Bar Council and One Pump Court joint response to the Ministry of Justice Call for Evidence into Immigration legal aid fees and the online system

About us

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Scope of response

This submission has been drafted jointly by the Bar Council and One Pump Court. The following addresses questions 1 to 15 posed in the call for evidence published by the Ministry of Justice on 4 November 2021.[1]

DIFFERENCES BETWEEN THE ONLINE SYSTEM AND THE PROCESS PRIOR TO THE ONLINE SYSTEM

1. What do you consider to be the key differences between the online system and the paper-based process in place prior to the introduction of the online system?

The online system has changed the process which takes place in advance of the substantive appeal. In theory, at least, it has incorporated a 'review' stage into the procedure, so that the Respondent can take a view on whether to proceed to a full substantive hearing once all of the evidence has been obtained and legal arguments presented.

Whilst in principle there is potential for the online system to assist in having decisions reviewed and issues streamlined, the impact of the new changes rests largely on the level of engagement of both parties. Unfortunately, due to what is often a lack of

[1] https://consult.justice.gov.uk/digital-communications/immigration-legal-aid-fees-online-system/

proper engagement on the part of the Respondent, the new system generally fails to fulfil that potential.

It is often the case either that the review does not take place or that it takes a substantial amount of time to complete (often well beyond the 14 days set out in the general directions). In general, the review process often results in barely reasoned review decisions which have not materially engaged with the Appeal Skeleton Argument (ASA) or the evidence, and still less with any legal submissions made in the ASA. This therefore makes little difference in terms of outcome, apart from building in delay (which in turn can result in the need for new and updated evidence by the time an appeal comes to hearing) and increasing costs.

As for the substantive hearing itself, our experience is that the Respondent's representatives are often less prepared than previously and are routinely requiring further time to read documents which should have been available for a long time. There appear to be difficulties in both the Tribunal and the Respondent linking documents to files.

The negative experiences can be compounded when the online system is combined with remote hearings. Defects which would normally be simply resolved (such as missing documents which require to be shown to opponents and/or witnesses) are far more difficult to solve. And difficulties in linking documents to files seem to result in long waits at the start of hearings, while documents are forwarded electronically to Home Office representatives or Counsel, who then need time to read them. These problems are aggravated by the fact that the Home Office email system appears not to be adapted to enable reception of large attachments.

Barristers have seen exceptions (mainly in the period up to Spring 2021, but seemingly far less thereafter) where the Respondent has engaged with an ASA and narrowed or clarified issues or withdrawn and reversed a decision at the review stage. These exceptions show that the system can provide advantages if properly worked. As set out below, however, any such review decisions which do not result in the immediate resolution of an appeal are likely to require considerable further work (effectively a two-stage preparation process in advance of an appeal), which is not adequately remunerated.

2. For each of the differences identified in answer to Q1, what do you consider to be the impact of those differences on your work?

From the perspective of Counsel for Appellants, the changes brought in by the online system have meant that ASAs are drafted at an earlier stage, to be served alongside the Appellant's bundle for the Respondent to carry out a review.

A review process follows the ASA where the Respondent indicates whether the decision will be withdrawn or whether the Respondent wishes the appeal to continue to a substantive hearing.

If the matter will continue to appeal the Respondent is required to provide a review decision setting out responses to the points made in the ASA. On the occasions when a response of any substance is provided, it will generally require a follow-up piece of drafting (a supplementary skeleton argument or supplementary submissions) in order to respond to points made in the review process. In addition, it is often the case that further evidence and a supplementary bundle is required, either in order to deal with points raised in the review decision, or simply to update the evidence, as necessitated by the delays caused by the review process. The need for updates can be most pronounced in cases relating to children or people with specific vulnerabilities such as serious mental illness, where individual circumstances change, and it is particularly important for the tribunal hearing an appeal to have the most up-to-date evidence before it. From the point of view of Appellant's Counsel, advice is necessary in respect of this further evidence which is required before the substantive hearing takes place.

As set out above, whilst the online system seeks to refine the process and narrow the issues, this really depends on the engagement of the parties.

The Bar's general experience (for which see also further below) is that the front-loaded nature of the online system process is requiring that, if Appellants truly engage with the process, they will inevitably duplicate work (because in effect their advocates need to prepare for hearings twice, because of the length of time between the ASA stage and the substantive hearing). Further, the online system is shifting the burden of work very significantly on to Appellants. One example is that Respondents now frequently do not provide bundles at all or provide bundles containing only a few pages of documents. We have seen a tendency for the Tribunal, rather than requiring the Respondent to compile an adequate bundle which contains all of the material upon which she relies in asking the Tribunal to uphold her decision, to simply require that everything be prepared by an Appellant.

