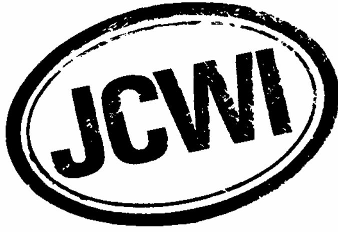

Response to The Asylum and Immigration Tribunal - The Legal Aid Arrangements for Onward Appeals Consultation Paper

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Copies of this briefing can be downloaded from www.jcwi.org.uk

JCWI (Joint Council for the Welfare of Immigrants) is an independent national organisation which has been providing legal representation to individuals and families affected by immigration, nationality and refugee law and policy since 1967.

JCWI actively lobbies and campaigns for changes in law and practice and its mission is to eliminate discrimination in this sphere. JCWI has been instrumental in influencing debates on immigration and asylum issues in both the UK and at European level.

JCWI has an experienced casework and policy team that conducts representations before the Immigration Appellate Authority and closely monitors the workings of the appellate system. We also provide specialist advice to other practitioners who represent their clients in the appeals process through direct advice, publications and training.

JCWI's membership consists of many black and ethnic community organisations that represent people who will be affected by the proposed changes. JCWI has been taking the views of these organisations and will continue to do so during the consultative process.

Access to justice and the provision of fair, non-discriminatory procedures for those individuals affected by immigration laws and policies is of central importance to JCWI and this paper highlights JCWI's primary concerns in relation to the proposed changes.

The Retrospective Legal Aid proposals for the new Tribunal

Under section 26 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (AITOC) power is given to the Tribunal or the High Court to make an order for costs following an appeal of a decision by the new Asylum and Immigration Tribunal (AIT).

A key part of the proposals is a reduction in the public funding of appeals. Under the new proposals, at the end of an application to review an AIT decision the Tribunal judge will make a retrospective decision as to whether legal aid funding should be granted based on the prospect of success at the time the application was made. A costs order will only be made in favour of the Appellant's representatives if the case is considered to have "had a significant prospect of success". Disbursements will be paid in all cases, but lawyers will only know if they are to be paid when the Tribunal judge makes this decision, thus legal representatives will risk working for nothing. To compensate lawyers for the extra risk that they run in pursuing a legal challenge, they will be paid a "risk premium" in cases where a costs order in their favour is made. Solicitors are already having to justify the work that they undertake and are expected to carry out as much, or more, work within a much shorter time frame. This has led to a considerable number of reputable and experienced immigration and asylum firms leaving the legal aid regime.

Summary of Concerns:

The new proposals will lead to increasing numbers of poor, unrepresented and badly advised litigants blocking the judicial system because they cannot find a lawyer able to risk not being paid. Lawyers prepared to do pro bono work will be stretched to the limit. Those representatives who charge privately for their services will apparently face no sanction for pursuing cases with no apparent merit through the courts. Small to medium sized legal firms and not-for-profit organisations are likely to suffer most. The proposed arrangements will create unwarranted uncertainty for committed Legal Aid solicitors. Black and ethnic minority litigants and representatives will be unfairly discriminated against since most immigrants and asylum seekers and their advisors tend to hail from Africa or Asia. It is becoming ever more difficult and expensive for migrants to enter the United Kingdom, whilst the current Government has made it increasingly difficult for people to claim asylum.

The current legal aid system requires a number of 'merits tests' at each stage of the proceedings. Requests for extensions and funding for appeals already have to be justified to the Legal Services Commission and funding for hopeless cases is rarely, if ever, authorised. Permission to appeal to the higher courts, including the Immigration Appeal Tribunal and the Administrative Court must be obtained. Should the Court consider there to be no merit in an appeal, then leave to appeal will be refused.

JCWI is concerned that many people will be denied a legal remedy simply because they are financially unable to access a lawyer to challenge judicial decisions that they consider unfair or incorrect. The results of the proposed legal aid arrangement may well have catastrophic consequences for those unable to pursue an appeal since they may be returned to face death or other human rights violations as happened in the notorious former Zaire cases when failed asylum seekers were arrested immediately upon their return.

Implications may well arise under the Human Rights Act 1998 and the incorporated Articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 6 guarantees the right to a free and public hearing within a reasonable time by an independent and impartial tribunal established by law. It may well be argued that an inability to put one's case to the Tribunal through lack of a publicly funded efficient representative will result in the loss of this right.

Exemption Categories
The scheme will only apply to the review and reconsideration of appeals under section 103A of the Nationality, Asylum and Immigration Act 2002 as inserted by section 26(6) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, and only if the appellant applies for the review. The exemption categories for the new arrangements are appropriate in that they apply to the most vulnerable classes of people affected, such as Fast Track appeals and onward appeals to the Court of Appeal. It does ignore the fact that appellants have to be granted leave to appeal before the appeal is heard. If the Tribunal or Court of Appeal does not consider that the appeal has merit then leave to appeal will be refused.

Transitional Arrangements
The new scheme will apply to review applications, including those where the Immigration Appellate Authority made the appeal decision before 4th April 2005.Current legal aid arrangements apply to any permission application to the Immigration Appeal Tribunal or statutory review application made before commencement. The new arrangements will not apply to IAT appeals awaiting a hearing which become Asylum and Immigration Tribunal reconsideration hearings on the creation of the AIT. Existing arrangements will continue to apply where applications to the High Court are made before 4th April 2005., but not determined, before that date.
The transitional arrangements proposed are not acceptable in that **a**ppeals which were lodged prior to 4 April 2005 should all be considered under the existing arrangements. Appellants should not be penalised for delays, sometimes of a year or more, on the part of the immigration or judicial authorities before the papers are passed to the appellate authorities or a hearing date is set.

