

Immigration Legal Aid Consultation on new fees for new services – A Summary

The Consultation

On 13th June 2022, the Ministry of Justice (MOJ) opened a consultation on the introduction of proposed new fees for Immigration legal aid work. The consultation, which was expected, has been launched due to changes to immigration legal aid made by the introduction of the Nationality and Borders Act, as well as changes to the way immigration legal aid services are delivered as a result of HMCTS' Reform Programme, i.e. the use of the Tribunal's online appeal system MyHMCTS.

Details of the consultation can be found here:

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

It has been sent to all representative bodies for comment and the MoJ welcomes feedback from individual practitioners.

We recommend that all legal aid practitioners, both current and prospective, consider these proposals carefully and how they may impact their legal aid practice.

Summary

There are two main areas of change highlighted in the consultation;

1. Changes to remuneration as a result of the online system which is now used in the First-tier Tribunal (Immigration and Asylum Chamber), and
2. Measures within the Nationality and Borders Act, which, when commenced, will both introduce new immigration legal aid services to the scope of legal aid and change existing services, necessitating changes to the remuneration for legal aid providers.

In summary, the new proposals are as follows;

- a. **The introduction of new fixed fees for online FTT appeals with no substantive appeal hearing; £669 for asylum cases and £628 for non-asylum cases.**

This would replace the current Stage 2a fee of £227 so is clearly preferable. However with online appeal cases, almost all of the work will have been undertaken by the point that the Home Office agree to withdraw the decision – usually with a view to granting the client some form of status. The difference between this fee and the fee for the full hearing is £340 which is the equivalent of approximately 6 hours work at CLR hourly rates.

- b. **The introduction of new fixed fees for online FTT appeals which proceed to a substantive appeal hearing; £1,009 for asylum cases and £855 for non-asylum cases.**

This would replace the current hourly rates funding scheme which has been in place since 7th October 2020. The MoJ states that they have considered data from the use of MyHMCTS to determine the average amount of time being spent on cases to work out an average fee.

The MoJ has confirmed to DG Legal that the existing bolt-on payments for advocacy services will remain the same.

c. The introduction of a new escape threshold for online system appeals, set at twice the value of the relevant fixed fee.

This appears useful as it both reduces the level at which a case becomes an Escape Fee Case and also permits a case to become an Escape Fee Case at the CLR stage only whereas previously both the Legal Help and the CLR aspects had to exceed 3 x the fixed fees in order for the matter to escape. The MoJ refers to this as ‘decoupling’ the Escape Fee system.

For example, currently (based on the former Stage 2b fee) you would need an asylum case to exceed £2940¹ (£413 + £567 x 3) in order for it to be flagged as an Escape Fee Case. Under the proposed new system, the Legal Help aspect can be ignored and you would need an asylum case to exceed £2018 (£1009 x 2) in order for it to be flagged as an Escape Fee Case.

At first glance, it appears that it will be easier for these cases to be Escape Fee Cases and thus remunerated at hourly rates.

Note that for Legal Help asylum cases, you will still need to exceed £1239² (£413 x 3) in order for the matter to be flagged as an Escape Fee Case and remunerated at hourly rates.

d. To remunerate advice provided to recipients of the new Priority Removal Notice at hourly rates.

A Priority Removal Notice (PRN) introduced by the Nationality Borders Act may be issued to some individuals who are liable for removal or deportation from the UK. The PRN will require individuals to provide any reasons and grounds to remain in the UK to the Home Office a statement, information or evidence in support of their claim to remain in the UK before a specified date. The aim of the PRN is to allow all claims to be considered in advance of a person’s removal, allowing those in need of protection to be identified and supported quickly.

Individuals who receive a PRN will be entitled to up to seven hours of non-means and non-merits tested legal advice and assistance to help them to comply with the requirements of the PRN. Legally aided advice can be provided not just on the PRN itself, but on the following;

- The individual’s immigration status,
- the lawfulness of the individual’s removal from the UK and,
- where the individual is held in immigration detention, on detention and bail.

At the end of the maximum of seven hours of advice, legal aid providers must make a determination as to whether the recipient of the PRN qualifies for onward legal aid funding for a substantive immigration matter, either through “in scope” legal aid or via the Exceptional Case Funding (ECF) scheme.

¹ Using asylum fixed fees as an example

² Using asylum fixed fees as an example

It is proposed that this “follow on work” is also remunerated by hourly rates; the same hourly rates payable for the advice on the PRN itself. A key condition of this work will be that the PRN recipient has already received up to seven hours of advice and a determination is made that they qualify for “follow on work”.

The MoJ proposes that the seven hours will be paid at hourly rates³. Payments for travel and waiting time should be claimable in addition to the maximum of seven hours of advice. Travel costs and fees for interpreters should also be claimable in addition to the advice, in accordance with the usual contractual rules.

This would amount to approximately £350 plus any disbursements, travel and waiting time and travel costs.

e. The introduction of a new bolt-on fixed fee for advice on referral into the National Referral Mechanism of £75.

Advice to clients about the NRM is usually part of the substantive matter and is not separately remunerated, however the MoJ says that they wish to facilitate the identification of more victims of trafficking. The provision of factual information about the NRM will enable potential victims of modern slavery or human trafficking to understand what the NRM does and what support could be available to them. Providing this information will contribute to the ability of the individual to make an informed decision as to whether to enter the NRM. For an adult to provide informed consent, three points must be explained:

- a. What the NRM is;
- b. What support is available through it; and
- c. What the possible outcomes are for an individual being referred.

