

# Early Legal Advice Project Guidance

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## Table of Contents

Introduction

Case types

Referral Strategy

    Strategy once online appointment system is running

    Strategy pre-implementation of online system:

    FAQs on the referral system

Cultural change

Detailed process

    Routing

    Representative meeting with applicant & Contact Management Appointment (CMA)

    Additional representative meetings with the applicant & the witness statement

    Possible variables to the ideal timetable

    Pre interview discussion

    The interactive interview

    Roles of the parties

    Departing from Agreed Issues

    The Record of Proceedings

    Post interview discussion

    Unrepresented applicants (by choice / privately funded)

    Decision

    Appeal process

    UASC process

Interpreters

Flexibility criteria & application

Complaints procedure

User group terms of reference

    Background to the project:

LSC Requirements

Ongoing requirements for evaluation

## Introduction

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This guidance must be read in conjunction with immigration legislation, Asylum Instructions, and LSC 2010 Standard Civil Contract section 8. It sets out details of a new approach that will be tested in the Midlands and East of England Region to improve asylum decisions through early legal advice.

The objective of the ELAP process is to get more cases right first time, identify those who are in need of protection earlier, manage public funds effectively, and increase confidence in the asylum system.

The aim of the ELAP is to determine the impact of providing legal advice and representation in support of asylum case owner's initial decisions (i.e. to approve or reject a case) across an entire and single UKBA region.

The ELAP is expected to deliver the following broad benefits:

- a) More sustainable asylum decisions made within PSA targets
- b) Whole system cost savings to be achieved and evidenced
- c) Improved overall quality of service provided by the system
- d) A clear view on whether national rollout of ELAP is achievable, with sustainable, evidenced outcomes

ELAP is expected to bring about the following outcomes:

- a) Greater sustainability of asylum decisions.
- b) For the appropriate Public Service Agreement to be met.
- c) For the UKBA Quality assurance and LSC Peer review targets to be, as a minimum, met and for additional ELAP specific quality measures to be achieved.
- d) Any rise in costs to be, at a minimum, offset by savings elsewhere.
- e) More effective conclusion of negative decisions.
- f) A cultural change in the relationship between case owners and legal representatives, directly impacting on the quality of decisions made.
- g) Greater confidence in the credibility of the asylum system from the applicant, case owners and legal representatives.
- h) Any identified benefits of ELAP must be attainable and sustainable on a national level, having not been dependent upon characteristics inherent in the region in which the ELAP is taking place, which do not and would not exist elsewhere.

It is also understood that in ELAP greater flexibility will be available to allow for the needs of different children, which will vary depending on age and circumstances, and to ensure that there is sufficient time for thorough case preparation by relevant agencies before the interview. The UK Border Agency will consider the best interests of the child throughout the asylum procedure in accordance with its obligations under Section 55 of the Borders, Citizenship and Immigration Act 2009.

The ELAP process will run in the region from the project's start date until a decision to end it is made. If instead the decision of UKBA / LSC is to continue or to roll out the process nationally, then the regional ELAP process will continue during the life of the Standard Civil Contract.

[Back to contents](#)

## Case types

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The ELAP process will apply to every asylum case that is lodged on or after 2010 Standard Civil Contract that is routed to the Midlands and East of England Region. The process will apply to all cases in the region irrespective of age, nationality or gender. It will become the MEE business as usual process.

The process will not apply to cases that are transferred to DFT or TCU and once a case is transferred out of the region, there is no obligation to continue with the process.

The current transfer policy is that if a case is interviewed in region the same region will do the decision, therefore transfer of cases in prior to decision stage should not be seen.

If a case is transferred into region after a decision it will go through the appeals process as normal.

If the case is routed out of the region post decision, the case will go through the normal appeals process and will not be an ELAP case.

Only those providers who hold contract schedules with the LSC for the Midlands and East of England (MEE) region may undertake publicly funded work on ELAP cases.

[Back to contents](#)

## Referral Strategy

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As part of ELAP it will be vital that clients obtain legal advice as soon as possible within the asylum process there by maximising the time available. The referral mechanism will be a key contributing factor in the success of ELAP. Ensuring that clients can access and attend a representative as early in the asylum process as possible, will help maximise the increased time available under ELAP thereby allowing true test of its principles.

In order to facilitate this, a method of referral may be required either directing clients to particular providers or allowing them to choose a provider from a selection presented.

All cases will be referred to a legal representative, apart from UASC cases. The current process of Social Services liaising directly with the legal representatives to book an appointment will continue, rather than UKBA referring the child to a representative firm and booking an appointment which may not be convenient to Social Services.

[Back to contents](#)

### Strategy once online appointment system is running

An online appointment system is being considered. It is anticipated this system will be available to the Asylum Screening Unit (ASU), so all applicants who apply for asylum and are routed to the Midlands and East of England Region will be offered an appointment with a local representative, regardless of their accommodation needs.

Following a face to face discussion between an Immigration Officer (at ASU), where the applicant is to be routed to the MEE region the client will be asked whether they would like an appointment with a local provider. If the applicant responds positively, they will have a choice of appointments, which the immigration officer can book. The applicant will be asked if they have a preference of gender of the legal representative. The client will be informed both in writing and verbally of the time and date of the appointment and a record maintained on the CID so the region is aware of the appointment details.

Where the applicant claims at Port or LEO, the appointment will be made once the applicant arrives in the area by a local UKBA member of staff. The appointment will be communicated to the applicant by letter and to the provider by email.

However, as the online system is not yet available, this element of the referral strategy will not apply to those cases opened before the online system is available.

[Back to contents](#)

### Strategy pre-implementation of online system:

In order to ensure that a form of appointment system is available to applicants prior to the online referral system being implemented, we will seek to expand the current paper rota system that operates in the West Midlands to the ASU.

We will expand this system to allow UKBA to schedule an appointment between an applicant and a local LSC provider based on a rota which will be provided to them by the LSC's administrator. UKBA will then inform the client of the appointment details, the provider will also be informed of the client's details.

