
Briefing on legal aid provisions in Clause 14 of the Asylum and Immigration (Treatment of Claimants etc.) Bill in the House of Lords

This briefing is submitted in support of amendment 48 to the bill contained in the Order of 11 May tabled by Lord Goodhart and Lord McNally. Further to this we would like to submit an additional amendment which should be read in conjunction with amendment 48.

Amendment

Clause 14 – page 13 line 5, at end insert

() If the Tribunal does not make an order under subsection (2) it shall give its reasons for this decision.

Briefing

Clause 14 introduces a new clause 103D to the Nationality, Immigration and Asylum Act 2002. This provides that the Asylum and Immigration Tribunal has decided an appeal following reconsideration it may order the costs for application and/or reconsideration be paid out of the Community Legal Service Fund. Under subsection 3 the Secretary of State may make regulations concerning the exercise of this power.

The justification for this was concern over the number of ‘weak’ applications being made to the Immigration Appeal Tribunal. The purpose was to limit legal aid only to meritorious cases. In the Lords debate on 4 May, Lord Falconer said of the proposal: ‘We are asking lawyers to share the risk with the taxpayer when deciding whether there is an arguable case against the tribunal determination and if it should be challenged.’ The proposal is in most respects a ‘no win, no fee’ scheme (although there will be exceptions for ‘near misses’ which have merit and separate ‘success’ awards)

Our concern is the practical effect this will have on asylum seekers and practitioners. The Tribunal will be able to judge with the benefit of hindsight – whilst the solicitor is being asked to predict the success in advance. For many practitioners the risk of failure will be too great to merit taking on cases and we imagine many will not undertake any review applications.

We accept that that ‘no win no fee’ is common in, for example, personal injury work. The main difference is that most personal injury cases will have some level of ‘success’; the main issue is frequently the level of damages. The lawyer will therefore have good prospect of payment. In asylum cases there would be no such guarantee.

As a consequence, there will be a likely conflict between client and lawyer, who will be forced to concentrate on the possibility of success rather than focusing on the client’s interests. Therefore many asylum seekers are likely to find themselves without representation at reconsideration.

However, we accept that cases without merit should not receive public funding. Therefore, if there are to be conditional fees, we support the amendment tabled by Lords Goodhart and McNally, as this will still allow the tribunal the opportunity to refuse applications but with a presumption in favour of payment. The risk will be reduced to such an extent that we do not imagine practitioners will be dissuaded from making applications.

It is worth noting that the new clause 103D removes the power to grant legal aid from the Legal Services Commission (LSC). There is a surprising inconsistency between the provisions in this clause and those in the Draft Criminal Defence Bill published on 17 May 2004. At present, the courts – usually the magistrates’ courts – are responsible for granting legal aid funding for representation in criminal defence cases. The Draft Bill proposes that this power be transferred to the LSC, who will – in practice – devolve the power to criminal defence solicitors. This change is designed to deliver controls and consistency in expenditure on criminal representation. According to the Department for Constitutional Affairs consultation paper on the Draft Bill:

‘Grant of public funding is not the core business of courts who are rightly focused on the administration of justice. Courts are not and cannot be expected to be responsible for the monitoring and controlling of publicly funded expenditure.’

Amendment

Page 16, line 6, at end insert:

“but such regulations shall not take effect before a period of 2 years after the date of enactment of this Act and the power shall not be exercised without such regulations being in place”

Briefing

The purpose of this amendment is to delay implementation sufficiently to see if the changes contained in the new Clause 103D are necessary after recent changes to the administration of legal aid have taken effect.

In his speech introducing the proposals, the Lord Chancellor relied on statistics showing that in 2003 only 12,000 out of 32,000 applications for appeal to the existing Tribunal were successful. However, he overlooked recent changes to the administration of legal aid for immigration and asylum cases, some yet to be implemented, which taken together will undoubtedly cut out many – if not all – of the applications that lack merit.

- In April 2004, the Legal Services Commission (LSC) took away contracts for immigration and asylum work from around 97 solicitors' firms that it believed to be abusing the system.
- The LSC itself now makes decisions on whether a case has sufficient merit to receive funding for an appeal (under the Controlled Legal Representation scheme). Prior to April 2004, this was a devolved power exercised by solicitors. Early evaluation of the changes by the LSC has been described to us off the record as 'extremely encouraging' and as indicating that spend is 'well under control'.
- From April 2005, the LSC will require all immigration and asylum advisers, whether legally qualified or not, to be accredited at one of three levels. The aim of this is to ensure a 'high quality service' to clients. An independent assessment organisation will assess whether advisers meet the relevant standards. The adviser's level of accreditation will determine the amount that the LSC will pay for legally aided work.
- The Nationality Immigration and Asylum Act 2002 gives both High Court judges and tribunals a power to make a 'certificate of no merit'. This informs the LSC that an application is considered to be a waste of public funds. We are not aware of any criticism of this system by the LSC or the judiciary.
- The Clause 14 provisions would replace the statutory review scheme set up by Section 101 of the 2002 Act, in operation less than a year. The High Court has dealt easily with the S 101 applications made so far (less than 300 in 2003) and members of the judiciary appear to be generally satisfied with the scheme. The Lord Chancellor has offered no comment on the legal aid performance of such cases.

The most effective way of ensuring that public funds are not misused is to ensure that only those capable of doing this work are entitled to do so. As the Government has introduced a raft of measures intended to control expenditure and ensure quality, it would be sensible to delay the introduction of conditional fees until these other measures have had the chance to impact. If they have the desired effect, any further change may be unnecessary.

There are at present serious concerns about a crisis in provision of civil legal aid, an issue that is the subject of an enquiry by the Constitutional Affairs Committee. We believe that there is a real danger that further, ill-considered changes could contribute to a collapse in provision – with serious consequences for asylum seekers and others seeking to establish a claim to be in this country.

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