

Refugee Council response to *Legal Aid: A Sustainable Future*

A Consultation Paper from the Department of Constitutional Affairs and the Legal Services Commission, CP13/06

October 2006

About the Refugee Council

The Refugee Council is the largest non governmental organisation in the UK working with asylum seekers and refugees. As well as giving help and support to asylum seekers and refugees, we also work with them to ensure their needs and concerns are addressed by decision-makers. The provision of, and access to, good quality legal advice is one of the greatest areas of concern expressed by our clients and our members and we welcome the opportunity to comment on these proposals.

Our response is restricted to the implications of the proposals for refugees and asylum seekers. Thus, this submission responds to the questions contained in section 8 of the consultation paper.

Immigration and asylum: responses to specific questions

Do you agree with the proposed scope of the graduated fee scheme? If not please explain why. (8.1)

The Refugee Council is not convinced that the change to a graduated fee scheme is either necessary or desirable. Representatives should be able to spend as much time as necessary on an individual's case and be remunerated accordingly. We accept the rationale for setting a number of hours beyond which authorisation is required. However, the system must, in practice, be flexible enough to respond to individual case requirements. In the proposals, additional payments are only made once four times the fixed fee amount of work had been conducted. This is far too high. We believe that practitioners should be remunerated for the work they carry out.

The Refugee Council does not believe that practitioners should receive extra financial reward for cases that result in grants of status. Such a system may discourage representatives from taking on cases that are particularly complex, including borderline cases which arguably most require legal representation. Additionally, we do not support the proposal that financial reward should be confined to the initial decision stage, since this would penalise representatives whose client does not receive a positive initial decision as a result of a poor decision having been made by a Home Office decision maker. In many cases (for example 53% of Somali claims in the first quarter of 2006) representatives succeed at appeal. It is essential that all representatives are fully remunerated for their work.

If the scheme is to be introduced, the fees need to be set at a realistic and competitive rate – we understand that there has been no market research conducted amongst suppliers to assess the real cost to them of their existing cases. We further understand that the rates that are proposed here involve a potentially significant cut in revenue for some suppliers and are based on hourly rates that have not been adjusted for inflation for some years.

Do you agree with our approach to produce different forms of remuneration for those services outside of the graduated fee scheme? If not, what suggestions do you have for contracting these services? (8.2)

We broadly agree with the outlined approach, but foresee difficulties when asylum seekers move into and out of detention. It is not clear who would represent the asylum seeker at each stage and how the funding would work. We are also concerned about lack of choice: asylum seekers need to be able to retain some control over who represents them and be able to change their legal representative if they are dissatisfied (see also our response to question 8.11).

Do you agree with the proposals for additional payments? If not please explain why. (8.5)

We strongly agree that there should be payments for representatives to attend the Home Office interview in asylum cases as we view this as a crucial part of the practice of “front loading” advice and representation, making resources available from the outset to enable a high quality of initial decisions. The presence of a representative can help to ensure that all issues are adequately and appropriately explored in the asylum interview and any outstanding issues identified.

We have concerns about the inclusion of the costs of interpretation, translation, travel and waiting within the same fixed fee. The costs of each of these can vary so greatly that we believe the actual cost of each should be met. For example, in the areas outside of London where New Asylum Model Teams have been established there can be considerable travel involved for representatives and interpreters and allowance for this should be built into the system outside the fixed charge.

Do you agree with the proposals to include interpretation and translation costs within the fees in asylum cases? If not, please explain why. (8.6)

We do not agree with these proposals. Interpretation costs can vary widely from case to case and are not in the supplier’s control. In our view, anything discouraging solicitors from incurring interpretation costs is a matter of concern. Relying on a client’s less-than-fluent English, or using a relative to interpret, creates a risk that the client’s case will not be accurately set out, or that vital information will not be disclosed at an early stage. This is likely to incur further time and cost to rectify at a later date. In order to ensure quality, the Legal Services Commission should encourage solicitors to use interpreters wherever necessary. Furthermore, there is a risk that including these costs in this way may lead to some “cherry picking” of cases in order to avoid the additional costs. This could disadvantage those asylum seekers who are in need of interpretation and translation.

Do you agree with our suggested approach to provide advice, information, and referral at ASU? If not, how else could these services be provided? (8.10)

We are strongly in favour of asylum applicants receiving advice prior to their asylum application. This can, as indicated in the proposal, identify vulnerable groups such as children, victims of torture or people with mental health problems. It can also be used to alert women to their right to apply for asylum in their own right and to the requirement for IND Case Owners to follow the Home Office gender guidelines.

Our understanding of this proposal is that the intention is to provide a generic, non-case specific, advice and information session comparable to that currently provided by the existing Induction Services. We therefore believe it would be more appropriate as part of the Home Office provision of information services, rather than as part of these proposals.

Do you agree with the proposal to restrict client choice and allocate clients to particular providers on a rota basis? If not, what alternative mechanisms do you think could be introduced to ensure that clients are guaranteed access to legal advice in the short period available between making their asylum application and their substantive interview? (8.11)

In order to operate within such tight timescales, it is difficult to see an alternative to allocating clients to particular providers. However, we believe that this raises issues of quality control since we do not accept that accreditation alone ensures a level playing field in terms of solicitors’ performance.

We believe that a client who does not have confidence in the person representing them should be able to change their representative. The rules for doing so need to be explicit. The system for initial allocation must be also transparent to avoid any potential for bias against firms perceived as disruptive of the strict timetables involved.