It is likely that first appointments booked in the region will take place slightly later in the process than would be the case under the online system, perhaps around Day 5/6 compared to Day 3.

[Back to contents](#)

### Timescales for the referral within the wider ELAP process and key roles in this process (operator & provider)

Further to the above, the likely timescales for referrals taking place under either system is set out below:

#### **Paper System – Start to launch of online system:**

Date offered appointment:	Day 1
Offered by:	Immigration Officer
Date Appointment booked:	Day 2/3
Booked by:	ASU or Local UKBA staff
Date applicant informed of appointment:	Day 3-5
Likely date of first appointment:	Day 5-7

#### **Online System once running:**

In ASU:

Date offered appointment:	Day 1
Offered by:	Immigration Officer
Date Appointment booked:	Day 1
Booked by:	Routing Team
Date applicant informed of appointment:	Day 1
Likely date of first appointment:	Day 3

Via Port/LEO

Date offered appointment:	(no offering system available)
Offered by:	
Date Appointment booked:	Day 2/3
Booked by:	Local UKBA staff
Date applicant informed of appointment:	Day 3-5
Likely date of first appointment:	Day 5-7

Through the online system the following information will be captured:

- Client name
- Client date of birth
- Client nationality
- Client language
- Interpreter required (Y/N)
- Client special requirements (e.g. BSL interpreter, disability access)
- Provider name
- Provider location (address)
- Adviser name
- Adviser IAAS Accreditation level
- Adviser gender
- Substantive interview date/substantive interview unknown at time of booking.
- Appointment booked by

- Date appointment made
- Appointment date
- Distance between client and provider locations

Through the paper system, the following information will be captured:

- Client name
- Client nationality
- Client language
- Interpreter required (Y/N)
- Provider name
- Provider location (town/city)
- Substantive Interview date where known
- Date appointment made
- Appointment date

[Back to contents](#)

## FAQs on the referral system

### **Q1. What happens if an applicant already has a representative within the region prior to claiming asylum?**

A. The client should be given a letter from the provider to take to the ASU with them; the Immigration Officer should also ask whether the client has a representative before they proceed to book an appointment. If the client does have a representative in the region then an appointment will not need to be made and the representatives details should be noted on CID, and a note of their decision not to allocate an appointment recorded on the notes screen.

### **Q2. What happens if an applicant already has a representative outside of the region prior to claiming asylum?**

A. The client should be informed that they will not be able to receive free legal advice on their claim for asylum if they continue to instruct a representative outside of MEE subject to very limited exception. The client should be informed that publicly funded advice, subject to limited exception, allows for a representative to discuss their case with UKBA and also to attend the interview with them and advise on the decision and its consequences. The client should be offered an appointment through the referral system.

### **Q3. What happens if an appointment is booked and the client does not attend what should the provider do?**

A. The provider should record on the online system that the appointment was not effective. They should also call/email the UKBA ELAP Admin officer to confirm the client did not attend. No costs will be claimable from the LSC as a result of appointments that are not effective.

### **Q4. What happens if a client has been made an appointment with Firm A but separately attempts to instruct Firm B within MEE region?**

A. Where the client has not attended Firm A and Legal Aid has not already been granted, Firm B is contractually free to grant funding to represent the client. UKBA should be informed of the change of representative and the Contact Management Appointment completed by Firm B as Firm A may be recorded on their systems already.

Where funding has already been granted by Firm A, Firm B must consider the good reason for transfer prior to any grant of Legal Aid. Firm A should be informed of the change of representative as should UKBA.

**Q5. Who will prepare the paper rota for UKBA to use when booking appointments prior to the availability of the online system?**

A. The LSC will provide UKBA with a rota based on the availability of its providers during the months of the project when the electronic rota is not available. Any changes to the rota will be communicated by the LSC Project Manager.

The rota will be broken down to allow the UKBA staff to select from a list of providers who may be closest to the client's location, or offer the earliest appointment.

**Q6. When booking appointments through the online system, what factors will be taken into account when selecting an appointment for the client?**

A. Where the client has requested the caseowner is of a specific gender, they will also be allocated a legal advisor of the same gender.

The location of the client will also be taken into account as the system allows search results to be returned by distance between client and adviser and the providers closest to the applicant should be prioritised.

From this list of providers, the next factor may be the date and time that the appointments are scheduled for. E.g. one provider may offer an appointment in 3 days time, another in 5 days but the one 5 days away is 10 miles closer. The additional travel costs and applicant's specific circumstances, along with the proximity of the interview should be taken into consideration.

Applicants will receive a standard letter advising them of their appointment with the legal representative.

[Back to contents](#)

## Cultural change

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The aim will be to create an environment where all relevant evidence is correctly identified and placed into account before the decision is made rather than coming to light fully only at the appeal stage.

To achieve this, legal representatives and case owners will work together to ensure that the key issues in the case are identified before the asylum interview and those which are not in dispute and do not require specific evidence are quickly agreed, allowing both the representative and case owner to concentrate on pursuing and gathering evidence for material issues which remain in dispute.

Where a material issue is in dispute and evidence could genuinely assist the decision-maker to make a just decision, the Flexibility criteria & application will ensure that agreed extensions to the usual timeframe are possible.

There may be the need for a significant shift in the manner in which case owners and legal representatives engage with each other.

The case owner's role is to conduct the asylum interview, gather evidence and consider the facts of the claim to establish whether the individual is eligible for protection or discretionary leave. The legal representative's role is to gather and collate evidence which supports the applicant's claim and to present this in a timely fashion to the case owner for consideration.

The legal representative is not the decision maker and, while they can submit evidence that supports the applicant, they are not able to submit evidence that undermines the applicant, their client.

If the legal representative is not satisfied that the applicant is eligible for protection or human rights, they can provide no comment.

