



Bar Council response to the Ministry of Justice Consultation on Immigration Legal Aid: A consultation on new fees for new services

About the Bar Council

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice consultation paper "Immigration Legal Aid: A consultation on new fees for new services."¹
2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Overview

4. The Bar Council welcomes the commitment in the consultation response to ensuring that legal aid practitioners are adequately remunerated for the immigration

¹ <https://www.gov.uk/government/consultations/immigration-legal-aid-a-consultation-on-new-fees-for-new-services/immigration-legal-aid-a-consultation-on-new-fees-for-new-services>

and asylum work that they do, as well as the recognition that the availability of legal aid funding is a key component in ensuring the fairness of the immigration system.²

5. This response should be read in conjunction with the Bar Council and One Pump Court joint response to the Call for Evidence into the Immigration legal aid fees and the Online system in December 2021.³

6. The junior self-employed Bar plays a vital role in ensuring effective representation in asylum and human rights appeals in the First-tier Tribunal (Immigration and Asylum Chamber), as well as in onward appeals to the Upper Tribunal and above and in judicial review proceedings. The focus of the Bar Council's response is therefore on Part One of the Consultation and the proposal to shift to a new system of fixed fees for appeals in the First-tier Tribunal ('FTT'). We also address the proposals around legal aid for the new appeals to the First-tier Tribunal in age assessment cases. The remainder of the proposals concern work for which counsel is not ordinarily instructed and we express no specific view on the proposals (save to the extent that our general points about the adequacy of the hourly rates are equally applicable here).

General point: the hourly rates for Controlled Work in Immigration and Asylum matters urgently need to be reviewed

7. There is a pressing need to review the level of remuneration for Controlled Work in Immigration & Asylum matters including work which is paid as Controlled Legal Representation, whether on the basis of fixed and escape fees or hourly rates. The fixed fees are calculated on the basis of hourly rates which are woefully inadequate. These hourly rates have not been increased for many years.⁴ They are significantly lower than the basic hourly rates applicable to certificated work (which now includes appeals to the Upper Tribunal), for which (unlike in most Controlled Work matters) enhancement of up to 100% is at least available on the basis of the complexity, urgency and/or importance of the issues.

8. Asylum and human rights appeals are often complex. The matters at stake could not be more important and it has long been recognized that they require the highest standards of fairness. Even experienced instructing solicitors frequently seek counsel's input at an early stage of an appeal, and counsel are often closely involved in preparation of witness statements and other evidence, including expert evidence. It

² See e.g. the Foreword to the Consultation Paper and §1 of the Executive Summary

³ <https://www.barcouncil.org.uk/asset/3DEAFDCD-4835-417C-912C63587590A967/>

⁴ The current hourly rates are contained in Part 2 of Schedule 1 to the Civil Legal Aid (Remuneration) Regulations 2013 (SI 2013/422) and have not been changed at least since those Regulations were introduced in April 2013.

is usually necessary to have a conference before a substantive asylum appeal hearing and extensive preparation will be required of counsel.

9. This involvement of counsel has increased with the introduction of the Online Procedure with counsel being instructed in many appeals to prepare the Appeal Skeleton Argument (ASA) and advise on evidence at an earlier stage of proceedings than has previously been the case. This early involvement of counsel is in the interests of fairness and efficiency. The purpose of the ASA is to give the Home Office a proper opportunity to review the case before the hearing and thus allow it to reconsider its decision, in light of the evidence and arguments relied on in the appeal. If the review system works as it should, a well-drafted ASA and appeal bundle would mean that more appeals were resolved at an earlier stage, thus saving the expenditure of public funds and court time. There is therefore an economic benefit in involving counsel at an early stage under the Online Procedure.

