GOVERNMENT RESPONSE TO THE CONSTITUTIONAL AFFAIRS SELECT COMMITTEE'S REPORT ON LEGAL AID ASYLUM APPEALS

Cm 6597

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Presented to Parliament by the
Secretary of State for Constitutional Affairs and Lord Chancellor

by Command of Her Majesty
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Introduction

The Government is grateful to the Constitutional Affairs Select Committee for its report on Legal Aid Asylum Appeals. Asylum and Immigration policy remains at the forefront of the Government's priorities. This is demonstrated by the new legislation passed in 2004 to create a new, faster and more effective appeals system.

The Committee will be aware the original policy for the reform of asylum and immigration appeals in the Asylum and Immigration (Treatment of Claimants,etc) Act was changed to encompass the will of both chambers and reflect representations made by interested parties, including the Committee itself.

The new legal aid arrangements that will underpin the new Asylum Immigration Tribunal (AIT) are contained in the Community Legal Service (Asylum and Immigration Appeals) Regulations 2005. They were subject to consultation and affirmative resolution debates on 21–22 March and passed to co-incide with the introduction of the Tribunal on 4 April 2005. The original policy for the regulations was similarly subject to change after representations were made by interested parties and now reflects these views.

New Policy

The intention of the Government in bringing forward the new AIT and Single Tier was to reduce delay into the legal aid system and reduce the level of abuse this delay encouraged. The new legal aid arrangements will enable this to happen and protect those in genuine need, maintaining access to justice through an experienced supplier base.

The Government believes in a system that strikes the right balance between providing legal aid to those with merit to be granted asylum out of the public purse, against filtering out those who abuse the system in order to try and stay in the country as long as possible at the public's expense. To enable this objective to be met it is vital that there is proper and appropriate judicial oversight of the system. After the Government considered the representations made in both Houses throughout the passage of the bill, the views of asylum and immigration stakeholders, and subsequent amendments to the legislation, it has concluded the right balance has now been met. The new legal aid arrangements reflect this.

The details of new retrospective legal arrangements as contained in the Community Legal Service (Asylum and Immigration Appeals) Regulations 2005 are described below.

Background

Section 26 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 inserts section 103D into the Nationality, Immigration and Asylum Act 2002. Section 103D provides a regulation making power for a new legal aid scheme, for the review and reconsideration of decisions of the Asylum Immigration Tribunal. Under this scheme legal aid will now be awarded retrospectively at the end of the process and in the majority of cases following reconsideration. The decision whether to award legal aid will be made by the Tribunal judge.

The arrangements only apply to the review and reconsideration stages of the process and only if the review application is made by the appellant. Existing legal aid arrangements will apply to the original appeal, review applications made by the Home Office, fast track cases and any appeals to the Court of Appeal.

The Regulations

At the review stage the AIT and the High Court will have powers to award costs but these will be very limited:

- 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.
- If an application is unsuccessful funding will not usually be awarded. The exception will be if the application was unsuccessful because of a change in circumstances and, but for that change, a reconsideration would have been ordered.

At the reconsideration stage 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.

If the AIT refuses to award funding following the reconsideration of an appeal, the representative and or Counsel can apply to the Tribunal for a review of its decision. A different senior judge to the judge that made the original funding decision will review this decision.

Conclusions and recommendations

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

Government response: Over recent years the asylum and immigration system has been subject to widespread abuse and exploitation by disingenuous claimants and unscrupulous representatives. The written evidence submitted by the Government to the Committee illustrates this fact.[1] Mounting legal aid costs have exposed over-claiming, duplication of work and the provision of poor quality advice by suppliers, whilst low success rates for onward appeals have highlighted the existence of culture in which weak and unmeritorious appeals are pursued to create delay.

Against this background the Government has introduced reforms aimed at improving the asylum legal aid system and the appeals process. In April 2004 a major package of reforms was introduced to the legal aid system aimed at driving down costs and improving the quality of representation[2]. At the same

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[1] In the calendar year 2003 fewer than one in ten of the cases that sought permission to appeal to the Immigration Appeal Tribunal (IAT) were successful in reversing the decision on their case. There were 32,178 decisions on applications made for permission to appeal to the AIT. Of these 12,002 were allowed to go to a full hearing and 20,111 were dismissed. Therefore 37.3 % of permission applications succeeded in getting a full hearing.

