



JUSTICE

Proposed Changes to Publicly Funded Immigration and Asylum Work

**JUSTICE's response to the Consultation Paper issued by
the LCD in June 2003**

For further information contact

Anneliese Baldaccini, Human Rights Legal Officer (Asylum)

Email: abaldaccini@justice.org.uk Tel: 020 7762 6433

Proposed Changes to Publicly Funded Immigration and Asylum Work

JUSTICE's response

1. JUSTICE is an all-party, law reform and human rights organisation, whose purpose is to advance justice, human rights and the rule of law. It is the British section of the International Commission of Jurists.
2. JUSTICE has a long engagement with asylum issues, particularly in providing expert human rights analysis of asylum policy, practice and legislation. Our central concern is that international human rights standards are upheld in the UK government's policy and practice.
3. The right to legal assistance and legal aid is a corollary to the right of access to justice, as guaranteed under Article 6 ECHR and recognised explicitly in the EU Charter of Fundamental Rights¹. JUSTICE strongly believes that early and continued access for the asylum applicant to competent legal advice and representation is critical to a fair and just asylum procedure and consequently vital for the protection of refugees.
4. JUSTICE's response to the DCA's consultation paper focuses on the impact which, in our view, the proposed time limits to publicly funded immigration and asylum work will have on effective access to justice for asylum seekers and refugees.

What impact will focusing advice and representation through the maximum limits have on clients and particular client groups?

5. JUSTICE is concerned that any arbitrary time limit imposed on legal assistance will be inappropriate in all cases. The consultation paper effectively proposes a fixed fee for advice and assistance similar to that introduced for cases in the magistrates courts. Such a proposal raises three issues:

(a) Are cases of this kind sufficiently standard to justify standard payment?

¹ EU Charter of Fundamental Rights, Article 47: "Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice."

- (b) If so, is the standard fee proposed sufficient for the work routinely done in standard cases?
 - (c) If not all cases will be standard, how will those requiring exceptional work be treated?
- 6. It is absolutely clear that the motivation behind this consultation is more concerned with the savings of cost than in easing administration. The paper does not argue the case for standard treatment nor does it consider the work that needs to be undertaken by a conscientious practitioner in order to meet their professional obligations to their client.
- 7. On the evidence provided by such respected bodies as the Immigration Law Practitioners Association (ILPA), JUSTICE believes that the time limits proposed for initial advice and for preparation of appeals are inadequate. For those seeking to stay in the UK under asylum or human rights law, accessing justice requires that they have an opportunity to put their cases properly. We are concerned that these time limits may restrict the ability of asylum seekers to talk about intimate and shocking experiences in a manner credible to the courts and thus to present a convincing case which would gain them justice in the form of leave to remain.
- 8. It should be remembered that asylum seekers are normally in a particularly vulnerable situation. The capped payments proposed do not reflect the time often needed to build trust in order to take statements from clients, a particularly lengthy process when there is need of interpretation. Cases often revolve around issues of credibility and it is crucial that all relevant facts are taken into account because issues that emerge at a later stage will be disregarded or may even be used against a practitioner's client. The consultation paper makes no attempt to argue that this crucial work can be competently undertaken by immigration practitioners in the five-hour publicly-funded time limit available for initial advice and assistance.
- 9. JUSTICE considers the proposals similarly questionable in relation to the proposed time taken to prepare an appeal to an immigration adjudicator. The paper states that: 'representation on appeal in meritorious cases can add major value to the asylum process as a whole' (para.40). However, we are concerned that the four-hour time limit will not allow adequately prepared and represented cases in front of adjudicators. Poor quality advice and representation not only harms the individual

claimant whose cases may fail as a result, it also leads to significant delays in the determination process and to increasing expenses.