10. The fixed fee for advocacy for a substantive hearing in an asylum matter is set at £302 (£237 for immigration matters) which is equivalent to approximately 5.75 hours' work at the hourly rate applicable in immigration and asylum escape fee cases for advocacy. Before the introduction of hourly rates for asylum appeals in October 2020 it was not uncommon for counsel to only receive the advocacy fee in a case which did not escape the fixed fee threshold. Given the low level of the fixed fee payable to providers for preparing a full asylum appeal, and the likelihood that they would have done significantly more work than this would adequately remunerate, this was unsurprising. The result that was for a full asylum appeal hearing, often involving many hours of preparation, calling for considerable expertise, and in which the issues at stake could not be higher, counsel might only be paid £302.

11. Even in cases which escape the fixed fee or are paid at hourly rates, the hourly rates are now unconscionably low given the importance of what is at stake in these matters. They are not capable of ensuring that counsel are adequately, or appropriately, remunerated for this complex and important work. Unlike in higher court work, legal costs are rarely awarded by the First-tier Tribunal to a successful appellant, meaning that counsel cannot counter balance the low legal aid rates with the prospect of recovering higher *inter partes* rates in successful appeals. Although there is some privately paid work available, very little is paid at commercially viable rates. The current cost of living crisis only aggravates the problem in the context of rates which have not been increased for many years (so in real terms have decreased). There is thus a significant risk that without upward adjustment of the hourly rates, it will become – and indeed may already be – unaffordable for many junior counsel to continue to undertake this work, despite a strong commitment to it at the specialist immigration Bar. They must be urgently reviewed to avoid specialists with real expertise leaving this area of work.

12. The level of the hourly rates at which counsel are paid in the First-tier Tribunal is of further concern given the introduction of a new appeal right in age assessment cases. There is a real risk that counsel who have developed expertise in judicial review work in this field will no longer be willing to work at the significantly lower rates payable in the First-tier Tribunal and without the likelihood of recovering *inter partes* fees if successful. This risk is further addressed below.

Question 1: do you agree with our proposals for new fixed fees for asylum and non-asylum appeals? If no, please explain why and suggest an alternative

13. No. The Bar Council considers that the system of paying hourly rates for work done in appeals is more likely to lead to counsel (and providers) being adequately – and promptly - remunerated for the work done in these complex and important cases.

14. The Impact Assessment accompanying the consultation paper indicates that there is expected to be no net saving from moving from hourly rates to fixed fees. However the Bar Council is very concerned that counsel will lose out significantly in cases which do not escape the fixed fee, including because providers will revert to the previous practice of only paying counsel the advocacy fee, even where counsel does substantial preparation work.

15. Junior counsel are frequently instructed to draft the ASA. This is a key part of the online procedure which is designed to ensure that the Home Office has early notice of the evidence and arguments and to encourage resolution of appeals before the hearing. In practice, it is often necessary to draft a further skeleton argument for the appeal hearing, whether because further evidence has been obtained,⁵ the Home Office review has raised new issues, or because of the passage of time. More fundamentally the purpose of the ASA (to identify the issues in the appeal and encourage early resolution without a hearing) is fundamentally different to that of the hearing skeleton argument (which is to assist the presentation of oral argument and guide the Tribunal through the issues and evidence as at the date of the hearing).

16. Even where a further ASA is not required, the passage of time between the stage at which the ASA is filed and the final hearing, means that often different counsel will be instructed for the hearing and in any case, counsel will need to effectively reacquaint themselves with the case in order to prepare for the hearing.⁶

⁵ Indeed we are aware recently of cases where an updated ASA has been directed at the Case Management Hearing to take account of further evidence (often country or medical expert evidence) obtained since the ASA was originally drafted.

⁶ See the 1 Pump Court and Bar Council Joint Response to the Call for Evidence referenced above for further explanation of the work required of counsel in preparing for the

17. It is essential that counsel are able to be paid fairly for this work whether or not the matter proceeds to a substantive hearing or escapes the fixed fee. The Bar Council is concerned that a move back to fixed fees will make it even harder for counsel to obtain payment of a fair fee for this work in cases which do not escape the fixed fee. In particular, we are concerned that counsel may not be able to be paid fairly in cases which do not reach a substantive hearing, in which the providers are only paid the revised 2(a) fee, or where different counsel are ultimately instructed for the substantive hearing to the counsel who drafted the ASA (as will often be the case given the long periods of time which may elapse between the preparation of the ASA and the final hearing). Paying fixed fees for remuneration of preparation in appeals will at best put providers and counsel in the difficult position of having to agree the division of the fixed fee between them, in circumstances where they may have done (under the proposed new escape threshold) up to twice as many hours as the fee will compensate for. The Bar Council is concerned that in practice it is counsel who will lose out, and this important work will not be financially viable.