One specific example, showing the potential for the review system to create further unnecessary work relates to an occasion where the Respondent raised an 'additional' issue in a review which had not been taken within the Refusal letter. The additional issue related to the provenance and reliability of DNA evidence (despite open-source evidence showing that the DNA test laboratory was in fact accredited). In this case, further work was therefore necessary to obtain evidence to show that the Respondent was in error despite this matter never having been in issue previously. Submissions were made at the substantive hearing itself which led to the Respondent withdrawing that 'additional issue' from the schedule. The quality of decision-making is therefore

crucial to ensure that the online system is fit for purpose and does not unnecessarily generate more work.

Another example, which shows the potential of the process to create undue delay, relates to a case involving a very vulnerable Appellant with complex post-traumatic stress disorder (PTSD). The First-tier Tribunal (FTT) directed the Respondent to review the case on three separate occasions at 3 Case management review hearings (CMRH's). A review letter was only received on the day before the final CMRH, with the Respondent stating that they continued to rely on the refusal letter and that the expert psychiatrist involved was 'entitled to his opinion'. This appeal was ultimately successful on appeal, and arguably could have been dealt with far sooner if the Respondent had not been responsible for such prolonged delay. In terms of the professional obligations to ensure appropriate representation of extremely vulnerable Appellants and witnesses, and the accommodation which this requires, this potential for prolonged delay and distress and harm to Appellants also impacts on the workload of Counsel and solicitors.

3. Please explain how case management review hearings were used prior to the online system, and how they are being used as part of the online system.

Case management review hearings (CMRH's) now take account of the review process, there is an attempt to outline the matters in dispute for the hearing in an agreed 'schedule of issues', so that the parties are clear in advance about the scope of the substantive appeal.

On occasion the Respondent has been invited to indicate at the CMRH stage whether they raise any issue with the qualifications or experience of experts that have provided reports served within the Appellant's bundle. Whilst in principle it would assist to have that established at the CMRH stage, it is often the response of the Respondent that such a position cannot be confirmed at that stage. Again, the quality of preparation on the part of the Respondent has the potential to undermine the usefulness of the CMRH within the online system.

THE APPEAL SKELETON ARGUMENT

4. Please explain whether, and if so, at what stage appeal skeleton arguments were used prior to the introduction of the online system.

From the perspective of Counsel for Appellants, skeleton arguments were ordinarily served on the morning of the appeal hearing, or very shortly before. The skeleton arguments previously prepared by Counsel did not follow the pro forma directions set out by the Tribunal, and as such often included excerpts of the relevant statute, case law and policy guidance.

Many Counsel still provide a skeleton argument on the day of the hearing, to supplement the appeal skeleton argument (ASA) in light of the review decision, and in order to draw the Tribunal's attention to matters of legal precedent which may not be included within the ASA, due to directions to keep the ASAs short and succinct. It is our experience that First-tier Tribunal judges welcome these more detailed submissions and that, therefore, the advice about the contents of ASAs, if loyally followed, results in skeleton arguments which are of insufficient assistance to the judges who hear substantive appeals.

5. What do you consider the role of the appeal skeleton argument to be under the online system?

The online system has meant that an ASA is served alongside the bundle. The role is intended to be to draw the Respondent's attention to the law and evidence which supports the Appellant's case, with a view to inviting the Respondent to withdraw the negative decision before the substantive hearing takes place. The ASA also seeks to narrow the issues on appeal by seeking agreement about what is in dispute by way of a schedule of issues.

In reality, therefore, ASAs are directed as much at the Respondent as at the FTT: they aim particularly to focus the Respondent's mind on matters which, it is hoped, will lead to concessions about the whole of an appeal, or significant elements of it. Our experience is that if these matters are not foregrounded in this way, the Respondent does not take them into account on review. The result, however, is that, in order to function at the 'review' stage, ASAs are likely to be lopsided, concentrating on those points where it is hoped that the Respondent may concede.

This, together with the need to update submissions following any review which in fact properly engages with the issues, and with the need to provide updating submission about any fresh evidence (see above) means that ASAs routinely need to be supplemented by a later piece of written work.