10. JUSTICE believes that the proposed restrictions on preparation time will lead to complex asylum cases being poorly prepared and reduce access to justice. The legal aid system needs to ensure that competent expert legal advice and representation is provided throughout the asylum determination procedures in order to ensure due process and fairness for the applicant, but also in the long run to make the system work efficiently.
11. We are also concerned that there are practitioners who will work unquestioningly around whatever time limits the DCA imposes. The DCA should be aware that it is those who are acknowledged as the best and the most ethical who will find these limits inadequate to do the job at the level of competence that they expect. Since there has been widespread concern at inadequate ethical and professional standards in this area, the DCA should be particularly concerned at the effect of these proposals.

Are there any other ways in which unnecessary expenditure can be reduced?

12. The DCA should first identify where there might be unnecessary expenditure and its causes. Crisis-led short-term decisions have been endemic in legal aid policy-making for too long. The DCA may be concerned that some practitioners spin out their cases and claim excessive amounts. If that is the case then the appropriate remedy is appropriate cost control by the Legal Services Commission.
13. Government and Legal Services Commission policy has been commendably committed to the improvement of standards of practitioners conducting legal aid. The Commission has established a world-leading role in the imposition of quality measures. The desire of the DCA to make savings is understandable, but the temptation to cut quality should be resisted.
14. Furthermore, it is widely acknowledged that one of the problems in asylum cases is the low standard of initial decision-making. This was the conclusion of *Providing Protection* published by JUSTICE and a consortium of other concerned organisations

in 1997. It is apparent that many of the current delays and waste of resources continue to be a result of ineffective administrative procedures.

15. The proposed cuts will ease the pressure on the Home Office to improve its initial decision-making, which only recently started to appear of more acceptable standards. This would be completely illogical. It is much more sensible for there to be more 'front loading' of costs; better initial decision-making; and less recourse to appeals and reviews.

Do you believe that concentrating funding on the preparation of a statement of case at the initial stage is the most appropriate use of limited funds?

16. JUSTICE agrees with the consultation paper that focused written representations in initial applications can add major value to the asylum process as a whole (para.4). However, we note that this statement is not consistent with the proposal to introduce a blanket cap restricting the time available to prepare a case up to the first Home Office decision.

17. JUSTICE has consistently stressed the importance of ensuring that all facts relevant to the asylum claim are properly put in writing and can be properly considered at the asylum interview. This is necessary so that a solid and defensible first instance decision can be taken. Much of the ensuing litigation is avoidable, or can be dealt with more quickly, if the system is 'front-loaded' to ensure good quality initial decision-making. We consider that competent, professional legal advice before first interview is an essential component of that front-loading. Moreover, the right to ensure adequate advice and assistance at first instance is of fundamental relevance in the case of the increasing number of applications being dealt with under the non-suspensive appeals procedure.

18. JUSTICE strongly disagrees with the suggestion in the consultation paper that attendance by representatives at substantive interviews is unnecessary; of no benefit to the client; and a waste of public funds (para.21). We note that the Home Office also takes the view that legal representation at asylum interviews is not necessary. As the recently adopted Protocol applying to all interviews conducted by caseworkers in the Immigration and Nationality Directorate (IND) makes clear, a representative's

role is limited to observing the interview only². The DCA has different interests to the Home Office and should not accept, as the consultation paper does, that the representative's passive role at substantive interviews is of no use to advance the client's case. Home Office policy creates an effective Catch 22. It allows representatives to attend provided they don't interfere with the proceedings. The DCA should question rather than follow this restriction on the practitioner's role. It would be much more sensible to equate such interviews with those in the police station where appropriate intervention is expected and, indeed, required. Silent attendance would not be acceptable in other situations within the criminal justice system where liberty is at stake.

19. Notwithstanding the attempted limiting of their role as 'observers', JUSTICE believes that the importance of representatives attending interviews should not be underestimated. While not allowed to formulate specific questions, representatives are often able to bring to the attention of the interviewing officer any relevant lines of questioning which were curtailed or have not been pursued. They ensure that the client is able to give a full account, clarify questions or comments made by the interviewing officer if they are unclear, ambiguous or misleading, and ensure that the interview record is accurate. Their very presence may also provide support and reassurance to the asylum seeker.

