

## **29. Immigration**

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## 29.1 General Approach

1. The Immigration Category of Law has a number of significant variations from other Categories of Law to accommodate the particular requirements of this type of work.
2. The purpose of this guidance is primarily to provide a context for the interpretation of the provisions of the Immigration Category of Law Specific Provisions. It is important that Suppliers familiarise themselves with the Immigration scheme and the detailed provisions set out in section 11 of the Unified Contract Specification, as well as the general provisions set out in sections 1 – 9 of the General Specification and Annex B, which apply to all Suppliers holding a contract in the Immigration Category from 1 October 2007.
3. The Criteria for immigration are set out in section 13 of the Funding Code. These Criteria cover Legal Representation before the Asylum and Immigration Tribunal and any further appeal to the Court of Appeal or House of Lords.
4. Most other proceedings within the immigration category of law will be by way of judicial review and will be dealt with under the judicial review Criteria in section 7 of the Funding Code. (See paragraph 29.2 below)
5. Legal Representation in proceedings before;
  - i) the Asylum and Immigration Tribunal
  - ii) the High Court in relation to applications under s103A of the Nationality, Immigration and Asylum Act 2002.

must be provided by way of Controlled Legal Representation under the Unified Contract.

6. All other Legal Representation in this category, whether before the High Court, Court of Appeal or House of Lords, is funded as Licensed Work and (subject to any devolved powers), must be subject to an application to the LSC for a certificate.

7. Whilst this guidance is primarily concerned with the funding rules, as they now exist, these must be seen in the context of the future development of the scheme. Unless otherwise stated, references to Paragraphs in this guidance are to Paragraphs in the Immigration Category Specific Specification of the Unified Contract.

## **29.2 Judicial Review – Criteria**

1. Applications for Legal Representation for judicial review in the immigration category will be refused where the applicant has the right to appeal the decision complained of, e.g. to the Asylum and Immigration Tribunal or, in the case of refusal of support, to the Asylum Support Adjudicator. Refusal would be under code criterion 7.2.3.
2. When considering prospects of success criteria what matters is the likelihood of the court granting the application for review, not of the Home Office reversing their decision. Because many immigration judicial reviews will raise issues of overwhelming importance to the client or significant human rights issues, Legal Representation in these cases is only likely to be refused when the prospects of success are poor.
3. It would be unusual for Legal Representation to be refused in an immigration case once permission had been granted. The presumption of funding under criterion 7.5.2 will apply in such cases. There may however be some cases where further action by the Home Office, or further information coming to light, make it unreasonable for funding to be granted.

## **29.3 Statutory Review**

On 4 April 2005 Section 2(5) of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 repealed section 101(2) of the Nationality and Immigration Act 2002. Section 101(2) related to the remedy of statutory review. For those few cases for which statutory review remains a remedy Suppliers should apply the guidance as contained in 29.2 Judicial Review.

## 29.4 Retrospective Funding

1. As from 1 April 2003, the Commission has limited power to grant retrospective funding in certain judicial review and statutory review cases. The introduction of this power coincides with the general removal of devolved powers for solicitors to grant Emergency Representation in immigration matters. The power to fund retrospectively provides some protection for solicitors who carry out urgent work or are unable to secure funding in cases which the Court subsequently decides have merit.
2. The power to fund retrospectively arises only in
  - (a) judicial review proceedings where the presumption of funding in criterion 7.5 of the Code applies. This is where the Court grants permission and the case has significant wider public interest, is of overwhelming importance to the Client, or raises significant human rights issues. Most immigration matters come within the category of overwhelming importance to the Client. The power to fund retrospectively will operate in such cases where the Court ultimately grants permission.
3. In those cases there are two circumstances in which retrospective funding will be considered :
  - (a) the solicitor took all reasonable steps to apply to the Director for Emergency Representation but it was necessary for the solicitor to carry out urgent work before the application could be determined. In those circumstances, the Director may issue a certificate and backdate it to the date the urgent work was undertaken (Rule C21.5 of the Code Procedures);
  - (b) where the application (whether emergency or substantive) has been refused by the Director but the solicitor proceeds with the judicial review or statutory review and is successful in obtaining permission or review as described above. In those circumstances, the Director can issue a

certificate backdated to the date the solicitor first applied for funding. This can be done either when an appeal to the Independent Funding Adjudicator is pending or after the Independent Funding Adjudicator has considered the matter (rules C21.4 and C65.7 respectively of the Code Procedures).

4. In practice, the Director generally will be prepared to grant retrospective funding in cases which fall within the conditions laid down within the Code Procedures. If both limbs apply, i.e. urgent work was carried out before the application could be determined, and thereafter the application was refused, the Director will backdate the certificate to the earlier date to cover the urgent work.
5. There may be some cases where a certificate is issued, typically following an appeal to the Independent Funding Adjudicator, before permission is granted. If it appears that the conditions for retrospective funding are satisfied so that cover should be available from a date earlier than the date of the certificate, the Director will be prepared to issue an amendment to the certificate, or letter confirming that the certificate takes effect from such earlier date as is appropriate.

## **Part A – Fee Levels and Payment Provisions**

### **29.5 Controlled Work**

1. Immigration Controlled Work is remunerated under the Graduated Fee Scheme (see Paragraphs 11.5 to 11.30) or by Hourly Rates as set out in the Payment Annex to the Immigration Specification.
2. For the avoidance of doubt, any application for an extension of leave by a former asylum seeker, who was granted a form of limited leave to remain and where the case is now proceeding as either an active review by the Home Office or the applicant is making, or has made, an application for further leave to remain on the basis of the 1951 Convention Relating to the Status of

Refugees and/or Article 3 of the ECHR as incorporated in the Human Rights Act, should be reported as an Immigration Asylum Matter.

3. If an original application was also made prior to 1 October 2007, such a review/application for further leave will fall within Paragraph 11.2 (b) and therefore be remunerable at Hourly Rates.

