how these provisions were hurriedly cobbled together after the Government accepted that it could not get its ouster clause through Parliament, largely because the judiciary had made quite clear—and we quote some of their comments in our written evidence—that it was contrary to the rule of law and that everybody must have access to the courts. If you are a British citizen seeking to bring judicial review proceedings and you do not get legal aid, then you still have a chance to get your case before the court—you speak English, you understand the decision that you are judicially reviewing, you will be able to draft some grounds, albeit not in legal language, and you will have a right to a hearing, and the High Court judges treat very seriously their duty to elicit the necessary facts and points at an oral hearing. This procedure for access to the High Court is very different—asylum seekers generally will not speak English, they will not understand the determination and in the five days that are available and with the restrictions on funding on solicitors, they are very unlikely even to have it translated to them. Even if they did have it translated they would, presumably, only be able to

do grounds in their own language—the court presently has no facilities to translate these.The procedure is on a point of law only, they will not understand that—and there is no entitlement to an oral hearing. As far as I know the DCA has not suggested that there is any possibility that an asylum seeker could have effective access to the High Court unless he was legally represented, but the effect of these proposals is that asylum seekers who do not have completely unmeritorious cases will be denied access to the High Court. We do think that that is the ouster clause by the back door.

**Q37 Mrs Cryer:** It came out in what you were saying that there is a crucial role for an interpreter. How does the representative come to know the case if there are no translators?

***Alison Stanley:*** There are, and they are currently funded and under the new proposal it is suggested that those external disbursements will be funded, whatever the outcome of the case. You have to work through an interpreter in order to take instructions, it is impossible otherwise.

**Q38 Mrs Cryer:** In the courts there would be a translator.

***Mark Henderson:*** The Court Service provides interpreters at hearings.

**Q39 Chairman:** This is a paper exchange initially, is it not?

***Mark Henderson:*** For the appeals before what will be the Asylum and Immigration Tribunal, which are determined at a hearing, the court provides an interpreter, firstly to interpret between the appellant and the court and, secondly, because it is accepted as a matter of fairness that the appellant is entitled to have the full proceedings translated to him. The High Court procedure for statutory review is different; there, there are no translation services provided by the court and the necessary interpreting services which are required so that the appellant can understand the proceedings and give instructions are provided by the solicitors, funded by the Legal Services Commission.

***Alison Stanley:*** Can I just add in—and again this is anecdotal because so far we have not been able to survey all suppliers—in terms of a decrease in representation of suppliers to individuals it is quite clear that it is already happening because we have now got information that there is only going to be one firm left in the north-east that is going to be supplying legal aid, no firms are going to continue in Leeds, there is a diminution in the number of suppliers in London—and that is often not that firms are pulling out completely, but they are altering the ratio of privately funded work and publicly funded work. The main supplier in Birmingham, which has an excellent reputation, is reducing the proportion of legal aid work; currently they do 70% publicly funded work, they are reducing it to 30%.

**Q40 Chairman:** All of this is the result of the proposals we are now discussing, so this is just context.

***Alison Stanley:*** This is the context, but because that is happening there will be an increase in unrepresented clients, so the scenario that Mark has given of unrepresented clients trying to work the system is going to be a real one and that is certainly going to have an impact on the work of the High Court

***Vicky Guedalla:*** The comment that we have from one of our members who no longer does publicly funded work—his work is all privately funded—is that he says of his previous experience: "If I had not had the training and experience I acquired at [he names a very highly reputable firm that he worked with previously] I would not be able to competently undertake asylum and human rights work on a private basis now. As firms stop doing this work, these skills and experience will become scarce or die." A comment from another member at the other end of her career, a category 2 accredited case worker under the new scheme who is deciding not to continue and qualify as a solicitor: "I am not interested in a career involving substandard work for vulnerable people." The Committee really should not underestimate the devastating effect of these proposals on morale, coming on top of everything else and, as has already been mentioned, the sheer financial uncertainty. We are, most of us, small business-people, medium-sized businesses, with salaries and overheads to pay. An analogy has been made with conditional fee agreements in other areas of work, but the margin of error, the margin of profitability in PI work is infinitely greater than it is in this area of work. It is already cut down to the bone and the amount of bureaucracy that we have to undertake, unremunerated, to deal with the Legal Services Commission has increased multiply, particularly since April of last year. I have endured that, I do not say entirely uncomplainingly, but I am prepared to tolerate it because I perceive it to be part of a necessary good husbandry endeavour by the Legal Services Commission to improve standards and to keep a grip, but it does not leave any slack for these proposals to be added on top and squeeze me even further.

**Q41 Chairman:** These proposals must only represent a small proportion of the work that you and other practitioners do in the immigration appeals field at the highest level.

***Vicky Guedalla:*** They do, but if you are doing this work properly, if you are delivering an hour's work for every hour billed, there is so little slack that you really cannot afford it. If this were to constitute 5% of my work, I cannot afford to be not paid for 5% of that which I am currently paid for because I already have to spend such a high proportion of my time doing unremunerated bureaucratic work to help the Legal Services Commission in its administration of the system. It cannot be done.

***Mark Henderson:*** For many barristers this really will have a very substantial economic impact, partly because they are sole practitioners and so cannot

share the risk with colleagues, partly because quite often an initial appeal will be done in-house by the solicitors' firm and a barrister will be instructed at the stage of the High Court proceedings. The DCA has been saying that this is not a no win-no fee scheme, but on the present proposals that is exactly what it is for the High Court proceedings because the DCA proposes—for, we respectfully submit, no good or valid reason—drastically circumscribing the High Court judge's power to award costs where the High Court proceedings are unsuccessful. The Bar Council had a consultative meeting at which more than 30 immigration barristers were consulted about their views, including a substantial proportion of the junior Bar. Certainly the judiciary and the IAA value the junior Bar and we had also understood the Legal Services Commission, because they had placed considerable resources into training junior barristers because they thought they provided a cost-effective and quality means of providing advocacy at appeals. Not one of those barristers thought their practice would be economic under the DCA's proposals as they currently stand.

**Q42 Peter Bottomley:** Essentially what we are hearing is that the Department of Constitutional Affairs is becoming a department of administrative complications and unfair funding to achieve the result which Government could not achieve when they wanted the ouster clause. Judges and Parliament in effect said this would not be just, so the Department has come forward with a different scheme and, by the way, separately is proposing that those judges should not remain in Parliament so presumably the same thing could not happen again. Can I just go back to what Mark Henderson was saying, just for a moment? If I am a potential appellant who cannot persuade a provider to take on my case, I am left without English in most cases, without legal training, trying to write something which the High Court can look at on a paper basis to decide whether I should be able to have my appeal, is that roughly right?
***Mark Henderson:*** And having a determination in front of you in a foreign language and wondering who is going to translate for you.

**Q43 Peter Bottomley:** Perhaps we ought to say to the Department of Constitutional Affairs could they take one of their non-legal eagles and ask them to prepare something in French—not North Serbian Croat but in French—in similar circumstances and see what they come up with. They would then get a French judge to look at it and say whether they understood it, let alone whether they could make a decision. Would that be a fair way to approach it. Can I move on to the Legal Services Commission? We have heard that even if the Government did not bring forward these proposals, things might be roughly the way they were, an improving trend with fewer cases of less merit being taken forward?
***Vicky Guedalla:*** Yes.

**Q44 Peter Bottomley:** It might be sensible, would you say, that the Government actually sought to drop these proposals for a time and let the present changes work through for a year or two and see what happened. Would that be a substitute?
***Vicky Guedalla:*** The accreditation scheme does not kick in fully until 1 April.
***Alison Stanley:*** Certainly, we would say that these are premature, they are not obliged to bring in these arrangements yet and it would seem to the Society to be eminently sensible to let the changes bed down and to see if the new AIT does result in an improvement in decision-making, which we all hope that it does. If it does then the review process will not be overwhelmed; if it does not result in an improvement in decision-making then surely it would be contrary to the interests of justice for these appellants to be denied public funding. Certainly, the new accreditation scheme which is compulsory imminently (in April) has been a very stiff test and I am certain it will have sorted out a lot of sheep from goats in that respect. The other factor of course is the drop in the number of asylum applications, which inevitably will lead to a drop in the number of appeals.

**Q45 Peter Bottomley:** If we have a drop in the number of asylum applications, we presumably can expect that every case which is granted on appeal or review means that the adjudicator was not able to make the right decision in the first place.
***Vicky Guedalla:*** Yes.

**Q46 Peter Bottomley:** And presumably we should expect the adjudicator to be making more right decisions and making more grants of applications when they are justified.
***Vicky Guedalla:*** Yes.

**Q47 Peter Bottomley:** Do you think it would be acceptable for the Legal Services Commission to provide funding when there is a significant prospect of success rather than 50/50? Could you be fairly be asked to do that, or ought they to grant it on a 50/50 basis?
***Vicky Guedalla:*** I agree with the evidence of the president of the AIT in this regard, Ousley J, who said that essentially one should apply the same test for whether to grant funding as is applied presently by the High Court or the AIT in considering an application for a review. That involves realistic prospect of success at the ultimate hearing; I would say that that means that there are significant prospects. It is always artificial to express these things in percentage terms, but providing that significant prospects was reasonably understood I do not think we would fight over the terminology.

**Q48 Peter Bottomley:** If at the moment the risk premium is supposedly 25%, that suggests you have to have a four in five chance of success for the thing

to come out at 100% of costs. If you add on a quarter to 80% you get to 100%. We are presumably thinking of significant prospects of success being way below that.
***Vicky Guedalla:*** Yes.

**Q49 Peter Bottomley:** Without going into percentages, more likely than not, rather than two out of three cases will be granted.
***Mark Henderson:*** Yes. We understand that the DCA at one point wondered whether in percentage terms they should be looking at around 70% as the threshold. It would be extraordinary in this field, where questions of life and death are at stake, to, as we have discussed, effectively deny someone access to the High Court whose case was more likely than not to succeed—and then to remove him, where on that basis, he is at fairly substantial risk of being killed.

**Q50 Peter Bottomley:** Are there objections in principle to introducing retrospective funding?
***Alison Stanley:*** Certainly there are, I think we can all say that. It is going to be an impossible task for a judge to make a decision on funding at the end of the case because they will have to participate in an extraordinary feat of mental gymnastics to put him or herself back into the position of the adviser at the beginning of the case with the information that was then available to make an assessment of whether or not it was significant, if it goes for the first option. I would say that in itself "significant prospects of success" is a very ambiguous phrase and it is not at all clear what it means, and if it means reasonably arguable then we would have no objection to it, but it is not entirely clear what it does mean. If the High Court judge considers that a case is reasonably arguable and that was sufficient to send it back, then that should be enough to justify funding the case. It is absurd to expect a subsequent hearing to determine whether or not a case should be funded; if the High Court judge considers it to be arguable then so be it.

**Q51 Peter Bottomley:** Because the practitioner has to make the decision on the information available to the High Court judge.
***Alison Stanley:*** Exactly so.
***Vicky Guedalla:*** In the absence of bad faith the practitioner should expect to be paid for honest work honestly done, and there are already safeguards for those cases where there has been an absence of good faith or an absence of due diligence; judges already have the power to make wasted costs orders, to refer practitioners to their professional bodies, to refer cases back to the Legal Services Commission. They even have the power to order that the Legal Services Commission pay the other side's costs in really extreme cases.

**Q52 Ross Cranston:** Of course, in practice that does not happen very often, does it, any of those?
***Vicky Guedalla:*** Well, if that is not happening very often maybe that is more evidence that a sledgehammer is being brought to hit a nut.

**Q53 Ross Cranston:** I wanted to ask you what may seem to be self-interest questions to my colleagues about the profession—which come out of your submission actually—about how is the risk going to be shared between the Bar and solicitors, now that the solicitor may be disadvantaged because the barrister gives advice that is not up to the mark, and of course vice versa, that the barrister may not be properly briefed. If the case fails the risk has to be borne by someone; how is it going to be divided between the two parties? As I understand it the Department does not have a view yet on this, but how is it going to work in practice?
***Mark Henderson:*** What we do understand the Department has accepted is that people should be judged only on the information that was available to them at the time, which must be fair and indeed was what Parliament was told would happen, and the Department has accepted that costs should only be at risk if there has been a properly funded opportunity to assess the merits first. We accept that barristers are in a different position from, say, experts, who we agree must be funded in any event because they do not have an opportunity to assess merits. Of course, for the reasons we have said we oppose conditional fees in this area fundamentally, but if it is going to happen then we accept that all practitioners who have the opportunity to assess the merits should have their costs at risk based on what they knew at the time. That obviously means that different assessments are going to have to take place for the solicitor and the barrister; that only adds to the complexity and artificiality of that assessment being done months hence by a member of the AIT.

**Q54 Ross Cranston:** You would expect the adjudicator to make that decision.
***Mark Henderson:*** He would have to, in the same way that in the wasted costs jurisdiction presently solicitors and barristers are often treated differently. As I think Justice said in their submission, the fact is that obviously, as a matter of fairness, there would have to be provision to treat them differently compared to what they knew and when they were involved in the case. That simply adds to how unworkable these proposals are, and to the extent of the cost and effort that is going to be required to deal with a minority of cases which, as you have heard, certainly could be—even if they are not at the moment—dealt with under arrangements that are presently in place.

**Q55 Ross Cranston:** Alison, that would be your view, if it did come in, that the adjudicator should be making the decision as to where the costs would fall between solicitors and barristers?
***Alison Stanley:*** If it comes in—and obviously we oppose the principle—then it seems only fair that both barristers and solicitors should be obliged to share the risk but, quite clearly, the assessment at the point of risk is slightly different for both parties and

barristers should have a separate right of appeal on that, otherwise it would be grossly unfair for everyone; there should not be just one appeal over the cost issue as a whole. In fact, that reflects what happens at the moment on all taxation, that there is an opportunity to appeal against a taxation on either the solicitor's costs or on the barrister's costs. Currently solicitors appeal on behalf of both, but the barrister can put forward their own arguments.

**Q56 Chairman:** Who are you appealing to?
***Alison Stanley:*** In certificated cases it is to a taxing master in the High Court—they are called an assessment officer or a costs judge, I believe. I am sorry for not getting the right terminology.

**Q57 Chairman:** The Government have not yet indicated an appeal mechanism for this, or is it being assumed that you are going to go to a taxing master or whatever?
***Alison Stanley:*** It is assumed that it would be back to the AIT, and I believe there is an assumption that it would go to the President of the Tribunal.

**Q58 Chairman:** I think you felt that there was a consistency issue, that if you do not have a mechanism you cannot enforce or safeguard consistency of decisions.
***Vicky Guedalla:*** There certainly needs to be an appeal mechanism and a transparent appeal mechanism. A decision to refuse funding retrospectively in a case is casting a professional slur on the practitioners who made those decisions, and it is very important that they should have every opportunity to contest it.
**Chairman:** Are we talking about anything different in character to what happens in other areas of law in terms of what sort of appeal mechanism you have? You are not trying to create some tribunal are you?

**Q59 Ross Cranston:** They simply want it done in the normal way.
***Vicky Guedalla:*** It is not quite analogous to anything that happens in any other area.

**Q60 Chairman:** The reason for a retrospective judgment is, by definition, different.
***Vicky Guedalla:*** There are mechanisms at the moment if one's costs are cut back—

**Q61 Chairman:** It is reflecting on the integrity of the practitioner.
***Vicky Guedalla:*** Yes, it is.

**Q62 Chairman:** It is really something analogous to or indeed the same as the mechanisms which exist in other areas of practice, in that without it there is the risk both of severe unfairness to a particular practitioner and inconsistency of decision-making.
***Mark Henderson:*** There must be a mechanism and I think the president of the AIT in his evidence to this Committee accepts that it should not simply go back to the same body that has already made the decision, and I think he suggests that the High Court in some form is really the only other feasible body, because under the DCA's proposals you are actually looking at the overall merits of the asylum case, of the litigation, rather than simply whether six hours was a reasonable amount of time to spend on a witness statement, which again brings us back to the point that these hastily cobbled together procedures really are turning out to be a sledgehammer to crack an increasingly small nut.
***Alison Stanley:*** If it would help, the Society can give you a very brief note on the current costs system and the method of appeal on it.
**Chairman:** I think, perhaps more pertinently, whether the present costs system could be available for dealing with this or whether something more elaborate is needed. Mr Bottomley.

**Q63 Peter Bottomley:** Can I come back to this risk premium business again? If we take, for example, the Refugee Legal Centre, which are recognised as being pretty good at what they do, if they have a 70% success rate, and on the pretty broad assumption that cases are equal—which you say is average—my calculation is that they need to have about a 43% risk premium to be able to meet all their costs; if you divide 30 by 70 it comes to 42.8%. How on earth can we expect people to go for a success rate significantly higher than 70% unless we are asking people outside the government-funded legal system to make a loss?
***Vicky Guedalla:*** You cannot, and may I say in answer to you, before we get on to calculating what the risk premium ought to be, we need to look at the risk premium on top of what? At the moment publicly-funded applications to the High Court are remunerated under legal aid certificates which pay a basic hourly rate of £79 for London practitioners, on top of which you can be awarded enhancements of up to, in theory, 100% or more for particularly expeditious or difficult or complicated work. That is paid under the present system, not retrospectively—again, you know you are going to get paid the basic rate plus a bit if it is extra good work—but what is proposed here is to offer a much lower rate than that, to bring it down to CLR rates, and then put a small risk premium on top of that, so the final rate you actually end up with is less than you would get on the equivalent work now. We see no excuse for it paying any High Court work differently than other High Court work.
***Mark Henderson:*** Could I just add on that point that we, the Bar Council, were particularly shocked to find the reference to High Court work being paid by CLR in the consultation document, given that Parliament had been told by the Lord Chancellor that a success fee would be paid. We had discussed in a series of meetings with the DCA the level of risk premium that should be applied; we then get a proposal which, if effected according to CLR standard rates—and that was the implication—would mean that for many barristers you are looking at cutting the basic rate by 50% and then giving you 25% back. We are happy that the LSC has assured us, though they have not yet told us how they are going to do that, that they will rectify that anomaly.

**Peter Bottomley:** Getting away from the interests of the Bar and the solicitors, do you think we should be asking the Government is what they are putting forward proportionate, is it necessary, is it fair and will it work?

**Chairman:** I think that is what we are asking them, and at that point we need to bring these proceedings to a close. I am very grateful to the three of you for the help you have given us today; thank you very much.

## Tuesday 1 March 2005

Members present:

Mr A J Beith, in the Chair

Peter Bottomley
Mr Ross Cranston
Mr Clive Soley
Keith Vaz
Dr Alan Whitehead

*Witness:* **Baroness Ashton of Upholland**, a Member of the House of Lords, Parliamentary Under-Secretary of State, Department for Constitutional Affairs, examined.

**Q64 Chairman:** Good morning, Baroness Ashton, and welcome. We have a rather complicated morning before us because we have a gear change from asylum appeals to SIAC and special advocates and a change of minister at that point. You will be quite relieved to go at that stage.
***Baroness Ashton of Upholland:*** I am the warm up act!
**Chairman:** Sometimes the warm up acts are better than the main act. Are there any interests to be declared?
**Mr Cranston:** I am a barrister and Recorder.
**Keith Vaz:** I am a non-practising barrister and my wife holds a judicial appointment.
**Mr Clappison:** I am a non-practising barrister.

**Q65 Chairman:** Baroness Ashton, what do you think the effect is going to be of introducing retrospective funding on the provision of legal advice for potential appellants, both the quality of advice and the quantity?
***Baroness Ashton of Upholland:*** My inspiration for the changes that we have made is that what we will do is take out of the system the disincentive to consider very carefully whether an application should go forward for a further appeal and enable public money to be used more effectively to support those who have genuine claims to ensure that we do the right thing by those people.

**Q66 Chairman:** You are not doing this in any other area of law, and there are problems with unmeritorious claims and the legal aid budget is under severe pressure. Why have you singled out immigration for this treatment?
***Baroness Ashton of Upholland:*** I think when you look at any system you have to determine what about that system you need to examine and perhaps rectify, and it seems to me (and I am not a lawyer so I perhaps look at this from a different perspective) that in management what you examine with a system is what is it that incentivises people to behave in particular ways? It is quite obvious that if you are an applicant, whether you have merit or not, there is no incentive, if you want to stay in this country, for you to withdraw from the system but rather to continue; and so we have to look at how do you examine that system in a way that says we want to make sure that we incentivise properly the system to operate to the benefit of those who have cases with merit. Therefore the obvious thing for us to do is to incentivise in a sense around the supplier end to enable the right kind of cases to go forward. It is a very specific decision for a very specific problem and a very specific part of the system.

**Q67 Chairman:** Those incentives are not unique to immigration. We are looking at family justice at the moment, and sometimes it might appear to be in the interests of the resident parent to protract proceedings until the court can no longer reasonably change the situation, so it is not unique to immigration.
***Baroness Ashton of Upholland:*** No, but the solutions can be unique. If you look at the family system, what we have been trying to do, because the resident parent is interested perhaps in preventing the child from seeing the non-resident parent, and so on—we discussed this in the Committee not very long ago—the issue for how do you make sure the system works effectively will be how do you make sure the court has power to make sure that the child sees the non-resident parent appropriately. It is horses for courses. It is appropriate for the system; it is certainly looking at what the issue and the problem is and incentivising or disincentivising the system appropriately.

**Q68 Mr Cranston:** Could I ask you about the comparison with no win no fee, because I think in a way the Department has resisted that analogy, but is it not very much like no win no fee because if you do not get there successfully in terms of the appeal, and so on, you are not likely to get your expenses?
***Baroness Ashton of Upholland:*** As you know, Mr Cranston, the test we have provided is a significant prospect of success to go through what we are calling the filter mechanism, and we have built into the end of that process the opportunity for the judge who has heard the case to look again to see whether the application had been properly made, whether on the basis of the evidence put forward, indeed, the filter had worked appropriately, and then to award. Obviously a case, if successful, will be paid. I do anticipate that there will be cases that are not successful that will also receive their money, and that is quite different in no win no fee.

**Q69 Mr Cranston:** The difficulty is that in most cases, well generally, if you are successful at the appeal, even though the case might be sent back and you are not successful, you do get your expenses, is the clerical term, but here it is different because you might be successful, it goes back, it is not successful

and you may well not be paid? There is that difference. Why the difference between the ordinary way of lawyers getting paid?
***Baroness Ashton of Upholland:*** I think to ensure that what is put forward at the filter stage is all the information and that it is all the right information and it is done to the highest possible standard. I do not think there is anything wrong with saying at the end of the case it is appropriate for the judge to look back and say, "Was all that done properly?", in which case, of course, payment would be made.

**Q70 Mr Cranston:** Yes; I guess the problem is the analogy. Normally, if you are successful first time round on the appeal, you get paid. It does not matter what happens later on.
***Baroness Ashton of Upholland:*** I accept that, but I think what I am trying to argue, and again, as a non lawyer perhaps if I 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.

**Q71 Mr Cranston:** I do not want to put ideas in your head, but if this is a good idea, why not apply it to other cases as well? In other words, you have to look at the total process and you have to make a global assessment of whether or not the case should ever have been brought. Why just use it here?
***Baroness Ashton of Upholland:*** I think what we are trying to do here is to look at a very particular problem, which another committee has looked at before, about how do you in this particular part of the legal system make sure that cases with merit are dealt with properly and people who should be granted asylum or indefinite leave to stay get it and those cases that do not have merit are dealt with swiftly and the results of that are followed through, which I know is something you have also been interested in to make sure it does happen. You have to design a system that is going to give you the best possible outcome in fairness and justice but also to ensure that that does happen, and, as I have already indicated, when I looked at this—because I have only had this portfolio for a short time—I thought what was very interesting was that again you look at why would somebody give up. If an applicant wishes to stay here, that is what they have come to do, there is no incentive in any event for them to want to do anything other than push forward, so you have to look at what is the quality of advice and what is the best way of making sure that where that has merit, the supplier and the applicant working together to provide that, that information goes through to the courts, is dealt with appropriately, good suppliers operating very well under the new accreditation system, and so on, will have nothing to fear from this because if they get through the filter they will know they have put forward a good case, they will themselves know that they have put that forward with all the evidence available and they will know the judge will look at that appropriately.

**Q72 Mr Cranston:** Of course there are all sorts of explanations as to why it might ultimately fail and it might not have anything to do with the fact that all the information is there?
***Baroness Ashton of Upholland:*** Well, indeed, and I am sure the judge will act appropriately.

