



working with refugees to build new lives

Refugee Council and Refugee Action joint response to:

“Consultation on the Proposed Amendments to the General Civil Contract (Solicitors) and General Civil Contract (NfP) Relating to Immigration and Asylum Work”

March 2006

Introduction

1. The Refugee Council is the largest organisation in the UK working with asylum seekers and refugees. We not only give help and support, but also work with asylum seekers and refugees to ensure their needs and concerns are addressed.
2. We run general advice services, but not legal advice, for asylum seekers in London, Birmingham, Leeds and Ipswich. A growing issue confronting each of our services is the difficulty that our clients have in getting access to legal advice and representation, particularly at the appeal stage of a person's asylum claim.
3. Refugee Action is a national organisation providing frontline advice and information for asylum seekers on a wide range of topics including NASS support, voluntary return and complex issues such as domestic violence and racial harassment. We do not give legal advice but do signpost or refer clients to immigration solicitors where appropriate. We currently see approximately 650 clients a week across 7 One Stop Shops in the South West, South Central, North West and East Midlands. Approximately one fifth of our advice sessions are related to accessing legal advice

The two agencies experience

4. The Refugee Council and Refugee Action are extremely concerned about the possible consequences of the imposition of a performance standard of 40 per cent success on contractors representing cases at the AIT. We fear it will mean people will find it even more difficult to get advice and representation. The source of our concern is two-fold:
 - a) The daily lists of the AIT reveal that an average of 15 per cent of appellants appear legally unrepresented. In the case of the fast track procedure at Harmondsworth this is routinely 35 - 50 per cent of cases legally unrepresented.
 - b) All of the advice services in our One Stop Shops are dealing increasing numbers of clients whose solicitors are no longer representing them but are far from clear why and certainly do not appear to understand about their right of review to the Funding Review Committee or what to do about it. They come to the Refugee Council and Refugee Action seeking alternative sources of advice as well as practical assistance in completing their appeals. We can assist with neither of these directly as we do not meet the required level of regulation.

The need for appeal

5. Access to an appeal process with high quality legal advice and representation is central to a fair asylum system. Between 2002 and 2005, the proportion of asylum appeals which have been allowed by the AIT averaged 19 per cent¹. Any diminution of access to legal advice and representation is likely to result in flawed asylum decisions leading to the removal of asylum seekers with a continuing need for protection that has not been fully tested before the law. Wrong decisions, and

¹ Home Office – Asylum Statistics: 4th Quarter 2005 United Kingdom.

the inappropriate removals that can result, undermine the integrity of the British asylum process and place many individuals in potentially dangerous situations.

6. We do fully support the proposal to introduce devolved powers at appeal stage. Large numbers of solicitors firms have closed down since April 2004. Many have told us that this is because they were unable to adequately represent an individual within the tight legal funding timeframe and because the process of seeking legal funding appeared to them unwieldy and time consuming. It certainly delayed our clients' ability to access support pending an appeal. We recognise the Legal Services Commission's (LSC) ambition to ensure high quality advice that is accessible to those who need it, and believe that this is a very positive step towards that aim.
7. Asylum is a dynamic and rapidly changing area of law that by definition needs to be subject to scrutiny and challenge. As well as the individual asylum seeker's right to appeal, solicitors who take on unclear or difficult asylum appeal cases play an important role in testing government policy and in assisting the evolution of refugee and human rights law.
8. It is the experience of the two agencies that solicitors have already become increasingly hesitant to take on cases where the outcome is unclear. The 40 per cent success threshold for funding is likely to increase this reluctance and thus greatly reduce the ability of the legal profession to provide this safeguard.
9. This view of the 1951 Refugee Convention as a living instrument that evolves to reflect society's growing understanding of persecution is reflected in changes such as that in the position of women and homosexuals which came about as the result of legal challenges where the outcome was far from clear. Both agencies are greatly concerned that it will be much more difficult for solicitors to test the legal implications of cases under the proposed system.
10. The President of the AIT has made it consistently clear that he is not in favour of appellants appearing before a tribunal without representation. The Refugee Council believes it is clearly inefficient and wasteful to have people who do not fully understand the law and legal procedures submitting their own appeals and then having to cope with the procedures of the hearing. Tighter restriction on the ability to represent cases can only exacerbate this process with growing numbers of self represented appellants making the court's ability to establish any protection need far more difficult.