## **29.6 Provisions Applying to Graduated Fees**

### *Stage 2: Controlled Legal Representation*

1. Where a Supplier has withdrawn Controlled Legal Representation prior to the substantive hearing, having claimed the Stage 2a Graduated fee, and the Client is successful upon review to the Independent Funding Adjudicator the Supplier can agree to accept instructions on the appeal under Controlled Legal Representation (see Paragraph 11.10). 2. A Supplier may not claim payments for both Stage 2a and Stage 2b in this scenario, and should contact their Account Manager who can remove the earlier Stage 2a claim from the Supplier Management System.
2. Both Stage 2 Graduated Fees for Immigration Asylum and Immigration Non-asylum cover “*any post appeal advice and assistance*”.
3. Post appeal advice and assistance may be appropriate if there is a concurrent application still pending on behalf of a Client either at the end of either Stage 2a or 2b. Controlled Work may then be kept open to deal specifically with the concurrent application. For the avoidance of doubt “*concurrent*”, as referred to in Paragraph 11.124 of the Immigration Specification, refers to applications lodged at the same time.
4. If further work is required, (for example obtaining travel documents or making an application for judicial review in respect of the non-receipt of status papers), it is remunerable under Hourly Rates. This will normally constitute a new Matter Start.
5. Post appeal advice does not include work in relation to a potential fresh application; this will be remunerable under a new Matter Start.

6. Matters cannot be kept open on a speculative or 'just in case' basis.

#### *Exceptional Cases*

7. A case is treated as an 'Exceptional Case' where the value of the work covered by the Stage 1/Stage 2 Graduated Fee(s), when calculated as if it were paid at the appropriate Hourly Rates, exceeds three times the value of the Graduated Fee payable under the scheme. (Paragraphs 11.26 to 11.30). The 'actual costs' of work covered by the applicable additional payments will also count towards calculating whether a case is treated as exceptional.
8. If a matter concludes at Stage 1, the Exceptional Case calculation will take place at the point when the completed matter claim is reported to the LSC.
9. If a matter proceeds to Stage 2, the Exceptional Case calculation will take place when the claim for that stage is reported to the LSC. However, this calculation will also include the costs and fees reported at Stage 1.
10. If a matter transfers to a different Supplier, whether during or at the conclusion of a Stage under the Graduated Fee Scheme, separate calculations will be made on each of the Suppliers' claims. One Supplier's costs will not count towards whether a second Supplier's claim is treated as 'Exceptional'.

#### **29.7 Provisions Applying to Hourly Rate Cases**

1. For solicitors, in those cases that are opened prior to 1 October 2007, Legal Help cost limits have been automatically increased to those detailed under Paragraph 11.36 (a) and (b), namely:
  - i) £800 in Immigration Asylum matters
  - ii) £500 in Immigration Non-asylum matters

2. For Not For Profit (“NFP”) Suppliers, as those matters opened prior to 1 October will continue to have “Casework” rather than “Cost” limits, these have also been increased to reflect the limits applicable to solicitors, namely:
  - i) 16 hours in Immigration Asylum matters
  - ii) 10 hours in Immigration Non-asylum matters
3. For both solicitors and NFPs, any time/costs incurred prior to 1 October 2007 will count towards these limits, and extensions may be sought where required using the CW 3 A form (see paragraph 29.9 below).
4. For matters opened by solicitors prior to 1 October 2007, the Legal Help Disbursement Limit will be increased automatically to £400.
5. For NFPs, in those matters opened prior to 1 October 2007, there will continue to be an Individual Disbursement limit for both Legal Help and Controlled Legal Representation. This has been increased to £400 per disbursement.
6. Matters opened prior to 1 October 2007, which have or proceed to Controlled Legal Representation, will continue to be funded at Hourly Rates:
  - i) For solicitors, the £1600 Upper Cost limit will be applicable in both Immigration Asylum and Immigration Non-asylum matters.
  - ii) For NFPs, the 12 hour Casework Limit will continue to apply. This limit does not include the time or cost of attending the hearing itself and is exclusive of disbursements and VAT.
7. For those matters, which proceed to Controlled Legal Representation on/after 1 October 2007 in relation to Bail only, the £500 Upper Cost Limit will be applicable to both solicitors and NFPs.
8. For those matters in which Suppliers advise the Client prior to them claiming asylum at the Asylum Screening Unit and after which Suppliers continue to be instructed, the work that would have been claimed within the £100 will now be covered by the Graduated Fee or Legal Help £800 Asylum Cost limit. It will not

be possible therefore for Suppliers to claim costs up to £100 for the pre-ASU work, plus the Asylum Stage 1 Graduated Fee if they continue to be instructed.

## **29.8 Provisions Applying to Proceedings Under S103 NIA 2002**

### *Assessment of merits in relation to an application for review under S103A NIA 2002*

1. The £100 limit for assessing the merits of an application for reconsideration, claimable under Hourly Rates, does not cover advising the Client and taking further instructions on the determination.
2. For matters remunerable under Hourly Rates, the Controlled Legal Representation Upper Financial Limit covers advising the Client and taking further instructions on the determination, an extension may be sought for that purpose if the existing limit has been utilised.
3. For matters remunerable under the Graduated Fee Scheme, the Stage 2b fee also covers this work.
4. Having taken the Client's instructions the Supplier should then consider the merits of making an application for review and reconsideration.
5. Suppliers do not need to apply to the Commission for a new cost limit where they are applying the merits test for an application for reconsideration. If the matter is one that attracts a Stage 2 Graduated Fee, the Stage 2b fee covers any time for applying the merits test for an application for reconsideration and if such an application is not being pursued, explaining the consequences of the decision.
6. If the matter is one that is remunerable at Hourly Rates, then following the substantive appeal hearing before the Asylum and Immigration Tribunal, Suppliers may claim additional costs (inclusive of Counsel fees & disbursements) of up to £100 exclusive of VAT to consider the merits of an application for review and reconsideration under section 103A of the NIA 2002. This sum is in addition to the Upper Cost Limit. (Paragraphs 11.52 and 11.65)