20. JUSTICE believes that disallowing costs for the attendance at interviews would considerably undermine the role of the representative to protect and advance the legal rights of refugees and asylum seekers. It is at interviews that the credibility of the applicant's statements is tested. By their nature, asylum laws and procedures affect individuals who tend not to be well-versed in the law of the host state, who frequently do not speak the language of the host state, who may be traumatised and who are, due to their personal experiences, often particularly distrustful of persons in authority. Again, if there is any suggestion of inappropriate quality in the role of those attending interviews, this should be dealt with as a quality issues, not one aimed at costs savings.

² *Protocol governing the conduct of substantive interviews and the roles of interviewing officers, representatives and their interpreters*, binding on representatives from 1st January 2003.

Is there need to include other exceptions to the maximum limits?

21. The DCA should consider again the time limits to apply in standard cases, having regard to best practice as set out by ILPA in their 2002 publication³. Unlimited amounts should be available for exceptional cases where there is proper cause.

22. Proper causes are, for instance, those in connection with a client's detention. The right to liberty and security of the person is a fundamental principle of international human rights law. There should be no barriers to the detainees' ability to obtain competent independent legal advice and representation, which is already notoriously difficult for immigration detainees and even more pronounced for those detained on arrival. Moreover, logistical aspects and specific policy measures, such as being moved around the detention estate for no apparent reason and being issued with repeat removal directions, severely limits the detainees' right to challenge their detention. For these reasons, JUSTICE's believes that the right of access to legal advice and representation should apply throughout the detention period.

What impact will the proposals for maximum limits have on business, charities and the voluntary sector?

23. We repeat that we are concerned that a significant number of asylum practitioners will re-examine the nature of their partnership with the Legal Services Commission (LSC) in the light of these proposals. Whilst we share the DCA's concerns regarding persistence of over-claiming and poor quality advice by a significant minority of immigration suppliers (para.4), we fail to see how cutting down the time, which could be spend on cases, will adequately address such concerns.

24. These proposals contradict the government's attempts to increase the quality of legal advice. There are already concerns that the general level of remuneration offered on

³ ILPA, *Making an Asylum Application – a Best Practice Guide*, 2002.

civil legal aid work has moved away a significant number of high quality suppliers from the legal aid system⁴.

25. We also are concerned that the arbitrary capping of legal aid expenditure for asylum and immigration suppliers will lead to an increasing demand for asylum and immigration advice being placed on generalist advice agencies and community centres, such as CABx, thus reducing their ability to provide holistic services to the community. Such agencies are not equipped for the specialist nature of this work.

Are there other ways in which quality can be ensured?

26. The recently published report by the Comptroller and Auditor General found that the introduction of contracts for legal help has led to better scrutiny by the LSC of the work of its suppliers. It pointed out, however, that the LSC needs to do more to tackle poor performing suppliers and those who overclaim. The report recommended that the Commission reduce the time it takes to remove suppliers – which currently takes a minimum of around 18 months - who persistently underperform and significantly overclaim⁵. The Select Committee on Public Accounts of the House of Commons also investigated the cost of civil legal aid and made similar recommendations⁶.

27. JUSTICE welcomes these reports and believes that broader powers to the LSC to remove persistently underperforming suppliers more quickly, together with the new accreditation scheme proposed, would be significant steps in tackling poor advice and overclaiming.

28. JUSTICE also considers that the LSC audit process should be made more effective in terms of assessing the quality of suppliers. We welcome, for instance, the steps taken in this respect by the OISC, which has devised a set of written assessments to test adviser competence during premises audits. We also welcome the use of peer

⁴ Report by the Comptroller and Auditor General, *Community Legal Service: the introduction of contracting*, HC 89 2002-2003, 28 November 2002.

⁵ National Audit Office Report, *Community Legal Service: the introduction of contracting*, HC 89, Session 2002-2003, 28 November 2002.

⁶ Select Committee on Public Accounts Twenty-fourth Report, 2002-2003.

assessment of quality. These are initiatives that the DCA should encourage the OISC and the Legal Services Commission to pursue vigorously.