**Q73 Mr Cranston:** Anyway we can argue about this all day. Could I take you to the statistics? You were very helpful here, because you produced the evidence that said that '5% of appeals to the IAT were allowed outright, 34% were dismissed, and then you followed with 44%, you did a sample of that to see how there was ultimate success. I guess the analogy here might be with areas like, for example, criminal appeals, not on sentence but on conviction, where the success rate is very, very low. It is 11% or something like that, I think. There, if you are successful or unsuccessful, if you put the case you are still going to get paid, the lawyers are still going to be paid, but here you are adopting a different approach and you are using the argument that not many cases are successful. Why the difference here? Why the difference between, again, immigration and the example I gave, crime?
***Baroness Ashton of Upholland:*** We looked at the statistics for the number of permissions that were granted, and, as you know from the figures I gave you, 67% of applications are not successful at the permission stage, but the amount of work, energy, time, effort and that equates inevitably to public money that is spent in that process was in need of re-examination; so the big question was how do we make sure that the cases that are coming forward for permission to go forward have significant prospects of success, do have merit, are done for the right reasons? Again, I go back to the fact that the incentive for the individual is to continue through the process making sure that was done effectively. Those statistics, I think, were the most stark for me when I looked at this policy area in terms of saying how do we make sure that those cases that go forward for permission do so because they do have real merit, and that is where the filter comes into play.

**Q74 Mr Cranston:** But you get the difference with crime. Only 10 or 11% are successful, so why treat this differently? It is the same sort of argument as previously. In your analysis there will be a very low success rate, nonetheless the ordinary rules apply in terms of lawyers being paid?
***Baroness Ashton of Upholland:*** 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. My role is taking over the policies to re-examine what we are proposing in this particular area, and it seems to

me that there is a real opportunity to make sure that we not only act fairly and properly by those applicants with genuine cause but also by the public purse, and that enables us to use resources more wisely, and that is always the balance that one makes.

**Q75 Mr Cranston:** I wonder what success rate would you want to see before you applied the ordinary rules about the payment of legal aid in this area?
***Baroness Ashton of Upholland:*** I do not have a figure, and I am very reluctant ever to say success for me is 'x'. I think success for me will be that an applicant with merit goes through the system in a much shorter timescale than the current 65 weeks. We are hoping for something like 32 weeks, if it works well possibly 36 weeks if you have a high court part to that, so people get the decisions made properly for them in a much better timescale, six to seven months.

**Q76 Chairman:** How many weeks?
***Baroness Ashton of Upholland:*** Currently it is about 65 weeks, and the ambition is about 32 weeks or 36 if we have got a high court part of that, which for the applicant is much better. I want to see cases going through more speedily, less of the remittance scheme which is where cases seem to go through a bit of a revolving door, to be honest, a better way of making sure that those with cases which have merit are dealt with swiftly and also that for those people where they do not have merit their situation is brought to an end in terms of this process as swiftly as possible so they are also not told they are going to get something they are not going to get.

**Q77 Mr Cranston:** But in terms of the success rate, you do not want to say what figure you want?
***Baroness Ashton of Upholland:*** I have not put a figure on it, no. It does not mean I will not eventually, but one of the things I was very keen to do is to make sure we had all the elements in place to look at what the consultation told us, to continue to talk to our partners—whether that is in the CAB or within the Refugee Legal Centre and so on—and then begin to examine how the system starts once the transition period is over, and then perhaps to be clear. So it is not a reluctance to nail my colours to the mast, I just do not think I am in a position to give you something that would be meaningful.

**Q78 Peter Bottomley:** Working it backwards, if the suggestion is that successful cases have a 35% uplift, it means that for a lawyer to come out on balance they have to accurately calculate a 76.5% chance of being successful. I think the Department by picking this 35% suggested uplift figure is giving the figure which you have not been able to give us?
***Baroness Ashton of Upholland:*** That is very kind of you to work that out. The 35% uplift, as you know, comes from the consultation. People felt 25% was too low, and we accept that totally. When you talk about 76.5%, 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 where it is all they have to make but where you would expect to see that number increase substantially.

**Q79 Peter Bottomley:** Can I just assert, in an interrogative way if you chose to take it that way, that if a very competent group of representatives, whether the Refugee Legal Centre or a specialist firm of lawyers, take on cases and get more than the 70% "success" rate, a 35% uplift still has them losing money?
***Baroness Ashton of Upholland:*** You can assert that. I think if you look at the way that the figures have been calculated what you have is that for the actual time that they spend doing the case they could be better off, for the time they spend preparing the case they might be slightly worse off and that we have allowed within the monies that we have available for the LSC the opportunity that, if senior counsel were needed for a case because it was felt to be very complex, there is the opportunity to ask for more money. I do not think in the grand scheme of things that if you look at the resources that we have put into this that firms or indeed the Refugee Legal Centre or others need be worse off. What I have already committed to, and I will do so, is to keep this under review in any event, but the 35% we felt was a good way of demonstrating that we were serious about making sure they were resourced properly but also to keep the door open for those complex cases where you might need more senior people who would expect to be paid at a higher rate.

**Q80 Keith Vaz:** If appeals are being brought that are entirely without merit, this would appear to indicate that the Legal Services Commission's assessment of a case's merit is an inadequate safeguard. If so, what is the Legal Services Commission doing in order to improve its quality control mechanism?
***Baroness Ashton of Upholland:*** As you know, Mr Vaz, a lot of work has gone on between the Legal Services Commission and the suppliers, if I may call them that—it is a very strange word, but that is what we call them apparently—to look at ensuring, both through accreditation and other methods, that we have good suppliers in the market place and that the LSC does its job carefully. They are looking always quite carefully at the systems they have in place. I think the reality is that a lot of the cases that come to the filter will not be hopeless and totally without merit but will not have significant prospects of success, and that is the test that we have placed before them.

**Q81 Keith Vaz:** But you know that the solicitors themselves have little confidence in the ability of the Legal Services Commission to do this. There is a lot of criticism over the way in which they have operated. You are aware of that, are you?
***Baroness Ashton of Upholland:*** I am aware of that. I would not put it in such strong terms. I am certainly aware of concerns, but I think the Legal Services Commission, first of all, has a very good dialogue and relationship with many of the solicitors, that the Law Society has done a lot of work in talking around not only the issues connected with this particular area of policy, but more generally we have a good and healthy relationship with them and that the LSC and the solicitors are continuing to talk to each other to make sure the system is robust all the way through. I do not think I would put it as strongly as saying that we have severe concerns, but I recognise there are issues that they would want to see addressed.

**Q82 Keith Vaz:** What are your concerns about the Home Office decision-making process? Do you have any? Do you think it is robust?
***Baroness Ashton of Upholland:*** I think it becomes more robust. I think that the work that has been done with IND in particular to develop training packages, to make sure that issues like understanding the country of origin of someone, all of those ways in which they have tried to make the system more robust at the initial stages, are beginning to show and are beginning to help the right decisions to be made at the beginning.

**Q83 Keith Vaz:** Why are you not making more of a fuss about the problems with the Home Office? This government has made a priority about immigration and asylum, you are cutting back on legal aid and it all starts with a decision being made at Lunar House and Apollo House. What is your Department doing to challenge the Home Office's assumptions?
***Baroness Ashton of Upholland:*** I am working with my colleague, Des Brown, because he and I work together on this and we meet to discuss the whole process, if I can describe it like that, from beginning to end. I have no doubt that there is a real desire on his part and certainly on the part of Charles Clarke to make sure that the system is robust, that people are properly trained, that the expertise exists to make the right decisions as smoothly and as quickly as possible for the benefit of the individual, and what I see is that a lot of work has gone on. We meet regularly. We also meet regularly, as you will know, with the Prime Minister and with members of the Foreign Office, with DFID, and so on, to examine the whole process, including our relations with other nations.

**Q84 Keith Vaz:** This is exactly what your colleague, David Lammy, said to us when I asked him the same question a year ago—how many meetings he has had, how cosy the relationship was, how he was having these discussions with the then minister for immigration and she resigned three weeks later. There has to be some progress about this, because this is where it starts, does it not? It is not the Department's fault? Do you not feel the Department is clearing up the mess that the Home Office is leaving?
***Baroness Ashton of Upholland:*** I do not, but I read the evidence that David Lammy gave you a year ago, which is why I was expecting this question, and, indeed, expecting it from you, Mr Vaz.

**Q85 Keith Vaz:** Good. Have you got a file on me then?
***Baroness Ashton of Upholland:*** Not a personal one. Part of my job, surely, is to know what areas of interest people have on the Committee. The issue, as you quite rightly raised, is that if the process before hand is not very good, that is why we end up with the problems that we have. I feel pretty confident that the issues that have been looked at by the Home Office, and, as I said, under the guidance to some degree of the Prime Minister who takes these issues, as you know very seriously, is beginning to result in a more and more robust service. There are more resources going into IND, the training packages are working well, the information they get, the database, and so on. You know as well as I do that you cannot change this over night, but if I look across the whole system what I see is intervention by government all the way through it to make sure that proper decisions get made as early as possible, not least for those successful applicants who should be given that decision as quickly and as smoothly as possible and allowed to stay and get on with their lives but also that all the way through this process we have put in the right balances to make it run smoothly, to use money effectively, to get the right outcomes. There is more to do. The Home Office would be the first people, if they were here, to say that to you, but my meetings with Des, with the IND people there, with our officials there and the on-going official dialogue as well have been very productive and I think a lot of the work that he has done now with the support of Charles Clarke, previously with the support of David Blunkett, to make sure this area is as strong as it possibly can be is beginning to bear fruit; it will take time.

**Q86 Keith Vaz:** Finally, and you will know this question obviously because you know I am going to ask it because you have looked at my file, a copy of which I will request under the Freedom of Information Act—
***Baroness Ashton of Upholland:*** I am responsible for that too. You know that.

**Q87 Keith Vaz:** I know; I have got your file! The five-year strategy was announced by the Home Secretary last week, the week before last. No doubt you were consulted about that strategy. What is the impact on the legal aid fund (your department) of the changes as far as visitors' visas are concerned?
***Baroness Ashton of Upholland:*** Family visitors' visas?

**Q88 Keith Vaz:** Yes; appeal rights?
***Baroness Ashton of Upholland:*** I do not have that figure for you because I am still in the process of discussing with other departments what our view is on the family visitors' visas and the issues concerning hearings where people are present. There is not a settled view on that yet. I have asked for more evidence to back up the proposals at this stage because I think there are issues about why the success rates are so different, and also, of course, there are some people who would not be able to present in writing because they either do not write English or they have a disability, whether that is dyslexia or a physical disability, or they would not be capable for other reasons of doing that. We need to get underneath that, my proposition is, a little bit more. We may well have that information, I just have not had it yet, about precisely why we think that is such a big differential and therefore to move to a system that at least recognises what those reasons are and puts in place the support for individuals.

**Q89 Keith Vaz:** You know what they say about this Government: in order to save money on immigration and asylum the Government is prepared to restrict rights, and there has been a lot of restriction of rights, has there not?
***Baroness Ashton of Upholland:*** I do not accept that. What I would say to you is that you have to look at how you design a system that uses the best resources in the best and most appropriate way, and sometimes that means reviewing do we have the right systems in place. Again, I can only talk as a non-lawyer coming at this from having worked in the outside world for most of my career where you always review when you see a part of your organisation, whether that is government or anything else, that seems to have pressure points that need addressing, and you have to think very carefully about how you address those appropriately. If you look at the family visitor visa question, we have a big pressure point. The consequence of that pressure point is a knock on to anything else. We cannot ignore it. The question then becomes: how do we best resolve it while making sure we do not take away rights, but if there is something happening as a consequence of more appearances in person whereby perhaps the system could be looked at again, perhaps the way in which we present written evidence to support visas needs to be thought through a little bit more. However, we need to think that through, and I have no objection to that, but I would like a bit stronger evidence to just make sure that we have got that completely clear in our own minds, because I am not, hence I am not proposing this proposal at the moment.

**Q90 Dr Whitehead:** Where the question of costs for solicitors and barristers comes in as far as appeals are concerned, the Department I think has accepted that people are essentially judged on the information that is available to them at the time, but clearly, as far as solicitors and barristers are concerned, there will be, as it were, a sequential issue there. What arrangements are to be introduced which will ensure that solicitors and barristers fairly share the risk of taking appeals?
***Baroness Ashton of Upholland:*** I think that partly rests in the relationship between the solicitors and the barristers themselves, as I understand the way they work together. What we have done—and I am not sure this answers your question properly, but I describe it rather like my gas bill where I pay a monthly amount and top it up when the bill comes in or they give me some money back. The way in which the LSC are working with the accredited firms is to sort out roughly what they would expect to receive in the course of their work and then to top it up or take it back at the end of that time depending, so that you have got money in the system coming into those firms on a regular basis and they self fund within that once they have got their notice. The way in which they work with their own barristers is, in part, I think, for them to organise. What we have been very clear about are the rates that we pay, but they need to think together about the robustness of the case that is being put forward, and, as I have already indicated, where they do think there is an important or complex case or a particular point of law to be able to apply for additional funding in order to get senior counsel to represent. I think we have covered it in a way that recognises their own relationship and does not get in the middle of that but also tries to provide clarity about what is available and also the readiness to listen where someone more senior is needed.

**Q91 Dr Whitehead:** I was trying to work your gas bill analogy out fully and properly. Surely the analogy perhaps in terms of solicitors and barristers is that you might still have to top up your gas bill even though on occasions your gas supply had been rather dodgy?
***Baroness Ashton of Upholland:*** You might; I certainly would not.

**Q92 Dr Whitehead:** You presumably say that your top up was not valid and you should not have that top up requested of you if the gas supply turned out to be faulty or dodgy. Is it not the case that if barristers had been instructed on the basis of inadequate information should they not be in a position separately to safeguard their position?
***Baroness Ashton of Upholland:*** I think that part of a barrister's job, and they do it very well—I am conscious I am in the presence of some—is to make sure the information they have got is appropriate and relevant to the case they take forward. I do not think of these people as being easily hoodwinked by anybody by any stretch of the imagination. They are experts in their field. They are used to doing cases. They know perfectly well what kind of information they need, and they will choose to involve themselves in a case or not depending on their relationship with the solicitor and the quality of the information. I do not have any fear about that. My analogy, and it is always dangerous when I do analogies because they always run out on me, but certainly when a costs order is made, if there is a differential between what

the firm has received and what they should have received by order, then it is given to them by the LSC. The point I was making was that we tried to develop a scheme where people get the regular sources of income in order to get on with work, recognising that there may be fluctuations in that work depending on how many cases they take through, depending on their success, of course, as well.

**Q93 Dr Whitehead:** I think the issue, is it not, as far as I can understand it, as it were, the costs will be awarded on the basis of the assumption that the work is continuous, whereas barristers and solicitors are not in the same position and perhaps therefore should be able to appeal against costs independently. That would obviously be appealed. The independent appeal would be based on the information they had at the time but that information would not always be the same. Therefore, should they not have a mechanism to appeal independently and, if they did, would that perhaps add to the costs of the system?
***Baroness Ashton of Upholland:*** Do you mean they could appeal separately to say, "Hang on a minute, I did it on this basis"?

**Q94 Dr Whitehead:** Yes.
***Baroness Ashton of Upholland:*** I think that the way in which we have got the system is that there would be no question that a note would be made. If a barrister felt strongly that they had acted in good faith to present a case that had, they believed, significant merit and during the course of the case, for argument's sake, the information they had been given was proven not to be correct or was, let's say, slightly misleading—I am very conscious about not trying to accuse the legal profession of doing that but for whatever reason—and at the end of the day the judge said, "Actually this never did have any significant prospect", of course the judge will take into account the role that those have played, but frankly that is for them to sort out, and I have no doubt that a barrister would be perfectly capable of pleading their case to a judge who would understand entirely the situation. However, my ambition is that solicitors and barristers working together will be undertaking cases that they both feel, on the basis of sound evidence, have significant prospects, as you have described it, of success, and I would hope that we would discourage cases where there was any question that the information was inaccurate and that people were acting and pushing forward. Hence, in a sense, the second stage. Precisely what that second bit does is say, "Hang on a minute. Did what you said in the beginning turn out to be what you said in the end?" I do not want for any reason information not to come forward at the beginning or to be distorted, if I can put it like that, so I am not worried about the facts in that context. I will, of course, be looking at it but I am not desperate about it.

**Q95 Dr Whitehead:** Are you worried about the total costs of asylum appeals and the proposed uplift, and, if so, what sort of assessment have you undertaken?
***Baroness Ashton of Upholland:*** We have looked at the uplift and we have looked at the figures that the LSC are projecting for the year ahead, and I think we have got a decrease projected from just over 200 million to 117 million. I think the uplift is important for the reasons that Members have indicated of making sure that we keep the supply base sound and that we keep people wanting to take on this work, recognising that, yes, we have added an additional risk factor, though one that we think is a properly calculated risk, and therefore to make sure that we reward people appropriately when they have taken cases forward. I think it is the right balance, I think it is a balance we should stick to and I think within the overall ambition for this system of which, yes, of course, making sure we use money effectively as part of it, we have got that right.

**Q96 Peter Bottomley:** Going back to my previous point about the 76.5, it is actually 74%, but in case anybody bothers to read our proceedings, the question essentially is that we are asking lawyers to take on cases and they will not be paid on any individual case for the cost they have properly incurred. They will either be paid more or they will be paid nothing; so they might not be paid for the work they have done or they will be paid for the work they have not done. What the Department is asking is for them to become so professional that they become able to take the ups and downs. Is that right?
***Baroness Ashton of Upholland:*** My hope is that as the system beds down in any event, one day there will not be a filter, as it were, because cases will only come forward that have that merit, and I am pretty confident that, as we look at the way this develops, what will we see is the accredited firms and the barristers working together with them will begin to examine carefully those cases that come forward, and what you will get are people with very high success rates and certainly high success rates in terms of getting their funding because the cases that have gone through the filter will have significant prospects and the judge will endorse that at the end of the case and they will be paid.

**Q97 Peter Bottomley:** A 50:50 chance is not what we are going for here, it is going above that to a 74% chance, which, as I understand it, is a higher chance than we are asking for locking people up under control orders? 74% is very high?
***Baroness Ashton of Upholland:*** I do not think you can equate this with the kind of risks that we have where we need control orders. I take the point, but I cannot accept it in that context. I do not think that there is anything wrong with trying to develop a system where the way in which we design it makes sure that we have the filter mechanism, the place where people make real decisions about what they think are their prospects of success, that they advise their client properly, that they bring it forward

because they do think on the basis of the first appeal—because we have already had an appeal, we have had a decision, we have had an appeal, both have said "No", we are now into the next phase that says, "What is different? What happened in that appeal?" I do not think there is anything wrong with thinking that there should ultimately be those that are likely to be very successful where at the end of it you have a very high success rate.

**Q98 Peter Bottomley:** I understand that, but essentially were I an applicant or an appellant and I went to the legal firm or the potential people who represent me and I said, "I have a two-thirds chance of being successful", they would turn round and say, "No, we are not going to take you on because that falls below the Department's threshold"?
***Baroness Ashton of Upholland:*** I do not think that is what happens at all. I think an applicant has solicitors, usually it is the same one, and I know there are issues about dispersal which is why we have built in additional time if people either are moved or cannot get their legal representative to do the work within the timescales they have given; but what you have hopefully got is an applicant who has got legal representation, the appeal has failed, the applicant and legal representative together sit down and look at what happened at the appeal and what they believe should happen next, and where they genuinely believe that a mistake has been made or there is information that has come to light, or whatever it is, they will then go to the filter and say, "We believe our case should be reviewed for the following reasons." They will look at it again, they will put it through and the judge at the final stage of that will say whether the case is ultimately successful or not, that that was done appropriately and properly and award costs. I do not think that there is anything other in what I have said that a system working effectively with very professional solicitors and barristers supporting an applicant that that is the way it will work. I do not believe the applicant for one minute will have the faintest idea what the success rate might or might not be. What they are more likely to be is somebody who really wants to keep going through the system because for them, for whatever reason, this is something that is the total focus of their life.

**Q99 Chairman:** Baroness Ashton, thank you very much for your clear and concise answers which have enabled you to clear the way for your boss to takeover the hot-seat in good time.
***Baroness Ashton of Upholland:*** I am sure he will be pleased.

# Written evidence

**Evidence submitted by Hon Mr Justice Collins, Lead Judge, Administrative Court**

I enclose as promised a copy of my response to the DCA consultation paper on legal aid for appeals from the new AIT (**not printed**).

You will see that it **is not a response from the judges of the Administrative Court** as a whole. It occurred to me that if there were to be any challenge to whatever was in the end included in any Regulations, that challenge would come to the Administrative Court and so it would be undesirable for there to be an advance judicial view.

You may be aware that there is a proposed increase in the fees payable for applications to the Administrative Court. I am told that the relevant increase is to be from £180 to £400. £400 will be a real disincentive to lawyers to take on these cases.

I am content that my response should not be regarded as confidential. Similarly, my previous letter (**Annex**) can be relied on by the Committee but it must be made clear that **the response is mine and not that of the judges of the Administrative Court as a whole**.

*14 December 2004*

**Annex**

**Response to Letter from Rt Hon Alan Beith MP, Chairman of the Committee**

I am hoping to submit a response to the consultation paper on the legal aid arrangements in relation to the new tribunal on behalf of the Administrative Court judges. Like you, I am very unhappy with what is proposed.

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. I entirely agree with you that 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. It is desirable that unmeritorious claims should be discouraged but, particularly in dealing with asylum seekers who, if genuine, will face serious ill treatment or even death if returned, it is important that reasonable claims should not be deterred.

If retrospective funding is to be applied, it must only be for second appeals, or their equivalent. Having, as was inevitable, lost the ouster clause, the government had to introduce the "temporary" review mechanism to avoid the High Court being swamped. The results is in effect a two tier system which has thrown away all the benefits of such a system. But it does mean that the renewal of an application to the High Court can be treated as the equivalent of a second appeal. And it is only the success or failure of that application which should attract retrospective funding.

I will send you a copy of the courts' response to the consultation paper in due course.

*Hon Mr Justice Collins*

*22 November 2004*

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**Evidence submitted by Hon Mr Justice Ouseley President, Immigration Appeal Tribunal**

Consideration of the merits of the proposals in subordinate legislation must start from what Parliament has already enacted. One of the problems with consultation on subordinate legislation is that there may be different views about the meaning or effect of what has already been enacted, as well as of that which is proposed. My comments are therefore based on my understanding of each. The Regulations cannot contradict it or go outside the enabling power. It seems to me that Parliament intended the system to operate as follows:

1. The legal aid funding for applications for reconsideration should be made to the High Court when it deals with them, and in the interim period, to both the Tribunal and then to the High Court as successively they deal with those applications. The Act, in section 103D(1) gives the impression that that issue is to be dealt with at the same time as the application for reconsideration itself.

2. The Tribunal upon substantive reconsideration then appears able from the Act, section 103D(3), both to be able to grant legal aid for the application (if no order had been made by the High Court) and to grant legal aid for the substantive reconsideration.

3. The Act is quite clear that the Tribunal deals with that funding retrospectively, knowing the result and full strength of argument in the reconsidered appeal.

4. However, all of that is subject to the very wide language of the regulation-making power in section 103D(4) and (5)(c) in particular.

5. The draft Regulations, Regulation 6, do not expressly exclude the High Court from making a decision on the grant of legal aid for the application for reconsideration when deciding on that application, but do not expressly permit it either. This uncertainty is undesirable. It may be that it is intended that the High Court should have no such power, and that it all should be dealt with by the Tribunal upon reconsideration itself. I do not see why, conformably with Parliament's enacted intent, the High Court should not be able, if it felt so moved in any particular case, to decide that legal aid funding be granted for that application stage.

6. However, the real issues for debate are:

— what test should be applied under section 103D(1) and (3); and

— who should review any adverse decision under section 103D(3).

The Act itself is silent as to the basis upon which the High Court, or Tribunal in the interim, should grant an application for reconsideration (regardless of how it is to be funded). The proposed Procedure Rules cannot control the High Court jurisdiction. But it is proposed that insofar as the Tribunal is involved in granting applications, the merits test (Rule 27(6)) should be:

(6) The immigration judge may make an order for reconsideration only if he is satisfied that—

(a) the Tribunal may have made an error of law; and

(b) either—

(i) there is a real prospect that the Tribunal would decide the appeal differently on reconsideration; or

(ii) there is some other compelling reason why the decision should be reconsidered.