7. Similarly, up to £100 is also payable under Hourly Rates, for consideration of a determination where the appeal has been successful but the Home Office applies for reconsideration. Similarly, under the Graduated Fee Scheme, the relevant Stage 2b fee would also cover assessment of the merits should the Home Office apply for reconsideration. (Paragraphs 11.12, 11.18, and 11.36 (c.ii)).
8. For a matter paid at Hourly Rates, a separate £100 is not claimable for both the Supplier and Counsel to assess the merits.
9. If a Supplier takes on a new Client at the review or reconsideration stage, it is unlikely that they would be able to immediately demonstrate at that point that the relevant merits test for Controlled Legal Representation is met, due to a lack of information. Suppliers should therefore complete the Legal Help form in order to enable them to assess the merits of making an application for review, for which up to £100 inclusive of disbursements will be claimable at hourly rates (Paragraph 11.36).
10. It is likely that the previously instructed firm would have obtained Counsel's opinion (on the merits of review and reconsideration) before refusing funding for a review and reconsideration and it is only in exceptional circumstances that Suppliers should obtain a second Counsel's opinion. Upon receipt of the previous Supplier's file, Suppliers should note on the file any issues there might be regarding the first opinion.
11. Paragraph 11.38 provides that only in '*very limited circumstances*' would Counsel be required to advise under Legal Help. All circumstances should be considered as to whether the case is so exceptional as to warrant the provision of Counsels' advice under Legal Help.
12. Neither the Stage 2b Graduated Fee nor the £100 limit under Hourly Rates cover the costs of drafting and lodging an application for review under s 103A of the NIA 2002. This work will be funded under the provisions of Paragraphs 11.55 and 11.56 of the Immigration Specification.

### *Disbursements*

13. In relation to the application fee to the High Court, the fee or any part of the fee should only be claimed as a disbursement where the Client has been refused an exemption or remission.
14. This will be monitored on audit and fees claimed where an exemption or remission was available may be disallowed. Please refer to the Court Service website and form EX160 and related guidance. Suppliers should ensure that evidence is retained on file of both the application to the Court for a remission or exemption and any refusal of such a request. (Paragraph 11.61)

### *Applications for reconsideration by the AIT which are not subject to an order under s103D of NIA 2002*

15. If a Client transfers to another Supplier before a decision on a section 103 D cost order can be made by the Immigration Judge the present Supplier cannot claim their costs to date from the LSC immediately.
16. Whilst at the time of transfer no decision on the order has been made, the granting of an application for a section 103 D order by the court demonstrates a Supplier's entitlement to claim costs from the LSC, without such an order such entitlement cannot be evidenced (see Paragraphs 11.56 and 11.59).
17. The 3-month deadline to claim such costs (as per the Unified Contract Standard Terms) from the LSC will not begin until the Supplier has received such a decision.
18. If the Home Office withdraws a decision prior to the hearing, the Asylum and Immigration Tribunal has the power to make a funding order in respect of the preparation for reconsideration, where the reconsideration does not take place or is not completed or the appeal is treated as withdrawn because the respondent withdraws the decision.
19. An application for a Funding order on this basis, or for any other reason for a reason specified in regulation 6(1A)(b) of the Community Legal Service

(Asylum and Immigration Appeals) Regulations 2005, should be made within 10 days of the event described in regulation 6(1A)(b).

20. If a Supplier withdraws their Clients' appeal prior to reconsideration taking place or being completed, the Asylum and Immigration Tribunal has the power to make a funding order; such an application should be made in accordance with the Asylum and Immigration Tribunal guidance.
21. If a Supplier requests a funding order, but the Immigration Judge does not consider the request, the Supplier may not claim their costs from the LSC until such time as a cost order is obtained. Rule 33 (Order for Funding on Reconsideration) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 requires that the Tribunal that has reconsidered an appeal, makes a funding determination, where the appellant's representative has specified that he is seeking a funding order. The funding order determination is separate from the determination of the appeal itself.
22. Should Suppliers require further guidance, they should refer to the relevant Practice Directions on the Asylum and Immigration Tribunal website.
23. If a Supplier has not received a determination on the application for a costs order from the Tribunal following receipt of the determination of the appeal, they should contact the Tribunal to inquire of the decision and obtain a copy of the same. The grant of a costs order demonstrates the Suppliers' entitlement to claim the relevant costs from the LSC. The absence of such an order could lead to costs being disallowed on assessment.
24. Where a case is remitted by the Court of Appeal for reconsideration, Suppliers do not require a section 103 D Order in relation to the remitted appeal. Suppliers would however be required to open a new matter to undertake any work under Controlled Legal Representation in relation to this second reconsideration appeal, following which the Supplier would be entitled to incur reasonable costs, subject to assessment.

