

**ILPA response to
Legal Aid: Refocusing on Priority Cases – Consultation on Draft
Regulations, Funding Code Changes and Lord Chancellor's Authorisations**

ILPA is a professional association with some 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 and 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.

In this response we have used the substantial decisions set out in the Ministry of Justice's consultation response on 'Legal Aid: Refocusing on Priority Cases' as a framework for our comments on the draft regulations, Lord Chancellor's authorisations and draft amendments to the Funding Code which are intended to implement the aforementioned substantial decisions.

I. Definition of 'wider public interest':

The substantial decision is the introduction of a 2-stage test:

- Potential to produce real benefits for individuals other than the client and
- The case is an appropriate case on its facts to realise those benefits.

The objection raised in our consultation response that the most appropriate cases are often (certainly in the immigration category) picked off and settled by opponents to avoid precedents being set which would be unhelpful to the opponent, is rejected on the basis that if the case is so strong on its facts it is likely to settle, it would not be needing to rely on the assertion of wider public interest in order to get funding. This nevertheless leaves unanswered another potentially problematic scenario identified in ILPA's consultation response, i.e. that of an applicant refused funding on the basis that a more appropriate case to realise the benefits may emerge in the future. Where does this new test leave such an applicant, as self-evidently there could be no guarantee that a 'more appropriate' case would come along at a later stage. How long would such an applicant be expected to wait before the Commission would be satisfied that no more appropriate case had presented itself?

The proposed new test is to be implemented by an amendment to Section A of the Funding Code (see 2.4, 'Other definitions' at page 11). The proposed amendment is apt to achieve that which it is sought to achieve, but ILPA retains and reiterates the aforementioned concerns about the substance of the proposal.

2. Public interest and borderline cases:

There will be a 'special controls regime' for certain types of cases. This will apply to some, but not all, categories of cases which fall for referral to the Special Cases Unit under Rule 23.1 of Section B of the Funding Code:

- Cases in which the actual or likely costs exceed £25,000;
- Cases which, if they were to proceed to a full trial / final hearing, or to the conclusion of the appeal stage in the Court of Appeal, the likely costs of the case might exceed £75,000;
- Appeals or proposed appeals to the Supreme Court (now, irrespective of the likely costs of the case);
- Multi Party Actions, and potential Multi Party Actions;
- Cases in which it is necessary to determine whether the case has a significant wider public interest or raises significant human rights issues in order to determine whether funding should be granted or continued;
- Exceptional Case Contracts.

A new Rule C23A provides that some of the cases referred to the Special Cases Unit will be subject to 'special controls'. These are (see Rule 23A.1):

- Appeals or proposed appeals to the Supreme Court (now, irrespective of the likely costs of the case);
- Multi Party Actions, and potential Multi Party Actions;
- Cases in which it is necessary to determine whether the case has a significant wider public interest or raises significant human rights issues in order to determine whether funding should be granted or continued;
- Cases where the Director of the Special Cases Unit is satisfied that, if the case were to proceed to a full trial / final hearing, or to the conclusion of the appeal stage in the Court of Appeal, the likely costs of the case might exceed £25,000.

Cases subject to 'special controls' are (see Rule 23A.2) made subject to the proposed new procedures in Part D of the Funding Code. In these cases, any right of review to the Independent Funding Adjudicator ('the Adjudicator') arising under Rules 22, 26, 40 58 or 65 of the Funding Code will now lie to the Special Controls Review Panel. The aforementioned rules concern, in summary:

- Refusal by an authorised representative to apply for or grant funding;
- Refusal by the Commission to grant funding;
- Refusal by the Special Cases Unit to authorize and exceptional case contract;
- Amendment or refusal to amend a certificate;
- Discharge or revocation of a certificate;
- Reconsideration by a Director following referral to the Adjudicator.

Under Rule C 46.2, decisions of the Special Controls Review Panel may (as with decisions of Directors and the Adjudicator) be declared by the Commission as 'decisions of principle', where the issue appears likely to affect a group of claims or claims of any given description.

Thus the Special Controls Review Panel has been accorded significant powers relating to cases which are necessarily those of the greatest legal and factual complexity.