Legal representatives and case owners must have access to up to date and accurate direct contact details (telephone, fax and e-mail) of each counterpart responsible for their case.

Case owners and legal representative are encouraged to communicate case queries or updates via phone and e-mail rather than formal letters (post or fax). Records of conversations must be kept by both parties on their file or IT database.

A UKBA e-mail can include 2 details of personal information (such as the Home Office reference number and name). No personal case details can be included (such as a witness statement or decision letter), although e-mails can be used to update the representative on actions to follow by fax or to finalise meeting or initial contact details for example.

Contribution to the monthly user group meeting is strongly encouraged so both parties can identify and discuss issues outside of the formal interview situation. See User group terms of reference for further details.

[Back to contents](#)



## Detailed process

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### Routing

When an applicant claims asylum, they will be provided with details of a pre-booked appointment with a legal representative. The appointment should take place 2 to 3 days after their claim is lodged (day 3 or 4). The referral will follow the [referral strategy](#).

The referral process will notify the legal representative of the appointment. The referring individual is responsible for also updating the UKBA database with details of the appointment and the representative's contact details.

When the region receives the case, the workflow manager shall allocate an interview date 17 working days after the application (and at least 5 working days after the initial appointment with the representative) where the representative is funded by the LSC. For example, if an applicant applies for asylum on Monday 15 November, they have an appointment to meet with their rep on Friday 19<sup>th</sup> or Monday 22<sup>nd</sup> November, the witness statement should be submitted by 10:00 Friday 3<sup>rd</sup> December, and the interview on day 17 – Tuesday 7<sup>th</sup> December. These times refer to working days.

[Back to contents](#)

### Representative meeting with applicant & Contact Management Appointment (CMA)

The purpose of this discussion is to ensure the legal representative and case owner are aware of the key events for the case and to confirm the interview date is convenient.

The representative must call or e-mail the ELAP administrative officer in order to complete this CMA. Ideally it will be conducted while the applicant is still with the representative and by telephone, but where for practical reasons it is more convenient to share information by e-mail that is acceptable. The transfer of information must be completed within 24 hours of the appointment.

During this telephone conversation, the ELAP administration officer and representative will confirm: Applicant's name, date of birth, nationality (if by phone). If by e-mail, only the applicant's name and Home office reference number should be shared for data protection reasons.

- Interview date
- Preferred language for the interview
- If there are any special circumstances (e.g. prefer a woman interviewing officer)
- Details of the responsible legal representative
- Details of the responsible case owner
- (Other details that are normally collected on the FRE) such as health, details of dependents, reporting conditions, telephone number for the applicant, details on AVR.
- Any anticipated issues

The ELAP Administration officer will update UKBA database with the details, and ensure the ELAP questionnaire is completed. The file will be passed to the case owner.

If UKBA has not heard from the representative within 24 hours of the appointment, the representative will be called to check if the appointment went ahead and to share details of the interview time / date.

Where the applicant did not attend the appointment, the ELAP administrative officer will remove the representative's details from the IT system so the firm is no longer linked to the case.

[Back to contents](#)

## Additional representative meetings with the applicant & the witness statement

It is expected the representative is likely to meet with their client at least three times before the interview. The second meeting may be to establish the facts of their claim and the third, to agree the witness statement.

The witness statement must be submitted by 10.00 on day 14 of the process, at least 3 working days before the interview.

Increased flexibility is built into the ELAP timetable compared with the current process. It is hoped this additional time will reduce the need to ask the case owner for flexibility if applicants do not attend appointments, or additional evidence is required. If flexibility is required, the representative should contact the case owner at the earliest opportunity.

There will be instances where meeting this timeframe is difficult. As soon as the representative is aware that the witness statement may not be ready, they must tell the case owner they may not be able to meet the deadline and agree a revised timeframe where appropriate. The case owner will consider any requests for flexibility in accordance with the flexibility criteria.

No interview in the region should commence unless a witness statement is received and a justifiable reason for delay is provided by the legal representative. If the applicant is not eligible for legal aid and chooses not to have a representative, or has funded their own representative, or the legal representative has not completed their functions in the timeframe provided then it may be appropriate for the interview to go ahead. Please see the [broad service expectations](#) for the process if the interview needs to be cancelled.

Adherence to this will be monitored by the regional team and fed back to the LSC if patterns appear.

[Back to contents](#)

### Possible variables to the ideal timetable

**The applicant does not attend initial appointment with the legal representative:** If the applicant does not attend the appointment, or attends but is not eligible for legal aid the legal representative must contact the ELAP Administrative Officer to notify them that the applicant has not attended and will not be represented by them, or will be represented, but not funded by legal aid.

If they have not attended but have a reasonable explanation for non attendance the applicant or legal representative must provide an explanation to the UKBA, such as a medical note, if flexibility criteria are requested.

It is important representatives feed this information back to the UKBA so the success of the referral strategy can be measured.

**The applicant presents to the representative 5 days before the witness statement is due:** Some applicants may not attend their initial appointment but may contact a legal representative after their initial appointment. If this occurs, there is no obligation on the case owner to defer the interview provided the applicant meets their legal representative at least 5 working days before the date the witness statement is due.

**The applicant presents to representative less than 5 days before the witness statement is due:** If an applicant eligible for legal aid presents themselves at a legal representative firm prior to the substantive interview, but after the 5 days before the witness statement is due date, the legal representative should contact the case owner and ask for flexibility criteria to be invoked.

**The applicant is not eligible for legal aid:** If an applicant presents to their pre-booked appointment and they are not eligible for legal aid, the representative can refer them to a suitable advisor (if not in house). If an applicant is not receiving legal aid, it is expected their representative will follow the ELAP process, however, if the applicant does not wish to fund the extra time of their legal representative, the case owner can continue to make the decision provided they record the level of legal representative's involvement on the evaluation questionnaire.