7. This may influence but does not have to influence the High Court approach.

8. But the merits test should be related to the legal aid test for simplicity of operation.

9. The proposed tests in draft Regulation 6 and 7 (Option 1) appear to envisage legal funding being granted retrospectively if there was (i) a reasonably arguable error of law and (ii) a significant prospect that the appeal would be allowed in consequence. This is obviously demonstrated where the appeal actually is allowed and this should need no further consideration. It is difficult to envisage a Tribunal rationally refusing to grant legal aid funding retrospectively in those circumstances.

10. Where the appeal is dismissed, the Tribunal should go on to ask itself whether, in the light of what it now knows, it regards the appeal as having involved a reasonably arguable error of law with a significant prospect of that leading to the appeal being allowed, even though it was ultimately unsuccessful, or some other compelling reason for consideration.

11. Thus the test in the Regulations should be that legal aid funding should be granted by the Tribunal for the substantive reconsideration:

(a) if the appellant succeeded on reconsideration; and

(b) if not, nonetheless there was a significant prospect, judged as at the date of reconsideration, that the appellant would succeed in his appeal as the result of an error of law, or there was some other compelling reason for reconsideration.

12. One advantage of retrospectivity is hindsight. It should be used to assess prospects of success in the light of all that is known. This covers both changes in circumstance or law, for better or worse, and the more detailed examination of legal and factual material which a full hearing brings compared to a paper application on a comparatively short analysis, with no input in most cases from the respondent.

13. I do not regard it as sensible to try to assess prospects, as the draft Regulations require, as at the time of making the application, ignoring all that is now known, and trying to work out how much of that was or should have been known or realised earlier. This latter test would also have the disadvantage of inviting the Tribunal to reach a different conclusion from the High Court which granted the application, but theoretically on the same material. This is because it is likely that the High Court would grant an application for reconsideration where there was a reasonably arguable error of law with a significant prospect of it affecting the ultimate outcome of the appeal. Yet that is what a Tribunal would have to reject if it were to reject funding.

14. That problem does not arise where the Tribunal is making its decision with the benefit of a hindsight not available at the High Court. It is difficult to see that the grant of the application for reconsideration would not otherwise automatically lead to the grant of legal aid retrospectively, as the conclusion of the High Court would dictate the answer to the question. Rightly or wrongly, however, there is no point in the retrospectivity enacted by Parliament if that is to be the approach.

15. The test which I suggest seems to me to strike a fair balance between access to the Courts and deterrence to abuse. I have no objection in principle to retrospective funding. I do not think that the stricter option put forward reflects the deterrence which retrospective funding itself inherently engenders. On present information, the stricter option is too tight, and does not strike a fair balance. The other option is probably not very different from what I have set out above except that it appears, bizarrely, to suggest that the Tribunal put itself into the position of making an assessment regardless of its knowledge of the outcome or of the way the argument developed before it.

16. I do not have very decided views about who should review a legal aid decision. There is an obvious advantage in it being a different and higher body for the fresh thinking and independence it brings. There is an obvious disadvantage in that this is not obviously High Court work and not all the detail will necessarily be obvious from the determination of the merits or of the funding unless it becomes very detailed. The less stringent the test, the less necessary a High Court review. Some such High Court review might be best provided for as a step available after a Tribunal review.

17. I am sending a copy of this to the DCA.

*Hon Mr Justice Ouseley*
President, Immigration Appeal Tribunal

*9 December 2004*

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**Evidence submitted by Citizens Advice**

1. Introduction

This paper represents the submission by Citizens Advice to the inquiry by the Constitutional Affairs Committee on Legal Aid for Asylum Appeals, announced on 10 December 2004.

Citizens Advice is the co-ordinating body for the 480 Citizens Advice Bureaux in England, Wales and Northern Ireland.[1] Currently, 23 Citizens Advice Bureaux hold a contract in immigration with the Legal Services Commission and are thus able to offer advice, assistance and representation in relation to asylum and/or immigration appeals.

In this submission, we address the following issues: retrospective public funding; prospects of success; and the effect on access to justice.

2. Retrospective public funding

If implemented, these proposals would introduce a system of retrospective funding for challenges to decisions of the Asylum and Immigration Tribunal, with legal aid being awarded (or not) at the end of the process when the appeal decision has been reconsidered.

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 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. This means clients with genuine cases and where injustice has been done will find it increasingly difficult to find representation.

3. Prospects of success

The proposals include a merits test; the Judge's decision as regards whether the legal advisor gets paid will be based on the prospects of success at the time the review application is made. It is possible (at least in theory) for an unsuccessful case to be funded. The proposals set out two options for the wording of this test. Citizens Advice does not support either option. However worded, the proposed test will make it harder for a vulnerable and frightened client group to get access to justice.

Firms of solicitors will be reluctant to take on many if any of these cases as they too require work to be financially viable. Citizens Advice Bureaux will be unable to offer representation because of the lack of certainty around whether or not the time spent on the review application will be allowed to count against the contract they have with the Legal Services Commission for the delivery of publicly funded legal services.

[1] Citizens Advice Bureau in Scotland belong to a separate organisation, Citizens Advice Scotland (CAS)

Citizens Advice Bureaux have to produce 1,100 hours of direct casework time (as defined by the Legal Services Commission) for every casework post funded. They do not get paid on a case by case basis as legal aid solicitors do. If a Citizens Advice Bureau were to pursue a review application on behalf of a client which takes 20 hours of work but the Tribunal retrospectively decides that it will not award funding, that is time that can no longer be counted towards the 1,100 hour total. This increases the likelihood that the Citizens Advice Bureau will under-perform on the overall contract and risk losing part or all of its funding. No Trustee Board is going to agree to Immigration caseworkers taking on many, if any of these appeals, given the attendant risks to funding. The fact that the DCA is offering a costs uplift if you are awarded legal aid does nothing to make it more likely that Citizens Advice Bureaux will be able to take the risk in the first place. Citizens Advice Bureaux will have no choice but to limit the services it offers clients to those which ensure they retain their funding; this will exclude most onward appeals from the new Asylum and Immigration appeals.

4. The effect on access to justice

Citizens Advice fears that clients will face real practical difficulties in getting someone to represent them if these proposals are adopted. If the client receives an inadequate service both in relation to their original application and any subsequent appeal to the new Asylum and Immigration Tribunal, or those decision makers simply get it wrong, they will then face the impossible task of persuading someone to apply for a review or reconsideration (as appropriate) on their behalf at risk as to costs. We do not see how this fits with any reasonable person's definition of justice or provides access to justice.

These proposals do not address the core problem which is that too many cases go to appeal because the original case was inadequately prepared and presented by the initial representatives. Citizens Advice Bureaux come across cases where appeals are essential because insufficient effort was made in the course of the original application to collect evidence (or account for its absence), interpreters were either not used at all or the wrong language was used, or clients did not understand the process or what was expected of them. For example, the failure to take a sufficiently in depth statement, by probing the client for dates, exact locations, sequence of events, names and relationship to the client of those involved etc, can rebound on a client with disastrous consequences. Appeals can and do fail because Adjudicators interpret lack of detail as implying lack of weight and this in turn undermines the client's credibility

The time restrictions on the amount of work that can be done at the Legal Help level and under Controlled Legal Representation that were introduced in April 2004 run counter to the need to ensure that a thorough job is done at this initial stage. Although it is possible to apply for time extensions, this in itself takes time and such applications are often only granted in part. It would help if these initial casework limits were revised to allow a 10 hour initial limit for non Asylum work and 20 hours for Asylum work. Greater use of peer review by the Legal Services Commission should ensure that this time is well spent.

The Legal Services Commission aims to improve the quality of publicly funded services in Immigration and Asylum work via the introduction of the Immigration Accreditation Scheme (IAS). This accreditation will become compulsory for all advisors performing Immigration and Asylum legal aid work from 1 April 2005. Citizens Advice hopes that this will boost the quality of the service to clients and in particular of the original appeal against the immigration decision taken by the Home Office. We hope the Department for Constitutional Affairs will monitor the effect of introducing of the Immigration Accreditation Scheme before pursuing these proposals any further. Citizens Advice has yet to evaluate Bureaux experience of this scheme and may have further comments to make on the IAS in due course.

*Sophie Brookes*
Legal Services Policy and Development Manager
Citizens Advice

*10 January 2005*

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**Evidence submitted by the Council on Tribunals**

The Council was set up by the Tribunals and Inquiries Act 1958 and now operates under the Tribunals and Inquiries Act 1992. The Council's main statutory function is to keep under review the constitution and working of the 80 or so tribunal systems under its supervision and, from time to time, to report on them. The Council must make an Annual Report to the Lord Chancellor and the Scottish Ministers, which is laid before Parliament and the Scottish Parliament. The Council must be consulted before procedural rules are made for any tribunal under its supervision.

The Council responded to the DCA's November 2004 Consultation Paper on "The Asylum and Immigration Tribunal—the Legal Aid Arrangements for Onward Appeals" (CP 11/04). In its response the Council concentrated on two aspects of the paper: first, retrospective granting of legal aid; secondly, the two options outlined in the Consultation Paper for the "prospects of success" test for legal aid funding.

### Retrospective granting of Legal Aid

In commenting on CP 11/04 the Council said that it recognised that the provisions relating to the retrospective granting of legal aid are already contained in legislation, under section 26 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

However, the Council noted that the relevant provision (section 103D) was only introduced to the original Bill at a late stage, with little opportunity for external commentators to make representations about it. Although the Council recognised that the proposals in CP 11/04 were intended to give effect to the wishes of Parliament, the Council nevertheless took this opportunity to register its strong disapproval of section 103D. The Council considered such a provision to be fundamentally unfair. It would have the practical effect of precluding review of the Tribunal's decision in a significant number of meritorious cases.

### Prospects of success test

The Council commented on the proposed new rules for the award of legal aid in asylum appeals. The Council did not consider either of the two options proposed in CP 11/04 to be satisfactory. The Council considered that, despite the assertion to the contrary, both options come close to creating a "no win, no fee" arrangement for the payment of legal aid fees, with unsuccessful cases likely to be funded only on an exceptional basis.

The Council noted that even for established legal aid practitioners it would often prove difficult to judge the true merits of their clients' case before it is finally determined. The Council had major concerns that, under these proposals, an appellant's prospective legal adviser would, in effect, be sitting in judgment on a case. The Council considered this to be wrong in principle. Consequently the Council strongly disliked both options. The proposals will deprive the great majority of appellants who do not have independent means of the benefits of prior funding for a review and reconsideration. The Council considered that neither of the options were satisfactory, but of the two, Option 1 would be less objectionable than Option 2. The Council did so, on the basis that Option 1 requires a less subjective standard to be met in order for the supplier to be successful in his application for retrospective funding.

Council on Tribunals

*December 2004*

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## Evidence submitted by Immigration Advisory Service

Created in 1993, IAS is the successor organisation to UKIAS. Together we have been using public funds to assist immigrants and asylum seekers with their initial and onward appeals since 1970. UKIAS was the only body in receipt of public funds to undertake this work. We have considerable collective experience of arguing and presenting onward appeals at the Immigration Appeal Tribunal and have a small team of senior legal staff dedicated to this work. IAS enjoys high rates of success at this level and other levels of appeal. We are also unusual in representing a considerable number of immigration clients (spouse, child, visitor, business and student cases) as well as asylum clients.

We believe these proposals may force us to stop assisting our clients with onward appeals, leaving poor initial appeal decisions unchallenged. The effects will be a drop in the quality of decision making as judicial supervision is curtailed, more unjustifiably separated families, more student refusals, more unfulfilled business needs and more genuine refugees returned to face persecution and torture. The worst affected immigration clients will be from poor countries, particularly in south east Asia and parts of Africa, where decision-making is in our experience at its worst and most prejudiced.

### Fundamental objections

IAS is absolutely convinced that the proposed AIT re-hearings are totally unworkable if they are to be done unfunded. Representatives simply cannot be expected to prepare new witness statements, new expert evidence, new country bundles and attend court for, potentially, a full day if the funding is not in place to do so. The new regime will make proper preparation for re-hearings impossible, which will have the effect of making it less likely that funding will be granted, giving rise to a self-fulfilling prophecy.

IAS is a not-for-profit organisation and a charity. The proposals seem to assume that claimants' representatives are making unmeritorious applications in order to profit from public funds and therefore that it is acceptable to impose an element of calculated commercial risk on the decision to appeal. IAS makes no profit, has no profit margin to gamble with and cannot take commercial risks. There is a very real danger that IAS will be unable to undertake AIT review work at all, therefore. We would be forced to gamble, literally, on losing some cases but winning enough other cases with enhanced costs to break even. This is entirely unacceptable and impractical. After over 30 years of publicly funded work before the Immigration Appeal Tribunal, it appears that we will be forced to withdraw from onward appeals work.

Objections to underlying assumptions

IAS strongly objects to several of the underlying assumptions in the proposal. These assumptions need to be challenged because the proposed changes, in common with almost every single piece of primary or secondary legislation for the last decade in the field of immigration and asylum, will not have the universally desired effect of reducing delay and improving efficiency while maintaining standards of justice.

IAS believes that the following underlying assumptions are fundamentally incorrect:

We dispute that there are a significant number of unmeritorious appeals at all. The standards of decision-making by many Immigration Adjudicators are, sadly, shockingly low. IAS knows and respects a considerable number of adjudicators and recognises that they have an extraordinarily difficult task, particularly given the consequences of an incorrect decision, but the fact is that many adjudicators appear to be incapable of writing a properly reasoned determination, irrespective of whether the appeal is allowed or dismissed. The most common errors include:

- failure properly to consider expert evidence such as medical evidence;
- failure to make plausibility findings with reference to country information;
- circular reasoning (eg "I do not believe you because I do not believe you");
- logical non sequiturs, particularly over the significance of behaviour by asylum seekers;
- simply omitting to give reasons for conclusions reached.

Such determinations simply cannot be said to be safe or sound. A claimant is entitled to a properly reasoned decision, whether the appeal is over a future risk of death or torture or over the right for a husband and wife to live together in the UK.

The significance of the mistaken assumption is that the proposed measures will not tackle the underlying malaise, only the superficial symptoms. Better and more effective training for adjudicators, more time to write determinations, a more inquisitorial, less adversarial system, better decision-making by the Home Office and a more participatory, engaged Home Office are the real solutions, yet the proposed measures do nothing to advance a genuine quality agenda. Indeed, by seeking to reduce judicial scrutiny and make it harder to challenge poor reasoning, the measures can only contribute to a worsening of an already poor state of affairs.

We strongly reject the apparent assumption that unmeritorious appeals are brought exclusively by publicly-funded claimants' lawyers. A very considerable number of unmeritorious Home Office appeals have been brought since an unannounced change of Home Office policy two years ago, when the Home Office suddenly started lodging appeals against adjudicator decisions to allow appeals. In the experience of IAS, many of these appeals could properly be described as vexatious, particularly where the Home Office failed to send a representative to attend the adjudicator hearing, which invariably leads to a later Home Office appeal if the appeal was allowed. The Court of Appeal has commented on a number of occasions on this phenomenon.[2] The measures do nothing to restrict such appeals, despite the fact that the Home Office is wasting public funds both directly by employing staff for this purpose (rather than appearing in front of adjudicators at first instance) and indirectly by forcing other publicly-funded lawyers to defend Home Office appeals.

If the funding rules are to be implemented, as seems inevitable, we suggest that some sort of cost sanction be included in them to discourage Home Office appeals. This could, for example, take the form of enhanced costs for the claimant's representative (or the Legal Services Commission) if the Home Office appeal is unsuccessful or the Home Office acts in an inappropriate way.

In addition, the measures do nothing to discourage privately funded unmeritorious applications, although this is less of an issue than Home Office appeals.

We also strongly object to the underlying assumption that claimants' representatives engage in publicly-funded work for the purpose of making a profit. IAS does not and indeed cannot and we operate under not-for-profit contracts with the LSC. Most solicitors firms undertaking this work are small but dedicated high street practices with very small profit margins and relatively low salaries. None of us do this work for profit, we do it because we care about the work and the clients. Preventing us from representing our clients' interests by these means is sordid and unnecessary and it ignores the high success rate of claimant appeals to the Immigration Appeal Tribunal. We are aware of dubious claims by Ministers that very few remitted appeals are ultimately successful but as lawyers we can only judge decisions by their transparency and quality of reasoning. The statistics indicate that we have been extremely successful in demonstrating that adjudicator decisions lack these qualities.

[2] For example, see one recent example in *P and M v SSHD* [2004] EWCA Civ 1640 (8 December 2004): "36. Before leaving these issues, we would emphasize that it is important that the IAT confines itself to its proper reviewing role, because there is justified concern at the length of the appeal process. This has contributed to Parliament changing the process in a way that will restrict the rights of the parties to appeal. If all concerned had acted more responsibly, an appeal may not have been considered necessary in this case. Usually the blame is placed upon the immigrant or asylum seekers' advisers. In this case the failure of the Secretary of State to be represented undoubtedly contributed to what has happened"

These measures will no doubt reduce the number of onward appeals by means of financially penalising claimants' representatives and making the work all but impossible except on a pro bono basis but, as stated above, it does not mean that judicial decision making will improve or that properly reasoned, rational decisions will be reached. The measures will have a retrograde effect on the quality of decision making and will only serve to undermine justice.

### Issues of concern

#### Proper use of charitable funds

IAS has not had an opportunity to seek legal advice from specialists on this question but we are extremely concerned that our charitable status will prevent us from participating in AIT reviews under the proposed funding regime. We cannot gamble our charitable funds and we cannot take commercial risks. We simply do not have the money to do so. We are also concerned that our trustees may be personally liable if this is considered a breach of trust. We may well be forced to abandon this review work entirely.

We seek assurances from the DCA that this is an issue that has been considered and that separate funding arrangements can be made for IAS and RLC, the two largest and among the most respected suppliers of legal representation in the sector, and for other not-for-profit organisations, such as Citizens Advice Bureaux.

#### AIT re-hearings

As stated at the outset, this is an issue of the utmost concern to IAS. We simply cannot see how it is feasible to expect a representative to prepare for a full hearing of an appeal without funding. If the re-hearing is to be meaningful, fresh evidence will be needed, as will up-to-date expert and country information, a witness statement dealing with issues arising from the previous hearing and any new matters and a lawyer will need to attend court, potentially for a whole day—and all of this must be done pro bono, in the hope that funding will be retrospectively granted. This is quite simply impossible.

Neither is it an answer to claim that the re-hearing will be limited to certain issues by directions issued by a SIJ or the High Court when granting permission for a review. If credibility findings are challenged, or the AIT's approach to expert or country evidence is challenged, the entire case will have to be re-heard. It is actually very unusual for an adjudicator to make purely legal mistakes on a narrow point.

The decision on funding must be made prior to the full re-hearing. IAS believes that the purpose of the proposed measure would be perfectly well fulfilled if the funding decision is made after the error of law assessment but before the re-hearing, as the disincentive to doing the initial pro bono work to lodge the appeal would still be effective. The hearing to consider the error of law and the re-hearing have to be separated. IAS would be happy to discuss this further with the DCA.

There is no reason why a decision on funding cannot be made before the re-hearing if the test applies at the time of the initial application for a review anyway.

#### Directions by and expectations of AIT

IAS is also concerned that the AIT will expect representatives to behave in certain ways but will not have regard to the funding difficulties under which representatives operate. For example, directing that a skeleton argument or witness statement is prepared for a re-hearing or that a directions hearing is attended is entirely unrealistic if the representative must do so pro bono. However, the AIT will retain discretion to dismiss appeals or exclude evidence if it is not served in accordance with what a representative may consider to be an unreasonable or impossible direction.

The AIT cannot expect representatives to meet the standards of conduct and case preparation expected of professional lawyers if those lawyers are unfunded. In particular, IAS is a not-for-profit charity and does not have a contingency fund, profit margin or bank overdraft that can be risked to undertake such work. We will simply be unable to comply with the expectations and requirements of the AIT and the LSC and may be entirely unable to undertake the work at all. This also has implications for the regulation of representatives. The LSC, OISC, Law Society and Bar Council will need to recognise that basic standards cannot be met if the LSC is not willing to pay for them.

#### Nature of the test for funding

IAS is concerned that even the proposed test of "significant prospects of success" is inappropriate. The "very likely to succeed" or "very strong prospects of success" tests are wildly inappropriate and would effectively prevent any review applications at all from publicly-funded claimants.

It is rather difficult to see how or if the "significant prospects" test differs from the "real prospects of success" test for permission to appeal to be granted by the Tribunal. Creating a second test seems unnecessarily confusing. It is also extremely difficult to see how this will work in practice.

IAS suggests that a "vexatious" or "unreasonable" test would be far more appropriate if some sort of test is required. In contrast to the existing system and procedure rules, which merely allow or permit the Tribunal to notify the LSC that funding was not appropriate in any particular case, the new system could force the AIT to consider this question properly in every single case. Representatives would at least know that if a case is brought with good faith and it passes the "real prospects" test, then funding would be guaranteed. This would also prevent the need to de-link error of law consideration and the full re-hearing.

*Colin Yeo*
Head of Higher Appeals
Immigration Advisory Service

*December 2004*

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## Evidence submitted by The Bar Council

### Executive summary

1. Asylum seekers cannot gain effective access to the High Court without representation: the proposals will shut out many asylum seekers' and immigrants' access to the courts, doing by the back door what the Government failed to do by the front door during the passage of the 2004 Act.

2. There is no justification for circumscribing the High Court judge's discretion to allow costs where he considers that an application, albeit unsuccessful, was competently and properly brought.

3. The proposed risk premium of 25% is inadequate.

4. Any practitioner whose fees are adversely affected by a funding decision should have a right of review, and the practitioner can only fairly be judged on the information available to him at the point at which he assessed the merits.

### The threat to the right of access to the High Court

5. The Bar Council fundamentally opposes a conditional fee arrangement for fundamental rights cases involving issues such as life or death and freedom from torture. It also has the gravest concern about a scheme which discriminates against asylum seekers and immigrants by granting public funding only retrospectively and applying a higher merits test than applies to other publicly funded judicial review even where other litigants have substantially less at stake.

6. The DCA has not explained why the current changes are necessary in the context of a substantial overall reduction in the asylum legal aid budget, the recent legal aid changes (which have already had a detrimental effect upon the economic viability of practice in this field), and the present moves towards accreditation.

7. It is worth reflecting on the context in which the statutory arrangements for review by the High Court have arisen. The Government's original proposal was to prevent asylum seekers and immigrants having access to the courts to challenge the legality of decisions of the Asylum and Immigration Tribunal (AIT). It abandoned this proposal in the face of widespread and profound concerns about the implications for the constitution and rule of law. Lord Steyn said in a speech at the Inner Temple on 3rd March 2004 that:

> [The ouster clause] will preclude judicial review on the ground of lack of jurisdiction, irregularity, error of law, breach of natural justice and any other matter. These are the very areas in which the higher courts have repeatedly been called upon to assert the sovereignty of law. The Bill attempts to immunise manifest illegality. It is an astonishing measure. It is contrary to the rule of law. It is contrary to the constitutional principle on which our nation is founded that Her Majesty's courts must always be open to all, citizens and foreigners alike, who seek just redress of perceived wrongs.

8. The Lord Chief Justice stated that the proposal to prevent the High Court reviewing decisions of the AIT was "fundamentally in conflict with the rule of law", adding that

> I am not over-dramatising the position if I indicate that, if this clause were to become law, it would be so inconsistent with the spirit of mutual respect between the different arms of government that it could be the catalyst for a campaign for a written constitution.
> What areas of government decision-making would be next to be removed from the scrutiny of the courts? **What is the use of courts if you cannot access them?**
> **(***Times*, 4 March 2004, emphasis added)

9. In the face of this criticism, the Government reintroduced statutory review by the High Court of decisions of the AIT. This access to the High Court is fundamental to the compatibility of the Asylum and Immigration Act 2004 with the constitution and the rule of law. As the final sentence of the comment by the Lord Chief Justice quoted above demonstrates, the rule of law requires that asylum seekers have effective access to the High Court where they claim that the AIT has acted unlawfully in determining their appeal.

10. The DCA does not suggest that non-English speaking asylum seekers denied the right to work to pay for representation can effectively represent themselves in a paper based High Court application which requires them to identify a point of law. Nor does the DCA suggest that High Court judges will adopt an inquisitorial role in identifying errors of law when faced with applications by unrepresented claimants, or even that the judiciary will have facilities to translate grounds lodged in the claimant's own language (which would in turn require the claimant to have the original AIT decision translated into his own language within the time limit for making the application).