The 40 per cent standard

11. We are not clear how this figure of 40 per cent has been arrived at – the current success rate at appeal is 19 per cent. Furthermore the Home Office seeks to further reduce the proportion of appeals that succeed as it improves the quality of initial decision making. The LSC proposal is difficult to reconcile with the Home Office's efforts to dramatically improve the quality of initial decision making.
12. We understand that the justification for the 40 per cent standard is the desire to ensure that only truly meritorious cases are brought, and hence the probability of success will rise, but we are concerned that in doing this the effect will be to force

contractors to play safe and exclude those borderline cases that arguably most require representation. There is also an issue of conflict of interest where clients may have an arguable case but the supplier may be unwilling to jeopardise his/her average success rate.

13. Furthermore we are concerned that there is a lack of consistency in the application of the merits test amongst a wide range of suppliers all applying what is an extremely subjective test. For example it is common to hear practitioners commenting that they have identified aspects of a case that should be raised that a previous representative had failed to pursue.
14. It is difficult to get hard evidence about consistency of course but we would draw the LSC's attention to the *Report of the Certification Monitor*, Sarah Woodhouse in July 2005. She commented: "Many applicants are ill served by legal representatives within the NSA process. Standards of best practice commonly accepted by immigration and asylum lawyers were rarely adhered to". In particular "little or no work done on behalf of the applicant, other than attending the asylum interview – for example the opportunity to make written representations before the Home Office decision not taken up, and no attempt made to assemble evidence to support the application. This was particularly marked for human rights applications which went beyond asylum applications." We strongly believe this is indicative of the wider position in relation to supplier's application of the merits test and that this will be considerably worsened by such a high performance criteria.
15. We also understand that at present there is no requirement on suppliers to report when that supplier has actually refused CLR. Thus there is no mechanism for monitoring the appropriateness such grants and refusals. We believe monitoring should be in place to ensure consistency. Where an appropriate standard has not been met that supplier should be subject initially to peer review before any more draconian action for breach of contract.
16. We do not believe that representation at appeal should be subject to the merits test in asylum cases. Although the current test is that of a 50 per cent chance of success it should be borne in mind that success in asylum cases means a reasonable degree of likelihood of persecution which is a lower test. In other words the threshold for cases where there is some case to argue is relatively low and we should not be experiencing the high levels of cases being discontinued by their solicitors that we are.
17. It should also be recognised that all asylum and human rights cases that go to an in-country appeal have already been scrutinised by the Home Office and those that the Home Office believes are clearly unfounded and bound to fail at appeal have been identified and certified (denying an in-country appeal). Only those cases where Home Office recognises the claim may succeed are given an in-country appeal. We believe that all appellants should be guaranteed representation in these cases. That way the courts are more able to assess the need for protection and there is equality of arms between the parties.

Conclusion

18. We are strongly opposed to the imposition of a contractual obligation on suppliers to achieve a 40 per cent success rate for CLR at appeal – we are concerned that it has been arbitrarily reached without any statistical justification. Also it will encourage unwarranted caution and remove the ability to test the law in the very areas where this is needed.
19. We believe all asylum seekers should be represented throughout the procedure, including at appeal. The crucial test is to ensure that the right decision is made on a claim and it needs to be properly represented both initially and at appeal. Failure to do so is creating growing problems for those in the asylum process, for the courts and for advice agencies. This makes it less likely that all those in need of protection will receive it.

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