24th April 2020

Extremely Urgent

Legal Aid Agency[1]

Dear Sir/Madam,

We are a group of over 216 immigration practitioners (firms and individuals) and are writing to you about funding arrangements following the recent introduction of the *"Reform Online Pilot"* ("pilot") and the bulk CMRH directions ("directions") issued on or around 25th March 2020, by the First Tier Tribunal, Immigration & Asylum Chamber (FTT) and the associated practice directions ("PD") concerning the case management of appeals during the Covid-19 public health pandemic.

We are aware, from the LAA's press release on 3rd April 2020, of your stated intention to *"… align legal aid fees for First Tier Tribunal immigration and asylum appeals with HMCTS' move to an online system for these cases."*[2]

As stakeholders, we wish to bring the following important points to your attention and would also seek further engagement with the LAA in respect of any proposals for future funding arrangements.

1) Nature of the Reform Online Pilot

The directions issued pursuant to the pilot represent a paradigm shift from the current system.

The pilot mandates providers to undertake ***"front-loaded"*** **full** preparation for all appeals. Within **28 days** of receipt of directions, providers must prepare and upload to the online portal:

- Detailed witness statements;
- A bespoke country information bundle;
- The *"appeal skeleton argument" (ASA)* for which the pilot directions set out over almost **4 pages** (see #3.7, 3.7.1-5, 3.8--3.14) the unprecedented requirement for a very detailed document.

Providers will also be required to obtain instructions from the client and then secure funding before being able to instruct medical/country expert reports (if relevant) within this time frame.

[1] Cc: MOJ, President Clements, Law Society, General Council of the Bar, ILPA, LAPG.

[2] https://www.gov.uk/government/news/support-package-for-legal-providers-will-ensure-access-to-justice-during-coronavirus-outbreak?utm_source=6994ef54-f35c-4e3f-8ac6-e7f3ac2363b7&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

These stages are mandatory *before* an appeal can proceed to the review stage, which is undertaken by the Home Office (who must also upload documents).

If either party fails to comply with these onerous conditions, then the matter will not proceed to either the "*review stage*" or onward to appeal, and the appeal will remain in a state of limbo.

2) Funding
The only funding available for the front loaded preparation is under stage 2a of the Graduated Fee Scheme (GFS), which is £227 and £90 for a telephone CMRH, if the FTT direct one.

Moreover, if the decision is withdrawn and/or the Home Office decide to grant status, then the provider is not entitled to any further payments.

3) Lost Income
Firms will be required to prepare a full appeal and will only be entitled to £227 and £90 (for a telephone CMR) under stage 2a if the appeal settles.

Alternatively, if the matter does not settle and there is an effective appeal, providers would be entitled to the stage 2b fee only of £567. Additionally, they are entitled to claim a bolt-on hearing fee of £302.

Therefore, the maximum a firm can expect to recoup under each stage of the GFS is:

2a – £227 + £90 = **£317**

2b – £567 + £90 + £302 = **£959**

These figures are already very low and devised to address the previous appeals procedure.

If, as the Tribunal anticipate, the Home Office review matters at or prior to the CMR stage and withdraw their decision[3] or grant status to the appellant, providers will only be entitled to £317. This represents a loss of **£642** per case to the provider in anything up to 16-23% of cases[4].

There is no funding provision for the mandatory requirement for the ASA which is now required in all appeals.

This is financially unsustainable.

[3] **Under the Pilot this ranged between 16-23%**
[4] ibid

4) Escape Fees

The existence of an escape threshold is no answer to our complaints. Only a small minority of cases reach the escape threshold and the majority will be fully prepared and be paid as a stage 2a payment.

Also, to meet the escape threshold *both* the stages 1 and 2 matters must reach x3 their respective fixed fees. Many cases will not have met the escape threshold at the earlier legal help stage.

Many smaller firms lack the resources to undertake the time consuming nature of those applications. The disparity between regional rates and London rates is a further significant prohibiting factor.

As practitioners, these are just some of the everyday problems we experience which make escape fees an unpredictable basis upon which to build and maintain a sustainable business model.

5) All this within 28 Days

The requirement to undertake all of this front loaded preparation in just 28 days in normal times would be an insuperable challenge and will place further strain on already extremely stretched resources.