11. In those circumstances, to deny publicly funded representation for High Court proceedings under the 2004 Act is effectively to shut out asylum seekers' and immigrants' access to the courts. It is to do by the back door what the Government failed to do by the front door during the passage of the 2004 Act through Parliament.

12. The DCA and LSC have rejected suggestions that they are introducing a 'no win, no fee' scheme for these cases, but for the High Court proceedings (subject to extremely rare exceptions), a no win, no fee scheme is precisely what is being proposed. In a significant proportion of cases, barristers are instructed only in respect of the High Court proceedings, the proceedings before the appellate authority being dealt with in-house. The effect of the current proposals is that if the application to the High Court is unsuccessful, the barrister will not be paid, regardless of whether the judge considered the application to be reasonably and properly brought.

13. The problem is particularly acute for barristers as they are required to be sole practitioners and therefore have no ability to share the risk with colleagues as occurs in solicitors firms. At an open meeting at the Bar Council on Wednesday 8 December 2004, a wide cross-section of the Immigration Bar including many junior practitioners were unanimous in the view that barristers would in time be driven out of this area of publicly funded work if the scheme was introduced as proposed.

14. The effect of the no win, no fee regime for High Court applications is chilling enough. The additional and enduring uncertainty over whether practitioners will be paid even for High Court applications that they win creates a double whammy effect which will itself render the scheme completely unviable.

### The merits tests proposed by the DCA

15. Of the two options offered in the consultation paper, the second suggested merits test is plainly absurd: it would have the effect of preventing legal representation in life or death cases with a significant prospect of success. As indicated above, the Bar Council sees no basis for applying a tougher merits test to this field than to other areas of judicial review. However, of the two options proposed, the first suggested merits test is the less dangerous in human rights terms.

16. The DCA argues that only in exceptional circumstances should payment be available for High Court applications that are rejected. A no less exceptional criterion must therefore be applied to disallowing payment for High Court applications which have been allowed. Where a High Court judge has determined that a rehearing is required, there should be no circumstances other than impropriety on the part of the practitioner (such as withholding information from the judge) where it could be reasonable for costs to be disallowed. This should be reflected in the regulations.

17. Either test will discriminate against asylum seekers and immigrants compared to other publicly funded litigants in judicial review proceedings by applying a stricter merits test. Any test must reflect the fact that in some cases, the error of law may be that the claimant was denied any fair hearing by the AIT. If such a breach of natural justice is established, it cannot be appropriate to apply a higher merits test to the ultimate prospects of success on rehearing than was originally applied. The claimant should not be penalised because he was denied a hearing first time round.

### The proposals to restrict the High Court judge's discretion

18. The present proposals seek to define in advance the circumstances where public funding may be granted by a High Court judge and to straightjacket the High Court judge's ability to determine in the circumstances of the particular case whether payment should be made for a case which albeit unsuccessful, was reasonably, competently, and honestly brought. The Lord Chancellor indicated to Parliament that High Court judges "would be able to order legal aid to be paid if they consider there are exceptional circumstances". (HL Committee, 4 May 2004, Col 998). That is inconsistent with the proposed regulations limiting the judge's power to allow costs if he considers that exceptional circumstances exist.

19. If the DCA accepts that the aim is a "no merit, no fee" system rather than a "no win, no fee" system, then it is essential that the High Court judge is not prohibited from awarding costs in circumstances where he concludes that the application was properly brought, finely balanced and/or there are exceptional circumstances why funding should be awarded.

20. Apart from the experience and expertise that a High Court judge will bring to bear, he has the advantage of considering costs at the point when the application has been made, rather than the far more challenging, complex and controversial exercise required of the AIT of putting itself in the shoes of the practitioner advising on the High Court proceedings at some previous point in time and seeking to exclude hindsight in determining whether the application was reasonably brought in light of what was known at the time.

### Rates of remuneration and the proposed risk premium

21. The Lord Chancellor indicated to Parliament that to address the adverse impact of the scheme on the availability of competent practitioners, a risk premium would be paid over and above present rates. Any prospect that a risk premium might mitigate the effect of the scheme would depend upon the premium being realistically calculated to meet the "risk". The proposed premium of 25% is significantly below the average uplift in CFA cases and does not properly reflect the risks involved.

22. During pre-consultation meetings, there was no suggestion that the hourly rates presently paid for High Court statutory review proceedings would be reduced before applying the risk premium. To do so would be absurd. It would both negate the effect of the risk premium and undermine the basis upon which the scheme was presented to Parliament.

23. There was in any event no suggestion of any particular concern about barristers' costs on review to the High Court (which costs constitute the greater proportion of the total costs of an application drafted by counsel).

24. The Bar Council was therefore profoundly surprised and concerned to find in the DCA's consultation document a reference to High Court proceedings being funded through CLR rather than being funded as licensed work as is presently the case with statutory review and all other publicly funded judicial review proceedings. 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.

25. 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.

26. 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.

27. 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.

### 'Risk-Sharing'

28. It is plainly correct that disbursements should be paid in any event to those who do not have an opportunity under the proposals to make an assessment of the prospects of success. This should extend to all disbursements (subject to the reasonableness of the disbursement). There is no justification for limiting the principle to interpreters and experts.

29. The Bar Council understands that the DCA and LSC accept that fairness and economic practicalities require that fees for lawyers are also not put at risk without the practitioner having a reasonable (and reasonably funded) opportunity to assess what the prospects of success actually are. That was a key plank in the DCA's argument that the scheme was economically viable for barristers. It requires that funding be set at a level which properly reflects the anxious scrutiny that any barrister would have to give to such an assessment in human rights cases of such overwhelming importance to the client. The Bar Council is concerned that the LSC's proposals on fees for assessing the merits do not indicate adequate regard for this principle.

30. Advising on the merits involves both an assessment of the ultimate prospects of success of the appeal on rehearing and predicting whether a High Court judge will identify a potential error of law. The former is insufficient without the latter. The latter requires a sound understanding of public law and practice and judicial review in particular. The person responsible for drafting the application to the High Court will ordinarily be the appropriate person to assess the merits. There is no reason in the public interest for directing the funding elsewhere.

REVIEW OF FUNDING DECISIONS

31. A decision to disallow costs has substantial implications both in an immediate economic sense and in a longer term professional sense. As with the wasted costs jurisdiction, there must be a proper opportunity to be heard. It may be impossible to decide the review fairly without an oral hearing.

32. The proposal in the consultation paper is that the AIT will review its own decision. While it may be useful to enable the original decision maker to reconsider his own decision, it is patently unsatisfactory that the only form of appeal on such important matters should be to the decision maker whose decision is the subject of the appeal.

33. The absence of an appropriate appeal mechanism is likely to lead to a proliferation of judicial review applications. The Bar Council understands that it is proposed that the President of the AIT will handle all such applications personally. That raises particular problems if he was personally involved in the original decision to disallow costs.

34. Any practitioner—solicitor or barrister—whose costs are disallowed should have a right to apply for a review. As with the wasted costs jurisdiction, different issues may be raised in review applications by the solicitor and barrister. Only one may wish to seek a review or they may wish to advance different grounds.

35. In order for the right of review to be effective, written reasons must be given for disallowing costs, sufficient to let the practitioner know why his costs were disallowed and to make appropriate representations in the review. That will be especially important if the AIT is proposing disallowing counsel's costs of High Court proceedings where counsel was not subsequently instructed in the rehearing before the AIT.

36. A barrister can only determine the prospects of success on the information and evidence contained in his brief (and any knowledge of the case gained through any previous involvement). He must be judged on that basis. In assessing the barrister's decision, regard must be had to the barrister's obligations under the Code of Conduct which states that:

> Whether or not the relation of counsel and client continues a barrister must preserve the confidentiality of the lay client's affairs and must not without the prior consent of the lay client or as permitted by law lend or reveal the contents of the papers in any instructions to or communicate to any third person . . . information which has been entrusted to him in confidence or use such information to the lay client's detriment or **to his own** or another client's advantage. (para 702, emphasis added)

37. In relation to the LSC, there is a statutory exception to the duty of confidentiality set out in the Code in part so that clear and accurate information can be provided in respect of the assessment of the merits. No such statutory exception is proposed for the present proceedings. The Bar Council would not support one. There are good reasons for rules of client confidentiality and to create an exception would be particularly unwelcome in the present context where it would lead to confidential information being provided to the same body as determined the client's substantive appeal as opposed to a separate funding body.

38. However, as with the wasted costs jurisdiction, fairness will require that a judge or the AIT do not draw adverse inferences in respect of a failure to address allegations where the obligations of client confidentiality under the Code of Conduct prohibit the barrister from addressing them properly.

The Bar Council

*January 2005*

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## Evidence submitted by The Law Society

EXECUTIVE SUMMARY

1. This paper contains the Law Society's evidence to the Committee concerning new proposals by the DCA for legal aid funding of applications for reviews of decisions of the new Asylum and Immigration Tribunal. The main proposals are that there will be a new, more stringent legal aid merits test to be assessed at the end of the case by the Tribunal which will then retrospectively decide whether legal aid should be granted. The stated aim of the proposals is to prevent the new Tribunal being overwhelmed with weak applications.

2. The Law Society opposes these changes for the following reasons:

- The proposals are unnecessary as there are already adequate controls on merits which are exercised by the Legal Services Commission, the judicial "filter" system and experienced solicitors who will be subject to mandatory accreditation from April 2005.
- There are serious access to justice implications as reasonably arguable cases may be excluded from legal aid eligibility with potentially severe consequences, particularly for those seeking asylum. It is also likely that a number of legal aid practitioners will withdraw from this area of work as they will not be able to bear the financial risk of taking on such cases.

— The proposals are premature as the new appeal system is untested. The quality of decision making which may generate either greater or fewer applications for reconsideration is not known. In any event the number of appeals in the system must fall significantly because of the substantial decline in the number of asylum applications.

— The proposals are derived from an enabling provision in the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 and as such implementation is not mandatory. The proposals should be abandoned or at least put on hold until a proper evaluation of the new appeals system can be made.

## Introduction

3. This evidence is submitted by The Law Society, the regulatory and representative body for 116,000 solicitors in England and Wales. The Society welcomes the decision of the Constitutional Affairs Committee to conduct an enquiry into legal aid and asylum appeals including the proposals by the Department for Constitutional Affairs (DCA) to introduce retrospective legal aid funding for applications for reviews of decisions by the new single-tier Asylum and Immigration Tribunal (AIT).

4. The statutory framework for the retrospective funding proposals is section 26 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (The Act) which contains enabling provisions to introduce retrospective funding arrangements for applications for reviews of decisions by the AIT, which will commence operation in April 2005. The Society considers these proposals to be deeply flawed and has submitted a detailed response to the DCA's proposals.

5. The Law Society believes that these proposals represent a continuation of the government's political agenda to limit the appeal rights of immigrants in general and asylum seekers in particular. The initial draft of the Asylum and Immigration (Treatment of Claimants, etc) Bill sought to prevent any onward appeal to the Courts against decisions of the AIT. After widespread opposition to this proposal, (which arguably violated basic constitutional principles of access to the courts) the government agreed to allow a right of statutory review to the High Court. The issue is now whether the new legal aid proposals for funding of appeals will effectively deny access to the very appeal procedures it was deemed so necessary to preserve.

6. Retrospective funding coupled with the proposed more restrictive merits test will inevitably mean that vulnerable applicants with reasonably arguable cases will be denied legal aid to pursue their appeals. The reasons why we believe this will happen and why we consider the current proposals to be unnecessary are considered in more detail below. A brief summary of the current and proposed new appeal procedures is provided at **Annex A**.

## The new funding arrangements

7. Under the proposed new funding arrangements, decisions about granting legal aid will be made in the majority of cases by an AIT judge at the end of the reconsideration process. It is envisaged that legal aid will only be granted where the application has been successful or was a "near miss" insofar as when the application was initially made, it would have satisfied the merits test in the circumstances that prevailed at that time. In a minority of cases, for example appeals that are withdrawn before reconsideration by the AIT, the decision to allow legal aid may be made by the High Court.

8. In cases where legal aid is ultimately granted, it will be provided under Controlled Legal Representation (including High Court statutory review applications that would previously have been funded under a legal aid certificate.) Civil legal aid will still be available for the small minority of cases which proceed to the Court of Appeal.

9. Subject to financial eligibility, legal aid will be granted if, at the time the application was submitted, the case would have satisfied a new more stringent merits test. The DCA propose to implement one of two thresholds, either one of "significant prospects of success" or, more restrictively, whether a case "was very likely to succeed or had very strong prospects of success". Solicitors and barristers will be expected to share the risk of taking on these cases. In cases which are not deemed to satisfy the merits test, legal aid suppliers will be entitled to request a paper based review of the decision to refuse funding. Where the merits test is satisfied, there will be a "risk premium", which will remunerate successful cases at an enhanced rate of 25%. This is intended to compensate legal aid suppliers for the additional risk involved in taking on these matters.

10. The DCA state that these changes are necessary to prevent the new AIT being overwhelmed with weak applications and the method of achieving this is to shift the risk of funding onto legal aid practitioners. The DCA regard the proposed new funding arrangements as integral to the operation of the new AIT although the Society sees no reason why the new appeals procedures cannot be freestanding without the need for any fundamental change in the method of funding.

### Law society concerns

11. The Society agrees that unmeritorious applications should not be publicly funded. However, we believe that existing measures are sufficient to deal with this problem without the need for retrospective funding and a new merits test. We are also concerned that the proposals will lead to an unacceptable reduction in access to justice for some of the most vulnerable people in society and may result in chaos if those effectively deprived of access to experienced accredited solicitors submit applications in person.

### Sufficiency of existing arrangements

12. There already exist a number of "filters" or safeguards to prevent unmeritorious cases reaching the review stage. The Legal Services Commission (LSC) already employs quality controls on firms conducting publicly funded immigration work including costs assessment audits, Quality Mark audits, and Peer Review. Further, since April 2004, devolved powers were removed from firms and the LSC is introducing stringent criteria for granting them back. All publicly funded review applications are subject to the Controlled Legal Representation (CLR) merits test. Firms without devolved powers must have CLR approved by the LSC before they can continue to represent a client, whilst firms with devolved powers risk substantial costs penalties and other contract sanctions if they are subsequently found on audit to have misapplied the merits test. In addition, from April 2005, all lawyers undertaking publicly funded work in these cases will have successfully completed a rigorous process of accreditation, providing a further safeguard on the quality of advice in this area of work. All of these factors mean that there are already a raft of measures to prevent unmeritorious cases progressing to the review stage.

13. In addition to the public funding filters there is a rigorous filter exercised by judicial scrutiny. Within the existing two-tier system, leave to appeal to the Tribunal must be granted before an appeal can be heard. In 2003, just under 35,000 applications for leave to appeal were made and just under 12,000 appeal applications were received by the Tribunal. The leave procedure thus filtered out approximately two thirds of applications. The 2003 figures represent a peak, as Government figures indicate that the number of asylum applications have fallen substantially in 2004 so the overall number of appeals is likely to be considerably lower in the future. The new single tier system will require that applications for review of AIT decisions will be scrutinised by a High Court judge who will determine whether the case should go back to the AIT for reconsideration. There is no reason to assume that this process will be less robust than the current leave procedure. Indeed the Secretary of State has indicated that it will be at least as robust.

14. The combination of LSC requirements and judicial scrutiny ensures sufficient safeguards against the system being overwhelmed with weak applications. We do not believe further limitations on the availability of legal aid are legitimate. Where a High Court judge has determined that an appeal has sufficient merits to proceed, the interests of justice dictate that legal aid should be granted. We do not believe it is justified for the Government to require an additional test for the reasonableness of legal aid when a High Court judge has made that determination.

### The proposed new merits test

15. The DCA consultation paper suggests two options for the new CLR merits test for AIT review applications. Option 1 is framed in terms of whether a case had "significant prospects of success" and option 2 is a test framed in terms of whether a case was "very likely to succeed or had very strong prospects of success".

16. We believe that option 2 is wholly unacceptable. A test framed in these terms cannot be compatible with the interests of justice, as the implication is that only cases that are almost certain to succeed will qualify for funding. This would effectively prevent public funding of all applications which seek to clarify and develop caselaw, as well as cases where it seems reasonably clear that the Tribunal has made an error in law but there is some element of doubt. This cannot be in the public interest. There would be a further perverse consequence that even where the applicant succeeds at the reconsideration stage, funding could still be refused if the Tribunal judge considers that the merits test was not satisfied at the time the review application was submitted.

17. This option also goes beyond the intentions of Parliament expressed during the passage of the Asylum and Immigration (Treatment of Claimants) Act. Lord Filkin has stated that "our intent is not to squeeze out of the system those cases which have reasonable grounds for being argued".[3] David Lammy MP informed the House of Commons that "there are a number of scenarios where it would be right for the lawyer to receive payment where he had not been successful on behalf of the applicant" and cited an example an unsuccessful application where the "case may have established important case law that defines a particular group or community and will have a lot of bearing on immigration and asylum cases. In such circumstances, it would also be right for the lawyer to receive funds".[4] If option 2 were to be implemented, it is highly unlikely that such cases would receive public funding.

[3] HC Deb, 6 July 2004, col 739
[4] HC Deb, 12 July 2004, col 1166

18. Option 1 is also undesirable. The term "significant prospects of success" is ambiguous and open to subjective interpretation by different Tribunal and High Court judges. This could lead to inconsistency in decision making, which offends against the interests of justice. It is clear that this test is intended to be more stringent than the current test for Controlled Legal Representation, which, in conjunction with the other existing filters in the system, and bearing in mind the complexity of the issues and the importance of these cases to the applicant, provides a sufficiently stringent merits filter.

19. The Society believes that, subject to means, any reasonably arguable application for a review should be eligible for legal aid. If legal aid funding decisions were to be transferred to the Court or Tribunal, this could be justified only on the basis that legal aid will be available for all applications where a High Court judge orders full reconsideration by the Tribunal. The Society would also accept that where, on full reconsideration it is established that a supplier had culpably misrepresented the application, the Tribunal could be empowered to revoke legal aid. The Society believes that this would adequately secure the stated objective of screening out any unmeritorious applications.

20. The requirement for the judge retrospectively to consider merits, as they were at the time the review application was made is problematic. This requires the judge to form a view entirely uncoloured by any intervening circumstances. This will make the task of making objective and consistent funding decisions very difficult.

### The introduction of the new arrangements is premature

21. We are strongly of the view that there are too many untested factors to justify the introduction of the proposals at the present time. The first factor is the new AIT itself, which will not come into operation until April 2005. If the quality of decision making is better than that currently exercised by adjudicators, then it is reasonable to assume that there will be fewer potential review applications which would satisfy the existing merits test. This in itself would reduce the risk of the review procedure being overwhelmed. If there is no improvement in the current quality of decision making, then it is entirely contrary to the interests of justice to effectively curtail the right to pursue a review by imposing stricter merits criteria for legal aid and expecting suppliers to pursue the matter on a speculative basis.

22. The second major factor is the introduction of compulsory accreditation which also commences in April 2005. Only those lawyers who can demonstrate a high level of knowledge and competence in immigration and asylum law will succeed in achieving accredited status. In the House of Lords debate on the statutory framework for these proposals, Lord Filkin stated that the proposals will encourage lawyers to give "a more rigorous examination to the prospects of the case succeeding". Lord Filkin goes on to say:

> we recognise that good lawyers do that already, but that has not been universally the situation in our experience of asylum matters over the recent years. This is not an attempt to remove these cases from the scope of legal aid but a genuine drive to ensure that the focus of public funding is on deserving cases.[5]

23. Lord Filkin thus implicitly accepts there is nothing wrong with the current merits test but rather the need to curb the misapplication of that test by incompetent lawyers. Accreditation, together with the stringent measures already taken by the Legal Services Commission, is driving these lawyers out of publicly funded immigration work. The effect of these measures should be properly evaluated before new, more restrictive funding arrangements are put in place. To implement the proposed changes will inevitably mean that, contrary to the proclaimed intentions of the government, meritorious cases will be removed from the scope of legal aid.

24. The third significant factor is the substantial drop in the number of asylum claims which will inevitably mean that the number of appeals to the AIT and consequently the number of applications for review must also fall significantly. The Society does not believe that the DCA's concerns about the review process being overwhelmed with weak applications have any real substance.

### Implications for access to justice

25. It is inevitable that implementation of these proposals for retrospective funding will reduce substantially the number of solicitors and counsel carrying out publicly funded work in this area, as they will not be able to risk taking on even quite strong cases that may not retrospectively be deemed to satisfy the proposed new merits test. The full extent of that risk cannot be determined until a final decision is made on the nature of the new merits test to be adopted.

26. The Society is aware of a number of highly regarded practitioners who have withdrawn from publicly funded immigration work because of the constraints introduced by the April 2004 contracts, and fears that the new funding arrangements could be a catalyst for further withdrawals by respected providers. We doubt that the proposed 25% uplift will offer a sufficient incentive carry out this type of work. For High Court statutory review applications (which will be carried out under Controlled Legal Representation rather than

[5] HC Deb, 4 May 2004, col 998

under a civil legal aid certificate) there will be a cut in payment rates even after the uplift has been applied.[6] Immigration lawyers who on average are amongst the least well paid in the profession, even in comparison with other areas of legal aid, simply cannot afford to take the chance of doing substantial amounts of work for which they might not be paid. Those who carry on are likely to do so on the basis of goodwill, rather than for sound business reasons. This is not a sustainable way to run legal aid. Many practitioners will be faced with the ethical dilemma of advising clients that although they may have a reasonably arguable case, the firm cannot continue to represent them as the funding prospects are too uncertain. Even where solicitors have, in the words of Lord Filkin, given a "rigorous examination of the prospects of the case succeeding" the proposals could mean that they will not be in a position to take on even reasonably arguable cases.

27. The proposals offend against the principle of "equality of arms." The Home Office commands substantial resources compared with represented appellants. Where appellants are effectively denied representation the balance is tipped firmly in favour of the state. The potentially grave consequences for asylum seekers so denied representation could potentially give rise to a claim under Article 6 of the European Convention on Human Rights which enshrines the right to a fair trial. Even where representation is provided under the proposed funding arrangements inequality continues to exist, as there is no suggestion that the Home Office should loose funding for defending appeals it ultimately looses.

28. Asylum appellants with genuine cases are desperate to avoid removal to countries where they are at risk of loss of liberty, torture or death. It is very likely that applicants with reasonably arguable cases who are denied public funding will submit their own applications without the benefit of professional representation. Any significant increase in litigants pursuing their cases in person, particularly those who have a limited command of English, is likely to cause considerable practical difficulty to the Tribunal, as well as failing to provide effective help to the applicants. The net effect could be contrary to the smooth and efficient running of the Tribunal that the new funding arrangements purport to facilitate.

## Conclusion

29. As David Lammy has made clear in Parliament, these proposed legal aid changes are devised under an "enabling power" within the Act 2004. The Act does not require these changes to be implemented and the Society calls upon the government to recognise the changed circumstances since the Act was debated in Parliament and either scrap the proposals altogether, or at least delay implementation in order to allow a proper evaluation of whether they are necessary or justified.

## Annex

### A brief outline of the current appeals procedure and funding arrangements

30. Under the current system, appeals against Home Office decisions are initially heard by an adjudicator. Adjudicators' decisions may be appealed to the Immigration Appeal Tribunal but only where the Tribunal has first granted permission to appeal. If permission is refused, there may be grounds to apply to the High Court for a statutory review of that decision. The substantive decision of the Tribunal can be appealed to the Court of Appeal where grounds exist and ultimately to the House of Lords. In practice it is common for the Tribunal to remit cases back to a different adjudicator for a re-hearing.

