



Bar Council response to the Legal Aid Agency's consultation on the Amendments to the Standard Civil Contract (Immigration) 2018.

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Legal Aid Agency's consultation on the Amendments to the Standard Civil Contract (Immigration) 2018.
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.

Response

4. The Bar Council welcomes the decision to pay for work done on appeals proceeding in the First-tier tribunal under the new online procedure by hourly rates. However, we have two main concerns about the proposed contract amendments.

Concerns about the proposed contract amendments

5. First, we share the concern raised by LAPG and ILPA as to the need to clarify whether the changes apply retrospectively to appeals commenced under the online procedure before the amendments to the Remuneration Regulations. We agree with LAPG that the only equitable approach, and the one which will be administratively more convenient for both the LAA and practitioners, is to apply hourly rates to all cases started under the online procedure. If this approach is adopted, then allowance

will need to be made in respect of costs limits, for cases started before the contract changes.

6. Second, we are concerned, and surprised, by the decision to exclude advocacy services from hourly rates under the online procedure. The letter from the Government Legal Department to Duncan Lewis Solicitors of 4 August 2020 stated “The Lord Chancellor has also decided to make a temporary amendment to the 2018 Standard Civil Contract for immigration and asylum appeals lodged online using the First-Tier Tribunal’s new ‘Core Case Data’ platform and for cases where parties are directed by the Tribunal to have their appeal dealt with online, which will be remunerated on an hourly-rates basis.” The proposed amendment does not propose to remunerate advocacy on an hourly-rates basis which appears in direct contradiction to the Government’s stated intention. We do not understand the rationale for this decision. The decision is aggravated by the fact that the proposed amendments to the contract appear to mean that in a case under the online procedure, advocacy services can *never* be paid at hourly rates and advocates will only be paid a maximum of the standard fee of £302 for the first day a hearing is listed (£237 in an immigration matter), and £161 for the second and any subsequent day.

7. That means two lengthy days of advocacy in a complex asylum appeal trigger payment of £463, and for immigration £398. It also means a hearing adjourned on the day of the substantive hearing, then relisted, will only attract the ‘additional substantive hearing’ fee, irrespective of complexity and the duration of the hearing. So, a complex asylum or immigration hearing that lasts a whole day will trigger payment of £161.

8. If this is the intention or the effect of the amendments, we believe this will make legal aid funded advocacy services unsustainable for the vast majority, particularly those self-employed junior barristers whose practices depend on the sustainability of publicly funded First-tier Tribunal work.

9. The problem appears to us to arise from the interplay between a number of provisions in the contract and the Remuneration Regulations. We appreciate that, as has been acknowledged, these changes are complex and it may be that this effect was not intended. We look forward to working with the LAA to identify a workable solution.

10. The following provisions of the proposed contract amendments are the cause of our concerns:

- New §8.81(o) which excludes advocacy under the online procedure from hourly rates.
- New §8.84(d) which excludes advocacy services from any escape fee calculation where they are paid as an additional fee.
- The amendments to §§8.77 and 8.78 which provide for the escape fee payable to be calculated at the conclusion of stage 1 where the matter proceeds under hourly rates at stage 2.

11. It should be recalled that the definition of ‘advocacy services’ in the Remuneration Regulations is broad. Reg 2(2) states that:

“advocacy services” means work done —

- (a) by an advocate at a court hearing;
 - (b) by an advocate, as such, in connection with an advocates’ meeting;
 - (c) by counsel in connection with a conference; and
 - (d) by counsel in connection with an opinion,
- and fees and rates for advocacy services include, unless different provision is made in these Regulations, remuneration for preparatory work, attendances, travelling and waiting in relation to those services;

12. Thus it appears that where counsel is instructed to attend a hearing, they can only be paid a maximum of the additional fee for advocacy no matter how long the hearing lasts (up to 1 day), how far they have to travel, how long they wait at the hearing, or how much time they spend preparing for the hearing, including attending on the client in conference or preparing an opinion.

13. We understand from clarification helpfully provided by the LAA that it is intended that if counsel drafts the Appeal Skeleton Argument under the online procedure, they will be paid for this work at hourly rates. It is also suggested that preparation would be paid at hourly rates. However it is not clear which is the clause in the fee scheme which states this, or where the demarcation lies between work that is classed as preparation of the appeal, and so payable at hourly rates, and work which is classed as preparatory work for the hearing, and so payable as part of the standard fee for advocacy services. This must be clarified by the LAA so as to reduce the risk of confusion and misunderstanding on the part of providers and counsel.

14. However, even with that clarification, the apparent absence of any possibility of a case escaping the standard fee for advocacy is deeply concerning and problematic. If the standard fee is supposed to remunerate counsel for travel, waiting, attendances and preparatory work as well as the hearing itself, there must be provision for escape fees. This need is underlined by the fact that appeal hearings are not infrequently

adjourned at the hearing, either part heard or because one or other party is not ready to proceed. The fee for the second or subsequent hearing day of a hearing is even less.

15. This also limits the scope for counsel to be remunerated adequately in cases where it is accepted the complexity and time needed for preparation is such that an hourly rate is appropriate. The amendments prevent hourly rates being paid on an escape fee basis for all of the work undertaken by counsel, unlike before. They also make it more difficult for solicitors and legal representatives to hit the escape fee threshold. Far from being the positive change that was intended, this wording puts counsel in a worse and less sustainable position than before.

Bar Council

1 September 2020

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