[Back to contents](#)

## Pre interview discussion

In all cases, the case owner and legal representative are required to discuss the material issues in the application before the asylum interview and to come to an agreement in relation to the following categories of issue:

- The key material factual claims
- The key legal or country issues engaged by the case
- Any areas of concern or specifically in dispute (and why)
- If the flexibility criteria applies (e.g. severe physical or mental illness etc)
- What evidence has been submitted, and if there is any evidence to be submitted.
- The time the representative should attend the interview (taking into consideration any Emergency Travel Document interview requirements).
- Any special requirements (which have not already been raised at the CMA).

The pre-interview discussion is the opportunity for the representative and case owner to discuss the interview and any additional evidence the representative is looking to submit. The discussion should be diarised by both parties to take place on day 15, and must take place at least 36 hours before the interview is due to commence so any costs associated with the interview will not be incurred should flexibility criteria be evoked.

The discussion is recorded by the case owner on the pro-forma, a copy of -which is shared with the legal representative at the interview. Any disagreement between the two parties over the way the discussion was recorded should be settled promptly following the discussion.

Neither the pre or post interview pro-forma should form a part of either party's bundle as the intention is not that it binds the parties, rather it focuses minds on the current direction of thought and evidence that could be submitted.

[Back to contents](#)

## The interactive interview

When the legal representative arrives they must call the case owner to notify them they are at the MEU. The representative and their applicant will progress through security, and take a ticket to report to the duty officer. The duty officer will ensure the interpreter has arrived and contact the case owner. The total time between entering the building and the interview starting should be no more than 30 minutes. It is important the representative and applicant are at the Midlands Enforcement Unit in advance of the interview start time. Any additional costs incurred by the representative due to a self created delay will not be claimable from the LSC.

No interview in the region should commence unless a legal representative is present. If the applicant is not eligible for legal aid and chooses not to have a representative, or has funded their own representative, or the case meets the minimum requirements set out, the interview can go ahead. Please see the Complaints procedure for broad service expectations and the process if the interview needs to be cancelled.

As a result of the pre-interview work, the issues in each case should already be known to the case owner and legal representative before the asylum interview and a discussion should already have taken place with the legal representative to narrow the issues in dispute. As a result, the case owner will be in a position to prepare thoroughly for the asylum interview which will also be limited and potentially shorter and simpler than is currently the case. The asylum interview should therefore represent the last rather than the first opportunity to clarify issues in dispute in the majority of cases. The legal representative and case owner will agree how the interview will be managed, with a view to jointly ensuring that, in the vast majority of cases, all factual issues are put into account and that the whole case has been presented before the end of the interview. The central role of the applicant and the establishment of the facts must always be in the forefront of the minds of all parties. Please see the Detailed process for further information.

The length of each interview will be monitored and results will feed back into the evaluation of the project.

If either party needs the interview to end by a particular time, they should make this clear at the outset of the interview (for example, the representative needs to leave promptly at the end of a normal working day by 5.30). When that time is approaching, the case owner must agree with all parties how to proceed and if required, the interview can be completed on another occasion.

The rules of interviewing must be followed by all parties (see the Asylum Instruction on Interviewing) – i.e. the legal representative or caseowner must not ask leading questions to the applicant.

The interview must be non-adversarial.

In cases where there are a number of Emergency Travel Documents (ETD) to complete prior to the interview, the case owner may choose to discuss with the legal representative at the pre-interview discussion the time they should present for the interview so save unnecessary time waiting for the interview (the legal representative will not be required for the ETD interview).

[Back to contents](#)

## **Roles of the parties**

As the decision-maker, the case owner will lead the interview. The case owner may wish to conduct the majority of the questioning him/herself, alternatively, the case owner may request the legal representative to begin the questioning; only questioning the applicant him/herself when an issue of difficulty arises or needs clarification. In either case, the proceedings should be genuinely interactive so that both parties ensure that the applicant has addressed all the material issues still in dispute as fully and comprehensively as possible. The legal representative may request the case owner to ask follow up questions where an issue does not appear to have been adequately explored and the case owner may request the legal representative to take over questioning if it appears this would assist either the applicant or the case owner to understand and deal with the issues effectively. The nature of the interactive interview will be explained to the applicant at the outset of the interview.

Normal professional standards will apply to the legal representative and caseowner so that any line of questioning should not lead the applicant. Where either the case owner or the legal representative feels that the questions become leading this should be brought to the others attention and noted.

At all times, the emphasis should be on assisting the applicant to put forward the factual basis of the claim in as much detail as possible.

The interview should not become a forum for a detailed discussion between the legal representative and the case owner about legal points. Again, the central role of the applicant and the establishment of the facts must always be in the forefront of the minds of all parties.

Breaks, delays and adjournments should be permissible whenever these are reasonable and at the discretion of the case owner.

[Back to contents](#)

## **Departing from Agreed Issues**

The starting point for the interactive asylum interview will be the pro-forma which records those issues considered not to be in dispute and those which require further examination and evidence. It would not normally be appropriate to re-open issues already agreed not to be in dispute.

There are, however, two circumstances where a departure from the agreed issues would be appropriate.

Firstly, where the applicant's responses to questions cast doubt on an issue which had previously been considered settled and the issue is a material one.

Secondly, where the applicant raises new material claims which have not been presented before. In both these circumstances the case owner and the legal representative have a shared duty to assist the applicant to put forward the issue and to ensure that relevant follow up questions are put to the applicant.

In either of these circumstances the case owner and the legal representative should come to an agreement by the end of the interview on any differences to the pre interview discussion which need to be recorded on the post-interview pro-forma.

[Back to contents](#)

## **The Record of Proceedings**

A written record of the interview will be maintained by the case owner and the representative and applicant will be provided with a copy at the end of the interview and time to check the contents if required.

All and any interventions by the representative must be clearly and accurately recorded on the interview record. This is in order to facilitate evaluation of the project.