The MoJ sets out what they consider should be covered as part of this ‘NRM advice’ and this is set out in the table below;

Type of work under the NRM advice	Type of work that is not part of the NRM advice
<p>A factual explanation of the NRM:</p> <ul style="list-style-type: none"> • The process, including what the Reasonable Grounds and Conclusive Grounds decisions are. • The different outcomes at each stage. • A sense of timelines of each stage. 	<p>Identifying whether the individual is showing trafficking indicators:</p> <ul style="list-style-type: none"> • This is part of the main immigration matter to understand the individual, their circumstances and what their underlying immigration matter is.

³ See Table 7 (d) Civil Legal Aid (Remuneration) Regulations 2013

Type of work under the NRM advice	Type of work that is not part of the NRM advice
<p>An explanation of support surrounding the NRM:</p> <ul style="list-style-type: none"> • Broadly what support is available after each stage (e.g. a positive Reasonable Grounds decision). • And the type of support (e.g. legal advice, housing, counselling). 	<p>Ongoing advice or support through the NRM process:</p> <ul style="list-style-type: none"> • This advice is for referral into the NRM only.
<p>An explanation of how the NRM interacts with the immigration system:</p> <ul style="list-style-type: none"> • The potential impacts of entering the NRM on their immigration case. 	
<p>An explanation of the referral process itself:</p> <ul style="list-style-type: none"> • Explanation of consent (for adult victims). • Broadly what a victim is likely to be asked in order to be referred (i.e. details of their exploitation). 	

This proposed additional “bolt-on” fee of £75 is stated to be *‘largely factual and procedural in nature, focusing on what the NRM process is and the support it can offer, and is therefore unlikely to require specific tailoring to an individual.’*

£75 represents approximately 1.5 hours work at hourly rates. Given the complexity and the vulnerability of potential victims of trafficking and modern slavery, this does seem limited. Similarly, a concern may be that it is impossible to provide only ‘factual’ information about the NRM to clients without specific reference to the details of their substantive case. This is likely to mean that the process takes longer and cannot be provided as a one off piece of advice as the clients will require ongoing advice about the NRM and its processes throughout the life of their substantive matter and any ongoing NRM matter.

f. To remunerate new age assessment appeals work at the existing hourly rate payable for Licensed Work in the First-tier Tribunal.

The Nationality and Borders Act establishes a new decision-making function within the Home Office, known as the National Age Assessment Board (NAAB). The NAAB will be able to

conduct full age assessments on individuals who are subject to immigration control, upon referral from local authorities, although local authorities will be able to carry out their own age assessments should they choose to do so. The Nationality and Borders Act also introduces a new statutory right of appeal if the NAAB or a local authority assesses an individual to be a different age to the age they claimed to be.

An individual challenging an age assessment decision will now be able to appeal to the First-Tier Tribunal, and the Tribunal will determine the age of the appellant and assign the appellant a date of birth. The decision of the Tribunal will be binding on the Home Office for immigration purposes, and on the local authority for the purposes of exercising its functions under relevant children's legislation.

As the appeal right is specifically for individuals within the immigration system, the MoJ proposes allowing immigration providers to take on age assessment appeal cases as part of their contract, recognising the advantage for Appellants in having the same provider for their immigration matter and age assessment appeal.

Age assessment appeal work should be remunerated using the existing Licensed Work hourly rates for the First-tier Tribunal⁴.

This is a new opportunity for Immigration legal aid practitioners to retain age assessment cases as representation will be at the First Tier Tribunal now.

- g. To remunerate work on the rebuttal mechanism introduced through the Home Office's new asylum differentiation process at hourly rates and gather data to inform a future fixed fee for this work.**

The Nationality and Borders Act introduces a power for the differential treatment of refugees based on the criteria set out in Article 31 of the Refugee Convention. The effect of the power would be that those who are granted refugee status and meet the terms of Article 31 (i.e. having come to the UK directly from a country or territory where their life or freedom was threatened; who have presented themselves without delay to the authorities; and where applicable, have shown good cause for any illegal entry or presence in the UK) will be considered Group 1 refugees.

Those who do not meet the criteria in Article 31 of the Refugee Convention, for example, they did not come directly to the UK from a country or territory where their life or freedom was threatened, will be considered Group 2 refugees.

Where the SSHD is minded to place a refugee in Group 2, there will be an opportunity for the refugee to rebut that provisional grouping. The refugee will be able to submit a statement or evidence in support of their arguments as to why they should be placed in Group 1 instead. In the consultation, this process is referred to as "the rebuttal mechanism".

⁴ See Table 10(c) of the Civil Legal Aid (Remuneration) Regulations 2013

As with the online appeals pilot, the MoJ states that they will fund this work at hourly rates for a period of time so that they may gather data on the average time being spent by providers on the rebuttal mechanism.

Again, this is a new opportunity for immigration legal aid practitioners to take on this work. It is likely that those providers with detention contracts will take on the bulk of the work as they will presumably come into contact with the majority of clients who have been served with a PRN.

The deadline for responses to the consultation is 8 August 2022. These can be submitted electronically to civil.legalaid@justice.gov.uk or to Civil and Family Legal Aid Policy Team, 10.20 Ministry of Justice 102 Petty France London SW1H 9AJ.