Blackstone CHAMBERS

PROPOSED CHANGES TO PUBLICLY FUNDED IMMIGRATION AND ASYLUM WORK: MAXIMUM FEE LIMITS (MFLs)

JOINT OPINION

(1) Introduction

1. On 5.6.03 and 2.7.03 LCD (now DCA[1]) and LSC, respectively, issued consultation papers inviting views on proposed changes to the General Civil Contract (GCC) for both private solicitors and not-for-profit (nfp) organisations. Among the key proposals are maximum fee limits (MFLs) for both asylum/human rights and other immigration work, together with maximum disbursement limits (MDLs) for disbursements. Both consultation papers contain a series of proposals, together with supportive reasoning, and each invites from consultees general responses and responses to lists of particular questions.

2. We are instructed by the Refugee Legal Centre, who will be responding to the two consultation papers. RLC is an independent not-for-profit organisation, publicly funded through LSC and the Home Office. It is concerned with the provision of legal advice and representation for those seeking protection under asylum law, the training and support of those providing such advice and representation, and the promotion of the individual and collective interests of those whom it seeks to protect, through law and public policy. Accordingly, RLC's focus is on the nfp contract, and asylum/human rights work. So therefore is ours, though the logic of points we make will extend to the private solicitor contract and/or to general immigration work.

3. The MFLs relate in particular to, and we are asked to focus on, work done on initial legal help and in preparing an appeal to the adjudicator. As to these:

   (1) The MFL for initial legal help in an asylum claim is described at para 24 of the DCA consultation paper:

   > ***We are proposing that the time allowed for providing initial advice in an asylum case should be limited to a maximum of 5 hours work.***

[1] We shall use DCA throughout.

(2) The MFL for preparing an appeal to the adjudicator is described at para 33 of the DCA consultation paper:

> ***It is proposed that the maximum fee for preparing an appeal to an adjudicator will equate to 4 hours' costs to prepare the appeal.***

4. We are asked by RLC whether the adoption of these proposed MFLs would be lawful. In grappling with that question, we recognise its prospective nature. DCA/LSC are at the stage of canvassing proposals, on which consultation is ongoing, which must mean that their thinking is open-minded and not fixed. However, although there will doubtless be many "merits" and "policy" points, the question whether adoption of the proposals would be lawful, and if not why not, is relevant and important. It is a question which DCA and LSC could and should themselves be addressing, and at this stage. Moreover, they are required by public law principles (paragraph 14(3) below) to have consulted on the basis of adequate information as to the basis and reasoning thought to justify the proposals which they are minded to adopt. We will focus on the proposals and the explanation given for them, in examining whether their adoption would be compatible with the standards of public law.

5. For reasons which follow:

(1) The Court would in our view approach the adoption of these MFLs with very considerable concern and subject them to a rigorous scrutiny, looking to DCA and LSC to provide a cogent justification for the chosen levels and nature of the MFLs. The Court would also wish to ensure, in considering the justification for such MFLs, that an adequate inquiry had preceded the decision to adopt them, and that the material said to provide the justification had adequately been disclosed to consultees so as to enable them to respond to it.

(2) The basis on which DCA/LSC has explained that it is minded to introduce the proposals could not in our view satisfy the duties required as to justification, inquiry or disclosure. In particular, there is this unaddressed question, which goes to the heart of the matter namely:

> ***Key question: In considering the implications of the proposed MFLs, whether and on what basis is it said by DCA/LSC that a competent representative can be regarded as able to provide an asylum claimant with service which is practical and effective in its quality, within the chosen levels, and as fixed maxima, even in a non-typical (eg. complex) case ?***

(2) Context

6. There are four matters which we think should be mentioned at the outset. The first relates to the nature of the proposed MFLs (outlined at paragraph 3 above). They involve chosen benchmarks, which correspond to work done for a particular service in a particular type of case. Moreover, they correspond to a number of hours of work which is needed. But there are three important points which concern what the MFLs are not:

(1) They are not used as time standards to reflect the work done in a typical case. They are used to represent the maximum work which is allowable, so as to constitute a top limit (ceiling). In this respect, they are different from the "time standards" (see paragraphs 30-31 below) for which provision is made in the nfp contract, which were consulted on for that contract, and which are described in the private solicitor contract. The approach of using such time standards was designed to represent (see nfp contract specification January 2003, p.127):

> ***useful guidelines as to the time that you would expect to spend, as an average, on particular activities. You must have regard to those standards when carrying out and claiming for work, and we must have regard to them when assessing your claims.***