[2] The main initiatives introduced 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 no legal aid work is undertaken in asylum appeal cases without prior LSC approval; introduction of exclusive contracts for clients to Home Office fact track processes to reduce unnecessary changes of solicitors; applying financial funding limits to individuals irrespective of how many times they change suppliers; the introduction of a unique client number to help track clients and reduce duplication of work; removal from the scope of legal aid attendance at the Home Office interview; LSC also took over responsibility for funding of the Immigration Advisory Service and Refugee Council.

time a number of initiatives were also introduced aimed at speeding up the appeals process.[3]

These measures have all been successful. However, as the Government has also indicated in its evidence to the Committee, there was only so much that could be achieved within the context of the previous multi-tiered system. Opportunities for delay continued to exist and success rates for onward appeals remained low. The Government refuses to be complacent and as a result powers were included in the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 to introduce a new appeals structure aimed at delivering a faster and more efficient process. The new Asylum and Immigration Tribunal (AIT) was introduced on 4 April 2005 together with a new system of higher court oversight.

The new structure has been designed to cut processing times in half, reduce opportunities for delay and ensure that public money and resources are targeted on those genuinely in need. It will enable legitimate claims to be established with greater speed and for integration into the community to begin earlier.

The new legal aid arrangements are integral to achieving the aims of the AIT and realising the benefits that greater speed and efficiency will produce. If the new arrangements had not been introduced simultaneously there was a substantial risk that the AIT and the higher courts would be overwhelmed with weak applications, which would have undermined the benefits of moving to the new system. It was therefore essential that implementation of the scheme took place at the same time as implementation of the AIT.

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

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[3] The main initiatives introduced as part of the Nationality Immigration and Asylum Act 2002 (NIA) include Non Suspensive Appeals under section 94 where the individual is required to leave the country before they can appeal and Statutory Review under Section 101 which is determined by a single judge by reference only to written submissions.

Government Response: The asylum and immigration jurisdiction poses a specific problem, which is that disingenuous asylum seekers benefit from creating delay and unscrupulous representatives, have until now, had a financial incentive to assist them in doing so. The result has been a system in which appeals have often been lodged irrespective of whether they have merit.

To tackle this problem the new legal aid arrangements have replaced this incentive with a disincentive so that representatives who choose to pursue weak and unmeritorious cases stand to lose out financially because these cases will not be funded. As the Committee notes, the scheme will involve representatives making assessments about the commercial viability of pursuing a case. This assessment is limited to whether a representative is prepared to assume the risk of pursuing a weak case however, and the Government considers it appropriate to ask representatives to make this decision. Taking on meritorious cases will not involve uncertainty because these cases will be funded.

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

Government response: The purpose of the review stage is for the AIT, whilst the filter mechanism is in place, and the High Court, to determine whether there may have been an error of law, not whether there has been an error of law. Therefore, in effect, a decision is simply being taken on whether a case has merit and warrants further consideration. It is not until the reconsideration stage that the issue of whether there was, or was not, an error of law, is conclusively determined.

It is not anticipated that good suppliers will withhold information at the review stage. However, because the review does not involve a full consideration and examination of all the evidence, steps have to be taken to prevent this from happening and ensure there is no advantage to lodging weak applications speculatively.

If a case reaches the reconsideration stage and the appeal decision is overturned because an error of law is established then funding must be awarded. This is an express requirement in the governing regulations, the Community Legal Service (Asylum and Immigration Appeals) Regulations 2005.[4]

The Committee correctly identifies that under the new system borderline cases may be rejected at the review stage. However, this does not represent a change in policy. A permission stage, which is a common feature within the civil law jurisdiction, provides the courts with an opportunity to decide whether a case has merit and whether it should be considered further. The review stage will perform a similar function and if the AIT or the High Court thinks that a case lacks merit they can decline to order a reconsideration.

The distinguishing feature of the new system is that public funding will not usually be awarded if a case is unsuccessful at the review stage. As the Government has explained however, if a case is unsuccessful at this stage that will usually indicate that it lacks merit and should not have been pursued in the first place. It is appropriate to expect representatives, who are experts in their field, to make an accurate assessment of whether a case has merit and in the context of a system that has been subject to widespread abuse it is also appropriate that funding should be withheld if a representative has failed to make this assessment accurately.