However, in the current climate (social distancing, furloughing of staff, and lockdown) it is impossible.

6) Utility of the ASA

We have grave practical concerns about the feasibility of an ASA and appeal bundle being finalised so long before a full hearing (appeal are taking many moths to list at present).

Moreover, the utility of the ASA pre-CMRH which, will invariably need to be amended if issues are narrowed in the manner the FTT envisages is not a cost effective use of public money; to effectively pay for a case to be prepared twice.

To require a skeleton argument pre-CMR is unlikely to be of any useful purpose for the reasons set out and will in most cases unjustifiably inflate costs, because it is almost inevitably going to require to be redrawn when the matter proceeds to a full hearing, by which time the landscape (evidence and arguments) are likely to have changed.

Many practitioners draft outline skeletons/statement of issues for hearings which often require refinement and amendment once the evidence and issues have been narrowed or identified as the hearing approaches (months later) or changes in the law occur.

The LAA is yet to make any provision for either the ASA or for a second skeleton argument in the event issues narrow (after the CMRH for example) as an appeal progresses.

There has been no consultation about these issues or a rational process of enquiry. Had there been then it is clear that these very serious practical and legal obstacles would have been identified and addressed.

Had we been asked, then we would have made it clear that we do not consider it ever to be appropriate for a full skeleton (rather than an outline statement of issues for the purposes of settlement) to be prepared so long in advance of an evidence and fact-based hearing that requires a forward looking assessment of the appeal at the date of determination by the FTT.

An obvious example would be a case requiring medical evidence. If providers are obliged to prepare the ASA there is a real risk that it would have to be revised once the medical evidence is obtained.

The current proposals run the risk that representatives will routinely include disclaimers at the beginning of their ASA to say that the document is subject to the evidence currently available and the position outlined in the Home Office refusal letter, and they reserve the right to change/develop their argument in light of any further evidence or after hearing the submissions from the Respondent.

We wish to add that there may be individual examples where an ASA would be appropriate, for example where credibility is not in issue or where an appellant will not be giving live evidence due to a lack of capacity. However, these are very much examples which should be reviewed on a case by case basis and ideally at a CMRH.

7) Impact on the Legal Professions

Lawyers have been placed in an invidious position by the PD and directions. They now risk breaching the directions of the Tribunal and potentially being reported to their governing bodies and being exposed to professional misconduct charges.

Even where adjournments are being granted, providers are still being directed to abide by the PD and directions.

This is forcing them to work for no remuneration or self-fund what would usually be paid as disbursements for country expert reports and medical reports because of the unrealistic timetable and inflexible approach being adopted by the FTT.

8) Provision of Legal Services

The impact this will have on public funding and the administration of justice is profound. If the ASA requirement proceeds in the current form, it clearly threatens to decimate the provision of publically funded legal advice and representation to some of the most vulnerable in our society.

The scheme in its current form risks driving many law firms out of business. The scheme has fundamentally changed the manner in which appeals must now be prepared to a *"front loaded"* model, with no funding under the current legal aid funding regime[5].

This will result in many more appellants appearing before the FTT unrepresented, unable to comply with directions. The overwhelming majority of appellants do not speak English and will not be able to compile their own appeal bundles or draft an ASA. Yet without these steps, their appeals *"will not proceed"*.

All this will slow down the administration of justice and increase costs due to slowing down the appeals process.

9) Lack of Consultation

It is unfortunate that over the past 17 months during which the pilot was being trailed there was no corresponding discussions between HMCTS, the LAA and stakeholders on how the scheme would operate and be funded.

HMCTS has failed to properly consult with the LAA either during the pilot or prior to the decision to implement the PD, to ensure a funding scheme which at the very least mirrored the current regime *and* provided funding for the considerable additional work now required for the compulsory ASA.

A series of meetings have taken place in which firms involved in the pilot have been invited. However, there have been no wider consultation with providers generally and the Bar has not been consulted either.

Requests made by providers and the Bar to attend those meetings, to raise issues, have been made and declined by HMCTS.

Instead a series of "roadshows" setting out what had already been decided were held. During those roadshows it was repeatedly stated that there would be no roll out until there was adequate funding for the scheme and the ASA, yet the opposite is now the case.