6. Do you have evidence of any instances under the online system in which an appeal skeleton argument was not required or was not produced? If yes, please summarise your experience and explain why an appeal skeleton argument was not required/produced

Our experience is that they are always required and always produced.

7. Can you describe whether, and if so, how, an appeal skeleton argument under the online system differs between asylum and non-asylum immigration cases?

The general approach to ASAs in asylum and non-asylum (i.e. human rights or EU law) cases does not differ, save for the fact that the contents of the cases are different. Many asylum cases are also brought on human rights grounds and therefore include evidence and analysis relating to 'non-asylum' matters; many human rights claims include references to expert evidence, best interests assessments, evidence about factual disputes, assessments of risk, and so on, just as many asylum claims require assessment of expert and country evidence, together with submissions about factual disputes.

In legal terms, while a proportion of human rights appeals will focus on showing that a person meets relatively rigid inclusion criteria under Appendix FM (which themselves may require reference to a large amount of evidence), these are far outnumbered by appeals which require the courts to be addressed either in the alternative or exclusively on complex matters of judgment (insurmountability, reasonableness, undue harshness, 'very compelling circumstances', 'very significant obstacles', and so on), all of which are the now the subject of a huge range of caselaw at all levels of the courts and tribunals. Human rights cases involving the best interests of children, physical or mental disability or illness, and criminality or other forms of alleged misconduct are routinely particularly complex, and in our experience, they represent a high proportion of human rights appeals.

Similar issues of vulnerability, best interests, and alleged misconduct, of course arise routinely in asylum appeals, together with submissions about why a case falls within or outside relevant 'country guidance', expert and country evidence about country conditions, detailed submissions about the assessment of credibility of events taking place in other countries, and so on.

Furthermore, some cases may begin as 'non-asylum' cases, and then develop evidentially or legally so as to require an application to amend the grounds of appeal to include asylum grounds. One example is a human rights appeal based upon Articles 3 and 8 ECHR, which included a 900-page bundle, country experts, psychologist report, psychiatric report and medical records. Grounds of appeal were amended to include asylum following a decision made by the Upper Tribunal that mental health could engage the Refugee Convention.

ASAs in both types of cases must set out the issues in dispute, the evidence which supports the Appellant's case, responses to the Respondent's Refusal letter, and legal arguments which support the Appellant's submissions.

In terms of substantive appeals both asylum and non-asylum cases will require judicial findings on the evidence presented at appeal. In our view, the quantity and complexity of work undertaken in competently prepared asylum and human rights appeals is materially the same.

8. How long (in hours) does an appeal skeleton argument take in asylum/non-asylum cases? Do you have examples/evidence to support this?

There is no material distinction in terms of timing and preparation of ASAs for asylum and non-asylum cases. Both areas of work have the potential to be highly complex, with reference to large amounts of evidence (including expert evidence) and substantial legal analysis/arguments.

What determines the time taken for the preparation of either of these cases is (i) the complexity of the subject matter (ii) the number of issues in dispute between the parties (iii) the volume of evidence necessary to make the Appellant's case, and (iv) the existence and/or extent of necessary complex or novel legal arguments.

In our experience, the lengths of time taken for the preparation of ASAs (including preparation and drafting) vary between 3 hours (for unusually simple cases) and 30 hours (for unusually complex ones).

9. **Anecdotally we understand that the requirement for an appeal skeleton argument may have resulted in Counsel being more routinely instructed in appeal cases. What are your views on this understanding**?

The Bar is not aware of a general rise or fall in instructions for appeal hearings since the introduction of the online system. However, we are not best placed to judge this and have not collected data. What is clear is that barristers are more routinely instructed at *earlier stages* in the appeal cases where we are instructed.

10. Can you describe whether, and if so, how, an appeal skeleton argument under the online system differs between cases that result in a substantive hearing and cases that do not? Please also comment on whether this differs between asylum and non-asylum cases that result in a substantive tribunal hearing

We do not consider that the contents of an ASA are affected by whether a case goes on to a substantive hearing or not. The question seems to us to be the wrong way round: ASAs are normally required at an early stage in proceedings, when it is assumed that the case will proceed to a substantive hearing.

If the system worked properly, then no doubt the more work was done at the stage of the ASA, the greater the likelihood of avoiding a substantive hearing (and the remuneration system should of course reflect this).