As to the membership of the Special Controls Review Panel, the consultation response indicates (p.13) that members of the current Multi Party Action Committee and the Public Interest Advisory Panel will sit on the new Panel, together with 'one or more representatives from consumer groups'. We would like to know which consumer groups these representatives will be drawn from, as it seems to us unlikely that representatives of consumer groups would have the relevant expertise to make the decisions with which the new Panel will be charged. As above, these cases will necessarily be those of the greatest legal and factual complexity. As per our substantive consultation response, the decisions about funding into which the Panel will have significant input often relate to cases which go to the heart of determining the limits on state power and the balance to be struck between competing interests. What expertise is it envisaged that representatives of consumer groups will bring to this process?

In Section A of the Funding Code at paragraph 2.4 ('Other definitions') provision is made for a ring-fenced and capped budget for 'the funding of specific descriptions of services out of the Community Legal Service fund'. ILPA notes that the intention is to set such a budget for cases which only come within scope on the basis of significant wider public interest or significant human rights issues. ILPA reiterates the concerns raised in our substantive consultation response that immigration and asylum cases will, as the Commission accepts, almost invariably be of overwhelming importance to the client and will very often raise significant human rights issues. We are very concerned that borderline cases in those categories could be refused funding because the particular limited budget has run out or because the Lord Chancellor of the day does not view them as a priority. These are not cases that can be held over to the next funding year.

3. Damages claims

ILPA welcomes the withdrawal of the proposal to remove from the scope of funding section 8 individual damages claims in which likely damages would not exceed £5000.

ILPA has no comment to make on the requirement for likely damages to exceed £5000 in Multi Party Actions unless the claim concerns sex, race or disability discrimination, or child abuse.

4. Out of scope damages claims

ILPA welcomes the withdrawal of the proposal that low value individual damages claims which are only within scope on the basis of wider public interest should be required to show that likely damages would exceed £5000.

ILPA has no comment to make on the requirement for likely damages to exceed £5000 in Multi Party Actions which are only within scope on the basis of wider public interest.

5. Use of complaints systems / ombudsmen etc

No ILPA response.

6. Cost / Benefit in damages appeals

No ILPA response.

7. Judicial Review: presumption of funding

ILPA welcomes the abolition of the separate Funding Code test for post-permission cases, but strongly opposes the Commission taking powers allowing it to refuse to fund or to continue funding a Judicial Review in which when permission has been granted.

We note the anticipation that the number of cases in which this might happen will be 'very small'. We do not understand why the Commission requires this power, especially in view of the fact (see decision 8, below) that funding will not automatically be withdrawn if the client ceases to have a direct personal interest during the course of proceedings.

ILPA would be grateful for examples of cases in which the Commission would refuse to fund or to continue funding a Judicial Review in which when permission has been granted, as we cannot envisage the scenario in which this could possibly be appropriate.

In the consultation response it is acknowledged that it is not the role of the Commission to determine whether a case can be brought or whether it can proceed, but 'it is the role of the LSC to determine whether Legal Aid funding should be made available'. This is a very disingenuous attempt at justification of taking such draconian powers as to refuse to fund or continue funding a Judicial Review in which when permission has been granted. Determining whether funding should be made available in practice determines whether a case can be brought or proceed. This is necessarily so because an applicant for Legal Aid does not have adequate financial resources to fund his / her own claim, and cannot obtain funding from other sources.

8. Judicial Review: personal interest

Section A of the Funding Code is to include provision at paragraph 7.2.4 that Legal Aid will only be granted for Judicial Review where the client seeks a material benefit for himself / herself or his / her family, unless the claim concerns the environment. There appears to be no definition of 'family'. ILPA would welcome clarification that this would include unmarried partners.

ILPA welcomes the confirmation that funding will not automatically be withdrawn if the client ceases to have a direct personal interest during the course of the proceedings.

9. Judicial Review

ILPA welcomes the withdrawal of the proposal for a moratorium on funding between the issue of a Judicial Review claim and receipt of an Acknowledgement of Service.

10. Criteria for referral to the Special Cases Unit

ILPA welcomes the fact that the categories of cases to be referred to the Special Cases Unit has not been expanded so far as originally proposed. The categories of cases to be referred have been listed at pages 1 – 2 above.