As the legal representative and case owner are both present in the interview, the interview will not be tape recorded unless specifically requested by the legal representative in the pre-interview discussion (at least 24 hours prior to interview).

[Back to contents](#)

## **Post interview discussion**

While the majority of issues and evidence should have been presented before and during the asylum interview, it is open to the parties to agree a timetable for representations or evidence either in relation to issues already identified or in relation to those which arose for the first time or were re-

opened during the interview itself. As with all aspects of this process, the objective of post-interview submissions is to ensure that all relevant evidence has been put into account by mutual agreement before the decision is made.

It is preferable to complete the post-interview discussion immediately after the interview, however if further consideration of the case details is required by the case owner before completing the discussion this may be delayed.

The post interview discussion is not confined to one conversation, although it does require at least one conversation during which the post interview pro-forma can be agreed. It is important that the representative is aware of the likely outcome before they receive the decision – so if the case owner has advised the legal representative that they would be minded to grant immediately following the interview, so no further evidence is submitted by the legal representative, the case owner must allow the legal representative reasonable time to submit evidence if their decision becomes minded to refuse, prior to serving the decision.

If the case owner is minded to refuse the claim they can invite the legal representative to submit further representations on points raised during the post interview discussion. The case owner and legal representative must agree a reasonable timeframe within which these will be submitted. The maximum time allowed (without flexibility criteria being engaged) is five working days.

This discussion will cover:

- Any basic details accepted (name / dob / nationality etc)
- The key material factual claims that are accepted
- If there are any areas of concern or in dispute (and why)
- Points for discussion (e.g. legal issues, country issues, documents, proposed country of return etc)
- If the flexibility criteria applies at this stage
- If the representative can do anything else to assist the case owner.
- The timeframe for further representations
- The likely outcome of the case

The decision documentation must be served on the representatives, rather than the applicant, by fax or post. The representatives can then discuss the outcome with their client and if it is a refusal of leave, whether an appeal would be suitable. This will ensure the representative has the decision quickly. The decision cannot be served however until the post interview discussion is completed and documented. If a representative receives a decision where the outcome is unexpected and contrary to the post-interview discussion, they must call the ELAP project manager and request for the decision to be withdrawn and a further post interview discussion to be had. This must be completed within 12 hours of receiving a decision.

[Back to contents](#)

## **Unrepresented applicants (by choice / privately funded)**

Some applicants will not be represented either because they are not eligible for public funding, or because they choose not to be represented. Some applicants may choose to privately fund a representative.

In order to make a fair and sustainable decision based on all evidence, the case owner will need to make an assessment whether or not the applicant's case is one which requires specific evidence gathering. If the applicant is unrepresented as a result of failing the sufficient benefits test the case owner will proceed to interview and decide the case in the normal way, asking for relevant evidence to be produced if this is necessary for a just determination to be made. If the applicant is

unrepresented for any other reason the case owner provide the applicant with details of how to find a representative.

In situations where the case requires specific evidence gathering to ensure a fair and sustainable decision and the applicant remains unrepresented for any other reason not dealt with above, the case owner can recommend the applicant commissions such expert or other reports as are necessary to make the decision correctly him or herself, and shall follow the guidance in the flexibility criteria in as much as is necessary, to ensure the availability of all relevant evidence before the decision is made, despite the absence of a legal representative.

[Back to contents](#)

## Decision

The decision must meet UKBA decision making guidance. In addition, any decision to refuse leave must focus on the material issues agreed with the legal representative. If the case owner has refused any representatives requests (for example to commission an expert report), the reasons why the case owner thought it was not material to the claim and /or why it was considered not necessary (for a full and fair consideration of the claim) must be included.

[Back to contents](#)

## Appeal process

Providers should have regard for the criteria contained in sections 4 (Standard Criteria) and 13 (Immigration) of the Funding Code when considering whether to grant funding for Controlled Legal Representation (CLR) in the Immigration Category of Law. Providers should also refer to the guidance to criteria 13.4 and 13.5 as set out in section 29 of the Funding Code Guidance.

When undertaking the merits assessment providers should clearly demonstrate on file what issues continue to be contended and how these are to be successfully overcome on appeal given the opportunities to submit relevant evidence during the ELAP process. In particular if additional evidence is to be relied on it should be clearly addressed on file why such evidence was not obtained earlier or time requested to gather such evidence given the opportunities to do so. Where CLR is refused or withdrawn, providers should adhere to paragraphs 8.42 to 8.46 of the 2010 Standard Civil Contract Specification ensuring that clients are informed of the reasons for the refusal of funding, their right of appeal to the Independent Funding Adjudicator and are also provided with a copy of the completed CW4 form.

Where approached by a client who has already been refused CLR by another LSC provider, providers should also have regard for section 29.22 of the Funding Code Guidance.

[Back to contents](#)

## UASC process

The UASC process is the same as that for adults, apart from the timescales are in line with the NAM national timescales for UASCs, and an additional Contact Management Appointment (CMA) is conducted with the legal representative (along with the pre IV discussion, and post IV discussion).

UASC FRE's will be conducted by the UASC admin team as per current local guidance.

Every effort will be made by the caseowner to share the outcome of the age assessment with the legal representative before the substantive interview where it has been received.

The timeframes for UASC claims will be as follows:

- If the applicant has been screened and fingerprinted then their substantive interview date will be set for 6 weeks after they claim asylum.
- If the applicant hasn't been screened and fingerprinted then their substantive interview date is set for 8 weeks after they claim (the UKBA will try and arrange for the applicant to be screened and fingerprinted as soon as possible).
- The telephone FRE is conducted with Social Services as soon as possible after the case is routed to the region.
- The CMA should be completed as per the adult case when the representative meets with the UASC on the first occasion. Following this CMA, the SEF will be sent to the representative.
- The representative will have 20 working days from the date the SEF is sent to complete and return the SEF.
- The pre interview decision, interview and post interview decision should be completed in the same timeframe as per adult cases, with due consideration given to the needs of the child.