We have already indicated that cases which result in a meaningful review, but no withdrawal by the Respondent, are likely to result in the need for a supplementary skeleton argument or supplementary written submissions.

The approach within an ASA does not materially differ between asylum and non-asylum cases; nor is this affected by the question whether an appeal proceeds to a substantive hearing or not.

TRIBUNAL HEARINGS

11. Do you consider that the introduction of the online system has had an impact on the work necessary to prepare for a substantive hearing? If so, please explain how and why

In many circumstances a follow up piece of drafting is necessary in order to respond to points made in the review process. On occasion further evidence is required before the substantive hearing takes place.

In some circumstances the length of time taken to prepare the review and await the Respondent's review decision may mean that by the time the matter proceeds to a full substantive hearing some evidence is out of date. This is particularly the case in respect of medical evidence, and objective evidence on country conditions. Further work may therefore be necessary in advising on obtaining addendum reports and additional evidence before the substantive appeal hearing takes place.

From a human point of view, any substantive hearing necessarily requires full preparation shortly before it takes place: barristers like anyone else will forget details, lose their familiarity with bundles and country and expert evidence, and lose the sharpness of preparation as weeks go by. The practical result of this is that, however much work is done on an ASA, if weeks or months pass between a skeleton argument and a hearing, it will be necessary to return to the bundles in detail shortly before the hearing. When skeleton arguments were prepared shortly before a hearing, work on the skeleton argument and work on preparation for a hearing were essentially the same, or significantly overlapped. With the long gaps between an ASA and a hearing, it is essentially necessary to prepare for a hearing twice.

A further issue which appears to arise in online system cases is that relatively simple matters (like applications for extensions of time, or requests for service of a

Respondent's bundle) seem to be more complex, and to result in slower responses from the Tribunal.

12. Do you consider that the introduction of the online system has had an impact on what happens on the day of the substantive hearing itself? If so, please explain how and why

In principle, the online system could result in a narrowing of issues and greater focus on the day of the substantive hearing. As we have explained above, in our experience this is very much the exception rather than the rule.

In practical terms, it is the experience of some barristers that frequently the Judge and Respondent have not seen any papers at all before the hearing, despite the bundles and ASA having been prepared and uploaded weeks earlier. This causes delays and adjournments (including knock-on adjournments because of overloaded lists) on the day of the substantive hearing.

IMMIGRATION LEGAL AID FEES

13. Please provide evidence as to whether the previous controlled legal representation fee structure of stage 2a and stage 2b payments based on whether a case went to a hearing, would be suitable for asylum and immigration appeals using the online system?

We are not of the view that the previous CLR fee structure of Stage 2a and 2b payments was suitable for this work..

The previous fee structure also did not allow for consistency in terms of payment of Counsel's fees for drafting the ASA. In circumstances where that ASA would be successful and lead to a withdrawal decision, there was no provision for the payment of this work unless the case had already met the escape claim fee threshold. Similar issues occurred if Counsel had to return the hearing to another barrister after having drafted the skeleton argument. This led to the risk that it would not be financially viable for Counsel to undertake work drafting ASAs.

Further information regarding the position set out by Appellant barristers in relation to both the previous fee structure and the fee structure *originally* introduced along with the OS can be found at the joint statement dated 21 May 2020: [2]

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

14. Please describe what type of work you consider to be remunerable under the 'additional payments for advocacy services: substantive hearing' and 'additional day substantive hearing' fees.

We are of the view that in each case these categories cover only the costs of travel, waiting, attendance at court and advocacy directly incurred on the day of the hearing, Prior preparation for a hearing – including advice on evidence, drafting of written arguments, conferences with lay and professional clients in advance of the hearing and preparation of oral submissions – needs to be remunerated separately and at hourly rate.

PUBLIC SECTOR EQUALITY DUTY

15. Please provide evidence on the protected characteristics and socio-demographic differences of individuals who are using the online system, both legal aid clients and legal aid providers, including instructed Counsel?

We do not consider that the online system has led to any change in the approach to instruction of Counsel for substantive appeal hearings.

ADDITIONAL EVIDENCE

Given the relatively short period of time in which the online system scheme has been running, as well as general impact on our work due to the Covid-19 pandemic, it may be premature to form any firm conclusions as this juncture without further opportunity to observe the impact of the changes on our work. It is difficult to separate the impact of the online system scheme from the impacts of COVID restrictions. We would welcome a further consultation to feed back on the online system at a later stage.

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