## **Part B – General Rules for Suppliers**

### **29.9 Applying to extend Financial Limits**

1. From 1 October 2007 there will be three Controlled Work 3 Forms (“CW3”) in use. The nature of the matter will determine which form should be used on application to the National Immigration and Asylum Team.
  - The “**CW3A**” should be used solely for applications to extend the relevant cost limits in those cases outlined in Paragraph 11.2 (a) and (c).
  - The “**CW3B**” should be used solely for applications to extend the relevant cost limits in those cases outlined in Paragraph 11.2 (b), (d), (f), (g), (h), (i) and (j).
  - The “**CW3C**” should be used solely for applications to extend the relevant Disbursement limits in relation to matters attracting a Graduated Fee (Paragraphs 11.23,11.24,).
2. If a Supplier wishes to apply for an extension to one or more of the Legal Help, Legal Help Disbursement or Controlled Legal Representation Upper Cost Limits at the same time, they may do so on the same form the CW3B (Imm), however Suppliers should ensure that the costs incurred and requested under each of the limits are clearly distinguished and that sufficient information is available on the form to ensure that an informed decision may be made in relation to each request. (Paragraph 11.68)
3. If Suppliers believe that it would be more appropriate to make such applications on separate forms (e.g. One for the Legal Help aspect, the other for the Controlled Legal Representation Bail work) they may do so.
4. The Legal Help, Controlled Legal Representation and Disbursement limits detailed at Paragraphs 11.23, 11.36 and 11.47 are all exclusive of VAT. Please also refer to the guidance issued in Focus 48 and 49 regarding the circumstances in which VAT can be claimed.
5. On an application for an extension to a cost limit, up to 30 minutes can be claimed for completing the CW3A Form. This should be included in the section of the form dedicated to future work and can only be claimed if the application is successful. Time cannot be claimed for completing the CW3B or CW3C (Paragraph 11.68).

6. The costs of submitting a substantive application for a certificate, if an emergency certificate has been granted by a Supplier using its devolved powers, is chargeable under that certificate under licensed rates. If an emergency certificate has not been granted, then the costs of making a substantive application for a certificate will be remunerable at Hourly Rates under the relevant Asylum or Non-asylum Legal Help limit.

### **29.10 Previous Controlled Work**

1. In considering the provisions set out in Paragraph 11.69 of the Immigration Specification, Suppliers should make reference to the Funding Code Procedure Rule B9.1 and Paragraphs 2.22 to 2.30 of the Unified Contract – Civil Specification.
2. If a Supplier fails to make reasonable enquiries, any claim for Controlled Work in relation to this matter may be disallowed.
3. Where Controlled Work is given in the same matter from another Supplier within the six months preceding the application, Suppliers must obtain the consent of the Client to contact the previous Supplier on his/her behalf as soon as practicable in writing to:
  - (i) Confirm the reasons for the terminations of retainer: and
  - (ii) Request a transfer or copy of the file.
4. In the event that the Client refuses to give a Supplier consent to contact a previous Supplier then the present Supplier may not provide Controlled Work for that Client and may not make any claim for payment in respect of any such work, under the Contract (see Paragraph 2.23 Unified Contract – Civil Specification).
5. Suppliers should also be clearly aware of the provisions of Paragraph 2.24 of the Unified Contract – Civil Specification which states “*you may not start work for that client until you have received the file of papers and considered it’s contents unless absolutely necessary to take steps immediately to protect the clients position or meet a court deadline*”.
6. Suppliers will note, under Paragraph 2.25 of the Unified Contract, that for the purpose of the Funding Code Rule B9.1 (b) ‘*reasonable cause*’ does not include

situations where the client merely finds the first advice unpalatable and wants a second opinion.

7. If Rule B9.1 applies, a Supplier must, on request, signpost the Client to the appropriate regulatory body who can deal with the complaint regarding the alleged poor service received from the former Supplier. The present Supplier should also provide the Regional Office with details of the previous Supplier.
8. Rule B9.1 will not apply where the Client changes legal advisor within the same organisation or the legal advisor changes organisation and continues to advise the Client.
9. When providing Controlled Work in the circumstances of Paragraphs 2.22 to 2.28 of the Unified Contract – Civil Specification, Suppliers should record the justification for doing so on the file. Suppliers should have regard to any Contract Work already carried out on the matter by the previous contracted Supplier and ensure that the Contract Work they carry out does not involve unnecessary duplication.
10. Where a Client transfers instruction to a new Supplier due to the first Supplier's Immigration Contract being terminated / withdrawn, the Previous Controlled Work rules will normally be satisfied.
11. Where a matter does transfer from one Supplier to another, a new Cost Limit or Graduated Fee will be available.

### **29.11 Claiming**

1. When reporting matters, whether stage claims or completed matter claims, to the LSC, Suppliers should refer to the relevant provisions of the Unified Contract, Civil Specification and Immigration Specification for guidance. This documentation should also be read in conjunction with the Civil Codes Guidance and SMS guidance, all of which are available on the LSC website.
2. There are several key clauses of the Unified Contract Standard Terms that should be observed when reporting claims for costs:

- **Clause 15.2** - From 1<sup>st</sup> October 2007, unless otherwise agreed, Suppliers must submit all Controlled Work Claims via the LSC's Online facility. From 1<sup>st</sup> April 2008, Controlled Work Claims are payable by us only if they are submitted in accordance with clause 15.2.
  - **Clause 15.4** - Suppliers Claims must be true accurate and reasonable.
  - **Clause 15.6** - It is important that Suppliers submit each Claim to us within the time period specified by us. Otherwise, it can be difficult for us to forecast expenditure. Frequent failure to submit Claims within the time periods specified may lead to the issue **of Sanctions under Clause 29 and/or termination under Clause 30.**
  - **Clause 15.7** - Suppliers must send us each Claim for Controlled Work on the appropriate Contract Report Form so that we receive it within three months after they have completed the matter to which it relates.
3. For completed claims in relation to work undertaken in connection with applications for review under s 103A of the NIA 2002 and any subsequent Asylum and Immigration Tribunal reconsideration hearing(s), this claim should also include any costs relating to the assessment of merits for an application to the Asylum and Immigration Tribunal for permission to appeal to the Court of Appeal, and any such application.
  4. There is no provision to Stage Bill within the review and reconsideration stage.

#### **29.12 Means Assessment - Minors**

1. For the purposes of the assessment of means of minors under Controlled Work in the immigration category of law, the resources of a parent, a guardian or any person who is responsible for maintaining a child, or who usually contributes substantially to the child's maintenance, shall be treated as the child's resources, unless, having regard to all the circumstances, including the age and resources of the child and any conflict of interest, it appears inequitable to do so.