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

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[4] Regulation 7 establishes the process for a representative or counsel instructed by a representative to apply for a review of a Tribunal decision to refuse costs under s.103D(3). The application must be made in writing and must be made within 10 business days of receipt of the Tribunal's decision to refuse costs. A different senior immigration judge to the judge, or Tribunal composition, that made the original decision on costs, must carry out the review. The judge can either conduct the review on the papers or order an oral hearing, if one has been requested in the application. The judge must give reasons for his decision on the review.

Government response: The test which the AIT has to apply at the reconsideration stage, when determining whether funding should be awarded, is whether at the time the application for reconsideration was made there was a significant prospect that the appeal would be overturned on reconsideration.

As the Government has explained in its evidence to the Committee the intention behind the test is to strike a balance. Representatives that act in good faith and pursue meritorious cases must be remunerated and it is anticipated that funding will be awarded in the majority of cases which reach the reconsideration stage. At the same time however, it is essential that funding is not automatic if a reconsideration is ordered. The AIT must have the flexibility to decide that funding should not be awarded if, for example, information emerges at the reconsideration, which, had it been made available at the review stage, would have resulted in the application being dismissed. Every case must be decided on an individual basis.

The Committee expresses concern that a test framed in terms of significant prospects of success raises the threshold too high and risks disadvantaging legitimate claimants. However, as the Government has made clear, meritorious cases will be funded and the assessment which representatives have to make when deciding whether to pursue a case, is simply, whether a case has merit. Good representatives can and should be expected to do this and only representatives who choose to pursue weak cases will be taking a financial gamble.

It is also important to note that advice on whether or not to apply for a review of the AIT's decision on an initial appeal will be covered by Controlled Legal Representation (CLR) for the original appeal. Therefore the initial assessment as to a case's merit does not attract any risk because funding is guaranteed for this stage in the process.

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

Government response: The Legal Services Commission is responsible for determining the rates at which representatives are remunerated. As the Government explained in its letter to the Committee dated 7 March 2005 the new funding rates have been created to reflect the new structure of the onward appeals process. The Committee expresses concern that the combined effect of the retrospective nature of the scheme and the move to CLR rates means that representatives will see an overall decrease in remuneration. However, if representatives accurately assess whether cases have merit, they in fact stand to benefit financially. When taken overall the rates payable to representatives will be higher than the rates payable under the previous system and good suppliers that pursue meritorious cases will be rewarded with rates which attract a 35% uplift.

The review mechanism which has been put in place to enable representatives to challenge a decision of the AIT not to award funding, has been designed to ensure impartiality in decision making. As the Committee notes the regulations governing the scheme require that the review is conducted by a Tribunal judge other than the judge that made the original funding decision. This requirement preserves the impartiality and integrity of the decision making process because AIT judiciary, like all members of the judiciary, are independent of the Government but also of each other. Concerns that another member of the AIT could not impartially review a funding decision made by the President of the AIT are therefore unfounded but if a representative remains dissatisfied they will always have the option to seek judicial review of the AIT's decision.

Recommendation 6 **If the Government does pursue the idea of retrospective funding, and if appellants and suppliers are not to be adversely affected we conclude that the merits test will have to be set at a lower level. Where an appellant has reasonable prospects of success in demonstrating that the AIT has made an error of law and the result of that decision would be that he or she could be deported to face death, torture or other degrading treatment, he or she should not be denied justice by a funding scheme which proposes the requirement to demonstrate more than this. The Government dropped the 'ouster clause' which restricted appellant's access to the courts. It is important that the legal aid system should not be used to restrict legitimate appeals. (Paragraph 45)**

Government response: For the reasons outlined in response to recommendation 4 the Government is confident that the prospects of success test has been set at the right level. The assessment which a representative has to make when deciding whether to pursue a case is whether or not it has merit. It is not unreasonable to ask representatives to make this assessment and it is appropriate to target public money and resources, which are finite, on cases which satisfy this criterion.

The scheme is a necessary component in the Government's drive towards delivering increased speed and efficiency within the appeals process. Legitimate claimants will not be disadvantaged and representatives who pursue meritorious cases will not lose out financially.

As with any new scheme the Government will monitor its impact carefully to ensure it delivers its intended objectives.

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