



ILPA Response to the Ministry of Justice Consultation Legal Aid: Funding Reforms

The Immigration Law Practitioners' Association (ILPA) is a professional association with over 900 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration an asylum through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder and advisory groups including the Legal Services Commission's Civil Contracts Consultative Group, Immigration Representative Bodies Group and the Commission's Immigration Stakeholder group.

ILPA is responding to the following questions only:-

Question 7: Do you agree that the proposed hourly rates based on current guidelines are a reasonable starting point?

Yes, they are a reasonable starting point.

Question 8: Are there situations when this would not be appropriate? If so, what would they be and why?

We do not consider there to be any situation when it would not be reasonable to take the current guidelines as a starting point. We set out below our view on situations in which it may be appropriate and necessary to exceed those current guideline rates.

Question 9: Do you agree that it is appropriate to pay the same rates for the same type of expert in both civil and criminal cases? If not, why and what would the difference be?

We see no reason in principle why the same type of expert should be paid differently, subject to the need to ensure that appropriate experts are willing and able to accept instructions in different types of cases. We are mindful that the Asylum and Immigration Tribunal may be viewed by some experts as a particularly hostile forum in which they may not be willing to participate.¹ If there are circumstances when no appropriate and necessary expert can be instructed in any case in any category of law or jurisdiction because the specified rates are unacceptable to them, there must be efficient mechanisms and procedures to enable the prescribed rate to be exceeded.

¹ Note the case of SD (expert evidence) Lebanon [2008] UKAIT 00070 in which the Iraq country expert, Dr Alan George, was heavily and wrongly criticised in a draft determination of the AIT which was promulgated in error and subsequently withdrawn.

We consider that the underlying condition for the instruction of an expert in Controlled Work should remain as it is now, i.e. the standard condition for any disbursement to be incurred

“You may incur disbursements where:

- (a) it is in the best interests of the Client to do so;
- (b) it is reasonable for you to incur the disbursement for the purpose of providing Controlled Work to the Client;
- (c) the amount of the disbursement is reasonable; and
- (d) incurring the disbursement is not prohibited by this section or the applicable part of Sections 10 to 16 of this Specification”

The guideline rates should only be a guide to what would be considered a reasonable amount.

Although the UK Border Agency rarely bothers to instruct its own experts we share the concern (that we understand will be expressed by others responding to this consultation) that a situation must not be allowed to develop where there an inequality of arms, such that the opponents of publicly funded individuals are able to monopolise the best experts by exceeding the rates payable by the LSC. In particular, opponents who are public bodies should be limited to the same rate restrictions.

Question 10: What are the circumstances when prior authority would need to be sought to go above the proposed rates?

The LSC should allow the rates to be exceeded in any case where it is necessary to enable an appropriate expert to be instructed including:-

- where there is a need to maintain access to experts in a particular geographical area;
- where there is a need to maintain access to experts in a particular category of law or jurisdiction;
- where there is an unusual level of expertise required for the case, or where no one of appropriate expertise can be instructed within the rate. This may include for example because no one else suitable is available within the timescale needed (for example because of particularly short timescales set by the tribunal or the reluctance of the tribunal to grant an adjournment or an extended adjournment for an expert to report, which is a problem our members experience) or in the other particular circumstances of the case (for example where an expert needs to meet with a client who is detained in an immigration removal centre or prison, as many experts are reluctant to accept those instructions because they are so time consuming, and the travelling time means that the overall rate paid is much lower).
- Where a particular individual expert is required who will not accept instructions at the proposed rate In this regard there is a particular issue in immigration/asylum when, unlike in most other areas of law, it may be most appropriate to instruct an expert already working with the individual. This may for example be their GP or other treating clinician (most often a psychiatrist or psychologist). It arises because of the peculiarly incredulous attitude taken by the UKBA and by some immigration judges towards appellants and to what is sometimes characterized as self-reported and/or “self-serving” symptoms or conditions (and which are therefore “incredible”). In such circumstances the evidence of for example an NHS psychiatrist who has been treating the appellant over some time may be strongly preferred to that of an independent psychiatrist who usually meets the appellant on one occasion only.

Question 11 Are there any circumstances where fixed fees would be appropriate, for example DNA and GP reports? What should the fixed fees be?