In the current version of the Funding Code, cases referred to the Special Cases Unit as appeals to the House of Lords were subject to the same qualification as has been retained for cases expected to reach the conclusion of the appeal stage in the Court of Appeal, namely that the likely costs of the case might exceed £75,000. No justification has been advanced for removing this qualification. ILPA would like to know why this has been deemed necessary.

The Special Cases Unit will have power to require a case plan in any case. As we noted in our substantive consultation response, case plans are not considered by our members to be a useful tool. The cost (to the Commission) of representatives having to produce these and the Commission having to consider and approve them is significant. They are time-consuming and our members do not report that they produce any advantage to them in planning their representation in the case. They are only of any potential use to the Commission. We also doubt that in many cases they achieve any positive role in the on-going management of the case as there are frequent reports of them being finalised retroactively (sometimes long after the case has been concluded).

ILPA welcomes the indication that the Commission will commit more resources to the Special Cases Unit in view of the anticipated expanded workload and looks forward to receiving further detail on this as soon as possible.

11. Inviting representations before granting civil Legal Aid

ILPA welcomes the withdrawal of the proposal to invite representations from opponents on the merits of a proposed claim.

The proposal to invite representations on means has been retained. This is provided for by new Rule 15A in Section B of the Funding Code.

ILPA welcomes the decision that this will not apply in asylum or asylum support proceedings and notes that for the time being this measure will apply to private law children or finance cases, and that any future blanket application of this measure to other civil Legal Aid categories, such as immigration, would be a matter for the Lord Chancellor's order or guidance under ss.8(9) or 23 of the Access to Justice Act 1999. However ILPA notes (Rule 15A.2 (ii)) that the Director is also authorised to exercise the power to invite representations in cases where 'the Director considers that, in the light of the likely costs of the case and all other circumstances, it would be appropriate to invite representations from the other party before public funds are committed to the case'.

On the basis that this measure may therefore from April 2010 also be applied to cases in the immigration category, we make the following points:

We welcome the fact that Rule 15A.1 (authorising the Director to order that the opponent be notified of the intended proceedings and invited to make representations on the client's financial eligibility for civil Legal Aid) is expressed in

discretionary terms. The assumption that the vast majority of asylum / asylum support clients are impecunious is entirely correct, but this is also the case for many immigration clients.

We hope that the aforementioned discretion will be exercised sensibly. It would appear to ILPA to be a complete waste of time and resources to invite representations from the opponent (i.e. the UK Border Agency) in cases where the client has been in long-term immigration detention, or has been transferred to immigration detention at the end of a substantial prison sentence. Equally it would be a complete waste of time and resources to invite representations from the UK Border Agency where the client was in receipt of mainstream welfare benefits.

We note that the opponent will be given 'at least' 14 days to make representations (15A.3 (iii)) unless the Director agrees a shorter period is necessary in the light of the urgency of the case. The Commission will need to bear in mind that immigration cases are often urgent cases, which cannot be delayed for 'at least' a fortnight without fatally compromising the client's position.

12. Special Cases Unit / Independent Funding Adjudicator

Rule C59 (Section B of the Funding Code) makes the Adjudicator's jurisdiction subject to the proposed additions to Part D of the Funding Code. The key issue here is that in cases which have been referred to the Special Cases Unit under Rule 23, but which are not subject to 'special controls' under Rule 23A, the Adjudicator loses the power to determine the 'cost / benefit' analysis. The Adjudicator retains the power to determine the likely damages and any other benefit / remedy the client is likely to achieve, but can no longer determine how these benefits weigh against the potential costs of the case, so as to determine whether funding ought to be granted. We do not believe the case has been made for removing this power from the Adjudicator, and we reiterate the point made in our substantive consultation response regarding the expertise of the Adjudicators and the value of independent scrutiny.

Part D goes on to deal with the powers of the Special Cases Review Panel ('the Panel'). As noted above (page 2) in cases subject to 'special controls' a number of challenges to decisions by the Commission will be dealt with by the Panel, not the Adjudicator. In addition, the Director of the Special Cases Unit may refer any issue concerning the funding or continued funding of a case within the Unit to the Panel, whether or not the Director has determined it for himself. Again we wish to register our opposition to the removal of independent oversight in these cases.