Interaction should also take into account the best interests of the child. The legal representative and social services representative should work with the case owner to assist them in establishing the child's best interests in accordance with the UK Border Agency's obligations under section 55 of the Borders, Citizenship and Immigration Act 2009. For further guidance on the best interest of the child see the asylum instruction at:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/processingasylumapplication1.pdf?view=Binary>

[Back to contents](#)



## Interpreters

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LSC funding will not be available for the legal representative to bring an interpreter to the Home Office interview. Should a representative wish to bring an interpreter, they should advise the case owner at the pre-interview discussion so the case owner can ensure a large enough room is available for the interview.

If the interpretation is called into question around a material fact, consideration must be given to re-interviewing the applicant. It is important therefore that the interpreter and applicant are given a suitable amount of time prior to the interview commencing to ensure they understand each other (through, for example, establishing how the applicant got to the venue).

The Home Office interpreter can be utilised by the representative upon request before, during breaks, and following the interview, with due consideration to the need for interpreters to also have a break and timely progress of the interview.

It is the responsibility of the legal representative to advise their client prior to the interview date, that the Home Office interpreter will respect the confidential nature of the discussion between the legal representative and applicant and will not disclose the conversation, or any part of it, to anyone else. If the interpreter has cause for concern regarding the content of the conversation they have translated relating to the client's claim following interpretation for a legal representative and client, they are not allowed to disclose any details of the claim to any representative of the Home Office.

The interpreter will have been provided with OISC and the Law Society's details and details of how to lodge any complaint and are advised to liaise directly with these organisations should they have concern about the professionalism of the legal representative.

The Home Office interpreter is bound by a code of conduct. Annexed to this code is guidance on the additional requirements placed upon the interpreter under the ELAP process. This includes an overview of the role and responsibility of the legal representative.

Please note that the interpreter can not be seen to speak with the legal representative or applicant without prior approval from the caseowner and they may be subject to disciplinary action if they are found to be doing so.

If an applicant or legal representative has concern during or following an interview with the quality of interpretation, they must raise it immediately with the caseowner. The legal representative or applicant must not raise any concern around the quality of interpretation to the interpreter themselves at any point, especially when a caseowner is not present (for example during a private conversation with the client).

Monitoring the success of sharing one interpreter will be undertaken.

[Back to contents](#)

## Flexibility criteria & application

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The flexibility criteria seek to define, without being exhaustive, those occasions when a fair and sustainable decision may not be able reasonably to be made within the prescribed timeframe. Given the inbuilt flexibility in the process with regard to the time table being in working days rather than calendar days, the need to apply additional flexibility should be **rare and exceptional**. The criteria sets out circumstances where the time limits may (but not necessarily will) have to operate flexibly by agreement to ensure that applicants and their legal representatives have the time which is required to provide specific evidence on material issues in dispute and so that the case owner can make just decisions with all available evidence.

Given the unavoidable possibility of late disclosure of material facts as a result of fear, trauma, cultural background, gender or other factors, a case may fall within the flexibility criteria at any stage of the process, although it is expected that the majority of such cases will come to the attention of the legal representative after day four and before day fourteen (while the representative is compiling the witness statement).

The legal representative will be expected to submit a witness statement and any general supporting evidence no later than day fourteen and will alert the case owner to the possible need to adopt the flexibility criteria as soon as possible after their appointment with the claimant but not later than day fourteen. There may be instances where the need to adopt the flexibility criteria only becomes apparent at some time during or post the asylum interview. In these cases, where requested, there will be provision to allow for flexibility according to the criteria below.

Where a factual issue is material to the decision and is one which can be established by specific evidence, the case owner, having received the witness statement and general supporting evidence, and in discussion with the legal representative, will decide whether the issue is one which can be accepted without specific evidential proof over and above that already submitted. If this is not the case and the matter remains in dispute, the case owner and the legal representative will jointly ensure that all possible steps are taken to obtain the specific evidence required to decide the particular factual issue within a reasonable time, which shall be agreed between the parties.

It is also understood that in ELAP greater flexibility is available to allow for the different needs of children, which will vary depending on age and circumstances, and to ensure that there is sufficient time for thorough case preparation by relevant agencies before the interview.

The previous pilot found some requests for flexibility ran on to a number of weeks. To encourage action to be taken sooner, the case owner may request evidence from the legal representative that action has been undertaken to start the data-gathering process, for example, a commissioning letter to an expert witness that states when they expect the response by. It would be reasonable for the case owner to delay the interview or decision (as appropriate) until the expert witness report was received. If the expert witness asks the legal representative for further time, the legal representative must forward documentary evidence to show they are not able to submit the expert witness report by the timescales set out in the original agreed flexibility.

Requests for flexibility may be lodged by e-mail or phone. Submitting letters by fax or post is discouraged as the process seeks to encourage more personable relationships between the two parties and e-mail or phone are quicker and may avoid unnecessary delays.

If flexibility criteria are agreed, they must be confirmed by the case owner in writing (by e-mail) and a clear deadline agreed. If the deadline is missed, the case owner should try to establish with the legal representative's office why the deadline has been missed, after which the decision can be made without the agreed evidence.

All requests for flexibility, and the outcome of the request (grant or refusal and for what period) must be documented by both the case owner and legal representative. The case owner must record this information on the evaluation pro-forma attached to each file.

If a firm is continuously missing agreed deadlines then the complaints procedure should be followed by the case owner. If a firm strongly disagree with the case owners decision then the complaints procedure should be followed.

An example of where flexibility might be invoked is when an applicant claims to have scars and an expert medical report would be useful.

[Back to contents](#)

## Complaints procedure

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It is expected that there will be occasions when either the case owner or the legal representative considers the other party to be acting unreasonably. For example,

- Case owner or the legal representative frequently late for interviews
- Conduct of legal representative in interview is not deemed appropriate, for example reading the newspaper or taking no active role in the interview.
- Conduct of case owner is not deemed professional
- Legal representatives bullying case owners into accepting issues
- Case owners not disclosing material facts to the legal representative, such as fingerprint matches.
- Either party not completing pro-formas as per guidance timeframes.
- Case owner not agreeing to flexibility when evidence is crucial to case.