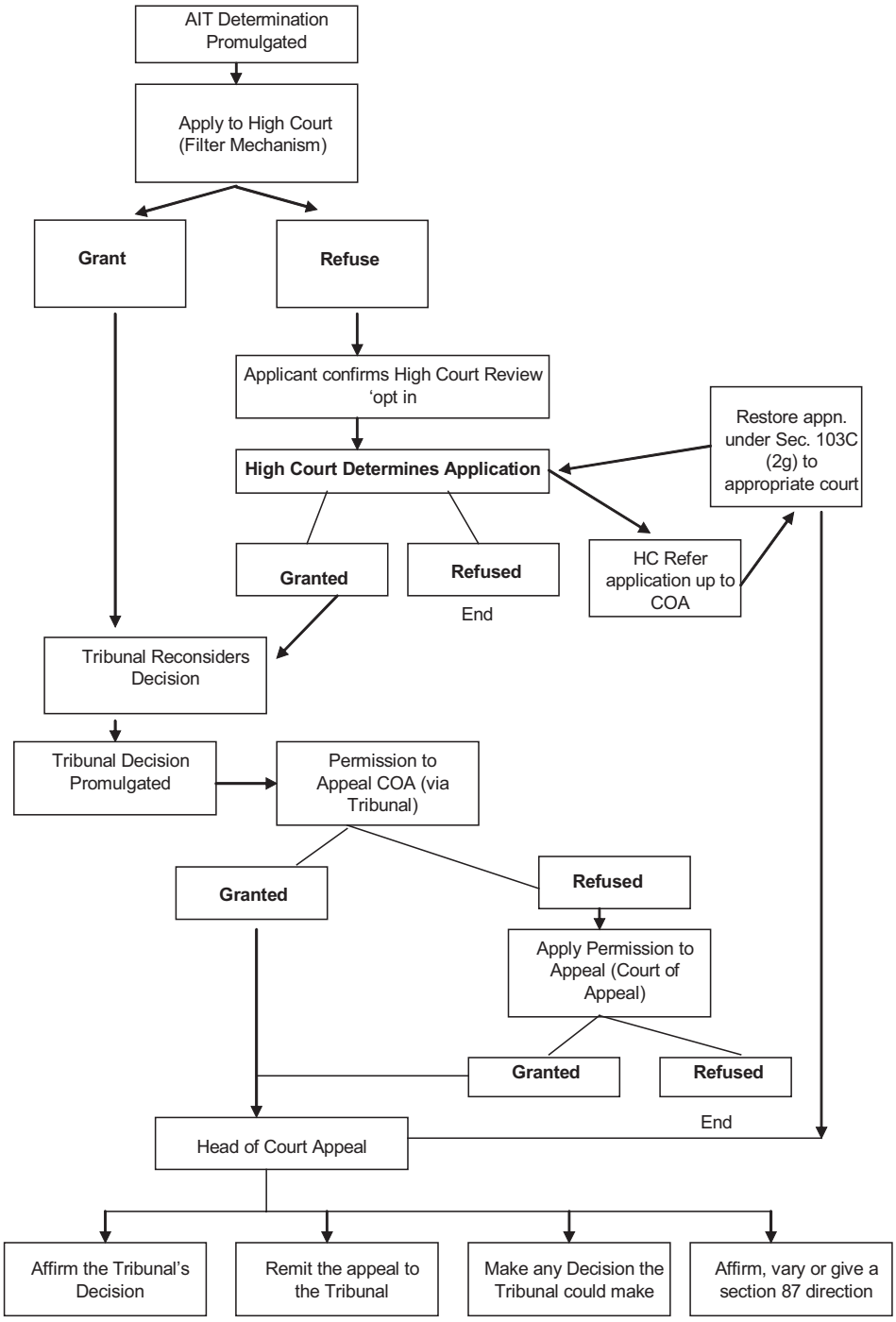
31. Subject to satisfaction of the means and merits test, appeals to an adjudicator or the Tribunal are conducted under Controlled Legal Representation (CLR) which is part of the Legal Help Scheme. Applications to the High Court and above would be conducted under a full legal aid certificate.

### A brief outline of the new appeals procedure

32. From April 2005 all appeals against Home Office determinations will be heard by the Asylum and Immigration Tribunal. This is a single tier system. An application for a review can be initially made to the High Court but only where the AIT has made an error of law. These applications will go through a "filter mechanism" where a High Court judge will consider whether the application should be sent back to the AIT for full reconsideration. If the High Court refuses there may be grounds for a review of the High Court decision. Refusal by the AIT on reconsideration may provide grounds to apply for permission to appeal to the Court of Appeal. The procedures are illustrated by the flow chart below which was originally produced by the DCA.

[6] High Court preparation rates (London): Civil legal aid: £79.50 per hour; CLR (inc. 25% uplift) £76.50 per hour

**AIT Appeals Onward Appeal Rights (Filter Mechanism)**




The Law Society

*December 2004*

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**Supplementary evidence submitted by The Law Society**

NOTE ON COSTS

1. This note follows from the oral evidence presented to the Committee on 9 February 2005. The Law Society agreed to prepare a brief note regarding methods of assessment of costs and appeals procedures against costs orders and assessments. The context is the DCA's proposals for decisions about legal aid for applications for review and reconsideration of decisions of the Asylum and Immigration Tribunal (AIT), to be made and the end of the reconsideration process by a Tribunal (or, in some cases a High Court) judge.

2. The Committee Chairman Alan Beith enquired whether these matters could be dealt with under the present costs system or whether something more elaborate is needed. The following information attempts to address this issue.

## A brief outline of the current system of assessment of Legal Aid costs

3. In litigation conducted under a civil legal aid certificate, the general position is that costs are assessed by the court where the claim exceeds £2,500. Claims under £2,500 are assessed by the Legal Services Commission.

4. Where costs are assessed by the court, the bill of costs is subject to an initial provisional or summary assessment by the court. After the initial assessment, solicitors are obliged to inform counsel if counsel's fees have been reduced or disallowed. If any interested party objects to the assessment, a detailed assessment hearing can be requested at which the parties are able to make oral representations.

5. Where costs are assessed by the LSC, there is a right of appeal to the Costs Committee at which oral representations can be made. There can be a further appeal on a point of principle to the Costs Appeals Committee. At each stage of the appeal, solicitors are obliged to inform counsel of any fees disallowed or reduced and, counsel can pursue an appeal in person.

6. For controlled work, ie Legal Help, Help at Court and Controlled Legal Representation, solicitors submit monthly bills to the LSC on a consolidated claim form. Claims may be audited by the LSC and the audit results may be appealed to the Costs Committee.

The proposed new costs system for publicly funded applications for review and reconsideration of decisions of the Asylum and Immigration Tribunal.

7. Under the new proposals, a Tribunal or High Court judge will make a decision as to whether legal aid will be granted, by applying the merits test retrospectively to the circumstances that prevailed at the time the application for review or reconsideration was made.

8. If legal aid is refused, practitioners can request a paper-based review of the decision. The DCA are yet to announce whether there will be a separate right of appeal for barristers. Once a funding order is made, the Courts will have no further role in assessment of costs. Practitioners will submit claims for costs on Controlled Legal Representation forms for payment by the LSC. If, on a subsequent costs audit, the LSC considers the claim to be excessive, the LSC will seek recovery of that excess from the supplier.

9. The Law Society together with the Bar Council and ILPA have raised serious concerns over the principle and application of the retrospective merits test and, the absence of any entitlement for practitioners to attend an appeal hearing in the event of refusal.

## The new proposals in relation to existing costs procedures

10. The new proposals constitute a hybrid system which does not readily fit within the existing arrangements for assessment of certificated cases or cases that are conducted under controlled work. For this reason comparisons are difficult to make.

11. Although all cases under the new proposals will be Controlled Legal Representation matters, they differ from other CLR matters in that the question of entitlement to legal aid on the merits, will be determined by the court rather than the LSC. The limited right of appeal will apply only to the merits issue and the court will have no role in assessing quantum.

12. In all other cases where costs are considered by the court, the court is conducting a purely quantum exercise rather than consideration of the merits. The assessment of costs is dealt with by a different judge to the trial judge. Although the trial judge will make a costs order which is a pre-requisite for the assessment, this is not analogous to the proposed role of the Tribunal judge, as in the former situation legal aid has already been granted and the only issue is whether the costs will be paid by the other party or from the legal aid fund.

13. Immigration and Asylum appeals applications will be the only legally aided matters where entitlement to legal aid is not determined until the end of the hearing. They will also be the only matters where the merits determination is made by the court and responsibility for assessment rests with the LSC.

14. These are also the only matters within the legal aid system where, as is currently proposed, there is no right for practitioners to make oral representations at a costs appeal.

15. For these reasons it is difficult to see how retrospective funding arrangements can be operated within the existing framework of costs assessment by the courts.

The Law Society

*21 February 2005*

## Evidence submitted by the United High Commission for Refugees (UNHCR)

### Our interest in this inquiry

1. The United Nations High Commissioner for Refugees (UNHCR) is a non-political, humanitarian organisation mandated by the United Nations to lead and co-ordinate international action for the worldwide protection of refugees and asylum seekers. Under Article 35 of 1951 Convention relating to the Status of Refugees ("the 1951 Convention") UNHCR has the function of supervising the application of the provisions of the 1951 Convention, and it is in this role that UNHCR would like to offer the following comments in relation to the current Constitutional Affairs Committee inquiry into the Legal Aid arrangements for onward appeals, to ensure that fair access to the full asylum process be afforded to those in need of international protection.

### Importance of access to legal representation

2. The United Kingdom, as a member of UNHCR's Executive Committee,[7] has repeatedly drawn attention to the importance of fair and effective asylum procedures.[8] UNHCR has consistently emphasised the need for good quality decision-making and an appropriate appeal or review process to maintain procedural safeguards and due process. In UNHCR's view, the legal representative plays an important role in ensuring that these standards are maintained, that an asylum applicant is able to advocate his or her case effectively, and that proper access to and understanding of the procedures is achieved.

3. A system to authorise funding at any stage of the appeal process must be designed to ensure that asylum seekers receive advice and representation in a timely and effective manner. The primary consideration must be for a procedure that does not restrict access to review of the application of the 1951 Convention. In this regard, the administration of funding will need to be carefully aligned with that of the appeal procedure, to ensure that its operation supports the appeals process, rather than obstructs it.

4. UNHCR has noted predictions that the envisaged system of retrospective funding for challenges to decisions of the Asylum and Immigration Tribunal ("AIT"), and the attendant risks that will have to be taken by legal representatives taking on such cases, are likely to lead to fewer legal representatives practising at this level. It has also been commented by practitioners in the field that lawyers are likely to move away from asylum law altogether, in view of this new policy combined with other recent changes, whose cumulative effect is to make it increasingly difficult for an asylum legal representative to continue to work to a high standard or to run a viable business.[9]

5. It is the global experience of UNHCR that access to legal assistance can be problematic for asylum-seekers. These difficulties will clearly be heightened for an individual suffering from trauma or mental illness as a result of past experiences, or experiencing material deprivation in the host country. UNHCR is concerned to ensure that changes in the Legal Aid system do not have a detrimental effect on an asylum seeker's timely access to full and effective legal representation throughout the asylum process in the United Kingdom. While UNHCR is pleased that the Government might be concerned to prevent problems arising as to the quality of legal advice provided to asylum seekers, in our view, the solution should be to focus more on ensuring an enhanced quality of legal advice rather than on reducing the possibility to access it. UNHCR is concerned that the current approach—aimed at discouraging unmeritorious applications for review of AIT decision—could also act to harm the very deserving cases, by discouraging legal representatives from taking the risk in meritorious cases, or even by reducing the numbers of legal advisors in this area altogether.

### Prospects of success test

6. We note the two suggested options for the "prospects of success" test that are currently under consideration by the Department for Constitutional Affairs ("significant prospects"/"very strong prospects"—question 3 of the DCA's Consultation Paper).[10] We would comment that, in relation to the merits of their case, many asylum seekers find themselves in a "borderline situation". There are numerous reasons for this, including the factually unique nature of asylum cases, the personal vulnerabilities of applicants that may make explanations of events difficult, the obstacles often faced in evidencing past events,

[7] UNHCR's Executive Committee (ExCom) is made up of 66 countries that meet every autumn in Geneva to review and approve the agency's programmes and budgets and to advise on protection matters. ExCom sets international standards with respect to the treatment of refugees and provides a forum for wide-ranging exchanges among governments, UNHCR and its numerous partner agencies. ExCom Conclusions may only be passed with the unanimous agreement of the 66 countries; therefore, the unequivocal agreement of the UK Government was required in order to pass any ExCom Conclusion. During the adoption of ExCom Conclusions, States have ample opportunity to express reservations to their content. Although Conclusions do not have a legal binding force, they are of the utmost moral significance

[8] See ExCom *Conclusion on Safeguarding Asylum No. 82* (XLVIII) 1997

[9] Examples of such recent policy changes include: time-based restrictions on Legal Aid funding, the "Accreditation" process for legal representatives, shorter time limits recently introduced for appeal applications (and more specifically the 5-day time limit for applications for reconsideration of an AIT decision), and other features of the draft 2005 Procedure Rules

[10] The Government's proposals are contained in a paper entitled: *The Asylum and Immigration Tribunal—The Legal Aid Arrangements for Onward Appeals*, November 2004

and the complications inherent in a forward-looking consideration of risk on return. It is therefore often difficult to rate the prospects of success in an asylum case, even in terms of whether or not likelihood of success is as high as 50%, let alone to a higher standard.[11] It is also likely to be a highly subjective assessment.

7. The same principles will surely apply in many cases when attempting to consider the merits of a review of an AIT decision. When the difficulties of this assessment are combined with the potential penalty for an erroneous decision by a legal representative, it would seem likely that under either of the DCA's two suggested tests, legal representatives will tend to err on the side of caution when deciding whether or not to pursue a reconsideration application. Given this likely effect of either of the suggested tests, and the particularly grave potential consequences of an erroneous decision not to process an asylum appeal further, UNHCR would support neither test, but would recommend that the regulations governing the retrospective funding be amended to reflect the above-mentioned principles. UNHCR would urge that any merits test for funding is both set and applied in a flexible and humane manner. We would particularly recommend that the test used should be no more stringent that the current "Controlled Legal Representation" merits test applied to funding for asylum appeals, where funding is only refused where the prospects of success are "poor"[12]—that is prospects are clearly below 50%.[13]

UNHCR London

*January 2005*

## Evidence submitted by the Legal Aid Practitioners Group

1. This is the evidence of the Legal Aid Practitioners Group to the Constitutional Affairs Committee on the DCA's proposals for retrospective funding of immigration appeals.

2. LAPG is an independent membership organisation representing over 800 firms that undertake legal aid work. Between one third and one half of our members do some immigration work.

3. The AITC Act 2004 empowers the DCA to set up a system of retrospective funding for appeals from the AIT. It does not require it to do so. We believe that this approach is contrary to the best interests of clients, practitioners and the system as a whole, and should not be pursued. We also believe that the proposals do not comply with assurances given by Ministers during the passage of the Act as to how the funding system would operate.

4. Under the current arrangements, in order to proceed to challenge an immigration appeal decision by way of judicial review, the solicitor has to persuade the Legal Services Commission, in accordance with its funding code, that the case has sufficient merit that it should be funded. Once the LSC has confirmed that the case has merit, the solicitor is guaranteed funding, unless it subsequently transpires that the solicitor misled the LSC, or the Court decides that the application had no merit and issues a certificate to that effect. In either such case, the solicitor will not get paid. There are therefore significant protections within the existing system to ensure that solicitors bringing inappropriate appeals are heavily penalised for doing so.

5. We have seen no justification for denying the solicitor an assurance of funding before work is started on a case. 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.

6. The less harsh of the possible alternative tests being proposed under this scheme is that a case had "significant prospects of success". The current test is that a borderline case will be funded if it is of overwhelming importance to the client or raises significant human rights issues. Clearly, the vast majority of borderline asylum cases will meet this test. No case of less than borderline prospects of success meets the funding code. If such cases are being funded, then it means that the LSC is not applying the merits test properly and that Courts are not issuing certificates of no merit as robustly as they should.

7. Thus under the new scheme, a solicitor considering whether to assist a client will need both to apply a much more stringent test than at present and leave enough of a margin of error within the new test to ensure that he does not end up doing substantial amounts of work and not get paid for it. A significant number of cases that are properly brought under the current scheme (and therefore are not the sort of weak or improper cases that the Government rightly wishes to weed out) will not meet the merits test and will not be eligible for funding under the new arrangements.

[11] Paragraphs 195 to 205 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status

[12] Or prospects of success are unclear or borderline, and without other compelling factors

[13] Under the current Legal Services Commission instructions: "Legal Representation will be refused if the prospects of achieving a successful outcome for the client are: (a) unclear or borderline, save where the case has a significant wider public interest, is of overwhelming importance to the client or raises significant human rights issues; or (b) poor." "Poor" is described as: "prospects are clearly below 50%. Controlled Legal Representation must be refused where the appropriate advice to the client would be that in the circumstances of the case their appeal is more likely to fail than to succeed"

8. There are further checks and balances within the system to help guard against improper appeals being brought. The LSC has taken numerous steps over the past few years to remove from the system the poor quality immigration advisers, culminating in the bid round for contracts in April 2004. From April 2005, every single person working on legally aided immigration and asylum cases must hold accreditation. The new accreditation rules provide the toughest restrictions in any field of law on who can and cannot advise clients.

9. One justification given by the Government for bringing in this change is that it does not want the new system to be clogged up with unmeritorious appeals. Yet, in our view, one of the likely consequences of this change is that more applications will be made by people acting in person or with the assistance of unqualified community representatives. These clients will not have the benefit of legal advice on whether the case has merit, which points should be taken, or what the procedures of the system are. In many cases, the appellants will be obliged to present their appeals through interpreters. Thus, we believe that the change will in fact have precisely the opposite effect to the Government's stated intention.

10. Even if the retrospective funding provision is to be brought in, we believe that the merits test currently being proposed does not comply with assurances given by Ministers during the passage of the Act. Lord Filkin said during a House of Lords debate on 6th July 2004 (Lords Hansard column 739).

> Some of the debate will turn on whether it is reasonable to put the burden on the lawyer to make a judgment about whether he should take a case to appeal. The lawyers who are making that judgment will already know the case, because, in most cases, they will have advised the applicant on legal aid when he was making his appeal to the IND. They will have advised the applicant when he made his application to the IAT. Therefore, they will know the facts and the strength of that case. Essentially, the system will be that they should be rewarded on success and that they should be rewarded on near-misses. They should be rewarded at a higher rate than would normally be the case so that they are compensated for the risk that they take, because none of us can perfectly judge which case is a winner or even which is a near miss. Our intent is not to squeeze out of the system those cases which have reasonable grounds for being argued-those cases should be brought forward. Nor is it our intention to make the legislation so stringent that a good asylum lawyer cannot make a judgment where he thinks that the case has legs and should have a hearing. If he gets that wrong, one wants him to be in a position whereby, on swings and roundabouts over time, sufficient legal aid is granted as to continue an adequate supply of lawyers. Therefore, central to our thinking is that one has to pitch the legal aid, by whatever mechanism-there could be variability in it or a debate about it—so that there is an adequate supply of lawyers who are prepared to come forward and take cases that should be taken up because they have merit. However, we have to squeeze out those cases where there are no reasonable grounds for believing that there has been an error of law on the part of the AIT and that, therefore, they justify a reconsideration.

11. Even on the broadest possible interpretation of Lord Filkin's words, both of the tests proposed go significantly further to exclude funding than the assurance Lord Filkin gave to the House of Lords. The proposed test would exclude all borderline cases. These are cases which have "reasonable grounds for being argued," which Lord Filkin assured the House of Lords would be funded. Both tests would also fail to guarantee payment in a case that the solicitor won, contrary to Lord Filkin's assertion that "the system will be that they should be rewarded on success." The tests as proposed have the perverse effect of penalising a lawyer who demonstrates particularly skill in winning a marginal case, while rewarding one who took forward a case with significant prospects of success but lost it.

12. There is also a significant problem in relation to the proposal for a success fee. At present, applications to the High Court for a review of an Immigration Appeal Tribunal decision is funded under a full legal aid certificate, which attracts a basic preparation rate of £79.50 per hour in London. This basic rate is often subject to an enhancement of as much as 100% because of the urgency and complexity of the matter, so actual rates of £159 per hour are not unusual.

13. Under the new scheme, High Court applications will be funded under the controlled legal representation scheme, which normally attracts a basic preparation rate of £61.20. In the Legal Services Commission consultation on the contract amendments to be made to implement the scheme, it is proposed that High Court applications should attract a rate of £76.50. So although the scheme is offering a premium of 25% over the usual rates for controlled legal representation, this actually represents a massive cut compared with the current rates. We anticipate that this aspect of the proposal will be challenged by way of judicial review as being "Wednesbury unreasonable".

14. We would also endorse the views of the Civil Justice Council, a statutory body headed by the Master of the Rolls and with a responsibility for making recommendations for the improvement of the civil justice system. They said at paragraph 51 of their response to the DCA consultation on this policy,

> We also query the policy of reducing or removing public funding from cases involving fundamental rights and freedoms, and instead placing the onus on practitioners to take commercial risks in conducting such cases . . . We do not consider that it is appropriate for representation of vulnerable clients regarding challenges to executive actions to be dependent upon the willingness of practitioners to take commercial risks in the same way as damages claims.

15. In conclusion, we do not accept that there is any need to change the funding system in order to meet the Government's stated aims. The current test, if properly applied, is clearly adequate to achieve them. We believe that the likely effect of the retrospective funding arrangements will be that more good solicitors will leave the system. Clients with reasonable but not overwhelmingly strong cases, who are presently helped quite properly, will no longer be entitled to representation; and because solicitors will need to leave a "margin of error" in their assessments of cases, they will reject some cases that properly fall within the merits test. Firms that are insufficiently severe in their application of the test may find themselves in financial difficulties when funding is refused, despite having acted competently and in good faith throughout. Some of those who cannot get representation will nonetheless appeal as litigants in person, either acting alone or with the benefit of community advisors, with little understanding of the law and procedures involved. The Court may find itself hearing poorly prepared cases of little merit presented in person by clients who do not speak English. We believe that this presents a greater risk to the smooth running of the Courts than the prospect of a few cases being brought with the benefit of legal representation that perhaps should not have been brought.

Legal Aid Practitioners Group

*January 2005*

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**Evidence submitted by East Midlands Consortium for Asylum and Refugee Support (EMCARS)**

1. East Midlands Consortium for Asylum and Refugee Support (EMCARS) is committed to supporting all asylum seekers during their stay and to working to enable the fullest settlement and integration into society of all those granted leave to remain in this country.

2. We have grave concerns about any additional limitations for legal aid funding for asylum appeals. We have already experienced a notable decrease in the supply of legal advice and many private practices have closed their immigration departments due to tightened policy on the available legal aid funding within the past year. Some of our partners have raised concerns that it is simply impossible to do the required workload with the time limit of the funding available. Asylum cases by their definition are difficult and complex requiring extreme care at all times and it is rare that the applicant would have private funds available to cover the costs arising from the proceedings.

3. The Consultation paper for the new proposals[14] claims that the new procedure will support the desire of achieving a more fair, fast and efficient appeals process. Hence, "[T]o achieve this the number of weak cases seeking to overturn appeal decisions needs to be reduced".[15] The new single tier tribunal is designed to limit the applicant's appeal rights. This, per se may lead to unfair proceedings as according to the latest statistics over 30% of appeals are overturn. This suggests poor quality of the first instance decisions. Considering that the asylum claim affects a person's life, it is natural for the unsuccessful applicant to explore every possible appeal route. In order to produce fast and fair decisions, it ought to be more important to explore the reasons behind the first instance decisions and seek to ensure that the quality of these are improved as a priority. Access to appeal procedure is essential to ensure that also in the future any wrong first instance decisions are to be set right.

4. As established above, there is a significant decrease in the number of practices doing immigration work across the country. Many clients in our regions must in fact seek legal assistance from London areas where the supply is higher. We are not aware of a comprehensive study as to the reasons behind the lack of immigration advisers is our region, but we have highlighted this issue with the Legal Services Commission and will have a regional meeting about this matter in January 2005. We can however estimate from our partners that it is simply not profitable to take on cases which by their definition are complex and time consuming as the legal aid funding procedure takes a long time to complete with no guarantees of being refunded for the actual time used but simply being compensated for a fraction of it. We are told that some private practices will use the initial 5 hour limit and then drop the case to be picked up by charities. This seems to be because the initial workload is higher than five hours and application for extension takes unreasonable time and effort. Thus, it is not feasible for private practices to take the financial risk for not covering their time and costs.