ILPA notes that there is a presumption that the Panel will determine issues referred to it on the papers unless it considers it in the interests of justice to hear oral representations on behalf of a client (see D3, 3.1). ILPA considers that there should not be such a presumption, rather that the Panel should always contact the client and the client's legal representative with a request that they indicate, within a specified period, whether they wish to make representations in person to the Panel. In our view it is in any event invariably likely to be the case that the interests of justice will require at least the opportunity for oral representations to be afforded. Advocacy by a legal representative before the Panel in these circumstances should of course be appropriately remunerated. We appreciate that there is provision for the

client's legal representative to receive a copy of any report by the Panel to the Director, and to make written representations to the Director before any final decision on his part (D3, 3.3 & 3.4). We would be grateful for confirmation that the drafting of such representations will also be appropriately remunerated. In ILPA's view, effective oral submissions before the Panel itself are likely to assist the Panel in making its decision (either to uphold the original decision of the Director, or to report to the Director), as questions can be asked / clarification sought there and then, saving time generally and perhaps reducing the need for written representations at a later stage.

13. Community Action Contributions

No ILPA response.

14. Prison Treatment Advice

No ILPA response.

15. Removal of devolved powers in Judicial Review cases

We welcome the decision not to remove devolved powers in Judicial Review cases.

16. Restricting LA for non-residents

Schedule 2 of the Access to Justice Act 1999 is to be amended to 'exclude from routine access to civil legal aid those who are non residents' other than for immigration and asylum cases.

ILPA welcomes the clear and broad terms of s.2 of the draft Community Legal Service (Scope) Regulations 2010, which will introduce a new paragraph 4 to Schedule 2 of the Access to Justice Act 1999, of which paragraph 4(b) will specify an exemption from the residence test (see below) for:

'Services relating to immigration, leave to enter or remain in the United Kingdom, removal and deportation from the United Kingdom, asylum, nationality and citizenship;'

ILPA welcomes the withdrawal of the previously posited 'lawful residence test' and notes that those who will be excluded from routine access to civil Legal Aid to pursue cases in the Courts of England and Wales (with some exceptions, to follow) are those who at the date of the application for funding are not resident in:

- The UK
- The rest of the EU
- British Overseas Territories
- Crown Dependencies
- Macao
- Hong Kong

ILPA understands that 'to reside' in one of the above territories means to be able to give signed confirmation that at the date of the application for funding, the client in

fact resides in one of the above territories and is able to give an address within that territory which is not the address of the solicitor or legal representative.

ILPA notes the categories of case, in addition to immigration (as above) in which there will not be a routine exclusion from access for those who reside in territories outside the above list, namely:

- Child abduction
- International child contact cases
- International child protection cases
- International protection of vulnerable adults case

ILPA notes that those present but not resident in the UK would not have routine access to civil legal aid. We understand this means visitors who are visiting only to conduct litigation, and holiday-makers, though there are exceptions, thus those present but not resident will be able to access civil Legal Aid for:

- Domestic violence cases
- Childcare / supervision proceedings
- Emergency housing matters
- Mental Health Act / Mental Capacity Act detention

We note that any case which is on the face of it excluded on the grounds of non-residence may apply for funding under s.6(8)(b) of the Access to Justice Act 1999 (provisions for 'exceptional funding'). Decisions on applications for such funding would be made by the LSC, with no ministerial involvement. The draft 'Lord Chancellor's Authorisation on Claims by non-residents' indicates that the test for granting funding to excluded non-residents is 'where funding is required to satisfy the United Kingdom's obligations under the European Convention on Human Rights'.

ILPA would be grateful for confirmation that what is intended by this is that all claims against United Kingdom government departments and their agents will be funded in order to uphold the principle of equality of arms which is enshrined in Article 6 of the aforementioned Convention such that, for example, a client who was assaulted by Immigration Service officers (or the equivalent private contractors) during the course of removal would have a legitimate expectation of funding being granted to bring a civil claim against the assailant even though they may not be in a position to instruct solicitors to do so until they had in fact been removed, i.e. to an excluded territory.

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