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[5] https://www.gov.uk/government/news/support-package-for-legal-providers-will-ensure-access-to-justice-during-coronavirus-outbreak?utm_source=6994ef54-f35c-4e3f-8ac6-e7f3ac2363b7&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

It is surprising that such significant changes have been confined to a select group of firms involved in the pilot without HMCTS canvassing and taking the views of all stakeholders or as wider a pool as possible.

This proposal will have a transformative impact upon the viability of every firm and every advocate who practices in this area, yet their voices have not been heard, and the ultimate losers will be our extremely vulnerable clients.

10) Counsel
We are aware that the Bar and ILPA have raised a number of serious concerns about the practicalities of the pilot and utility of the ASA with the MOJ and yourselves in both correspondence and in meetings. We share all of those concerns.

Unlike under the previous system where there was a CMRH, which allowed for issues to be identified, narrowed and conceded by the parties, the pilot fails to provide for this.

There is no mechanism for retaining the same counsel to undertake drafting of the ASA and retention for the hearing. This further risks inflating costs.

If counsel is instructed to draft the ASA but is not retained for the appeal or if the decision is withdrawn/there is a grant, there exists a real risk that counsel will not agree to draft the ASA and/or attend upon an appeal unless separate and adequate remuneration is made available for *both* the ASA and the appeal.

We are aware that Counsel from across the United Kingdom are refusing to accept instructions to draft the ASA due to a lack of funding *and* expressed grave concerns about the adequacy of funding of appeals under any proposed fees scheme.

We share those concerns also as both instructing solicitors and advocates.

11) One Size Does Not Fit All
Some obvious examples where this pilot would raise difficulties are in trafficking cases and cases involving minors. These cases are often very front heavy, with many weeks of face to face meetings in order to build trust and confidence before the very distressing experience of reliving an account of horrific abuse can be disclosed; there is no recognition of this in the 28 day timetable and the inflexible requirement of an ASA.

12) ***Using a New Matter Start***
In correspondence from the LAA to pilot participants, it has been suggested they may open a further matter start as a possible *"withdraw to grant"* and thereby obtain a further payment.

Absent any further confirmation or guidance, this is an unsatisfactory solution and leaves providers open to payments being recouped.

In any event this seems to be very problematic under the Standard Civil Contract, where it clearly states that it would not expect a new matter start to be opened in such circumstances unless there was a significant amount of further work required; see for example the sections in the 2018 Immigration spec - 8.25 and 8.65:

> ***"Matter Start rules***
>
> ***8.25 An Asylum application and any Asylum appeal will constitute one Matter. The appropriate UKVI unique Client number will be that of the original Asylum application.***
>
> *8.26 An Immigration application and any Immigration appeal will constitute one Matter. The appropriate UKVI unique Client number will be that of the original application given by the UKVI.*
>
> *8.27 Any associated or additional application to an application within scope of Part 1 of Schedule 1 to the Act on human rights grounds will also form part of the same Asylum Matter.*
>
> *8.28 Where a Client has made or wishes to make a fresh application for Asylum then this new application would constitute a new Matter Start.*
>
> *8.29 Where you have an ongoing Matter, work undertaken in relation to a determination that the Client qualifies for civil legal services provided as Licensed Work including complying with any pre-action protocol may be undertaken as part of the same Matter."*
>
> *8.65 Stage 2 will end at the point that a determination is made that a Client qualifies or does not qualify for Licensed Work in relation to the submission of an application for permission to appeal to the Upper Tribunal or where the Matter otherwise ends earlier.*

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/738516/2018_Standard_Civil_Contract__Immigration_and_Asylum_and_IRCS__Category_Specific_Rules__August_2018_.pdf

Also under the **2018 Specification (General Provisions)** the suggestion of utilising a new matter start conflicts with 3.34 & 3.47:

> ***"When can subsequent Matter Starts be opened?***
>
> *3.34 Once a Matter Start has commenced, whether under this Contract or any Previous Contract, a new Matter Start can only be opened for the same Client if the*

Client has a new legal problem which is separate and distinct, as defined in Paragraph 3.30. Any work which does not relate to such a separate and distinct problem must be carried out under the original Matter Start, whether or not circumstances have changed or developments have occurred as the Client's case has progressed.