Any restrictions on choice need to go hand in hand with the development of effective client feedback mechanisms to monitor solicitors' performance. Complaints procedures need to operate speedily to be effective.

Do you agree with our suggested approach to provide legal services to clients in Detention Centres? If not, what alternative arrangements do you think could be introduced to ensure that clients are guaranteed access to legal advice and representation whilst reducing the administrative burden on the LSC? (8.12)

Please see our response to question 8.2. There are problems relating to people moving in and out of detention, and indeed between removal centres, that need to be addressed.

With regard to the evaluation of the Detention Duty Adviser scheme, we strongly believe that an independent evaluation should be carried out and a steering group established, involving external agencies, to assist with the monitoring and development of this approach. Feedback from Visitors Groups and organisations such as BID strongly suggests there is a need for better information and training for those involved in the project in order for them to run effectively.

Do you have any suggestions about how legal services could be provided to immigration clients held in prison? (8.13)

We suggest that similar arrangements to those in Removal Centres be established. Even if it is not possible to formally cover all prisons, it would be possible to establish procedures whereby firms contract to cover certain prisons under referral arrangements.

Do you agree with our suggested approach to provide legal services to unaccompanied asylum seeking children? If not, do you have any other suggestions about how we can ensure that providers delivering services to this client group have the necessary experience and expertise? (8.14)

We welcome the creation of a specialist panel. However, the success of this approach will largely depend upon the criteria that will be used for deciding who should be on the panel. We believe that individual lawyers, not firms, should be on the panel. These individual Panel members should be formally accredited, following appropriate training and assessment, as an extension of existing accreditation criteria. Possessing knowledge of the welfare arrangements for children and the skills to talk to children and take down their statements appropriately could be used as additional criteria for inclusion on the Panel.

We recognise that imposing such requirements will inevitably affect supply. We suggest that this needs to be recognised and addressed by adjusting remuneration of children's cases to reflect the additional time that they take and the additional expertise they require.

We disagree with the statement that "there will be occasions where it would be more appropriate for a case to be dealt with by child care specialist rather than an immigration practitioner". All asylum seeking children should have the advice of an immigration practitioner who is in a position to present

a child specific interpretation of the Refugee Convention. They should then either have, or be able to call upon, other areas of expertise where needed.

If we understand correctly that the CLR funding for appeals by unaccompanied children is to be included within this proposal, attention needs to be paid to the particular cases of those who, having applied for asylum as unaccompanied children, are given discretionary leave for a period of less than twelve months. It is common for these children to turn 18 years of age before they have the right of appeal against the refusal to grant asylum. The Refugee Council believes that these appellants should be considered as unaccompanied children for the purposes of CLR in line with LSC published policy and they should be exempt from the merits test. This would go some way to addressing the disadvantage they have faced by being denied a right of appeal immediately following a refusal of asylum.

Do you agree with our proposed approach with remunerating work outside the graduated fee scheme? If not, what suggestions do you have? (8.15)

We agree with the proposed approach, subject to our comments above about the need to ensure that there is adequate recompense for the time spent on all cases, but particularly children's cases (see response to question 8.14). We assume that the retention of an hourly rate can reflect this.

The system needs to be flexible enough to ensure that those asylum seekers who move from another category into an 'exceptional' category do not miss out on appropriate legal advice as a result. We are particularly concerned about children who are age disputed by the Home Office but who are subsequently assessed to be children. IND policy is to treat these claims as children's cases regardless of where they are in the asylum process. This may necessitate additional legal advice. It will also mean that applicants originally dealt with in the graduated fee scheme move out of that into this separate scheme.

Do you agree with our approach of extending the exclusive contracting arrangement for fast track clients to other services and client groups? If not what other proposals do you have to help reduce duplication of advice? (8.17)

We have significant outstanding concerns about the quality of representation in the fast track system. Evidence provided by BID on the Harmondsworth Fast Track demonstrates the failure of some representatives to protect their clients' interests.¹ Similarly, the Certification Monitor for Non Suspensive Appeals cases commented in her 2005 Report that some representatives in the fast track displayed a poor level of expertise.²

In addition, we fear that the likely reductions in funding may result in deterioration in supply and quality of legal representation. Fixed payment at such a basic level creates a disincentive to go beyond a bare minimum of work and thus may mean asylum seekers' cases are not fully explored and presented.

The Refugee Council believes it is of the utmost importance that asylum seekers retain the right to change their solicitor if they are unhappy with the one they been allocated, and that complaints systems are speedy and effective. (See also our response to question 8.11)

¹ See "Working against the clock" BID 2006 <http://www.biduk.org/pdf/Fast%20track/BIDFasttrackReportFINAL.pdf>

² "There was clear evidence that many of the legal representatives did not understand the legal framework of s115 or s94... It was obvious to me that such applicants were not receiving adequate advice and representation" Para 134 of the Annual Report of the Certification Monitor 2005: April 2006 <http://www.ind.homeoffice.gov.uk/6353/aboutus/certificationmonitor2005.pdf>

Do you agree with our approach to develop national and regional providers? If so, are you a provider or part of a network that would be interested in becoming this type of provider? (8.19)

We believe that there are dangers in restricting the supply base too narrowly, for the reasons indicated in our responses to questions 8.11 and 8.17.

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