5. It is our worry that after the proposed changes no private practice will take upon any other than extremely simple and clear cut cases if any. It is agreed that expenditure spent on asylum cases comprises high proportion in the legal aid budget. However, it is our view that as everyone has a right to seek refuge

[14] *The Asylum and Immigration Tribunal–The Legal Aid Arrangements for Onward Appeals*, p10 Consultation Paper
[15] *ibid*

in accordance with Refugee Convention 1951[16] and that this right is not guaranteed unless it is ensured that the asylum process is and is seen to be fair and just. Thus, it is imperative to ensure that the asylum process is not only fair for those who have personal means to fund it.

6. Altogether, it seems clear that most asylum seekers are unable to represent themselves in the proceedings. Many cannot read, write or even speak English. In addition, the current asylum process is complex and to have a truly fair hearing, one needs qualified legal representation throughout the proceedings. It is our view that the proposed changes would inevitably lead to very unjust results and thereby would constitute unfair trial within the meaning of Article 6 of the European Convention on Human Rights and Fundamental Freedoms 1951. Hence, we feel that the proposal for retrospective funding is incompatible with the Human Rights Act 1998.

*Helen Everett*
Regional Consortia Manager, EMCARS

*January 2005*

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**Evidence submitted by The Refugee Legal Centre**

The Refugee Legal Centre welcomes the consideration by the Constitutional Affairs Committee of the recently published proposals by the DCA[17] for the funding of onward asylum and immigration appeals under the new Asylum and Immigration Tribunal.

We enclose at Appendix 1 (**not printed**), for the consideration of the Committee, our detailed briefing response on these funding proposals, dated 13 December 2004. In addition to the concerns raised therein, we would like to make the following further points particularly in light of the Legal Services Commission's subsequent proposals:

1. We consider that the stringency of the merits test proposed within the funding scheme amounts to a covert no-win, no-fee system, rendering rights of access to the higher courts notional rather than real and effective. We understand that Mr Justice Collins, former President of the Immigration Appeal Tribunal and the most senior judge in the High Court dealing with immigration matters has voiced similar concerns.[18]

2. Ministers have repeatedly stated that good advisers will not be affected by these provisions.[19] That RLC falls to be regarded as such is clear: we have been awarded devolved powers by the LSC (whereby we are one of the few of the immigration contract holders to be able to merits-test and grant funding for appeals cases in-house;[20] the Home Office has for many years advised asylum-seekers who need representation to contact us; the Immigration Appellate Authority does the same when individual appellants are without representation. Not least, our statistics show that our success rates at appeal at all levels are significantly higher than average.

3. The "uplift" fee or risk premium will, it is proposed, be 25%. In practice, this will mean that we will have to achieve a huge increase in our success rate to ensure financial viability of this work. An examination of our statistics confirms that, were this scheme to be introduced, this work would no longer be financially viable.

For the period July 2003 to March 2004, 223 applications were made for permission to appeal to the Immigration Appeal Tribunal: 140 of these were granted (63%: roughly double the stated national average); 83 refused (37%: less than half the stated national average).

However, of those refused leave to appeal, 14—or 17%—were successfully challenged via statutory review: thus a more accurate statistic would be that 157 applications were granted (70%) and 66 refused (29.5%).[21]

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[16] UN Geneva Convention Relating to the Status of Refugees 1951 as amended

[17] DCA Consultation Paper CP(L) 30/04: *The Asylum and Immigration Tribunal—the Legal Aid Arrangements for Onward Appeals*

[18] According to an article in the *Daily Telegraph* (23/12/04), Mr Justice Collins considers the suggested merits tests will "present a high or very high risk to the lawyer that ultimate failure would mean no pay"

[19] See paragraphs 9 and 10 of our consultation response

[20] The great majority of representatives have to apply to the LSC for funding at the appeals stage. The LSC will grant funding on the basis of its assessment of the merits of a case

[21] Over the same period, the RLC decided that 105 should not be pursued further by way of application to the Immigration Appeal Tribunal for lack of merit: indicating that, of 328 applications we might have brought in the period, 32% were not pursued. (In fact this latter percentage may well be higher: a significant number of the applications brought will have been cases taken on at the application stage from previous representatives)

Of the 140 granted permission to appeal; 75 have to date been heard and decided at the Immigration Appeal Tribunal—13 allowed (17%); 12 dismissed (16%); 50 remitted (67%).

Of those remitted, it is not possible to state how many in fact were allowed as we cannot track cases throughout the system. However, based on our statistics for success rates at appeal before an Adjudicator, a success rate of 37.5% can be assumed.[22]

Thus under the funding system proposed, there is a very real risk that a significant number of cases would not receive (retrospective) funding:[23]

— the 29.5% of Tribunal applications refused leave to appeal;

— the 16% of appeals substantively dismissed by the Tribunal; and

— of the 67% of cases remitted, the 62.4% likely to be unsuccessful (ie 41.5% of the original).

4. Crudely put, the RLC is twice as good as the average provider and yet stands to lose funding for much of its higher appeals work. We provide at Appendix 2 (see **Annex**) an illustrative calculation of the impact of these proposals based on simplified statistics, from which the Committee will note that we stand to lose over half our funding for this work (55%), rendering it financially unviable. We consider that the flaw in the scheme lies in its focus on outcome rather than the interests of justice: for example, in 67% of the cases heard by the Tribunal a remittal was ordered, as errors of sufficient seriousness were identified to warrant the decision being set aside. Yet such cases are unlikely to be awarded funding in the future unless they go on to win, notwithstanding they were unsafe enough to be declared void. Applicants are thus penalised, in effect, for properly challenging the Tribunal's own initial errors.

5. We would also draw to the Committee's attention to the parliamentary debates during the passage of the Bill. These show that Parliament clearly did not wish to see experienced, high-quality advisers rendered financially unviable.[24] Most important, we do not believe that Parliament intended that the system should fail asylum appellants with real fears of persecution. The proposed process will nevertheless leave such appellants without effective access to the process for reconsidering defective first instance decisions. We wholly concur with the view of Mr Justice Collins that these provisions, if implemented, will amount to an ouster in all but name.[25]

*Emma Saunders*
Refugee Legal Centre

*January 2005*

**Annex**

ESTIMATE OF IMPACT OF THE NEW FUNDING REGIME ON RLC CASES

*Assumptions*[26]

1. The RLC assesses merit in the new process on the same basis as it does at analogous stages in the existing process.

2. The RLC's success rate in the new process is the same as at analogous stages of the existing process.

3. Ignore the possibility of making a reconsideration application to the High Court where it has previously been refused by the AIT.

4. We take an average of 3 hours to prepare a reconsideration application.

5. We take an average of 7 hours to prepare legal argument as to why the 1st instance determination is flawed.

6. We take an average of 15 hours where the AIT has reheard the case.

[22] RLC statistics for the same period show an average success rate of 37.5% for Adjudicator appeals. Thus it is reasonably likely that this proportion of cases remitted would have been successful (although this does not take account of the fact that some may have been appealed again, successfully, to the Tribunal)

[23] Although not all applications for leave had been heard at the time of writing, the statistics available have been taken as generally representative of the likely outcome of those cases pending

[24] "It was made quite clear in the other place that the official Opposition and, indeed, others, would not accept a conditional fee system." Dominic Grieve (Beaconsfield), H Deb, 12 July 2004, col 1166

[25] According to the *Daily Telegraph* article of 23/12/04, Mr Justice Collins considers the funding regime "could be regarded as an attempt to achieve, so far as possible, what the ouster clause was intended to achieve and to place too high a barrier against access to the courts"

[26] The Process is much more complex than that assumed by the assumptions. As a result the figures provided in this paper are intended to be illustrative of the problem of the proposed funding regime rather than an attempt to quantify its precise extent. In reality, we fear the problem may be greater than the illustrative figures suggest. An accurate assessment of the extent of the problem would require detailed modelling of the outcomes at the various stages of appeal which, unfortunately, would be beyond the scope of our resources

*Calculations*
Thirty-seven cases refused reconsideration on the initial application to the AIT (37*3 = ) 111 hours.
Nine cases dismissed funding on legal argument in a reconsideration hearing (9*10 = ) 90 hours.
Twenty-eight cases dismissed after a full rehearing (28*3 = ) 420 hours.
Total number of hours work for which funding is likely to be refused: 621 hours.

Nine cases allowed on legal argument in a reconsideration hearing (9*10 = ) 90 hours.
Seventeen cases allowed after legal argument and a full rehearing (17*15 = ) 319 hours.
Total number of hours for which funding will be granted: 409 hours.

25% uplift: 503 hours.

ILLUSTRATIVE IMPACT OF THE PROPOSALS

Using our statistics as a guide and taking a sample of 100 hundred cases, we could lose 55% of our funding.

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**Evidence submitted by Immigration Law Practitioners' Association (ILPA)**

PROPOSALS FOR THE "RETROSPECTIVE PUBLIC FUNDING" OF ONWARD APPEALS FROM THE SINGLE TIER ASYLUM AND IMMIGRATION TRIBUNAL

I write in response to the invitation to submit written evidence on these proposals, to which ILPA is opposed for the reasons given in our submission to the Department of Constitutional Affairs' consultation in December, a copy of which is attached (not printed). It is, however, somewhat longer than the submission now invited, so what follows is an amended and shortened version, which I hope will assist.

INTRODUCTION TO ILPA

1. ILPA was established in 1984, and is dedicated to encouraging high standards in the practice of immigration law. We have a current membership of 1,225, comprising barristers, solicitors and other practitioners regulated by other professional bodies. We have members who work in private practice and in the not for profit sector, and who engage in all areas of immigration law, commercial and publicly funded. Many undertake, or until recently have undertaken, publicly funded appeal work.

SUMMARY OF OUR POSITION

2. The retrospective funding proposals will cause injustice, and have a deleterious effect on appellants, on conscientious practitioners, on the administration of justice and on the future development of immigration and asylum law, because:

- Injustice will result if appellants cannot find competent representation, which will be the inevitable result if good practitioners are unable to afford to take on onward appeal work. This is too high a price, especially when the abuses that these proposals are purportedly designed to correct are already being brought under control by other means.
- The proposal to oust access to the higher courts did not find favour with parliament and was withdrawn, but the present proposals smack of ouster by the back door by blocking access to those whose representatives dare not risk the costs consequences of seeking to challenge determinations of the AIT.
- The present Tribunal does not always get the law right, and it is unrealistic to suppose that the new one will be any less fallible. The quality of decision making will inevitably deteriorate if it is not robustly tested, not only where obvious errors have been made but also in more marginal cases and in cases where the law is, or should be, open to development. Practitioners need the security, which those representing the Secretary of State enjoy in any event, of knowing from the outset that such cases will be funded subject, as at present, to a continuing duty to keep the merits under review. The public interest needs to be protected from the stultification of the law that will ensue if only the most obviously erroneous AIT decisions are ever challenged on behalf of appellants.

THE PRESENT POSITION AND SAFEGUARDS AGAINST ABUSE OF LEGAL AID

3. The Government should have more confidence in the Legal Services Commission (LSC) than these proposals imply. The LSC has already, from 1 April 2004, increased the stringency with which it tests, and requires its supplier practitioners to test, the merits of immigration appeals and judicial reviews. Through the process of supplier audit, and now through the compulsory accreditation scheme which will be fully in force on 1 April 2005, it continues to weed out practitioners it finds to be incompetent. It should be trusted to deal with applications for public funding for onward appeals from the AIT just as it deals with other applications, before the event, but subject to continuing merits review. It is particularly inappropriate to

consider tinkering with this principle now, less than a year after the present immigration funding structure was introduced and before the accreditation scheme is fully in force so there has been no opportunity at all to assess the impact of these combined measures.

4. The Government should also have more confidence in judges, who already have powers to make wasted costs orders and to refer cases to the LSC in cases so manifestly weak that they should never have been brought, or where information has been withheld. Indeed where the LSC itself is judged to have been at fault orders can be made under s.11(4)(d) of the Access to Justice Act 1999 for the Commission to pay respondents' costs. It is better that real punitive costs orders be imposed when actually deserved than that practitioners be intimidated by uncertainty into failing to challenge difficult cases to the detriment both of their clients and of the development of the law.

### Respect for judicial decision making

5. The Government should also trust judges not to be easily misled into granting permission for unmeritorious onward appeals. ILPA can conceive of no justification for a scheme in which honest practitioners might be denied payment in a case which the judiciary, either at AIT or Administrative Court level, had deemed to merit the grant of permission. Remedies for the dishonest are already to hand and should be used. The rest of us, for the sake of our clients, our businesses and our employees, need the certainty of knowing that we will be fairly remunerated for an honest job competently done.

6. Draft procedure rule 27(6) provides that an immigration judge may make an order for reconsideration only if satisfied that the Tribunal may have made an error of law AND either there is a real prospect that the Tribunal would decide the appeal differently on reconsidering or there is some other compelling reason why the decision should be reconsidered. If a judge is satisfied that this high threshold has been met then, in that class of case at least, practitioners should surely be certain of payment without more, provided there has been no dishonest misrepresentation.

7. This approach is consistent with David Lammy's statement to Parliament during debate on the 2004 Act that:

> We are keen to continue to discuss how we should define in regulations the scope of a meritorious case. On that basis, we wanted to include cases in which the lawyer was right to bring the case, but was not successful in acting on the applicant's behalf. Let us leave the technical discussions . . . to the legal profession and the DCA.

A lawyer will surely always be "right to bring" a case for which an immigration or High Court judge has granted permission after application of the prescribed high test, subject only to the continuing duty to review merits in the light of new information.

### Shortage of good representation and encouragement of the unscrupulous

8. Competent publicly funded immigration practitioners are already in short supply, a problem that has been exacerbated during the past year. The stringent funding regime introduced on 1 April 2004 may have been aimed at the unscrupulous and incompetent, but the margins of profitability have become so tight that a number of highly regarded firms have bowed out of the work, while others are protecting their businesses by restricting the amount of publicly funded work they take on. The funding uncertainty built into the present proposals will discourage them still further. Publicly funded immigration law properly practiced is simply not profitable enough to allow us to absorb these potential losses.

9. We fear not only that appellants will be abandoned by their representatives at onward appeal stage, but also that they will find it even more difficult than now to find legal representation in appeals from the outset. This is partly because of the generally discouraging effect of the proposals on practitioners who may already be struggling financially, but also because conscientious practitioners may be unwilling to take on cases knowing that they will not be able to afford to see them through in the event of an unfavourable initial AIT determination.

10. The less conscientious will have no such scruples, and in some cases presumably will also not scruple to use the proposed scheme as an alibi for refusing legal aid and exploiting appellants to raise funds they cannot afford to fund their onward appeals privately—precisely the kind of conduct that ILPA deplores and understood the government also wished to stamp out. That will be better done by keeping the funding of these appeals within the current regime, especially in the light of the current and future developments in the LSC's regulatory powers and practices.

### Demoralising the profession

11. The Government should not underestimate the demoralising effect on conscientious immigration practitioners of the implication that they uniquely among lawyers are incapable of fulfilling their duties to their clients, the court and the legal aid fund without being subjected to a special regime predicated on the premise that they need to be bullied by the threat of non-payment into recognising the need to "rigorously assess the merits of a case before deciding to pursue it", as the DCA consultation paper put it.

### The view of the appellate authority

12. We understand from the Chief Adjudicator, who addressed our AGM in November, that the Appellate Authority has made clear to the Government the high value that it places on competent representation before it. No doubt, if these proposals go through with the consequent reduction in available competent representatives that we predict, the AIT will do what it can to mitigate the damage for unrepresented appellants, but that can only be at the expense of longer hearings and more court time—a false economy indeed.

### The proposed alternative thresholds and the wishes of parliament

13. In our response to the DCA we provided answers to various specific questions raised in that consultation. I do not repeat them all, but refer the Committee to the attached full version of our DCA submission. I do, however, here summarise our main comments on the proposed alternative tests for funding, as follows:

14. The wish of parliament to preserve immigration appellants' right of access to the higher courts is not well served by these proposed arrangements at all, although of the two options proposed the first, whether a case had significant prospects of success, is clearly the lesser evil. But neither this test, nor retrospective funding in any guise, is necessary to achieve the aim of penalising practitioners who knowingly withhold material information, as has been implied by the DCA. There are already adequate mechanisms in place capable of ensuring that such malpractice is not remunerated (see paragraph 4 above).

15. Neither option is consistent with the statement of David Lammy to the House of Commons that:

> . . . even if an applicant has been unsuccessful in making their claim, their case may have established important case law that defines a particular group or community and will have a bearing on immigration and asylum cases. In such circumstances it would be right for lawyers to receive funds.

This statement was made on 12 July during debate on the House of Lords' amendments to what is now the 2004 Act so it was on this basis that parliament voted to accept the broad thrust of the government's proposals replacing its previous attempt to oust the higher courts' jurisdiction. It would thus be contrary to the wishes of parliament for any criteria to be applied that could result in lawyers being deprived of funding in test cases, whether ultimately successful or not.

### Practical difficulties

16. The adverse impact already indicated on appellants, practitioners, their businesses, their clients, the ability of the Legal Services Commission to provide competent suppliers in adequate numbers to meet demand from potential clients and the impact on the AIT of rising numbers of unrepresented appellants will all arise to some degree under either option, as will the difficulty for the judge of performing the highly artificial and philosophically challenging exercise of travelling back in time after the event to assess what the prospects of success had been before the review began. There may be an additional difficulty in option 2 in that, if it is to succeed in its aim of denying funding even in some cases that had succeeded at review stage, it must involve one judge impliedly criticising another, but penalising only the hapless practitioner.

### Dangers of fettering judicial discretion

17. The discretion of Administrative Court judges to award funding should not be fettered in any case where the court is satisfied that it is reasonably likely the AIT made an error of law, even if an order for reconsideration is not made because the judge is not satisfied on the 2nd limb of what is now the draft regulation 6.b test (significant or very strong prospect that the appeal would be allowed upon reconsideration). The health of the AIT, no less than that of any other Tribunal, will benefit from regular High Court scrutiny of the legality of its decisions. Lawyers should not be discouraged from bringing legal challenges for fear that their honest judgement as to the materiality of an error may ultimately differ from the conclusion of the judge, where it is accepted by the judge that there was indeed an error of law. This is not to say that the materiality of an error is not to be taken into account in assessment of a case for public funding at the outset, just as it is now, but simply to say that honest lawyers should not be financially penalised when they have been proved right on the law. After all, a finding that does not avail the appellant in a particular case may well be instrumental in preventing the AIT from repeating the error and causing material injustice in other cases. It is as distasteful to contemplate the prospect of lawyers being punished for achieving this as it is to contemplate the discretion of the Administrative Court in this area being undermined.

THE PROPOSED "RISK PREMIUM"

18. Practitioners in this as much as any other area of law need to be able, so far as the vagaries of practice allow, to plan financially for their businesses. Indeed the LSC requires its suppliers to have three-year business plans, annual budgets and quarterly variance analyses. Rational planning is simply not possible on the basis of "can I afford to take on this marginal case and risk not getting paid on the off-chance that a stronger case might come along next week on which I am likely to be paid". We need to know that if we make honest competent assessments we will be paid a fair rate for all our work, not premium bonanzas for occasional wins. It is not necessary to introduce the notion of a "risk premium" to justify paying reasonable rates for review work. We see no reason why those rates should be less than prescribed rates for certificated work, with similar provision for enhancement where justified, even if administered as an aspect of CLR (see also paragraph 23 below).

THE PUBLIC INTEREST AND THE NEEDS OF APPELLANTS

19. Appellants deserve to have their cases assessed by competent practitioners who can access funding in each appropriate case, not dependant on the happenstance of how many other relatively strong or marginal cases they have that might pay off with a risk premium. Under the special contracts for Civil High Cost Cases enhanced rates are paid if the prospects of success are borderline but the case is being taken on because of its overwhelming importance to the client, or in the public interest, and it could not be expected that practitioners would take it on at commercial risk. By contrast here we have the prospect of being offered inducements to take on only those cases which are near sure fire winners.

20. The concept of costs risk in public law cases, especially where the stakes for the individual are as high as they invariably are in immigration and asylum cases, is not to be equated with the risk in financial damages cases. This is a distinction recognised in the differential rates paid under the Civil High Cost Case contracts, and one that should not be lost.

MERITS, FINANCIAL ELIGIBILITY AND REMUNERATION—COMPARISON WITH CLR

21. The damage likely to be done by the retrospective funding proposals will be exacerbated if the merits test differs from that currently applied in Controlled Legal Representation (CLR) in immigration appeals. The CLR test was elaborated with effect from 1 April 2004 and is now well understood. ILPA has some concerns that a minority of practitioners may be protecting their own position by wrongly refusing CLR in marginal cases for fear of the costs consequences on audit if the LSC later takes a different view, but appellants in such cases at least have the protection of an appeal to the LSC. Under the present proposals there will be no such protection in a case where the practitioner is not prepared to take the risk of an onward appeal based on an untried merits test.

22. The effect of the draft financial regulations is to extend the CLR financial eligibility test to Legal Representation before the High Court, instead of the more flexible criteria now applicable in legal aid certificate cases. This is regrettable because it will exclude from eligibility those appellants on the financial margins who would have qualified for a certificate subject to a financial contribution under the present arrangements.

23. CLR remuneration rates are lower than the prescribed rates in certificated work, and do not have the same flexibility for enhancement. Parliament intended the new review procedure to replace of existing arrangements for access to the higher courts, so it should be remunerated in essentially the same way, and bills assessed in the same way. Whether this is done under the aegis of special arrangements under CLR or otherwise is probably immaterial. What matters is that once granted, so long as the merits continue to justify it, the supplier should be confident of being paid at a reasonable rate, commensurate with other higher court work, and that the interests both of suppliers and of the legal aid fund are protected by a fair process of bill assessment by the LSC.

24. In conclusion, ILPA opposes the current proposals because they are unnecessary to prevent abuse, but will result in injustice and risk stultifying the law.

*Rick Scannell*
Chair of ILPA
Immigration Law Practitioners' Association (ILPA)

*4 January 2005*

**Evidence submitted by The Department for Constitutional Affairs (DCA)**

CORRESPONDENCE FROM BARONESS ASHTON OF UPHOLLAND, PARLIAMENTARY UNDER-SECRETARY OF STATE

Thank you for your letter of 17 November, addressed to David Lammy, about our proposals for the legal aid arrangements for onward appeals against decisions made by the Asylum and Immigration Tribunal (AlT) detailed in the consultation paper published on 8 November. I am responding as I have Ministerial responsibility for asylum policy.

As you know, the framework setting up the way in which legal aid will be granted was established under section 26 of the Asylum and Immigration (Treatment of Claimants, etc) (AITC) Act 2004 and the policy debated and approved by Parliament. The proposals in the consultation paper have been developed through consultative meetings with the legal professions and the Judiciary—who have also had prior notice of the consultation period. We value the contribution of those who will be engaged in the new asylum and immigration appeals system. Their expertise is vital in developing the detail of how these legal aid measures will work in practice to ensure that the new system or oversight of AlT appeal decisions is a success. Because of this prior consultation, we are able to consult for the shorter period of six weeks.

Under the new legal aid arrangements, funding will be awarded retrospectively for the review and reconsideration stages. This will help ensure that lawyers take greater responsibility for assessing an appeal's prospects of success before agreeing to provide representation, and will discourage weak applications. In turn, this will reduce the potential volume of publicly funded cases going on to the higher courts and the AlT. At the same time, the new system will ensure that a final appeal decision is reached quickly and efficiently, reducing the number of unmeritorious cases reaching the higher courts.

The consultation paper puts forward two possible models for the prospects of success test. The models suggest cases will warrant funding if the case had "significant prospects of success' or were "very likely to succeed or had very strong prospects of success

Lord Filkin expressed this requirement on the floor of the House during the passage of the Bill as cases that have significant merit. This was supported by the House of Lords and there was agreement that a stricter test was necessary to prevent delay and abuse in the appeal system.

You are particularly concerned that solicitors who had briefed counsel on an appeal may be unable to pay counsel if the advice was on balance in favour of an appeal, but the appeal was ultimately unsuccessful. We are addressing that in a slightly different way. The consultation paper sets out the possibility of risk sharing for both solicitors and barristers and seeks views on how that can best be achieved. We believe that barristers, of all concerned, are best equipped to assess risk. However we acknowledge that disbursements for experts and interpreters should be payable in all cases, as it would be unreasonable to expect them to take on a share of the risk, as they are not in a position to assess the prospects of success.