[Back to contents](#)

### Broad service expectations

To mitigate against complaints, broad service expectations are set out below:

- Pre and post interview pro-forma: each party must make at least 2 telephone calls to try to contact the respective contact on day 15. If no response is received within 24 hours, please call the ELAP Administrative Officer to organise a formal appointment in the case owner's diary, or the firm's secretary in the representative's organisation to book the appointment.
- Witness statement – submitted by 10.00, 3 days prior to interview date (day 14). The substantive interview can not commence without a witness statement being received, unless the legal representative fails to submit the witness statement a second time, without reasonable excuse.
- Waiting time prior to the interview. Maximum 30 minute wait from the pre-booked interview start time for the applicant and representative from entering the interview building to the interview commencing.
- If the legal representative is late for the interview, the case owner should call the firm to establish their location and commence the ETD and NINO. The substantive interview can not commence without the legal representative being present. If the interview was scheduled for the morning, where possible, the case owner can defer the interview to the afternoon. If the interview is scheduled for the afternoon, the case owner may choose to reschedule the interview if there is not sufficient time to conclude the interview in that sitting.
- Before any interview goes ahead, the case owner must advise the representative's firm it is commencing.
- If the legal representative does not attend a second interview appointment or where the client requests the interview proceeds with out the representative present (and provided that the First Reporting Event was completed and the legal representatives were aware of both appointments), then the case owner may continue with the interview provided that the interview is tape recorded. Where the client requests the interview proceeds, the case owner must clarify with the client, on the interview record, that they wish to proceed without their representative. The legal representative will be granted 5 working days following the interview in which to submit additional information.

- Where an interview is likely to run beyond 17.00, the case owner should check with all parties in the interview if they have other commitments and cease the interview if one party is not able to conclude the interview. It is encouraged that attempt should be made to conclude the interview on the same day.
- Post interview discussion – to take place within 24 hours of the interview.
- Process relies on representatives not to submit objective information that is not bearing to the decision and to not delay solely for the purpose of delay.
- Decision service – the decision must be discussed with legal representative prior to service (which will be monitored by caseowner managers). See the Detailed process for further information.

[Back to contents](#)

The procedure will seek to address those issues, generally relating to the implementation of the flexibility criteria, which could be most usefully resolved through a complaints procedure rather than in the formal appeals process. It will not seek to resolve genuine disagreements as to the evidence or the conclusions which should be drawn from the evidence, since this is the proper place of the appeal system.

The mutual complaints procedure will be jointly overseen by the Legal Services Commission and the Regional ELAP Project Manager and will deal with circumstances where either a legal representative or a case owner is not applying the flexibility criteria fairly.

Within the confines of the above circumstances the aggrieved party should first complain to the regional ELAP project manager, in the case of the case owner or to the contact specified by each of the participating firm in the case the legal representative.

It is recommended that complaints are first lodged verbally, and later confirmed in writing via e-mail where possible. The regional ELAP Project manager will be maintaining a record of all complaints received from both parties in order to establish trends and patterns and improvements to the system.

If the matter can not be resolved by the ELAP Project manager or the firm's chosen contact within 24 hours, either party can raise the issue to the regional ELAP Grade 7 or LSC project manager. If the issue can still not be resolved, a formal complaint can be lodged to MECSU (Midlands and East Customer Services Unit) or the LSC relationship manager.

Each complaint will be responded to in writing within 2 working days unless there is an urgent need for immediate consideration.

[Back to contents](#)

## User group terms of reference

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### Background to the project:

In 2006 a New Asylum Model (NAM) was established to address a number of recommendations made to the Immigration and Nationality Directorate (IND) regarding the way asylum decisions were made. The new model incorporated case ownership, representing an end-to-end asylum process. It also placed emphasis on frontloading the process; ensuring a quality decision was made at the initial stage rather than relying on an appeal.

Building upon feedback from the National Audit Office and the UNHCR's Third Quality Initiative report published in 2006, and NGOs, the provision of legal advice early in the process was piloted between November 2006 and December 2007 in the Midlands & East of England Region. This process became known as the Solihull Pilot or ELA (Early Legal Advice). The pilot was a jointly managed by the UKBA and the LSC.

The Early Legal Advice (ELA) pilot in 2007 followed the following process:

- a) Within two days of claiming asylum, the claimant met a legal representative and discussed their claim.
- b) The legal representative and claimant drew up a witness statement which fully explained why the claimant was in fear of return to their home country. This was submitted, along with any supporting documentation, to the case owner at least 4 days prior to the interview.
- c) The case owner and legal representative discussed the case before the interview, identifying any key areas in dispute.
- d) At the interview, the legal representative and their interpreter was present to ensure process and to be satisfied that there were no concerns over interpretation.
- e) Following the interview, the case owner and legal representative discussed the case, agreeing areas that were not disputed and agreeing if any additional information could be submitted to assist the case owner in making a decision.
- f) Throughout the process, the legal representative and case owner collaboratively worked on the case and the case owner was able to invoke 'flexibility' criteria; agreeing a reasonable timeframe for submission of additional evidence which could assist the decision-making process with the legal representative.

Process steps c, d, e and f were specific to the ELA model and not a general feature of the NAM model. The focus on an interactive and collaborative approach for the process is also specific to the ELA model.

The ELA tested early advice on selected cases excluding Unaccompanied Asylum Seeking Children (USAC), those who abscond and those who lived further than 30 miles away from the Reporting Centre in Solihull, and those who did not comply with the pilot's set timescales.