18. When the previous “2(c)” fixed fee for online procedure appeals was introduced in June 2020, twenty chambers whose members specialized in immigration and asylum cases issued a statement indicating that *“Other than in exceptional circumstances, each member of the immigration team of the chambers listed below will not accept instructions under the ‘Reform Procedure’ to prepare an ‘Appeal Skeleton Argument’, unless specific provision is made for that work to be adequately remunerated.”*⁷ They did so because the new 2(c) fee made no provision for counsel to be remunerated for drafting the ASA in a case which did not go to a hearing and it was evident that the fee was not adequate for providers to be able to share this fee with counsel in cases which did not reach the escape threshold.⁸ We recognize of course that the new proposed fixed fee is considerably higher, has taken account of the additional work involved in drafting an ASA under the Online Procedure, and that the escape threshold is being changed. However, there remains real concern that the reintroduction of fixed fees *in itself will* cause similar problems for counsel who accept instructions to draft an ASA in a case which does not go to a hearing, or in which they are not instructed for the hearing.

19. A further concern arises because the need for providers to submit an escape claim and have it assessed by the Legal Aid Agency can result in delay in making

substantive hearing in an Online Procedure case:

<https://www.barcouncil.org.uk/asset/3DEAFDCD-4835-417C-912C63587590A967/>

⁷ <https://www.onepumpcourt.co.uk/news/one-pump-court-issues-joint-statement-with-19-chambers-relating-to-legal-aid-changes-in-the-first-tier-tribunal/>

⁸ See also the [statement](#) issued by the Bar Council on 18 May 2020 supporting ILPA’s [statement](#) of the same date.

payment to counsel of anything above the fixed advocacy fee. It is particularly difficult for junior counsel to manage long delays in payment when the basic rate of pay is so low. We are concerned that this will adversely affect junior barristers who are not from privileged socio-economic backgrounds and who may be paying off significant student debt. It may particularly affect counsel of certain genders and ethnic minority backgrounds who typically earn less than their counterparts. The Bar Council's November 2021 report on diversity at the Bar has detailed the comparative difficulty that individuals from ethnic minority backgrounds and women find in earning potential and in pursuit of careers at the Bar: 'Data in the report categorically and definitively evidences, in quantitative and qualitative terms, that barristers from all ethnic minority backgrounds, and especially Black and Asian women, face systemic obstacles to building and progressing a sustainable and rewarding career at the Bar'

20. The Bar Council also considers that it is too early to reintroduce a fixed fee for immigration and asylum appeals. It is only just over 2 years since the online Procedure was rolled out to all immigration and asylum appeals, and less than 2 years since hourly rates were introduced. Given the delays in the appeal system we are concerned that the decision may be being taken on an insufficient data sample and in particular that the data (which is assumed to be from cases which have been closed rather than the more complex cases which are ongoing) may be skewed towards more straightforward cases which may have been resolved more quickly.

21. In our joint response to the Call for Evidence submitted with One Pump Court, we indicated that counsel's experience is that the time taken to prepare an ASA varies greatly depending on the nature and complexity of the issues in any given appeal. Our evidence was that it could take between 3 hours (for unusually simple cases) and 30 hours (for unusually complex ones). The Bar Council is concerned that given this huge variation in the time taken, applying a fixed fee calculated on the basis of a limited data sample from the early stage of adoption of a new procedure will result in an underestimate of the time that it is likely to take.

22. For these reasons the Bar Council is opposed in principle to the reintroduction of a fixed fee for preparation of immigration and asylum appeals. Even if the MOJ remains of the view that a fixed fee is appropriate, it should not be introduced until more time has elapsed and a more robust data set can be obtained to inform the level of the fixed fee.