You are concerned that legitimate appeals will be restricted by these proposals. The purpose of the new proposals is to target legal aid resources on the more meritorious cases and reduce the number of weak cases reaching the higher courts. The consultation paper asks specifically for views on how the prospects of success test might be framed. We note that you would favour a test based on real or reasonable prospects of success, which I take to be a lower hurdle than the two tests we have proposed. We will, of course, look carefully at the results of the consultation exercise and reach a final decision in the light of your views and those of other respondents. Decisions on whether legal aid for the review and reconsideration should be awarded will be made by the Tribunal judge after the reconsideration hearing has concluded. The award will be based on the prospects of success of the case at the time when the application was made for the review of the AlT appeal decision.

I must stress that this is not a "no win, no fee" arrangement; unsuccessful cases after reconsideration will still be awarded legal aid if the Tribunal judge decides the application for the review of the AlT appeal decision had been properly made. This will ensure appellants are not restricted from bringing legitimate challenges while protecting against abuse of the asylum system.

The consultation exercise closes on 17 December 2004. No final decisions have been made, and we will consider the responses to our proposals very carefully before deciding the way forward.

I hope my response has helped to clarify our intentions. I am copying my letter to Sir Duncan Ouseley and Sir Andrew Collins, as before

Baroness Ashton

*8 December 2004*

THE ASYLUM AND IMMIGRATION TRIBUNAL—THE LEGAL AID ARRANGEMENTS FOR ONWARD APPEALS

1. FOREWORD

The Asylum and Immigration Tribunal is scheduled for implementation in April 2005. The new legal aid arrangements for the review and reconsideration of decisions of the AIT will be implemented in line with this timetable.

The written consultation on the regulatory framework underpinning the proposals began on 8 November and finished on 17 December. The LSC's consultation on contract changes with suppliers began on 13 December and is scheduled to finish on 4 February.

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. In the interim, the following information is intended to provide the background and context to the proposals.

2. SUMMARY

The Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (AI(TC)) was enacted on 22 July 2004. Section 26 of the Act creates a new single tier Asylum and Immigration Tribunal (AIT), for all asylum and immigration appeals. It also inserts new sections 103A through to 103E into the Nationality and Immigration Act 2002 (NIA), which provide for a new system of higher court oversight of decisions of the AIT and a regulation making power for new legal aid arrangements. (See **Annex A** for a process chart setting out the new system of higher court oversight.)

— Section 103A provides for a party to the appeal to apply for a review of the AIT's decision. Depending on where the original appeal was heard the application is made to the High Court of England and Wales, the High Court of Northern Ireland or the Outer House of the Court of Session. If the appropriate court thinks the AIT may have made an error of law it can order the appeal to be reconsidered by the Tribunal.

For a transitional period, while the new process beds down, a Senior Immigration Judge (SIJ) of the AIT will consider review applications in the first instance—this process is being referred to as the filter. If an application is rejected the applicant can opt for the High Court to look at the application.

— Section 103D provides the Secretary of State with a regulation making power for new legal aid arrangements for the review and reconsideration stages under section 103A. Under the new arrangements legal aid will be awarded retrospectively, in the majority of cases by the Tribunal judge following reconsideration, and in a limited number of cases by the High Court judge following determination of the review application.

3. BACKGROUND

Section 26 of the AI(TC) was introduced in response to continued concern that the asylum system is being exploited by disingenuous economic migrants and opportunistic legal advisors.

The asylum and immigration jurisdiction is unique in that there is an incentive to delay proceedings. 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 receipt of the asylum application by the Immigration and Nationality Directorate (IND), through to promulgation of the IAT's determination following a substantive appeal hearing.

UNMERITORIOUS APPEALS

During the passage of the AI(TC) the Government was asked to provide evidence of how the system is being exploited. A key part of this evidence is the fact that a large number of cases are pursued beyond the first tier of appeal, but very few of these, are ultimately successful. The statistics for 2003 showed that fewer than one in ten of the cases that seek permission to appeal to the IAT succeed in reversing the decision on their case. On 6 July 2004 Lord Filkin wrote to House of Lords colleagues setting out the reasoning behind this statistic. A copy of the letter was placed in the House of Lords library. See **Annex B**.

More recent statistics have been compiled for the period September 2003 through to October 2004, and they demonstrate that this figure of one in 10 has not significantly changed. See **Annex C**.

Whilst it is not suggested that every unsuccessful cases is an abusive one, the fact that the failure rate is so high strongly suggests that applications are routinely being made despite the fact that the case has no prospect of succeeding.

### Home Office appeals

One potential defect in the methodology used to compile the statistics in **Annex B** is that, at the time, it was not possible to identify whether an application for permission to appeal to the IAT had been made by the appellant or the Secretary of State. This has lead to suggestions that the Home Office is equally guilty of making weak and unfounded applications. Anecdotal evidence has always suggested otherwise, and the statistical data now available provides confirmation. Very few applications for permission to appeal to the IAT are made on behalf of the Secretary of State, but of those that are made the success rate is high.

Around 90% of applications are made by appellants. The success rate of this 90% is low however. Only 28% of applications are allowed. By comparison, the success rate for the applications made on behalf of the Secretary of State is 80%. (The statistics are set out in full in **Annex D**.)

Statistics are not available for the outcome of substantive IAT appeals by party. However, if the figures were available it can be assumed that the overall success rate for those cases in which the appeal is brought by the appellant would by worse than one in 10.

### Legal Aid

The huge increase in legal aid expenditure also raises concerns that the system is being exploited. Between 1997–98 and 2003–04 legal aid spending increased from £33.4 million to £201 million. It is accepted that this dramatic increase in costs has been brought about by a number of factors including:

- The introduction of legal aid for representation at appeal—which became available from January 2000 (prior to this it was restricted to advice and assistance);
- Past increases of the number of persons seeking asylum and subsequent appeals; more recently numbers have fallen; and
- Backlogs of initial decisions and appeals being cleared by the Home Office and the IAA.

These factors alone do not account for the huge increase in expenditure however. 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 unecessary 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.[27] There is anecdotal evidence that clients were shopping around for advice and suppliers continued to pursue unmeritorious cases under public funding.

## 4. Reforms

In response to the concerns about increasing expenditure and concerns about quality a series of reforms were introduced in April 2004.

### Expenditure

The measures introduced to bring asylum legal aid under effective control and to cut out unnecessary expenditure include:

- Introducing a financial threshold of five hours for the initial decision-making process, which can only be exceeded with prior authority of the 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 introduced the Unique Client Number to help track clients and reduce unnecessary duplication of work.

[27] New matter starts are the number of legally aided cases which solicitor firms may take on after being given authority to do so from the LSC. The number of new matter starts should therefore be at least comparable to the number of asylum claims even if the appeal rate is 100%, which it is not. If the number of new matter starts is almost double the number of claims this is a strong indicator that unnecessary and duplicated work is being carried out

— Removing from the scope of legal aid attendance at the Home Office interview apart from in exceptional circumstances.

— The LSC took over responsibility from the Home Office for the funding of the Immigration Advisory Service and Refugee Legal Centre which means that £15 million of public funds is now focused on clients that meet the LSC eligibility criteria.

The revised system means that firms have to approach LSC at two points before continuing with an asylum case, when they reach the five-hour threshold under Legal Help and for grant of Controlled Legal Representation (CLR), for representation at IAA. Figures for the first six months of this year show that one-third of applications for Legal Help extensions are being refused or reduced. In that same period 29% of applications for CLR were refused with only 10% of those decisions to refuse funding subsequently being overturned on appeal. Based on the firms reported outcome of cases, there has also been an increase in successful outcomes for clients since the beginning of the financial year. This indicates that funding is being targeted more effectively on meritorious cases.

(A table setting out the LSC's projected savings over the coming years is attached at **Annex E**.)

### Quality

Two principal measures were taken to address concerns about the quality of supply that had been identified through the LSC's cost assessment and peer review audit processes:

— The introduction of accreditation for all lawyers and caseworkers doing legally aided asylum work.

— Competitive bid rounds for immigration before awarding contracts for 2004–05.

Accreditation will be mandatory for everyone providing legal aid immigration and asylum advice from April 2005 and was introduced earlier when exclusive contracts were awarded for the Harmondsworth fast track. Extensive work has been carried out with the Law Society and Office of the Immigration Commissioner to ensure that the standards have been pitched at an appropriate level and the assessment process is rigorous but fair.

Before awarding contracts for this financial year a number of Regional Offices carried out competitive bid rounds to award contracts only to those suppliers who could meet the required standards on cost and quality. As a result of these bid rounds more than 100 suppliers were not awarded contracts.

## 5. New Legal Aid arrangements

Despite the success that has already been achieved in terms of improving the appeal process there is a limited amount that can be achieved through reforms to the current multi-tiered system. 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.

By comparison with the current 65 week period that it can take for an application to be processed from receipt by IND through to promulgation of the IAT's decision, corresponding time scales under the new process will be reduced by at least half.

In order for these time scales to be achieved however, it is essential that the AIT and the High Court are not overloaded by weak applications at the review stage of the process. To address this issue, in tandem with the introduction of the single tier AIT, new legal aid arrangements for the review and reconsideration of AIT decisions are being introduced. As the evidence demonstrates a great deal has already been done to tighten controls on legal aid and remove poor quality suppliers from the system. At the latter stages of the process however, the Government's position is that more still needs to be done to ensure weak applications are discouraged.

### Proposals

Under the new arrangements legal aid will be awarded retrospectively, usually by the Tribunal following reconsideration. The arrangements will not apply if the review application was made by the Home Office or if the application is being dealt with under the Fast Track process. The decision as to whether or not funding is awarded will be based on a test framed in terms of "prospects of success" ie how likely the case was to succeed at the time the application was made.

— Advice on whether or not to apply for a review of the AIT's decision will be covered by the existing arrangements under Controlled Legal Representation (CLR). When the representative is approached for advice they will need to assess whether the case meets the "prospects of success" test and consequently whether or not it should be pursued.

— If the representative seeks counsel's advice the cost of this advice will similarly be covered by the existing arrangements under CLR.

— If the representative is satisfied that the case does meet the prospects of success test and agrees to provide representation, funding will not be awarded until the Tribunal judge, or in limited circumstances, the High Court judge, makes an order under section 103D.

REVIEW STAGE

— If a case is unsuccessful at the review stage, in the majority of cases funding will not be awarded. If counsel has been involved in the preparation of the review application, their work will similarly not be funded.—In limited circumstances the High Court will have discretion to award funding.—The High Court's decision is final.

RECONSIDERATION STAGE

— If a case is successful at the review stage, at the end of the reconsideration process the Tribunal judge will decide whether or not funding should be awarded based on whether a case met the "prospects of success" test when the application was made. Again, if counsel has been involved their work will not be funded if an order under section 103D is not made.

— If funding is refused an application for a review of the decision not to make a section 103D order can be made to the Tribunal. Representatives who pursue a case in good faith can expect to be paid. For example, if a decision on a lead case affects the prospect of success of an individual case, funding could still be awarded. The Tribunal judge will be considering whether the case had sufficient merit when the application for review was made. The same could apply if the appellant's circumstances had changed since the review application had been made. However, if a representative can be seen to have dripfed information about his client's case in an attempt to paint it in the best light, then funding would not be forthcoming.

The intention behind the proposals is to discourage weak applications from reaching the Tribunal and the High Court, not to discourage suppliers from pursuing genuine cases.

If an application is unsuccessful at the review stage in the majority of cases funding will not be awarded. This is because an unsuccessful outcome at this stage of the process is likely to be indicative of the fact that the case is without merit and one which should not have been pursued. The test that the Tribunal and the High Court will apply when deciding whether or not a case should be reconsidered will be whether there is a real chance that the outcome of the case will be different. Asking suppliers to make an accurate assessment of whether an application will be successful is not unreasonable. They are not being asked to predict whether a case will be decided differently, but whether there is a strong enough case for reconsideration. A good lawyer can be expected to make this assessment.

The Government recognises however that there will be circumstances when an application is unsuccessful but funding should nevertheless be awarded. The High Court therefore has discretion to award funding in a limited number of circumstances. Representations were received on this issue in response to the consultation paper and consideration is being to the how widely the High Court's discretion should extend.

If an application is successful at the review stage and a reconsideration is ordered, at the end of the reconsideration process the Tribunal judge will decide whether funding should be awarded. This decision will be made based on the case's prospects of success at the time the application was made. The scheme will not be "no-win, no-fee". If a case is unsuccessful at the reconsideration stage, provided the Tribunal judge is satisfied that the case meets the prospects of success test funding will be awarded. The Government is aware of the difficulties inherent in anticipating the final outcome of a case. Representatives are therefore being asked to make an assessment of a case's prospects of success and not speculate as to whether it will be decided differently.

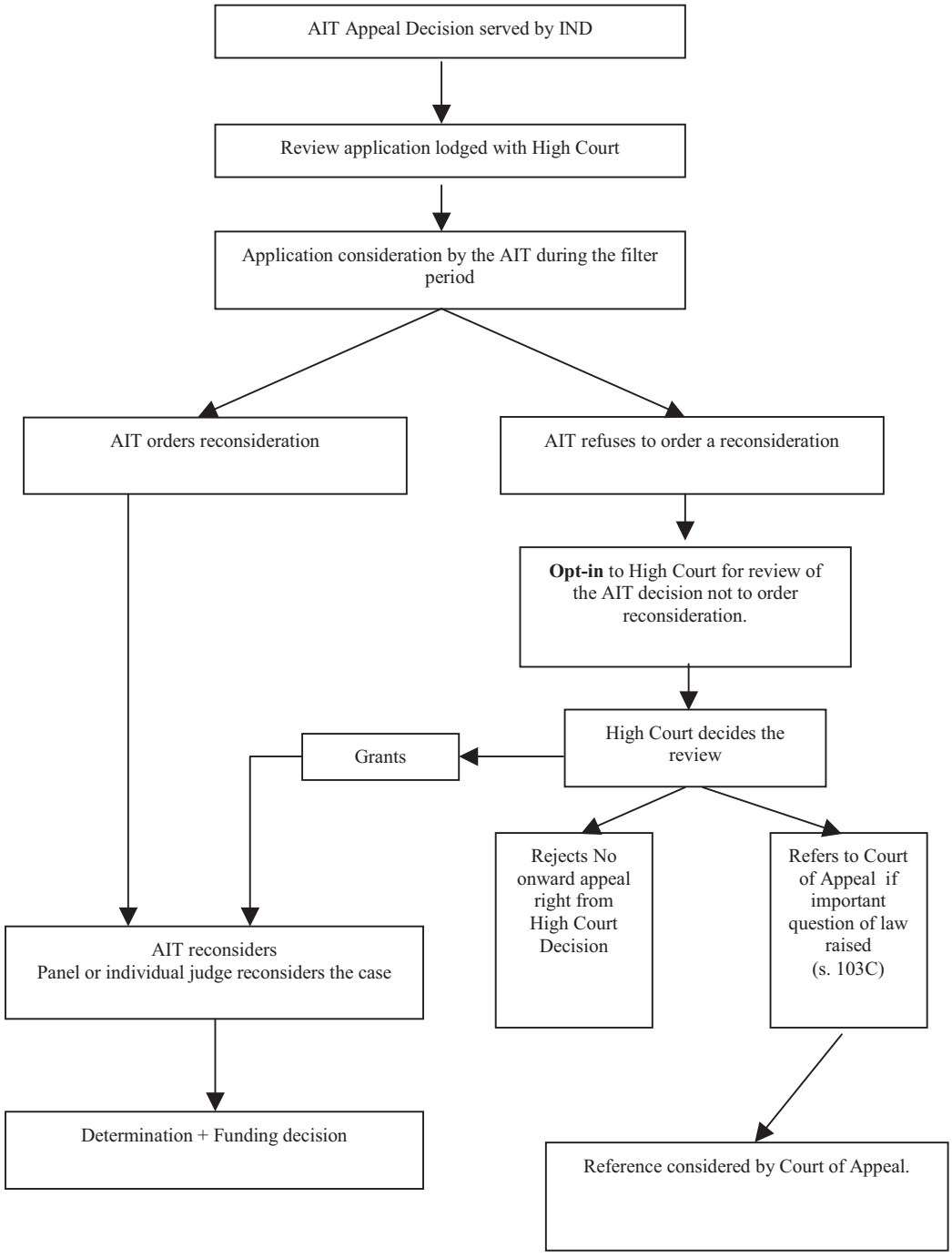
Representations were similarly received on this issue and consideration is also being given to how prospects of success should be defined.

Department for Constitutional Affairs

*19 January 2004*

**Annex A**

REVIEW AND RECONSTRUCTION OF AIT APPEAL DECISIONS




Where the appeal was decided by the AIT in Northern Ireland, this will be the High Court in Northern Ireland. Where the appeal was decided by the AIT in Scotland, this will be the Outer House of the Court of Session. Where the appeal was decided by the AIT in Northern Ireland, this will be the Court of Appeal in Northern Ireland. Where the appeal was decided by the AIT in Scotland, this will be the Inner House of the Court of Session.

**Annex B**

ASYLUM AND IMMIGRATION (TREATMENT OF CLAIMANTS, ETC) BILL: STATISTICS

A key part of the Government's evidence that the asylum appeals system is being exploited is the statistic that fewer than one in ten of the cases that seek permission to appeal to the Immigration Appeal Tribunal (IAT) succeed in reversing the decision on their case. This letter sets out the reasoning behind this information.

— In 2003, there were about 35,000 applications made for permission to appeal the decision of an adjudicator to the IAT.
— Also in 2003, there were under 2,500 cases which, at the conclusion of the IAT appeal process, received a different decision in their case.
— We cannot express this as a direct proportion because of the way the statistics are collected, but however you look at it, **fewer than one in 10 of cases in which permission to appeal is sought actually receive a different decision**.

The initial decision on an applicant's asylum claim is made by the Immigration and Nationality Directorate (IND) of the Home Office. If unsuccessful, the applicant may appeal to the Independent adjudicators in the Immigration Appellate Authority (IAA).

After the adjudicator has made their decision on the appeal, either party may further seek to appeal the decision of the adjudicator to the Immigration Appeal Tribunal. This is a two-stage process. First, they must seek from the IAT permission to make their appeal. If successful, they will then have a full hearing before the IAT. In its decision, the IAT may dismiss or allow the appeal, or remit the case for reconsideration by an adjudicator.

### Explanation of Statistics

In 2003,[28] there were 32,178 decisions on applications made for permission to appeal to the IAT. Of these, 12,002 were allowed to go to a full hearing and 20,111 were dismissed.[29] Therefore, 37.3% of permission applications succeeded in getting a full hearing.

Because of the way our systems collect data, we cannot follow this same cohort of cases through to the end of the process. Instead, we have to look at a "snapshot" of the cases at each stage of the process in a particular period. However, the proportions at each stage are consistent over time, making this a statistically valid approach to take.

In 2003, there were 9,451 decisions on substantive appeals by the IAT. The difference between this number and the 12,002 that were given permission for a full hearing is because the IAT is currently handling a backlog of cases. Nearly all of the 12,002 cases will eventually proceed to a full hearing.

Of the 9,451 decisions, 1,441 were allowed outright, and 3,184 were dismissed outright. A further 4,199 were remitted to the adjudicators for reconsideration.

### Remittals

The appeals that were allowed have obviously succeeded. However, it is not correct to say that all of the 4,199 remittals have also succeeded. A case is not necessarily remitted because the IAT is convinced an error has been made by the adjudicator. Instead, because of the limited scope of the IAT to reconsider evidence, it will remit a case if there has potentially been an error in the case, or because it wishes for further evidence to be considered. Indeed, if you look at a sample of cases remitted by the IAT, you will find that in many of them they are reasonably sure that a given decision is correct, but it needs to be further considered by an adjudicator to ensure that this is the case. An example of this would be where an adjudicator may have properly considered all the evidence, and made a reasonable decision based on that evidence. However, in his determination, he fails to note that he has indeed considered a key piece of evidence. This would be a case in which the decision of the adjudicator is correct, but in which the case would be remitted to make sure of this fact.

We have taken a statistically significant sample of cases that are remitted, and have found that in no more than one-quarter of the cases does the adjudicator reach a different decision to that which was reached first time around. This one-quarter of cases may properly be said to have succeeded, as they have achieved their aim of reversing the original decision. It is unimportant that the other three-quarters have reached an advanced stage of the process: they have still failed to overturn the original decision.

Using this proportion, one-quarter of the 4,199 cases remitted is 1,050. I would stress that this is still likely to be a generous estimate, but the limits of our sampling technique do not allow us to be more precise. Therefore, if you add the 1,441 allowed cases to the 1,050 remitted cases which achieve a different decision, you find that in 2,491 of the cases can the appellant be said to have succeeded. As a proportion, 26.4% of those cases that have been granted permission to appeal succeed at a full hearing.

Therefore, to find the overall success rate for cases in which permission to appeal is sought, we need to combine the two rates (37.3% of appeals are allowed to go to a full hearing, of which 26.4% succeed) to get an overall success rate of 9.85%-which represents a success rate of just below one in 10.

[28] All figures quoted in this letter are from the calendar year 2003. However, the proportions in the figures are consistent over time, so the conclusions remain true

[29] The remaining 64 were either remitted or withdrawn. We have not included statutory reviews at this point; there were 307 decisions on statutory review applications in 2003, of which over 80% failed, making them statistically insignificant in these calculations

### Home Office appeals

In the interests of full disclosure, I would like to comment on one potential defect in our statistics. It is not possible from the numbers that we have available to us to tell whether an appeal that is brought to the IAT is brought by the asylum applicant or the Home Office. Anecdotal evidence suggests that the proportion of cases brought by the Home Office has fluctuated over time. However, it also suggests that the Home Office has a significantly better success rate than one in 10 when bringing appeals, which means that if you were to be able to distil out only those cases in which the appeal is brought by the asylum applicant, the success rate would actually be worse than one in 10.

### Other statistics raised in debate

I would also like briefly to mention two other numbers that have been brought up previously in this debate, and explain whey they do not represent the full picture.

At second reading in the House of Lords, the Rt Rev the Lord Bishop of Oxford referred to a figure of 58.8%, while the Joint Committee on Human Rights in its recent report quoted a figure of "almost 60%". This is an accurate figure—the actual percentage of cases allowed or remitted at an IAT full hearing based on the 2003 figures is 59.7%—but we need to be clear about what it represents. Similarly, Lord Clinton-Davis later in the second reading debate referred to a success rate of "as much as 23%".

First, in the calendar year 2003, 37.3% of cases that applied for permission to appeal to the IAT were granted permission to appeal. In other words, nearly two-thirds of cases failed before they even got to a full hearing before the IAT. It is right to take these cases into account, as they have entered the appeal process asserting that they have a good case, and have been found wanting at the first hurdle. If you take them into account, the 60% figure reduces to no more than 22% success, which is that quoted by Lord Clinton-Davis.

However, secondly, as I have already discussed, it is not meaningful to include every case that is remitted in any estimate of success. Cases are remitted for many reasons, and fewer than one in four actually receives a different decision when reconsidered at the adjudicator tier. The most meaningful way to assess success in the IAT is to consider the proportion of cases that receive a different decision in the process, either by being allowed outright by the IAT, or by being remitted then receiving a different decision before the second adjudicator; as I have already outlined, this comes to fewer than one in 10 of cases that initially seek permission to appeal.

I appreciate that bringing any sort of clarity to statistics is a difficult task, but I hope that the numbers that I have outlined will help to inform debate on this issue.

*Lord Filkin*

Parliamentary Under-Secretary of State
Department for Constitutional Affairs

*6 July 2004*

**Annex C**

### Statistics for the period October 2003–September 2004

From Oct 2003–Sept 2004 there were 29,947 decisions on applications made for permission to appeal to the IAT. Of these, 9,852 (33%) were allowed to go to a full hearing, 67% were dismissed and less than 1% were withdrawn.[30]

In the period October 2003–September 2004 there were 10,054 decisions on substantive appeals at the IAT. The difference between this number and the 9,852 given permission for a full hearing is due to the IAT processing a backlog of cases.[31]

Of the 10,054 decisions, 14% (1,407 cases) were allowed outright, 34% were dismissed outright and 8% were withdrawn. The remaining 44% (4,424 cases) were remitted to the adjudicators for reconsideration.

As **Annex B** sets out, based on a sample of remitted cases it was found that in no more than one quarter of the cases does the adjudicator reach a decision that was different to the one reached the first time around. This quarter have succeeded, as they have reversed the original decision.

Using this proportion of one quarter, of the 4,424 remitted cases only 1,106 cases were ultimately successful.

