



7 July 2009

BY EMAIL AND POST

Consultation on Funding Immigration and Asylum Legal Aid in the First-tier Tribunal and Upper Tribunal

I am writing to consult you on the changes we are proposing to make to the Community Legal Service (Funding) Order 2008, the CLS (Financial) Regulations 2000 and arrangements for funding legal aid in the First-tier Tribunal and Upper Tribunal. This is to ensure that legal aid funding continues to be available when the Asylum and Immigration Tribunal (AIT) transfers to the unified structure established under the Tribunals, Courts and Enforcement Act 2007.

The Tribunals, Courts and Enforcement (TCE) Act 2007 provides a judicial and legal framework, which brings together individual tribunals into a new, unified tribunal structure. The Act creates a two-tier tribunal system: a First-tier Tribunal and an Upper Tribunal, both of which are split into Chambers. The Upper Tribunal primarily, but not exclusively, reviews and decides appeals arising from the First-tier Tribunal.

On August 21st 2008, the UK Border Agency published a consultation 'Immigration Appeals, Fair decisions; faster justice' which set out a number of proposals to deliver an immigration appeals system that is faster, final and respected. A response document was published in May 2009 which made clear that the Upper Tribunal Chamber will take the place of the existing High Court opt-in stage and will also hear onward appeals, which will replace the substantive reconsideration cases currently heard by the AIT. Stakeholders have been invited to participate in a separate consultation on the upper tribunal rules.

From a legal aid perspective, our aim is to replicate the current scheme of payments in the new Tribunals as far as possible without change and ensure that all necessary regulatory and legislative changes are made to preserve (as closely as possible) the

current legal arrangements under the new system (with the exception of the Costs Order regime which is not being preserved). We did consider whether to take this opportunity to review the payment structure for Asylum and Immigration cases, but decided that, in common with other Tribunal transfers, it would be preferable simply to replicate the existing scheme as far as possible which we consider to be fair and effective.

The Present Funding Arrangement

Currently, legally-aided representation before the AIT is funded through two different payment schemes dependent on whether it is for a substantive appeal or an application for review and reconsideration of an AIT decision.

Cases before the AIT are paid as controlled work. A substantive appeal is remunerated by graduated fee or at hourly rates depending on the circumstances. Challenge to the appeal decision is by way of application for reconsideration and legal aid funding (with limited exceptions) is subject to the grant of a Costs Order by the judge retrospectively at the end of a reconsideration process. The Costs Order decision is based on an assessment as to whether a case had significant prospects of success at the time the review application was made.

It has been accepted that in practice that in ordering a reconsideration the judge must have been of the view that there was a real possibility that the case would be allowed on reconsideration¹. If a reconsideration application does not succeed and reconsideration is not ordered, the application is not normally funded and the supplier receives no payment. If a Costs Order is made, remuneration of work is at rates that include an enhancement or uplift equivalent to 35% that is intended to reflect the risk of non payment that the supplier has taken.

The new structure

The transfer of the AIT to the First-tier Tribunal involves the abolition of the AIT and the transfer of its functions and judiciary (under sections 30 and 31 of the Tribunals, Courts and Enforcement Act 2007). The new tribunal will be part of the unified tribunals system, with a First-tier Tribunal replacing the existing AIT. An onward appeal process will take the place of the current review and reconsideration arrangement which will cease to exist, along with the system of funding through Costs Orders. The Upper Tribunal will hear onward appeals from the First-tier Tribunal. Permission to appeal to the Upper Tribunal may be granted by the First-tier Tribunal; if the First-tier Tribunal refuses permission, an application for permission to appeal can be made directly to the Upper Tribunal.

Proposed Funding Arrangement

The new arrangement retains the existing funding system for first stage appeals remunerated as controlled legal representation. This means that practitioner fees for First-tier Tribunal work, where there will be a dedicated chamber for immigration and asylum appeals, will be paid as in current arrangement of graduated fees or hourly rates depending on the type of case.

The rates that are to be payable for Upper Tribunal appeals are broadly comparable to existing review and reconsideration appeals. At present, if an application has been approved and a reconsideration has been ordered then in practice a Costs Order will be granted at the conclusion of the case. Where the application has been dismissed a Costs Order is not normally granted. We propose to replicate the current process so that where a judge grants permission to appeal to the Upper Tribunal costs for the case will be claimable; where permission has been refused no claim can be made from public funds. There are some limited exceptions that will remain.