2. For the purposes of asylum matters, it is considered that for all cases it would be inequitable for foster carers'/social workers' income and capital to be aggregated with that of the child. Please also see paragraphs 2.31 to 2.34 of the Civil Specification for further guidance.
3. These provisions do not apply to Licensed Work in the immigration category of law. Please see Regulation 11 (2), 11 (3) and 11 (4) of the CLS (Financial) Regulations 2000.

### **29.13 Alternative Funding**

1. Criterion 5.4.2 (Alternative Funding) in Volume 3 Part A of the LSC Manual, states as follows:

*'An application may be refused if alternative funding is available to the Client (through insurance or otherwise) or if there are other persons or bodies, including those who might benefit from the proceedings, who can reasonably be expected to bring or fund the case. For the purpose of this criterion only, alternative funding does not include funding by means of a conditional fee agreement'.*

2. In respect of matters in the Immigration category of law, Criterion 5.4.2 is concerned not whether a sponsor or other person or body will pay, but whether they ought to pay. This Criterion is of particular significance in cases where a sponsor is either a prospective employer or will benefit financially from publicly funded representation of the applicant.
3. It is reasonable to expect that a 'business sponsor' would be able to meet the applicant's costs.
4. This criterion is not applicable to visitors or other family related applications where there is usually no 'economic relationship' between the parties.

## **29.14 Boundaries between Controlled and Licensed Work**

*Applications to the AIT for permission to appeal to the Court of Appeal following a reconsideration hearing.*

1. Following a Reconsideration hearing, should a Supplier lodge an application to the Asylum and Immigration Tribunal for leave to appeal to the Court of Appeal, the Supplier may claim the costs of this under Controlled Legal Representation. The reasonable costs of assessing the merits of such an application, advising the Client of the same and making the application would be claimable under Controlled Legal Representation and would not be dependent on the granting of a section 103 D order for costs.
2. If a matter has transferred to a new Supplier following the dismissal of the Reconsideration appeal, any work in assessing the merits of an application for permission from the Asylum and Immigration Tribunal to appeal to the Court of Appeal can be claimed at Hourly Rates under Legal Help and the relevant Immigration Asylum/ Immigration Non-asylum cost limit would apply.Paragraphs 11.91 and 11.2 (d)).
3. If the means and merits tests are met, Controlled Legal Representation may be granted to cover the costs of making an application for permission to the Asylum and Immigration Tribunal.
4. Under the Nationality, Immigration and Asylum Act 2002 applications for leave to the Tribunal can be made on a point of law only. Costs will therefore be disallowed where an application has been made on issues of fact.

*Applications to the AIT for permission to appeal to the Court of Appeal following an AIT legal panel hearing:*

5. An application to the Asylum and Immigration Tribunal for permission to appeal to the Court of Appeal, following hearing before a panel of 3 or more judges, may also be claimed as part of Controlled Work.

6. If the appeal before the panel was funded under Hourly Rates, then an extension of the £1600/£1200 Controlled Legal Representation Upper Cost Limit should be sought to cover any further work in applying for permission to the Asylum and Immigration Tribunal.
7. If the appeal before the panel was funded under the Graduated Fee Scheme, as Stage 2b does not cover the costs of applying for permission to appeal from the Asylum and Immigration Tribunal, Suppliers will need to open up a new Matter Start, under Legal Help, to assess with the merits of making such an application. This would be paid under Hourly Rates and the £800/£500 limit (depending on the nature of the original application) would apply. Where the merits criteria are met, Controlled Legal Representation should be granted to actually make the application itself. Again, the upper costs limit of £1,600/£1,200 will apply.
8. If a Client seeks to instruct a Supplier following an appeal before a panel of 3 Judges, then subject to the Previous Controlled Work rules being satisfied, and if the relevant merits and means assessments are met, Controlled Legal Representation may be granted to undertake work in relation to the application for permission. Again, the £1600/£1200 Controlled Legal Representation Upper Cost limits will apply to this work(Paragraphs 11.91 and 11.2 (d)).
9. The application to the Court of Appeal itself and any appeal in the Court of Appeal will continue to be funded under the current provisions for Public Funding Certificates under Part C of the Funding Code.

### **29.15 Cases Subject to Exclusive Contracting**

1. There will be instances in which a matter may switch between being payable at Hourly Rates and being payable under the Graduated Fee Scheme at the conclusion of a particular stage.
2. Where a Client claims asylum and their case is deemed suitable for Fast Track and they instruct, under the relevant rota, a Supplier with an exclusive Fast Track Schedule, the matter will be remunerable at Hourly Rates. If the Client is subsequently released from detention, then from the conclusion of

that stage of the case (upon receipt and consideration of the Home Office decision and assessing the merits for granting Controlled Legal Representation), the appeal to the Asylum and Immigration Tribunal will be paid under the Graduated Fee Scheme – Stage 2.

#### **29.16 Legal Advice in relation to form filling**

1. Funding should not be authorised by a Supplier for assistance solely in relation to form filling. Where a legal issue is present in relation to a form then a short amount of attendance for an explanation of a relevant scheme can be provided under Paragraphs 11.2(g) and 11.98 and 11.99.
2. The requirement of a legal issue is a condition precedent, and this must be assessed before Controlled Work commences. Factual complexity should be distinguished from legal issues. A lack of understanding by a Client through either language or other difficulties does not necessarily mean that there exists a legal issue that would justify the provision of Controlled Work. Appropriate signposting or a referral should be made.
3. Clients do not require specialist advice and assistance in completing the majority of immigration application forms (unless they are the forms listed in Paragraph 11.101).
4. Most immigration forms are self-explanatory. Clients can reasonably be expected to have recourse to the information available on the relevant websites and other sources such as leaflets and non-specialist advice agencies.
5. The supplier should distinguish legal advice in relation to form filling above, with any legal advice that may be required in relation to a substantive matter.