[30] These statistics are taken from the IAA information database

[31] Because of the time taken to process appeals we cannot follow the same group of cases through to the end of the process. Instead we have to look at a snapshot of the cases at each stage of the process in a specific period. However, the proportions at each stage of the process are consistent over time, making this a valid approach

OVERALL SUCCESS RATE

If you add the 1,407 cases that were allowed outright to the estimated 1,106 cases that achieved a different decision after remittal you find that in 2,513 of the cases the appellant can be said to have succeeded. Therefore, of the 9,852 cases granted permission to appeal 2,513 were successful—so 25.5% were successful.

To find the overall success rate for cases in which permission to appeal is sought, we need to combine the two rates. So if 33% of cases go to a full hearing and 25.5% are successful then the overall success rate is 8.25% (25% of 33%). This represents a continued success rate of below one in 10.

**Annex D**

STATISTICS FOR THE PERIOD OCTOBER 2003–SEPTEMBER 2004 SHOWING THE PERMISSION APPLICATION RECEIPTS BY PARTY AND OUTCOMES BY PARTY.[32]

*The number of applications for permission to appeal to the IAT*

| | |
|---|---|
| Received | 31,523 |
| Promulgated | 29,947 |

| *Receipts by party* | |
|---|---|
| Appellant | 91% |
| Secretary of State | 9% |

| *% Outcomes by party* | | |
|---|---|---|
| Appellant | Allowed | 25% |
| | Dismissed | 65% |
| Secretary of State | Allowed | 8% |
| | Dimissed | 2% |

| *% Success rate by party*[33] | | |
|---|---|---|
| Appellant | Allowed | 28% |
| | Dismissed | 72% |
| Secretary of State | Allowed | 80% |
| | Dismissed | 20% |

**Annex E**

LSC ACTUAL, AND PROJECTED, COSTS AND SAVINGS

| *Year* | *Cash £ Million* | *RAB £ Million* | *RAB: Non-intervention* | *PSA7 savings (RAB)* |
|---|---|---|---|---|
| 2000–01 | 88 | 58 | | |
| 2001–02 | 118 | 171 | | |
| 2002–03 | 161 | 250 | | |
| 2003–04 | 200 | 181 | | |
| 2004–05 | 199 | 113 | 227 | 114 |
| 2005–06 | 130 | 111 | 255 | 144 |
| 2006–07 | 109 | 109 | 287 | 178 |
| 2007–08 | 106 | 105 | 323 | 218 |

The agreed LSC Corporate Target for 2004–05 for reducing expenditure is to save £30 million of expenditure in 2004–05. The driver behind this target was the need to control increasing case costs and reduce total expenditure on asylum legal aid compared to previous years. Therefore, the target is based on a comparison between forecasted actual expenditure and a projection of what spend would have been if intake had remained at the 2003–04 level, if the legal aid reform package had not been introduced in April 2004, and thus average case costs had continued to rise at the rate of 12.5% (non-intervened model). The target is based around committed resource and not cash.

[32] These statistics are taken from the IAA information database

[33] These figures are indicative only

The initial higher cash spend is a necessary short-term investment to speed up the asylum process, limit work that is allowed on cases with limited merit and improve quality. This creates immediate resource saving sand longer term cash savings.

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**Supplementary evidence submitted by the Department for Constitutional Affairs**

1. Foreword

The Government previously submitted evidence to the Committee on 19 January 2005 setting out the background to the proposals for new legal aid arrangements for review and reconsideration of decisions of the Asylum and Immigration Tribunal. The Tribunal is scheduled for implementation in April 2005.

It was noted in that submission that further evidence on the detail of the scheme could not be provided because consideration was still being given to the consultation responses received on the regulations that will underpin the new arrangements. The Government felt that because of the issues at stake it was important to give careful consideration to the various points raised in the responses before the policy was finalised. The Government is grateful for the Committee's patience.

2. Why are the proposals necessary

The new arrangements are being introduced to combat abuse of the appeals process by disingenuous economic migrants and opportunistic legal advisors and to reduce the number of weak applications reaching the Tribunal and the higher courts. This is imperative if the aims of the single tier are going to be achieved, which are to increase speed and efficiency within the appeals process and target public money and resources at genuine claimants.

The previous evidence submitted to the Committee demonstrates that the Legal Services Commission (LSC) has already introduced a comprehensive package of reforms to drive up the quality of legal representation and reduce exploitation of the system. These initiatives include:

- introducing a financial threshold for the initial decision making stage;
- removing attendance at Home Office interviews from the scope of legal aid, save in exceptional circumstances;
- taking the application of the merits test for asylum appeals in house; and
- introducing compulsory accreditation.

What the evidence also shows however, is that high volumes of legally aided, unmeritorious cases are still being pursued beyond the first tier of appeal. Between 2003 and 2004 approximately 30,000 decisions were made in asylum cases on permission applications to the Immigration and Appeal Tribunal (IAT). Of these decisions, only 33% resulted in permission being granted.[34] The remaining 67% of applications were dismissed.[35]

At the permission stage the IAT is not deciding whether a case will win or lose but whether it is arguable and ought to be looked at again, ie whether the case has merit. Therefore, 67% of the cases, for which permission to the IAT was sought, were considered by the AIT to be unmeritorious. Whilst, as has been previously acknowledged, not every unsuccessful permission application is necessarily an abusive one, a success rate as low as this is indicative of the fact that the system is being exploited. It also demonstrates that although a great deal has already been achieved further reforms are necessary to reduce the potential volume of weak cases under the new appeals structure.

3. The finalised scheme

The new arrangements have been designed to encourage representatives to focus more carefully on the merits of a case before agreeing to provide representation. By making funding retrospective the scheme introduces an element of risk, which is that if a representatives who choose to provide representation in a weak case, may not be paid for their work. The DCA considers this a proportionate response to tackling the problem of high volumes of weak applications. Public money and resources are finite and should not be used to fund and process unmeritorious cases. The proposals are not intended to restrict access to justice however, or oust the jurisdiction of the higher courts.

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[34] These statistics are taken from the Immigration Appellate Authority information database for the period October 2003 to September 2004

[35] A percentage of dismissals are overturned on statutory review but this is a very small percentage of the overall number of applications—less than 1%. This statistics is taken from the figures produced by the Administrative Court

The Government is committed to securing access to the courts and recognises the importance that higher court oversight plays in delivering justice in individual cases and in promoting developments in the law and improving the quality of judicial decision making. The Government therefore also recognises that any initiatives aimed at reducing the potential volume of weak cases moving through the appeals process must not be introduced at the expense of access to the courts.

A balance needs to be struck and this is why very careful consideration has been given to how the scheme is structured. A summary of the finalised scheme is attached at **Annex A**.

### The prospects of success test

One of the key factors in striking this balance is defining the test that the Tribunal judge will apply at the end of the reconsideration process when deciding whether funding should be awarded. In very rare circumstances funding will be awarded at the review stage, in the majority of cases however, it will only be awarded following reconsideration. This test is therefore crucial because it will dictate the level of risk that the representative will assume when deciding whether to provide representation.

The DCA consulted on two options. Option 1 proposed framing the test in terms of "very strong prospects of success" and option 2 proposed framing the test in terms of "significant prospects of success". Of the two options consulted on, the second was considered to be preferable.

Taking into account the consultation responses received the Government proposes that the test that the Tribunal judge will apply will be framed in terms of the second option and whether the case had significant prospects of success at the time the application was made.

It will be for the judiciary to interpret what "significant prospects" means in practice. The intention however, is that if a case is successful at the review stage and the representative has acted in good faith in bringing the case, funding should be awarded. It is important however, that success at the review stage will not in itself be sufficient to secure funding, which is why the test is being framed in these terms. Every case must be dealt with on an individual basis.

The Government is aware of concern amongst consultees that the proposals will force representatives out of the market because of financial uncertainty. Creating uncertainty is not the purpose of the scheme. Taking on a case will involve risk only if its prospects of success are poor. Representatives that act conscientiously and pursue cases with merit can expect to be paid.

Concern has also been expressed that an unsuccessful outcome will result in funding being refused automatically because the Tribunal judge is likely to decide a case's prospects of success based on the ultimate outcome of the case. Representatives should be reassured that this will not be the case. The Tribunal judge's decision will be made based on the case's prospects of success at the time the application was made and the information available to the representative at the outset. Successful cases will always be funded but if a case is unsuccessful the funding decision will not be directly linked to the outcome of the case on reconsideration.

### Funding at the review stage

At the review stage the powers of the Tribunal and the High Court to award funding will be limited, and in the majority of cases if an application is unsuccessful funding will be refused. This is appropriate because usually if an application is unsuccessful that will be because the Tribunal or the High Court has concluded that the application lacks merit and does not require further reconsideration. It is not unreasonable to ask representatives to make an accurate assessment of whether an application has merit and will be successful. The question that has to be considered is not whether the case will win or lose but simply whether there are arguable grounds to answer.

As outlined in the evidence previously submitted to the Committee the Government recognises that there will be circumstances when an application is unsuccessful but funding should nevertheless be awarded. The Tribunal and High Court will therefore have discretion to award funding if the application would have had significant prospects of success but a change in circumstances or a change in the law since the application was made has resulted in its dismissal.

Consideration was given to whether or not there should be a wider discretion for funding to be awarded at the review stage but this was not thought to be necessary. There will be circumstances where initially strong applications fail for unforeseen circumstances. This issue is addressed by giving the Tribunal and the High Court discretion to award funding in exceptional circumstances. There will also be cases where the prospects of success are difficult to assess. This issue is addressed by including a risk premium or uplift in the rates payable to suppliers. In all other cases if an application is unsuccessful that is indicative of the fact that the application lacked merit and it is therefore appropriate that funding should be refused.

### The risk premium

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.

As part of its consultation on the contract changes for the new arrangements the LSC consulted on a risk premium of 25% of CLR rates in addition to the basic rate. This was considered to reflect the level of risk that suppliers would face in reality, balanced against the need to control costs. Consultees expressed concern that this uplift would not adequately reflect the risks involved however. As a consequence the proposed risk premium was reassessed and has been increased to 35%.

The LSC is confident that a risk premium of 35% will be appropriate in the majority of cases. However, the contract allows for flexibility and if a case raises an exceptionally complex or novel point of law or a matter of significant wider public interest the supplier can apply to the LSC for CLR to be paid at a higher rate. Therefore in cases that meet this criteria the supplier will be able to apply for an uplift over and above 35%.

### Review of funding decisions

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.

## 4. Conclusion

The new arrangements have not been designed to restrict access to the courts but to discourage weak applications. This is a legitimate aim. It will facilitate speed and efficiency within the appeals process so that cases reach finality earlier and it will also ensure that genuine claimants are the focus of public money and resources rather than disingenuous economic migrants.

It will only be representatives that agree to provide representation in weak cases who risk not being paid for their work. Representatives that act in good faith and properly assess the merits of a case before agreeing to provide representation can expect to be paid.

Department for Constitutional Affairs

*21 February 2005*

**Annex A**

### Summary of scheme

On receipt of the Tribunal's decision on the original appeal the appellant can approach his representative for advice on whether or not there are grounds for challenging that decision. The representative's advice, and advice provided by counsel, will be funded under existing arrangements as part of the Controlled Legal Representation for the original appeal.

In providing advice on whether the appellant has grounds for challenging the Tribunal's decision, the representative should decide whether he is prepared to provide representation. This decision should be based on the test that the Tribunal judge will apply following reconsideration. This test is whether, at the time the application was made, there were significant prospects that the appeal would be allowed on reconsideration.

If the representative thinks that a case meets this threshold then he should provide representation. If he thinks that the case is weak or does not have significant prospects of success then representation should be refused.

If a representative agrees to provide representation it will be on the basis that the costs he incurs cannot be recovered, other than disbursements including expert and interpreters fees, until a section 103D costs order is made.

If an application is unsuccessful at the review stage, in the majority of cases funding will be refused. The Tribunal in its "filter" capacity, and the High Court, will have discretion to award funding but this can only be exercised in exceptional circumstances:

If at the time the application was made there were significant prospects that the appeal would be allowed on reconsideration but because of a change in circumstances or a change in the law the application was dismissed.

If an application is successful at the review stage funding will not be awarded. This is because the decision on funding will be taken by the Tribunal following reconsideration. An exception to this principle is if a case is successful but subsequently withdrawn or the respondent concedes. Funding will also be awarded if the High Court refers a case to the Court of Appeal because it raises an important point of law.

Following the reconsideration of an appeal funding will automatically be awarded if the case is successful. If the case is unsuccessful the Tribunal judge will look at whether at the time the application was made there were significant prospects that the appeal would be allowed on reconsideration.

In special circumstances the Tribunal will have the option of awarding funding to the representative but not counsel, or vice versa.

If the Tribunal refuses to award funding the representative and/or counsel can apply to the Tribunal to have the decision reviewed. In the application an oral hearing can be requested. It will be at the Tribunal's discretion to grant an oral hearing. The decision will be reviewed by a different senior judge to the judge that made the original funding decision.

## Correspondence from Baroness Ashton of Upholland , Parliamentary Under- Secretary of State

### New Legal Aid arrangements for Asylum and Immigration Tribunal: remuneration rates

I am writing following my appearance before the Committee on Tuesday, 1 March, at which I gave evidence on the Government's proposals for new legal aid arrangements for challenges to decisions of the Asylum and Immigration Tribunal.

I hope that I was able to respond to the majority of the Committee's concerns. I am aware however, that because of time constraints we were unable to address the issue of the rates that will be payable to suppliers under the new scheme. Given that this is a concern that has been raised by stakeholders in both the written and oral evidence presented to the Committee I thought it would be helpful if I responded in writing on this point.

Stakeholders, including the Law Society and the Bar Council, have expressed concern that because, under the new arrangements, work will be funded as part of Controlled Legal Representation, suppliers are effectively being asked to work for less. This is not the case however, and in considering this issue it is important to recognise that the new funding rates have been created to reflect the different nature of the new onward appeals system. Making a direct comparison between the rates payable under the current system and the rates that will be paid under the new system may therefore be unhelpful.

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.

When the LSC consulted with suppliers on the contract changes necessary as a result of the new arrangements an "uplift" of 25% to CLR rates was proposed. As a result of the consultation the LSC has agreed that a higher uplift rate of 35% will now be payable.

It is also important to note that in relation to payment rates there are provisions in the LSC's Contract for suppliers to apply for a further uplift to their costs in certain circumstances. The amount of uplift will depend on the nature and complexity of the case and will be subject to negotiation on an individual case by case basis. Any such uplift would be in addition to the 35% uplifted rates.

Taking all these factors into consideration the Government is confident that the remuneration package will be attractive for those suppliers who seek to take forward meritorious appeals.

I hope this letter has helped to clarify the issue.

*Baroness Ashton*

*7 March 2005*

**Evidence submitted by Justice**

1. JUSTICE is an all-party organisation dedicated to advancing justice, human rights and the rule of law with a membership of 1,600, largely lawyers.

2. We understand that this consultation relates to regulations to bring into force the provisions of s103D Nationality, Immigration and Asylum Act 2002 as inserted by the Asylum and Immigration (Treatment of Claimants) Act 2004.

3. We should state that we consider the Government ill-advised to implement the policy contained in the new section because the effect:

- conflicts with the general structure of decision-making on merits under Community Legal Service;
- involves retrospective decision-making which is likely to prove inappropriately intimidatory to claimants and their representatives;
- directly conflicts with policies advanced by the Government in relation to decision-making by other courts;
- is an example of poor governance;
- seeks to implement a policy which could be achieved by other means.

4. We note also that it is extremely difficult to analyse the "chilling" or intimidatory effect properly because the consultation document indicates that a "risk premium" will be added "to mitigate the risk associated with taking forward review and reconsideration work under the new scheme". This introduces a totally new element into legal aid funding, the effect of which cannot be judged because the document does not indicate what the risk premium will be.

5. The general policy over several years of the Legal Services Commission and the Department of Constitutional Affairs has been to develop a contracting system that guarantees the quality and integrity of providers of service. This has provided a variety of ways in which quality can be assessed and decisions taken on providers in consequence. The Commission is, thus, progressively removing poor performing providers and seeking to identify a core of "preferred suppliers" with which it can work.

6. In furtherance of this objective, the Commission and the DCA have recently argued that responsibility for decision-making over the merits of criminal cases should be transferred to the commission from the courts. In relation to criminal matters, the DCA recently advanced an argument in terms diametrically opposite to those in the current consultation paper:

> This change is proposed as part of a raft of measures aimed at gaining better control over grant because expenditure on criminal representation has been increasing in a seemingly uncontrolled manner. One of the reasons for the increase has been the apparent willingness of courts . . . to grant representation orders.[36]

7. The DCA position in this paper creates a difficulty. It would seem that its view of magistrates is that they have considerably more independence of judgement than the DCA accepts is reasonable. However, having reformed the immigration appellate structure, the DCA seems more confident that its tribunals will come to decisions less at variance with its own views. This could be portrayed as implying that it sees them as rather less independent.

8. The paper proposes quite specifically that neither claimants nor their lawyers will know whether payment will be forthcoming until a decision has been made by a tribunal after the hearing of review and reconsideration. The purpose:

> Is intended to encourage lawyers throughout the profession to rigorously assess the merits of a case before deciding to pursue it, which will in turn reduce the volume of weak applications.

9. These proposals might reasonably be portrayed as "a sledgehammer to crack a nut" and more about public presentation than proper policy. The commission has the mechanisms to control quality and to monitor performance: it could be relied upon to exercise these properly and simply—and appropriately—to say that it would penalise firms which advanced cases that were inappropriate.

10. Furthermore, the payment of a risk supplement, mirroring the position under conditional fees, means that, in time, the LSC could be left with a higher net payment of fees than would be the case if it properly monitored the actions of its suppliers.

11. The structure of the proposed arrangements is, therefore, poor. If the DCA seriously believed that this was the way to proceed, why is the method of retrospective decision applied throughout the Community Legal Service scheme? If firms conducting asylum work are operating inappropriately, why does the 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?

[36] Department of Constitutional Affairs Consultation Paper: *Draft Criminal Defence Service Bill,* Cm 6194, May 2004, para 40

Questions as asked

Q1: *Are the exemption categories appropriate?*

12. No. This is legislative posturing. See above.

Q2: *Do you agree with the proposed transitional arrangements?*

13. Yes if the scheme is to be proceeded with.

Q3: *Which of the two options provided best achieves the aim of the new scheme?*

14. Both of these options are likely to lead to extensive litigation. It would be far better to accept a general test of "reasonableness". That, after all, is the essential question—was it reasonable to take the case or not?

15. In any event, any test should make it clear that it is to be applied to the circumstances as they appeared to the lawyer at the time that the decision was made and on the instructions s/he was given by his/her client.

16. Of the two options, the first is less draconian than the second. Both are unsatisfactory for the reasons above.

Q4: *Are there any practical difficulties?*

17. Yes. The tribunal will be making an ex post facto decision on a set of circumstances of some difficulty.

Q5: *Should any additional circumstances in which the Administrative Court may award funded by added to the regulations?*

18. Regulation 6(3)(b) should be amended to read:

> the court is satisfied that, at the time of making the application it was reasonably arguable that the Tribunal made an error of law and that the appeal would be allowed upon reconsideration. The test is quite properly "reasonableness". If the application was unreasonable, then it should not be taken. The problem with any other wording is that it presupposes a class of cases which were reasonable to take and where, logically, any criticism of that decision would be inherently unreasonable.

Q6: *Do you agree with the proposed arrangements for review?*

19. No. The test should be a reasonable one, as above. It should be open for a provider to request an oral hearing. The proposals are far too defensive. It would be perfectly appropriate for the commission to take note of the percentage of successful applications in determining whether a supplier was meeting appropriate quality standards. This is its general approach elsewhere.

Q7: *Should there be a time limit for making a review application?*

20. There seems little objection to an appropriate time limit.

Q8: *Should barristers have a right to apply for a review of a funding decision independently of a solicitor?*

21. Yes. This will expose the unworkability of this proposed scheme. The tribunal will be required to make a retrospective judgement on what was known to barrister and solicitor. This will be hopelessly complicated.

Q9: *Are the new arrangements for risk-sharing appropriate, given the aims of the new legal aid arrangements?*

22. No. If the government thinks this is the way to proceed then it should apply these arrangements to the whole legal aid scheme. If it wishes to do that, then the appropriate way of doing so is through the fundamental legal aid review due to report early next year. This is ad hoc legislation without regard to principle or practice.

Q10: *Would a risk premium ensure that this work is cost effective for suppliers?*

23. The proposal for a risk premium exposes the absurdity of these proposals. They could end up costing the LSC more money than current arrangements. It would be better to keep payment at one rate and deal with quality properly.

Q11: *Are the proposals for the treatment of disbursements appropriate?*

24. Payment for disbursements should be unavoidable and this exposes the unwarranted complication of these proposals.

Q12: *Do you agree with the suggested amendments to the CLS regulations and the Funding Code criteria and procedures?*

25. No.

*Roger Smith*
Justice

*December 2004*

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**Evidence submitted by the Greater London Authority**

INTRODUCTION

The Mayor of London, Ken Livingstone, is shortly to publish a research report, *Into the labyrinth: legal advice for asylum seekers in London*. The purpose of this submission is to highlight the findings of the report that might be relevant to the Constitutional Affairs Committee's enquiry into legal aid for asylum appeals.

ASYLUM AND THE ROLE OF THE MAYOR

London is a city built on the arrival of immigrants including people seeking asylum from persecution. The Mayor recognises that policy on immigration including the arrival of asylum seekers connects directly with his statutory responsibility to promote social and economic development, equalities, health and community safety for Londoners. He has made clear his view that the proper discharge of his statutory duties requires him to contribute to the formation of immigration and asylum policy.

INTO THE LABYRINTH—KEY FINDINGS

The key findings of this qualitative study are summarised in the executive summary which is attached together with the report's recommendations at appendix A (**not printed**).[37]

The particular relevance of the report to the Committee's current enquiry is its findings on the existing financial risk placed on legally aided practitioners as a result of the legal aid reforms introduced in April 2004. The reforms introduced a package of additional advice thresholds or challenges through which most Legal Services Commission (LSC) funded solicitors and advisers have to pass—at any stage beyond preliminary legal help—if they want legal aid for work with asylum seekers:

- seeking extension of LSC funding after providing an initial five hours advice;
- seeking LSC funding for an appeal.

A further challenge is posed by the need for all LSC funded practitioners to pass exams and achieve accreditation by 1 April 2005.

At each of the thresholds the legal adviser has to invest some resources before they know whether they will receive any public funding. The resources will usually comprise staff time but, as with training for accreditation, may also be financial. The effect is that providing asylum advice and representation becomes decisively more risky.

Inconsistent decision-making by the LSC on applications for funding extensions is a further reason why asylum seekers may not be able to access the legal advice that they need.

As the report suggests, the legal aid reforms have contributed to a situation where:

- asylum seekers can find themselves abandoned by their legal representative the further their case progresses through the asylum process and are unable to access competent legal advice and representation, irrespective of the merits of their claim;
- the inability to access competent legal advice can result in asylum seekers being wrongly refused asylum and facing destitution or return to countries where they are at risk of persecution.

[37] Mayor of London, *Into the labyrinth: legal advice for asylum seekers in London*, Greater London Authority, March 2005

Evidence of the above is elaborated in:

— Chapter 3, page 34 under the heading "Resources or risk? Effect of the 2004 reforms"
— Chapter 4, page 42 under the heading "Resources"
— Chapter 5, page 56 under the heading "The impact of the legal aid reforms"
— Chapter 6, page 66 from the heading "Finding a legal adviser at the appeals stages" through to "Representation at appeal", and at page 70 "The Immigration Appeals Tribunal: second stage appeal"
— Chapter 7 under the headings "Impact of the legal aid reforms" at pages 76, 77, 79 and 81.

The relevant sections are attached at appendix B (**not printed**).[38]

CONCLUSION

The findings of *Into the Labyrinth* indicate that the existing financial risk upon practitioners means that some asylum seekers are unable to access the advice that they need and as a result their claims are wrongly refused. Any further risks, such as those proposed by the Department for Constitutional Affairs for onward appeals from the new Asylum and Immigration Appeals Tribunal, are likely to exacerbate this problem, leaving vulnerable asylum seekers facing destitution or return to countries where they are at risk.

*Ken Livingstone*
Mayor of London

*Frances Smith*
Policy Support Unit

Greater London Authority

*3 March 2005*

[38] *ibid*

Printed in the United Kingdom by The Stationery Office Limited
3/2005 302101 19585