Question 2: do you agree with our proposal to change the escape fee threshold? If no, please explain why and suggest an alternative.

23. Yes. If, contrary to the Bar Council's primary position above, fixed fees are reintroduced for asylum appeals at the levels proposed in the consultation paper, the proposal to change the escape fee threshold to twice the fixed fee will mitigate the risk

of counsel not being paid adequately for their work, because it will reduce the number of cases in which the value of work done exceeds the fixed fee but does not reach the escape threshold.

Question 3: do you agree with our proposal to change the escape fee mechanism? If no, please explain why and suggest an alternative.

24. Yes. We understand from conversations with legal aid providers that decoupling the Legal Help escape assessment will enable them to be paid earlier and therefore increase the sustainability of immigration legal aid practice.

Questions 4-7:

The Bar Council does not anticipate that counsel will be instructed for work covered by these proposals and therefore does not address them here.

Question 8: do you agree with our proposal to have age assessment appeals sit within immigration, public and community care categories of law? If no, please explain why and suggest an alternative.

25. Yes. We acknowledge that this proposal does not directly impact upon the Bar because barristers will be instructed in these cases by solicitors with the relevant expertise, whether they have an immigration, public or community care contract. Currently, it will be public and community care solicitors that have the expertise in dealing with age assessment cases because those are the solicitors that have, to date, had contracts to do this work. We are conscious that this is a particularly vulnerable client group. However, we do not consider that immigration solicitors should be prevented from taking on this type of work if they wish to do so, subject to those immigration practitioners ensuring that they have sufficient skills and knowledge to conduct these cases competently. We consider that it will be important that immigration solicitors who are new to this area continue to draw upon the expertise of specialist counsel with experience in dealing with age assessment disputes.

Question 9: do you agree with our proposed approach to remunerating age assessment appeals? If not, please explain why and suggest an alternative.

26. No. We support the proposals to pay hourly rates for this work, but the rates for counsel should match the rates contained in Schedule 2 of the Civil Legal Aid (Remuneration) Regulations 2013. That approach would reflect the fact that this is specialist work which ought to be remunerated at legal aid rates paid to barristers in High Court and Upper Tribunal cases. Barristers who are experienced in age assessment cases will currently be paid at standard legal aid rates for community

care/public law judicial review cases.⁹ The proposed hourly rates for preparation and attendance, advocacy and travel and waiting time are lower than those currently paid to barristers doing age assessment cases in the High Court. It is not clear from the proposals what rate will be paid to counsel for a conference (the only hourly rate listed is for attendance by a solicitor at a conference). We presume counsel will be paid for conferences at the preparation fee. The largest disparity in the rates is that for counsel's preparation and attendance - proposed rates of £55.08 (London) and £51.53 (non-London) compared to £71.55 (London) and £67.50 (non-London) currently paid for cases in the High Court or Upper Tribunal. This constitutes a pay cut of around 23%. The reduction in the proposed advocacy rate is lower, around 7%. However, it is important to bear in mind that these are reductions on the base rates payable. Counsel can claim up to a 100% enhancement on standard legal aid rates in age assessment judicial review cases (that enhancement being available in the High Court and the Upper Tribunal, as well as the Court of Appeal and Supreme Court).¹⁰ There is a real risk that community care and public law barristers, with experience in age assessment cases, will choose not to undertake this work in the First-tier Tribunal (or do less of it) and focus their practices on other areas of community care/public law that remain remunerated at standard legal aid hourly rates where an enhancement may also be claimed. If this were to happen, it would constitute a loss of expertise and skill that would be to the detriment of the clients. This would be particularly concerning if immigration solicitors without age assessment experience were to take on these cases because we consider that they would need the support of counsel with the relevant expertise.

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⁹ See Schedule 2 of The Civil Legal Aid (Remuneration) Regulations 2013

¹⁰ See regulation 6(3) of The Civil Legal Aid (Remuneration) Regulations 2013