### **29.17 Attendance at Interviews**

1. If a Client's age is disputed, it will be for the Supplier to assess whether the Client's claim is based on reasonable grounds, if so then the Supplier may be paid for attending a Home Office interview.
2. The LSC does not require expert reports to confirm minor status or mental incapacity. From 1 October 2007, the reasonable costs of attending an interview, where in scope, with the Home Office will be in addition to the applicable Legal Help cost limits. Authority from the LSC's National Immigration and Asylum Team to attend an interview is not required, however the justification for attending the interview, with reference to Paragraphs 11.102 and 11.103 of the Immigration Specification, should be recorded on file.

### **29.18 Detained cases**

1. In detained matters, the 3-hour limit on claimable travel associated with travelling to the place of detention to take instructions from a Client, is applicable in matters payable at Hourly Rates and under the Graduated Fee Scheme.

### **29.19 Levels of Service:**

1. If the criteria for Controlled Legal Representation are not satisfied (i.e. if Controlled Legal Representation would not be granted because the Client would fail either the means or merits test) then Suppliers should not continue to provide Legal Help to the Client in connection with that appeal except to inform the Client of their situation and advise on rights of appeal. This is consistent with the approach taken in relation to other forms of Legal Representation. (Paragraphs 11.8 (4), 11.14 (4), and 11.17 (4)).

## **29.20 Instructing Counsel before AIT**

1. Counsel cannot be instructed to give an opinion under Controlled Legal Representation. However, Counsel can be briefed to give an opinion if there is a complex legal case and the Supplier wishes to seek an advice regarding the merits of proceeding with a challenge in the Administrative Court or to the Court of Appeal where permission to appeal has been refused by the Asylum and Immigration Tribunal (certified case). It is considered within the competency of a specialist immigration Supplier to identify an error of law with regards to such an appeal.

## **29.21 Concurrent applications**

1. Where a Supplier assists a Client in making two or more applications at the same time under more than one basis, then this attracts one stage fee.
2. Where, during the currency of the first application a Supplier has made for their Client, which is pending (the Secretary of State has yet to make a decision on) and the Supplier's instructions are or the Supplier advises their client that they should withdraw the first application and submit another application, then this will attract one stage fee.
3. If the Client's instructions are, or the Supplier advises their Client not to withdraw the first application, but that another application should also be made on a different basis, this will not come within the definition of a 'concurrent' application and a separate Matter Start should be opened to cover work in relation to this second application.

## **29.22 Granting and Refusing Controlled Legal Representation**

### *The means and merits test*

1. The criteria contained in sections 4 (Standard Criteria) and 13 (Immigration) of the Funding Code apply when considering whether to grant funding for Controlled Legal Representation in the Immigration Category of Law. These services are subject to the means assessment for Controlled Work

2. Guidance on Criteria 13.4 and 13.5 of the Funding Code (merits and cost benefit) is set out below. Suppliers should apply these criteria before they grant Controlled Legal Representation. Suppliers must record their answers to the questions on the file.

3. For applications subject to an order under section 103D of the NIA 2002:

The Commission will only pay costs of these applications once the AIT (or in limited cases the High Court) has made an order under section 103D or the Supplier has successfully appealed to the AIT against a decision to refuse costs.

4. Legal Representation will be refused if the prospects of achieving a successful outcome for the client are:

(a) unclear or borderline, save where the case has a significant wider public interest, is of overwhelming importance to the client or raises significant human rights issues; or

(b) poor.

5. Save where the case has a significant wider public interest, Legal Representation will also be refused unless the likely benefits to be gained from the proceedings justify the likely costs such that a reasonable private paying client would be prepared to take the proceedings, having regard to the prospects of success and all other circumstances.

6. Controlled Legal Representation will only be granted where all the criteria are met. Suppliers must cease to provide Controlled Legal Representation where the Criteria are no longer satisfied.

7. Controlled Legal Representation may cover a bail application on a Client's behalf to the Asylum and Immigration Tribunal (whether or not a Supplier is providing representation in relation to the substantive application) provided that the criteria and questions set out are satisfied in relation to the merits of that bail application.

8. The following questions are to assist in applying the relevant merits test in immigration cases:

**Question 1: What are the prospects of the appeal being successful?**

These must be estimated in one of the following three categories:

(a) **Moderate or better**– prospects are clearly over 50%. If so, Controlled Legal Representation may be provided (assuming that all the other Criteria are satisfied).

(b) **Unclear or Borderline**– where it is not possible to predict the chances of success or where those chances appear to be 50:50. In those circumstances, you should refuse Controlled Legal Representation unless any of the following three factors apply:

- (i) The case is of overwhelming importance to the Client, that is, it concerns the life, liberty or physical safety of the Client or his or her family, or the roof over their heads. This will often be true of asylum cases; or
- (ii) The case raises significant issues of human rights; or
- (iii) The case has a significant wider public interest, that is, the proceedings have the potential to produce real benefits for members of the public other than the client and their family, other than any benefits that normally flow from proceedings of the type in question.

Where these factors apply and the prospects of success are unclear or borderline, Controlled Legal Representation will usually be granted provided all other criteria are satisfied. However if the prospects of success are poor then Controlled Legal Representation should be refused or withdrawn even if (i) to (iii) above apply.

(c) **Poor**– prospects are clearly below 50%. Controlled Legal Representation must be refused where the appropriate advice to the client would be that in the circumstances of the case their appeal is more likely to fail than to succeed.