(2) They are not used as fixed fees. The representative is paid for the actual hours done, until the chosen benchmark is reached, at which point the fee is limited to that level, no further work being regarded as necessary. So - if three hours' work were done in providing initial advice, the representative can only bill for three hours. If seven hours' work were done, the representative can only bill for five. In this respect the MFLs are different from the fixed fees which have been used in criminal cases (see paragraph 9(3)(c) below) and in family law work.[2]

(3) They are not benchmarks which allow for flexibility based on the circumstances of the individual case (eg. its complexity). They involve maximum levels of work designed to cover all cases. There is no provision for these to be exceeded, because a particular case is especially time-consuming because the issues are complex or difficult. There are suggested exceptions, but these are themselves fixed, being based on prescribed situations and involving prescribed increments, namely to cover applications for bail and advice in connection with detention (DCA consultation paper paras 28, 38), which carry proposed increments of 30

[2] Note that in the *Duncan* case (paragraph 9(3)(b) below) there was discussion of standard fees based on "average costs" ([142] and [219], [226]), calculated so as to be able "to plan work within a controlled budget" (at [232]), but extendable where further work was needed (see [115], [117], [343], [346]).

mins (legal help) and 2 hours (CLR): see LSC consultation draft specification paras 13.3.2 and 13.4.2. Unlike the position regarding disbursements (LSC consultation draft specification para 13.2.8(6)), where MDLs are proposed to be subject to the right to seek authority for an extension (there being described circumstances where such an extension is "likely"), for MFLs there is no proposed flexibility to deal with special circumstances.

7. The second preliminary matter is about who is the primary decision-maker. The DCA's consultation paper describes "proposed changes in the way in which we intend to deliver publicly funded legal services in the areas of immigration and asylum" (DCA consultation paper p.1). It goes on to say (para 16) that:[3]

> ***We have instructed the Legal Services Commission to consult on the detailed contract changes that will be required to bring our proposals into effect.***

LSC's consultation says it reflects "the Commission's view of how the DCA proposals might impact on the General Civil Contract" (LSC Consultation Introduction para 1). We make these points:

(1) DCA's powers of mandated intervention are limited to those provided for in the statute (Access to Justice Act 1999). The consultation documents do not say that DCA is proposing to issue a legally binding instruction to LSC, such as would impose obligations to amend the GCC.

(2) It seems to us that, absent an instrument imposing contracting requirements on LSC, it would and must remain a matter for LSC to satisfy itself that changes in the GCC are justified. On conventional public law principles[4], it would not be lawful for LSC to adopt contractual changes because DCA has decided that it thinks they are warranted. The statutory power to enter into contracts (1999 Act s.6(3)), and therefore the power to amend contracts (see too nfp GCC Contract p.57 and Specification p.94) vest in LSC, unfettered by the views of DCA absent an order under its statutory powers (s.6(4)). Even if DCA were to give "guidance" (s.23(1)), LSC's duty would be to "take into account any such guidance" (s.23(2)), but the judgment and responsibility would remain that of LSC. One of the consequences of this are that LSC would need itself to have

[3] Underlining in quotations connotes emphasis added.

[4] *Lavender (H) & Son Ltd v Minister of Housing and Local Government* [1970] 1 WLR 1231.

discharged the duties of inquiry and disclosure (paragraph 14 below), in satisfying itself as to reasonable justification for the new arrangements prior to their adoption. If, on the other hand, there is to be a statutory instrument, these duties will have fallen on DCA, though LSC's views would doubtless be an important relevant consideration.

(3) In this Opinion we shall proceed by analysing the content of the relevant public law duties require of whichever, in the event, is the primary decision-maker. We do so, having drawn attention to the importance in law of that body having discharged those duties.

8. The third preliminary matter concerns whether public law standards are engaged by these proposals. That question could arise because this case concerns the proposed imposition of standard contract terms. In that "contractual" context, it might be suggested that the principles of public law which would apply to a pure exercise of statutory power by DCA/LSC, are not engaged or not fully engaged. We do not think a Court would agree, for these reasons:

(1) Public law is concerned not with form but with substance; it does not fixate upon the source of power, but considers the true nature of the function.[5] The imposition of new constraints into the legal aid system cannot escape the public law principles which would otherwise be applicable, simply because they arise in the context of a reserved power to amend the GCC (see nfp GCC Contract p.57 and Contract Specification p.94). Indeed, the cases show that judicial review is available in relation to the imposition of the contractual regime, and LSC decisions to enter individual contracts.[6]

(2) In any case, LSC's power of funding services by means of contracts is a statutory power (1999 Act s.6(3)), as is DCA's power to impose duties on the discharge of that function (s.6(4)). The power of contractual amendment, exercised by LSC, would need to be exercised (as the contract recognises: see nfp GCC Contract

[5] *R v Hammersmith and Fulham London Borough Council, ex p Burkett* [2002] UKHL 23 [2002] 1 WLR 1593 at [31] (Lord Steyn: "In public law the emphasis should be on substance rather than form"); *R v Panel on Take-overs and Mergers, ex p Datafin Plc* [1987] QB 815, 838H-839A (Sir John Donaldson MR: "the courts ... recognise the realities of executive power"), 848C-D (Lloyd LJ: to over-emphasize source would "impose an artificial limit on the developing law of judicial review").

