



Department of
Justice

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Post Consultation Report: Consultation on Direction on Asylum
and Immigration Legal Aid Remuneration

December 2019

Enabling Access to Justice Division
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Introduction

1.1 The Department of Justice issued a Consultation which ran from 16 August to 9 October 2019 regarding a proposal to issue a Direction to the Legal Services Agency NI (the Agency). The Direction would advise the Agency that it shall interpret the fees payable in the Civil Legal Services (Remuneration) Order (Northern Ireland) 2015 in a manner which allows the full composite fee for an appeal before an Asylum and Immigration Tribunal to be paid in circumstances where the Home Office has withdrawn its decision on the day of the hearing.

Consultees

- 2.1 The consultees were:
- the Attorney General;
 - the Lord Chief Justice
 - the Law Society
 - the Law Society Immigration Practitioners Group
 - the Bar of Northern Ireland
 - NI Human Rights Commission
 - Colin Dougan, solicitor

Responses

3.1 Substantive responses were received from:

- the Law Society;
- the Law Society Immigration Practitioner Group;
- the Bar of Northern Ireland;
- Colin Dougan, solicitor; and
- Stuart McTaggart, barrister.

Summary of Consultation Responses

General Comments

4.1 The Law Society noted that legal aid fees for Asylum and Immigration cases were first set in 2004 and have remained unchanged for 15 years. In the intervening period Case Management Hearings have been introduced and the nature of the cases has become more complex. The Fee Scheme is also absent any provision for the payment of exceptional cases. It urged the Department to commission and undertake a review of these fees as soon as possible.

Responses to Questions posed in the Consultation

Q.1 Do you agree that the appellant's solicitor should be entitled to the Full Composite Fee where the decision under appeal has been withdrawn by the Respondent (Home Office) on the same day as the substantive hearing?

4.2 The respondees all agreed that the full fee should be paid where the decision has been withdrawn by the Home Office on the day of the Tribunal Hearing. The respondents all argued, however, that the Direction does not go far enough. Comments included that the full fee should be paid after submission of the Appellant's bundle of evidence or at any stage after the appeal has been set down for hearing.

4.3 The respondees all noted that there is a difference between the appellant withdrawing their appeal and the respondent withdrawing their decision which is under appeal.

Q.2 Do you agree that the solicitor should be required to provide written evidence of when the decision was withdrawn?

4.4 The respondents linked this with Question 1 and their arguments that the full fee should be payable where the respondent withdraws its decision before the day of the hearing. Some raised practicalities where the respondent gives the decision by telephone or the communication is sent late on the day prior to the Tribunal hearing.

Q.3 Do you agree that the solicitor should avail of the reconsideration facility offered by the Home Office in appeals before the First Tier Tribunal?

4.5 Respondees argued that the Home Office Guidance in relation to Reconsideration sets out the apparently limited circumstances in which the reconsideration process can be invoked and the draft Direction seems to suggest that the reconsideration facility is more widely available than the Guidance actually provides. In particular it appears that the Home Office will normally only reconsider applications if there is no right to appeal.

4.6 Other respondents noted that this facility was not available when the fees for Asylum and Immigration cases were set, and even if reconsideration is available, there is no specific fee for this work.

Q.4 Do you agree that the Agency may pay the 20% composite fee where the solicitor did not promptly submit new evidence or reasons which would have allowed the decision to be reconsidered.

4.7 Respondees linked their comments on this question to the answers to question 3 and the limited availability. Other comments noted the delay in getting new evidence such as expert opinion, changes to the appellants circumstances or events which happen in the appellants country or origin. It was also noted that decisions taken by the Home Office are often not based on new evidence but as a result of a Presenting Officer having reviewed the original decision and considering it to be unsustainable.

Q.5 Do you agree that the solicitor should apply to the Tribunal for the Appellant's costs pursuant to the Home Office Guidance.

- 4.8 The Law Society noted that the legislation providing for the award of costs provides that cost can only be awarded when one party or their representative has behaved "unreasonably". It also noted that the President of the First –tier Tribunal published a Presidential Guidance Note setting out when the Home Office may be required to reimburse successful appellants for their legal costs and it does not provide that in all cases where there is a withdrawal by the Home Office there should be an automatic application for costs by the Appellant. Other respondees note the limited circumstances in which costs can be awarded under the case law.
- 4.9 Respondees did agree that where costs are awarded, the Agency should not be liable for costs.

Q.6 Do you have any comment on the impact screening conducted by the Department.

- 4.10 The Law Society Immigration Practitioners Group commented that there are clear access to justice issues and the Department should consider the impact on ethnic minorities and the high possibility of direct discrimination on grounds of race, religious belief, political opinion and sexual orientation. It commented that those in asylum or immigration appeals would be disproportionately affected by the categories of persons listed in Section 75 by virtue of their own precarious immigration status.
- 4.11 The Bar of Northern Ireland queried whether all previous cases prior to this draft Direction under which a reduced fee was paid can now be revisited.

Departmental Response

- 5.1 The Department notes the wider comments on fees in asylum and immigration appeals. As noted in the Consultation Document, the provisions in this Direction are to deal with a particular challenge. The proposed changes are aimed only at assisting the Agency to interpret the definition of the composite fee to be paid in the situation where the Home Office withdraws its decision to which the appeal relates on the day of the substantive hearing to allow for appropriate remuneration in those circumstances. Any review of the actual level of remuneration or of specific fees is a separate matter on which the Department may bring forward proposals in due course.
- 5.2 The Department is grateful to respondents for highlighting the limitations on the provisions for reconsideration by the Home Office and has removed reference to reconsideration from the Direction.
- 5.3 Similarly, the Department is grateful to respondents for bringing our attention to the legislation and Presidential Guidance note relating to the circumstances in which the appellant can apply to the respondent for costs. The Direction has been amended to provide that the Agency will expect an application for costs will have been made where the Home Office has acted unreasonably in defending the appeal.
- 5.4 The Direction applies where there is a claim for costs which have yet to be determined or re-determined by the Agency pursuant to Articles 9 or 13 of the 2015 Remuneration Order. It does not apply to claims for costs which have already been paid.

Next Steps

- 5.5 The revised Direction will issue to the Agency on 7 January 2020 to implement.

- 5.6 The Department will review the fees, however, that will not be an immediate priority, but we will be in contact with the legal profession soon to consider how we can gather evidence to allow us to review the fees payable.