Examples of where the prospects of success will be poor are where:

- (a) In light of all the evidence the reasons for applying to remain in the United Kingdom are, in the case of an asylum application, outside the criteria laid down in the 1951 Convention relating to the Status of Refugees or, in the case of a human rights application, outside the criteria in the ECHR.
- (b) In a second or subsequent asylum or human rights application, where the same facts have already been determined before an Immigration Judge or AIT on a previous application and dismissed and there has been no relevant change of circumstance.
- (c) The Client's circumstances and/or the circumstances within his/her country of origin have changed since the initial application was made such that any claim on the basis of asylum or human rights would be likely to fail.
- (d) The Client's credibility is significantly in doubt and the client is unable to provide a satisfactory explanation for any discrepancies or provide relevant corroborative evidence of his/her statement.
- (e) In light of recent case law based on similar facts the appeal is likely to fail.
- (f) The Client has unreasonably failed to provide the necessary information such as to enable the Supplier to properly prepare the case despite the reasonable efforts of the Supplier to obtain that information.
- (g) The Client has provided false information relating to his or her identity or nationality and gives no reasonable explanation for this.
- (h) The Client has resided for over three months in a safe third country and does not dispute the safety of that country on reasonable grounds.
- (i) The Client is to be removed to a safe third country and does not dispute the safety of that country on reasonable grounds (this will not be relevant to claims under Article 8 of the ECHR).

A successful outcome for the purpose of estimating success will not, except as set out below, include a situation where the appeal may result in a recommendation by the Immigration Judge. The exception will be where there is a good or borderline chance (as defined above) that the determination and/or recommendation of the Immigration Judge will disclose clear exceptional circumstances which have not previously been considered and which will lead to the exercise of the Secretary of State's discretion outside the Immigration Rules.

**Question 2: Do the likely benefits to be gained from the proceedings justify the likely costs?**

In practice most asylum appeals will satisfy this question. However it could, for example, justify a refusal in relation to a limited application to remain in the country. If the answer to this question is no, then Controlled Legal Representation will not be granted unless the case has significant wider public interest.

Wider Public Interest as defined at section 2.4 of the Funding Code means the potential of the proceedings to produce real benefits for individuals other than the client (other than benefits to the public at large which normally flow from proceedings of the type in question). Wider Public Interest only has an impact if it is significant and this is unlikely to arise in a case before, at the first instance, at the Asylum and Immigration Tribunal. (See also 3C—041section 5.3 of Volume 3 of the LSC Manual.)

9. The criteria for Controlled Legal Representation should be applied as soon as practicable after the right to appeal has arisen and before the appeal is filed provided sufficient information is available to undertake the merits test at that stage and it is practicable for the client to sign the form within the time limits allowed. An example of where it may not be practicable would be where a client is in detention and the supplier is unable to secure an appointment before the time limit to appeal has expired.
10. In those circumstances urgent work could be carried out under Legal Help until the Controlled Legal Representation form could be completed and the merits assessed. This will be monitored on audit and may lead to the relevant work being disallowed on assessment. Persistent failure to apply the criteria

for Controlled Legal Representation before the appeal is filed may lead to a Contract sanction. (Paragraphs 11.8,11.14 and11.36).

11. Where Controlled Legal Representation is granted in connection with an appeal before the Asylum and Immigration Tribunal and the prospects of success are unclear as further investigation is required, then the merits test should be reapplied as soon as the information necessary to properly determine the prospects of success is available to the Supplier.
12. If after further investigation the prospects of success are poor then Controlled Legal Representation should be withdrawn.
13. The criteria should continue to be reviewed where practicable in advance of the hearing. If therefore, Controlled Legal Representation has been granted in any particular case, circumstances change or new information arises such that the means or merits test is no longer satisfied, supplier should cease to provide Controlled Legal Representation save to the extent of any professional duty owed (including in particular to inform their client, the Home Office and the appellate authority of their ceasing to act). Likewise, Controlled Legal Representation may be granted to a Client previously refused it where further information arises or circumstances change such that the criteria are now satisfied.
14. If the criteria for Controlled Legal Representation are no longer satisfied, then Suppliers should not continue to provide Legal Help to the Client in connection with that appeal except to inform the Client of their situation and rights of appeal. Carrying on the case under Legal Help defeats the purpose of the Controlled Legal Representation merits test.

### **29.23 Refusing or Withdrawing Controlled Legal Representation**

1. From 1<sup>st</sup> October 2007 all Suppliers have Devolved Powers to grant, refuse or withdraw Controlled Legal Representation. Where a Supplier refuses or withdraws Controlled Legal Representation (as the merits of an appeal are not met) they must, in all circumstances, inform the Client of their right of review to an Independent Funding Adjudicator (“IFA”). This must be done in writing and must include information on the time limits for making such an application.

2. The reasons for refusal or withdrawal should be noted on file and form CW4 must be completed. A copy of the CW4 form must be provided to the Client, a copy of which should also be retained on file. This will act as confirmation of the date and reasons for refusal or withdrawal of Controlled Legal Representation . Where requested the Supplier should assist the Client with the completion of the CW4 form and keep them advised of the process throughout.
3. Where following determination by the IFA, an application is successful (and the means test has been satisfied), Controlled Legal Representation will be deemed to be granted. The date of grant will be the date on which a full and properly completed application for review was received by the LSC. Where Controlled Legal Representation has been granted by the IFA, there will be no need for the Supplier to further demonstrate the merits of such an application and the determination of the IFA (which must be retained on file) shall act as confirmation of grant. In these circumstances there will be no need for the Supplier to complete form CW2. The Supplier must however continue to re-apply the merits of the application throughout it's lifetime and where (or if) appropriate withdraw funding.
4. Where a determination is made by the IFA, both the Client and the Supplier who refused or withdrew funding, should be informed of the outcome of the review. The information provided on the CW4 form, and supporting documents, will determine who is informed of the outcome and all efforts should therefore be made to clearly provide all relevant information.
5. A grant of Controlled Legal Representation by the IFA will act as a form of authority irrespective of whether the Client returns to the original Supplier, or seeks to instruct a new Supplier. In the circumstances that the Client decides to instruct a new supplier the "*good reason*" for transfer, under Paragraph 11.69 of the Immigration Specification, will be deemed to have been met. Here it is considered that the Client has reasonable cause to be dissatisfied with the services provided by the first Supplier (Paragraph 11.69 (b)).
6. Where the IFA refuses an application for review, of the grant or withdrawal of Controlled Legal Representation, a Supplier should not continue to provide

advice and assistance in relation to that matter. If following an IFA refusal a Client seeks a second, or further opinion, the Supplier should closely consider Funding Code Procedure Rule B9.1, Paragraphs 2.22 to 2.30 of the Unified Contract and Paragraph 11.69 of the Immigration Specification.