[6] *Duncan* (paragraph 9(3)(b) below); *R v Legal Aid Board, ex p Donn & Co (a Firm)* [1996] 3 All ER 1.

Specification p.94) "to ensure that it continues to achieve the objectives of contracting", which objectives are themselves to be found in the statute or instruments made under it (ss.4-6).

(3) It occurs to us that a helpful illustration is *R v Cleveland County Council, ex p Cleveland Care Homes Association* (1993) 17 BMLR 122, where judicial review was granted of standard contract terms which the council sought to impose on residential care home owners, the imposition of such terms being unreasonable given the serious likely consequences (closure of a substantial proportion of private sector homes).

9. That bring us to the fourth preliminary matter, which concerns the general stance of a reviewing Court.

(1) This is a context where DCA/LSC would remind the Court of a proposition along these lines[7]:

> ***Proposition 1: Difficult policy-laden decisions regarding use of scarce resources warrant recognising a latitude for permissible choices made by those public authorities entrusted with safeguarding the public purse and balancing competing interests.***

We think this proposition would be accepted by a public law Court considering the legality of adoption of MFLs, as the right starting-point. It serves as a strong reminder that it is not the role of the Court to second-guess public authorities, such as DCA and LSC, on difficult choices involving policy and judgment. That is correct, and important. Our analysis will proceed on the basis of this first proposition as the proper starting-point. It is not, of course, the end of the inquiry. For otherwise, the matter would have been held to be immune from review. The principles of public law may be soft-spoken. But they are not silent[8].

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[7] See eg. *R v Ministry of Defence, ex p Smith* [1996] QB 517, 556B-C (Sir Thomas Bingham MR: "The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational"); also *Law Society* (paragraph 9(3)(a) below).

[8] For an illustration of this from a different context see *R (Kelsall) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWHC 459 (Admin). There, a statutory instrument rigidly allocating compensation to fur farmers was quashed on ECHR and also irrationality grounds (see [62]). Aspects of the scheme had "no sensible justification" (at [48]) and "reasons ... do not bear scrutiny and are irrational", with effects beyond "a permissible margin for workability or approximation" (at [63]).

(2) There is a further, related proposition which DCA/LSC would be likely to raise, along the following lines:

> ***Proposition 2: Public law does not require a choice as to budgetary prioritization to be the subject of a detailed reasoned justification.***[9]

For our part, we think a Court would accept the accuracy of this as a statement of principle. However, we will need to return to its applicability in the present context. It seems to us to be important to recognise that not every conclusion in a situation of budgetary constraints will itself be a judgment as to budgetary prioritization. It will always be necessary to consider the nature of the particular conclusion in question, in considering whether the position is one where administrative law will properly require something tangible by way of a reasoned justification. As we shall explain, we think that is the position here.

(3) In conjunction with this question about the general approach of the Court in the present context, we think it is helpful to remind ourselves of three decided cases which we think provide useful signposts in approaching the present proposals.

(a) The first case was *R v Lord Chancellor, ex p Law Society* (1994) 6 Admin LR 833, which concerned eligibility regulations. The Law Society sought judicial review of regulations imposing an amended means threshold for legal aid eligibility, thereby excluding a category of persons. The Divisional Court upheld the regulations as not being ultra vires the Legal Aid Act 1988, the Lord Chancellor being entitled to make regulations adjusting the size or scope of the framework for provision of advice and assistance, where considered necessary and desirable. Nor were the regulations irrational, despite putting access to the court beyond the practical reach of a substantial fraction of people, since hard and difficult choices had to be made as to the allocation of finite resources, and this choice although regrettable was not irrational.

(b) The second case was *R v Legal Aid Board, ex p Duncan* [2000] COD 159, which concerned the adoption of the exclusive contracting scheme.

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[9] Cf. *R v Cambridge District Health Authority, ex p B* [1995] 1 WLR 898 (health authority not required to explain, by reference to limited budget, refusal to fund experimental chemotherapy); *R (Pfizer Ltd) v Secretary of State for Health* [2002] EWCA Civ 1566 [2002] EuLR 783 (in deciding to restrict NHS availability of viagra, Secretary of State not obliged, under EC Directive, to analyse and explain relative NHS prioritisation).