An independent evaluation was undertaken by Jane Aspden which was submitted to the UKBA in October 2008. The report made findings against three key success indicators:

- Case conclusion target (of 40% and later 60%) met.
- Overall cost savings with any increase in legal aid offset by a decrease in asylum cost savings elsewhere.
- Higher quality decisions which are more sustainable.

The report was undermined by poor data. Whilst acknowledging the failures of the data, the Aspden report nevertheless made a number of conclusions based on the data which led to the report being extremely positive about the success of the pilot and arguing for its nationwide roll out.

Project Board analysis has identified some benefits to the process and the provision of early legal advice continues to be seen positively. But significant concerns remain in respect of the costs of the

process, the time taken to make asylum decisions in the context of the current case conclusion target and the suitability of the model for a national wide initiative within the NAM model.

The Project Board has decided to run the process again, aided by LSC contracts, over an entire UKBA region for an evaluation period of 12 months, using superior evidence gathering methods set against specific objectives, in order to gain a fuller appreciation of the true implications of a national roll out prior to making a final decision about how best to proceed. This will be known as the Early Legal Advice Project (ELAP). The ELAP process will run in the region from the project's start date until a decision to end it is made. If instead the decision of UKBA / LSC is to continue or to roll out the process nationally, then the regional ELAP process will continue until the renewal of the legal representative's contract in October 2013.

## [Back to contents](#)

### Governance

The Early Legal Advice Project is governed by the Project Board.

The ELAP sponsors are:

- Emma Churchill, UKBA Director of Asylum
- Sara Kovach-Clarke, LSC Head of Policy

### ELAP User Group

The purpose of the User Group is to provide a forum for constructive feedback and arena to agree changes to the way the ELAP is applied in practice. It offers a forum to share best practice, experiences, issues, updates on changes in policy or the process, and updates if contact details for legal representatives or case owners change.

### Constitution

The ELAP User Group is established as a sub-committee of the ELAP Evaluation Steering Group and ELAP Project Board.

### Membership

The ELAP User Group will consist of the following who will represent the views of their colleagues who can not attend. These include:

- ELAP regional project manager (UKBA)
- ELAP Project Manager (LSC)
- Legal representative (proportional to the number of providers in each region, representing a cross section of each region)
- Representative from each asylum team

Other attendees may include:

- A senior case owner (UKBA)
- A team manager (UKBA / Legal firm)
- UNHCR

Where a member cannot attend a nominated deputy should attend on their behalf with delegated authority.

Attendance for case owners will form part of their PDR.

### Chair

The ELAP User group will be co-chaired by the regional ELAP Project manager and LSC Project manager

### Frequency of meetings

The ELAP User group will be held every four weeks at a convenient time for legal representative and case owners.

### Role and Functions

The role of the User Group is to consider and discuss issues, challenges and best practice arising from the ELAP process in the region. Recommendations for change can be agreed at the user group meeting and must be approved at Evaluation Steering Group level prior to implementation.

Agenda items should be sent to the project managers one week before the meeting and attendees must confirm who is attending from their region.

Minutes will be available to the project board and evaluation steering group, and may be used in the evaluation of the project.

Minutes will be circulated within a week of the meeting and will contain clear agreed action points to be resolved by the next meeting if possible.

[Back to contents](#)



## LSC Requirements

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Providers should refer to part F of section 8 of the 2010 Standard Civil Contract Specification for further guidance on the funding provisions relating to ELAP.

In particular providers should note the provisions of:

- Para 8.156: “Only Level 2 and above caseworkers can attend the Interactive UKBA Interview “
- And Para 8.166: “Legal Help undertaken in relation to ELAP Matters is subject to Hourly Rates as set out at Table 7(d) in the Payment Annex. CLR is remunerated under the Standard Fee Scheme. “

Providers should report their claims for costs to the LSC in the normal manner (please refer to paragraphs 8.108 - 8.110 of section 8 of the 2010 Standard Civil Contract Specification).

Providers should also report to the LSC on a monthly basis the details of those cases in which an initial decision was received from UKBA in the previous month. Similarly providers should also report the details of those cases which were determined by the First Tier Tribunal in the previous month.

These details should include:

Following receipt of initial decision:

- Client name
- Client Home Office Reference Number (UCN)
- Total costs incurred under Legal Help (total Graduated Fees and Additional payments to be claimed plus disbursements incurred)
- Confirmation of the decision outcome received from UKBA
- Confirmation as to whether CLR has/is to be granted for the appeal before the First Tier Tribunal.

Where the appeal has been determined:

- Client name
- Client Home Office Reference Number (UCN)
- Total costs incurred under CLR (total Graduated Fees and Additional payments to be claimed plus disbursements incurred)
- Confirmation of determination outcome received from the Tribunal
- Confirmation as to whether funding continues to be granted in relation to an application for permission to appeal to the Upper Tribunal<sup>10.22</sup>

This information should be recorded on a form provided by the LSC and submitted by the first Friday of the following month. For instance, details of cases in which decisions were received in October 2010, should be submitted via email to the LSC by no later than Friday 5 November.

[Back to contents](#)

## Ongoing requirements for evaluation

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In order to establish the extent to which the process has been successful in meeting the aims and objectives set out in the Introduction, the collection of additional information is required. The majority of this information will be collated by the asylum case owner with support from the ELAP administrative officers.

Every case owner will be expected to complete a separate paper pro-forma which will be stored on the case file, outlining how successful each stage of the process was. The evaluation will include quantitative and qualitative data, including an analysis of the paper pro-forma, interviews with case owners and legal representatives, and an individual file sample.

It is the responsibility of every case owner to:

- Complete the pre-interview and post interview pro-formas accurately
- Complete file documentation accurately
- Accurately record when discussions took place and if flexibility was invoked.
- Record information on file (and CID if easily accessible) and Legal providers record relevant information on their systems.

[Back to contents](#)

# Document Control

## Change Record

Version	Authors	Date	Change Reference
1.0	JG/JF	01/11/10	Original version
2.0			
3.0			