7. Where a Client does not proceed to follow the IFA route, a Supplier should not continue to provide advice and assistance in relation to that matter. Where a new Supplier has established that a Client has not pursued the IFA route (and the case is still within the 5 day time limit, or any extensions to this limit as agreed by National Immigration and Asylum Team, for appealing to the IFA) the Client should be strongly advised to do so. It should be explained that where IFA is a practicable option, work cannot be undertaken until this avenue has been pursued.
8. Where IFA is no longer a practicable option (having consideration for Rule B9.1) and where 'urgent' work is required in relation to an appeal (i.e. to protect the Client's interests or meet a court deadline) funding may be granted by the new Supplier, if it is believed that the merits are unclear and cannot be fully assessed at that time. Here Controlled Legal Representation may be granted (prospects of success unclear) to take all necessary steps, only, and the merits of the case must be re-applied as soon as all facts (to include the previous Suppliers file) are available. If the continued merits of the case are not met then funding must be withdrawn. The time spent re-applying the merits test may be claimed under the existing grant of Controlled Legal Representation (Stage 2a/2b or Hourly Rates).
9. The ability to carry out "urgent" work under Controlled Legal Representation will apply irrespective of whether a review to the IFA is available/appropriate or not. This provision will therefore apply where a Client first instructs a Supplier following a Home Office decision, and the Supplier has not had an opportunity to carry out a full merits test before needing to undertake urgent work. Here again Controlled Legal Representation can be granted to deal with the urgent work only, before carrying out a full assessment of the merits of the case. This must be done at the earliest opportunity.
10. Please note that where the Home Office / Entry Clearance Officer has considered an initial application for which the Client was publicly funded,

Legal Help cannot be granted solely to provide a second opinion on the merits of lodging an appeal. As mentioned above, where a Supplier refuses Controlled Legal Representation on the grounds of merit, the Client must be directed to the IFA route. If the Client refuses to take this route no further advice should be provided under Legal Help – in relation to the same matter.

11. For the avoidance of doubt, paragraph 10 above will not apply in the following situations
  - i) where the Client has not previously received Controlled Work in relation to the same matter
  - ii) a period of more than 6 months has elapsed since Previous Controlled Work was received in the same matter
  - iii) Controlled Work funding in relation to the matter ceased prior to the Home Office decision.

#### **29.24 Funding of Immigration asylum appeals under CLR in Scotland and N. Ireland**

1. Section 19 (1) of the Access to Justice Act prevents the Commission from funding proceedings outside of the England and Wales, save in limited circumstances.

Suppliers should be representing Clients in their own bid zone. If a Client moves/is dispersed a Supplier would need to justify why they believe that a local representative would not be better placed to represent their Client.

#### **29.25 Country of origin bundles**

1. All Suppliers are required to maintain and utilise a generic pack of current material in relation to the country of origin of any Client or Clients on behalf of whom they are providing Controlled Work relating to Immigration Asylum applications.
2. Time spent compiling this pack cannot be claimed. However any time reasonably spent considering its relevance to a particular case and/or

updating it for the purposes of the case can be claimed within the relevant Cost Limit.

3. Many offices deal with asylum applications on behalf of a number of applicants from the same country of origin. Being aware of the background in the country in question will be an important part of advising the Client, presenting their case to the Home Office and advising on the prospects of success of any appeal. However much of this work will be generic for the group and will not need to be duplicated in relation to any individual applicant.
4. Suppliers should therefore prepare and maintain for the benefit of their Clients, relevant packs of country of origin information, which may be examined on audit. The packs should contain information on matters such as the current political situation, government practices and any relevant Asylum and Immigration Tribunal determinations in relation to the country of origin of the Client. The information contained within each pack should be updated regularly and the amount of information contained in each pack is likely to be dependent on the number of Clients Suppliers act for who come from that country.

#### **29.26 Interpreters and Experts**

1. It is recognised that the services of qualified interpreters may form an essential role in the giving of advice and the presentation of a Client's case. Accordingly costs for an interpreter may be claimed where necessary.
2. There have been cases where unscrupulous interpreters and experts have manipulated Clients for financial gain, particularly in the field of immigration law. Therefore the LSC reserves the right to prevent particular interpreters and experts being instructed in relation to Contract Work and may at any time issue Suppliers with a direction in writing that prohibits the instruction of a particular interpreter or expert in relation to Contract Work.
3. The LSC may from time to time specify the maximum rates that it will pay for the services of interpreters and experts, and any accreditation,

membership of a particular organisation or qualification required of interpreters and experts to be instructed by Suppliers.

4. It will usually be appropriate and reasonable to use the services of an interpreter to enable Suppliers to communicate with the Client and take instructions although Suppliers will not require an interpreter at the Asylum and Immigration Tribunal unless the Client is giving evidence.
5. Interpreters cannot however be instructed to attend on a Client in a Suppliers' absence unless Counsel is present.

#### **29.27 Use of local Counsel**

1. Where Counsel is instructed then you should seek to ensure that they are, where practicable, from local chambers near the Hearing Centre where the appeal will take place, unless they do not charge for the travel time or travel costs. Any attempts to secure local Counsel should be clearly evidenced on the file.