Prospects of Success Test
Although the judge's decision will be based on the appeals prospects of success at the time the review application was made, it is claimed that this is 'not a 'no win, no fee' scheme' as there is a chance that some unsuccessful cases may be funded. The test is to be stricter than that currently applied by the Legal Services Commission.

Option 1: Does a case have significant prospects of success?
Option 1 on the surface appears the better option to achieve the aims of the new arrangements and the wishes of Parliament, however, it takes for granted that suppliers are provided with all the material information by their clients or by the immigration authorities. This is often not the case. Representatives who act in good faith and who later discover that they do not have all the relevant facts will be penalised for factors beyond their control.

Option 2: Is a case very likely to succeed, or does it have very strong prospects of success?
Option 2 encourages suppliers to take on only cases that they know they will win. Litigation is a contentious business and both options apparently aim at taking the challenge out of legal practice by reducing litigation to a routine predictable business.

There are practical difficulties caused by each option which are likely to cause hardship to both client and representative. Both options adhere to the no merit, no fee test. This is unfair. The law is constantly changing. A case which may at first sight appear meritorious may, upon closer examination, cease to be so. Representative must go on the facts and the law current at the time. Should clients provide misleading or false information or should the law change after proceedings have commenced, it is not fair to penalise representatives who have taken on cases in good faith and who have committed much time and effort into attempting to obtain the most favourable result for their clients. Both tests effectively install a 'no win no fee' condition into the legal aid frame work. The fact that law is constantly changing and evolving is ignored. Asylum seekers, in particular will be adversely affected since conditions in their countries of origin are not static and change rapidly. It would appear to encourage delays on the part of the Home Office in the consideration of cases.

It is difficult to see the difference between 'significant prospects of success', 'very likely to succeed' or 'very strong prospects of success'. If there is no distinction in substance between both options how can you make a choice?

Litigation is necessary sometimes to clarify points of law even where merits of a case are unclear. Unsuccessful cases may be of vital importance in that useful precedents may be established. Tying remuneration to success could therefore stifle the development of legal principles. Legal aid lawyers will be reluctant to take the risk of pursuing cases that could lead to the development of the law.

Additional circumstances to be considered
Additional circumstances in which the Administrative Court may award funding should be added to the regulations. Suppliers should be granted funding if they can show that they took on a case in good faith, that they have carried out the work efficiently and that there was no reason to believe that the known facts and law extant at the time of taking on the case precluded the possible success of the client's case taking into account both law and equity.

Review of Funding Decisions
Suppliers, unhappy with the Tribunal judge's decision on funding, can apply to the Tribunal to have the decision reviewed. The review will be paper-based. Material before the Tribunal when it made its decision will be taken into account and additional written representations may be made. It is separate from the appellant's appeal rights.

The proposed arrangements for review appear equitable if both the information before the decision making Tribunal and additional representations by both supplier and Counsel are to be taken into account by the reviewing Tribunal

Ten working days would appear reasonable for applying for a review of a funding decision with the same period for the review decision. It should be borne in mind that suppliers are likely to have other urgent work running concurrently with the work in

dispute over costs. It is unclear as to whether **there will be remuneration for pursuing reviews of funding decisions, which may entail making detailed and complicated representations. Solicitors should be paid for the work involved in applying for a review in the same manner as for their other work.**

Risk Sharing
Barristers should have a right to apply for a review of funding decisions independently of a solicitor since their grounds of review may differ from those of the solicitor who is not in a position to effectively justify all the work done by Counsel who is an independent contractor.

The arrangements for risk-sharing are not appropriate given the aims of the new legal aid arrangements. Both solicitor and counsel can only act on facts as they know them. As long as they both work in good faith, they should not be penalised for the omissions and wrong doings of others. If there is to be risk sharing, it should be shared equally since counsel should advise the client's representative on the merits of the case.

Remuneration and Disbursements
Many solicitors do not charge for all the work that they do. A risk premium may alleviate losses to some extent, but would not ensure that this work is cost effective for suppliers in every case. The majority of solicitors may well refuse to undertake any work where there is a chance, however slight, that they may lose. This means that many would-be litigants will be left without a representative as the majority of legal aid solicitors cannot afford to work without being paid. There is likely to be a drop in the number of interesting legal challenges upon untested and uncertain points of law. Immigration law without the stimulus of legal argument will stagnate and few new legal precedents will be set.

The proposals for the treatment of disbursements are appropriate to the extent that it is reasonable for disbursements for experts and interpreters/translators to be payable in every case. As solicitors pay many disbursements, such as travel, in advance, it is reasonable that these expenses are always payable, if reasonable as well. If it is reasonable to pay some disbursements all the time, why should solicitors' costs not be treated in the same way? Salaries do have to be paid as well.

Amendments to the CLS Regulations and Funding Code Criteria and Procedures
The suggested amendments to the CLS regulations and the Funding Code Criteria and Procedures are basically a tidying up process and are reasonable as far as the proposals go. Suppliers should be able to self grant CLR when pursuing a review

In summary:

JCWI submits that:

- The proposals are overtly discriminatory in that they will directly affect black and ethnic minority communities, reducing access to justice in a key area of law that primarily impacts upon these communities.

- The proposals can be expected to lead to a marked reduction in the availability of quality legal advice and representation on immigration issues across the country. This will inevitably lead to many people being unable to pursue their cases sometimes with catastrophic implications for their lives and liberty.

- The proposals spell out reduced access to justice through the denial of free legal assistance to those who cannot afford it, contrary to Article 6 of the ECHR.

- Increased unit costs in immigration cases are inextricably linked to the increased complexity of immigration law and policy, and the increased incidence of cases involving detention and removal, which necessarily require a higher degree of scrutiny.

- There is likely to be a drop in the number of legal challenges upon untested and uncertain points of law which will be against the public interest