Practitioners will be required to consider the merits of the application, as they do now. The merits test to be applied is set out in the LSC funding code and will not change. Funding will, for most cases, be determined by the outcome of the permission application to appeal to the Upper Tribunal. For cases currently subject to a Costs Order the rates are set out in table 8(b) in the Community Legal Services (Funding) Order 2008. In relation to cases that do not currently require a Costs Order the rates are set out in table 8(a).

Normally where an application for permission to appeal to the Upper Tribunal has been refused, funding for the permission application will not be payable. However in order to replicate the current arrangement we will continue to treat some categories of cases as exceptions to this provision. These cases will be funded at controlled legal representation hourly rates. Examples of cases that currently fall into this category include appeals being dealt with under the UKBA detained Fast Track processes and where the Home Office is lodging the appeal.

Transitional Arrangements

The new funding arrangement for Upper Tribunal appeals will apply after commencement early in 2010. Existing legal aid arrangements where Costs Orders are

¹ See case of RS (Iran) (2005) UKAIT 00138

awarded retrospectively by the tribunal judge will be kept for a transitional period to cover review and reconsideration applications made before the transfer date.

Funding Order

Amendments to the Community Legal Service (Funding) Order 2007 provide that rates that would have been payable in the initial appeal to the AIT will now be payable for proceedings in the Immigration and Asylum Chamber of the First-tier Tribunal, and to certain cases in the Upper Tribunal (i.e. those subject to the Fast Track Procedure, and where the permission application was lodged by the Secretary of State). All other appeals to the Immigration and Asylum Chamber of the Upper Tribunal, where the permission application is granted, will receive the rates that would previously have been payable for reconsideration and review applications subject to the Costs Order – that is, the rates set out in paragraph 8(b) of the Funding Order.

Community Legal Service (Financial) Regulations 2000

Amendments to the Community Legal Service (Financial) Regulations 2000 substitute references to the Asylum and Immigration Tribunal with the Immigration and Asylum Chamber of the First-tier Tribunal. The amendments also substitute references to the “High Court in respect of an application under section 103A of the Nationality, Immigration and Asylum Act 2002” with “the Immigration and Asylum Chamber of the Upper Tribunal”.

Drafts of both the Funding Order and Regulations are attached at Appendix A, although drafting is subject to change. Respondents are asked to note that the name of the chambers is subject to confirmation by the Government, and the finalised order will reflect the name chosen for the chambers.

LSC Funding Code Procedures and Contracts

Along with the proposals outlined above, the LSC is making consequential amendments to the Funding Code and Contracts. Please see attachment at Appendix B for further information.

We consider all these changes to be a reaction to legislative change, and therefore to be consistent with the Unified Contract agreement with the Law Society. This agreement currently prevents the Ministry of Justice and Legal Services Commission amending contracts with suppliers other than as necessary to respond to legislative changes.

Further changes may result from the consultation responses and/or additional work we undertake with Tribunals Service colleagues. It is worth reiterating that our principal intention in making these changes is simply to ensure continuity of legal aid provision, as far as possible on the same basis as before. If these changes were not made funding would not be available for any of the matters dealt with by the tribunals transferring to the new structure.

I would be grateful to receive any comments on the proposal to remunerate matters transferring from the AIT into the new tribunal structure as set out above, including the proposed amendments to contract provisions, by Friday 21 August 2009. Please send your responses by post or email to me at the above address. Unless you ask that your response be kept confidential, we may make your response available under the Open Government Code.

Moji Adetosoye

Asylum, Family and International Legal Aid

This consultation has been sent to the following:

Senior President, of the Tribunal Service; Deputy Presidents of the Asylum and Immigration Tribunal; President of the Law Society; Chairman of the Bar Council; Chair, Legal Aid Practitioners Group; President, Immigration Law Practitioners Association; Immigration Services Commissioner; Office of the Immigration Services Commission; Chief Executive, Immigration Advisory Service; Chief Executive, Refugee and Migrant Justice; Chief Executive, Citizens Advice Bureau; Director, The Law Centres Federation; Chair, Administrative Justice and Tribunals Council; UK Representative, United Nations High Commissioner for Refugees; UKBA Central Policy Team, Home Office; Director of Policy and Development, Scottish Executive; Public Legal Services Division, Northern Ireland Court Service; Lord Chief Justice Northern Ireland