3.47 Where Controlled Work has already been carried out for a Client then, subject to Category Specific Rules, a separate Matter Start would not be justified in the following circumstances:

***(a)** Controlled Work in relation to an interim remedy in a Matter on which Controlled Work has already been provided;*
***(b)** Controlled Work in relation to enforcement, a review, or an appeal (including an application for a determination that the Client qualifies for Licensed Work) in a Matter on which Controlled Work has already been provided;*
***(c)** Controlled Work in relation to making a complaint in relation to a Matter where Controlled Work is at any time provided in relation to a substantive legal remedy in the same Matter;*
***(d)** if a Client seeks advice as to whether he or she must change Provider from a Provider already providing Controlled Work. The provisions in Paragraphs 3.28 to 3.46 should be applied before any work is provided under a new Matter Start;*
***(e)** providing Controlled Legal Representation in a Matter for which you have been providing Legal Help;*
***(f)** providing Help at Court in a Matter for which you have been providing Legal Help; or*
***(g)** any work undertaken on a case by an Agent on your behalf will form part of the same Matter Start.*

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744438/HPCDS_Contract_-_2018_Standard_Civil_Contract_Specification___General_provisions_.pdf

13) Concerning Trend

Finally, this episode demonstrates another example of a concerning trend.

It is the second time something like this has happened without appropriate consultation and consideration of the impact of changes on provider's business viability and the consequential access to justice for vulnerable clients.

We are referring to the unilateral removal of the oral CMRH, which was abolished by the Tribunal and replaced by a Reply Notice - a paper form that providers are required to complete in accordance with client instructions.

The LAA refused to fund this work and therefore providers lost £166 for the oral CMRH they were previously entitled to in each case. This represented a 33% reduction in the overall fees for Court work.

It is absolutely vital that the LAA properly consults and engages with providers to ensure that adequate funding is made available to align with the Tribunal's new system. We cannot be expected to work without appropriate remuneration.

Almost all of us have now written on numerous occasions to the Tribunal in response to bulk CMRH directions, setting out our grave concerns about the rigid inflexibility of the proposed new system and its unworkable nature; amplified exponentially in light of the current pandemic.

We hope that the LAA will recognise the need to respond to the issues we have raised as a matter of extreme urgency.

We also look forward to hearing from you in respect to how we can become fully involved in the consultation process going forward.

Please forward any response to Amie Higgins at amie.higgins@outlook.com (joint co-ordinator)

Yours faithfully

UK Immigration Advisors Working Group – 217 members.

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ATLEU	Julian Bild	Solicitor
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David Benson Solicitors	Shankhanie Samarakoon	Trainee Solicitor
DG Legal	David Gilmore	Director
Fisher Stone Solicitors	Karin Oliver	Director/Solicitor
Fountain Solicitors	Faysal Yaqoob	Solicitor
Fountain Solicitors	James Howard	Head of Immigration
Fountain Solicitors	Lauren Butler	Head of Immigration
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Hallmark Legal Solicitors	Nadeem Ahmed	Director/Solicitor
Harris & Green Solicitors	Javaid Bostan	Partner
Humd Solicitors	Sajjad Khan Malik	Consultant
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IAS	Kristian Wood	Caseworker
IAS	Valerie Jones	Senior Caseworker
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IAS	Helene Santamera	Caseworker
IAS	Geoff Harding	Caseworker
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Links International	Junaid Bhatti	Immigration Advisor
Morden Solicitors	Abdul Naeem Janjua	Partner
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Optimus Law	Safina Kausar	Solicitor
Optimus Law	Zakia Shah	Caseworker
Optimus Law	Satvinder Chahal	Caseworker
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Park View Solicitors	Ambreen Kaoser	Solicitor Advocate
Primus Solicitors	Kashif Iqbal	Solicitor
Proctor & Hobbs Solicitors	Aneesa Ehsan	
Qualified Legal Solicitors	Sikander Elmore	Solicitor

Rahman & Co	Assad Ahmed	
Rahman & Co	Saghir Ahmed	
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Sultan Lloyd Solicitors	Sobia Zafar	Solicitor
Tann Law Solicitors	Andrew Nyamayaro	Director
Tann Law Solicitors	Yvone Gwashawanhu	Consultant
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UK International Lawyers	Shazia Habib	Caseworker
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Vanguard Solicitors	Naveed Ahmed	
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