We see no objection to the setting of a fixed fee where the work required is clearly predictable and finite such as with a DNA test (provided the fees set allow for the number of individuals to be tested and reported on). However, there must still be need to allow for the rate to be exceeded where market or other conditions mean that the work cannot be commissioned at that rate. For example the UK Border Agency specifies which DNA test companies can be used and which sample takers can be used (both in the UK and abroad) and fees must be sufficient to enable an acceptable organization/individual to be instructed.

We do not consider that fixed fees are appropriate for any other type of expert report as the amount of work required of them can vary so much. You mention specifically GP reports in this regard. In immigration and asylum cases these reports can range from a short letter just providing details of current medication to a lengthy report about contact with and treatment of a patient over a prolonged period of time. We see no sensible way of setting a reasonable fixed fee to cover this range.

We do not think that it is in the interests of justice for any expert to be under an incentive to restrict the amount of time they properly spend on a report because they are only being paid a fixed amount. As recognized in the preamble to the proposal, we do not think that there is any evidence that sufficient numbers of experts are sufficiently motivated to work on cases funded by the LSC, so as to eliminate the risk that an expert will be adversely influenced in the preparation of reports by the fact that they will be paid only a fixed fee.

Question 12: Are there particular types of experts who may cease to do the work for the proposed rates? Who are they and what can be done to address this?

We are concerned that certain country experts may cease to do the work for the proposed rates. For some countries or issues there may be only one or two appropriate experts whose expertise has been accepted by the AIT. Whilst some are academics others work in the commercial sector and may command high fees for their commercial work. We do not think there is anything that can be done to address this in advance. The LSC must be ready to approve requests for the rates to be exceeded in these cases.

The LSC might take into account factors such as express endorsement of the work of particular experts by Judges in the Court of Appeal when considering whether to approve the proposed rates being exceeded in any particular case. Experts whose work has been so endorsed are very likely, arguably justifiably, to be more in demand than other possible experts and inclined to consider themselves entitled to a premium rate over others.

The LSC should keep in mind the fact that the instruction of high caliber experts in asylum and immigration appeals before the AIT may well, if the appeal is allowed in part on the basis of the expert evidence, make an application for reconsideration by UKBA less likely or less likely to succeed. The use of high caliber experts therefore clearly has the potential to save the costs inherent in a case going on to the reconsideration stage.

Question 13: What other factors lead to issues with supply in some areas? What can be done to address these?

We mentioned above the reluctance of some country experts to accept instructions in cases before the AIT because of the negative attitude adopted towards experts on occasion. That is obviously outside the control of the LSC/MOJ as ultimately the

comments of a judge are a matter of judicial independence. However, the MOJ can foster a climate and provide judicial training in which the role of the expert can be better appreciated.

The LSC must accept that there is probably little they can do about some 'issues with supply in some areas' particularly if they are intent on reducing pay rates and that they must make proper provision for, and sensible criteria based on which, providers can apply for exemptions to the proposed rates.

Question 14: Do you agree with the initial Impact Assessment? Do you have any evidence of impacts we have not considered?

There appears to be no impact assessment for the expert fees proposal.

Question 15: Do you have any information or views on the Equality Impact Assessment? Do you consider that any of these proposals will have a disproportionate adverse impact on any group? How could any impact be mitigated?

We have no comments to make on this.

Additional comment

We would raise a concern that within immigration and asylum there can be a lack of suitable experts, particularly country experts and identifying suitable experts can be a difficult and time consuming activity. We have a concern that the imposition of rate caps and a reluctance on the part of the LSC to grant extensions to the rates will mean that our members will be required to spend increasing amounts of time trying to find a suitable expert who will accept instructions within the prescribed rates. This may waste valuable time, when we are operating to very tight Tribunal or UKBA timetables, leaving insufficient time for full preparation of the case or leading to delay and hearings having to be adjourned. We are also concerned that this additional work will generally be unremunerated as the case preparation will be covered by a fixed fee. The LSC must take into account these issues in the operation of its policy on granting funding.

On a practical issue we would ask that, if this proposal goes ahead, the LSC ensure that their decision makers have access to a database of experts whose applications for exemptions to the proposed rates have been allowed. This is not to say that being included in the database will mean such experts will always be permitted an exemption, but it would at least provide some guidance to decision makers at LSC about which experts may have a prima facie case for an exemption.

Alasdair Mackenzie, Acting Chair, ILPA
6 November 2009