A firm of solicitors sought judicial review of the new controlled contract scheme. The firm argued that the exclusion of non-contracted firms was inconsistent with an untrammelled common law or statutory right to a solicitor of choice. In a marathon (and therefore unreported) judgment, the Divisional Court held that there was no such right. The firm also argued that restricting firms to certain numbers of new case starts was irrational. That argument was rejected on the basis that there was no unlawfulness; rather there were particular problems needing ironing out when the scheme was kept under review.

(c) The third case was *McLean v Buchanan* [2001] UKPC D3 [2001] 1 WLR 2425, which concerned fixed fees. Two Scottish defendants argued that the continuation of prosecutions against them was unlawful, because their solicitors were inadequately remunerated by fixed fees payable under legal aid regulations[10]. The Privy Council rejected the claim, on the facts, since there was no evidence that the solicitors in fact acting for the defendants would withdraw. As to the argument that it was unlawful not to amend the regulations to allow discretionary increases so as to comply with ECHR Article 6(3)(c), the Privy Council declined to do more than make adverse comment, since that issue was "academic" to the two cases in question.

(3) Effectively meeting needs

10. Mindful of both the circumspection with which a public law Court would approach the present context (paragraph 9 above), we turn to examine the particular proposals in this case. The correct starting-point is, we think, the 1999 Act.

(1) As was recognised, in the context of the 1988 Act, in the *Law Society* case (paragraph 9(3)(a) above, at p.856) Parliament has provided for the establishment and maintenance of a "framework" for the provision of advice, assistance and representation, whose size and scope can be adjusted for policy reasons, from time to time by reference to budgetary considerations. Those observations apply equally to the 1999 Act, which provides for publicly funded advice and help (s.4(2)) within available resources and set priorities (s.4(1)) and

[10] The Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999, made under s.33(3A) of the Legal Aid (Scotland) Act 1986.

by reference to an objective of obtaining best value for money (s.5(7)).

(2) Against that budget-related backcloth it is right to point out that the 1999 Act (as was the 1988 Act before it) is concerned, within those resources and priorities, with securing, on the part of beneficiaries of funded work, access to services effectively meeting their needs (s.4(1)). The Act speaks too of securing services which are appropriate having regard to the nature and importance of the matter (s.4(4)(b)).

(3) It is not difficult to see that, in relation to eligibility requirements such as those with which the *Law Society* case (paragraph 9(3)(a) above) was concerned, that the exercise of statutory power is concerned with rationing in the sense of prioritising available resources. Legal aid eligibility requirements have traditionally done this, by reference to the poorest, those whose cases are particularly strong or those having particular kinds of legal problem.

(4) Rather different considerations can arise, however, in a situation where the question being asked is whether an arrangement is one which entails an eligible person's needs being effectively met. That this is a relevant question is clear from the wording of the statute (s.4(1)). Plainly, it would be a strong thing for budgetary considerations to involve the intended consequence of an eligible person's needs not being met, or being met ineffectively. We do not need to examine whether that position would be incompatible with the statute for there is nothing in the rationale of the proposed changes in this case which suggests such an intent. On the contrary, the plain indications are that the proposed MFLs are intended to be consistent with needs being effectively met. We turn to examine the rationale of the proposals, before considering whether a sufficient basis has been demonstrated to support them and therefore their legality.

11. Turning to the proposals themselves, MFLs are part of a set of linked changes designed to address a number of policy concerns. The backcloth is one of budgetary constraints, increased costs[11], competing claims on the public purse, and the need to ensure value for money (see DCA consultation paper para 1). Against that backcloth, there are two powerful strands:

[11] Albeit that, as DCA points out, there are many reasons why costs have increased including the increased throughput in connection with addressing the asylum backlog: see DCA Consultation Paper para 3.

(1) First, there is the commitment to tackling wasteful misuse of the Community Legal Service fund. The reasoning given for DCA's proposals refers to the need to reduce costs caused by (a) overclaiming by some legal representatives, (b) the unreasonable pursuit of unmeritorious claims, (c) work done which is not truly to the benefit of the client, and (d) wasteful duplication of work from unnecessary switching between firms. The proposals explain the intention to ensure enhanced scrutiny of those contracted to provide advice and assistance, including monitoring, accreditation and (in the context of switching firms) a cumulative approach to work done, policed via a unique file number.

(2) Secondly, however, there is the commitment to ensuring quality services for those eligible for funded assistance. DCA refers to addressing "concerns regarding the quality of the work undertaken by a significant minority of immigration suppliers" (DCA consultation paper para 4), and introduces MFLs given a "pressing need to reduce costs and improve value for money" in a context where (para 8):

> ***We work continually to ensure that the most effective and efficient publicly funded legal services are available to clients ...***

To address the quality deficit, DCA proposes a system of accreditation (para 13), confirming that (para 14):

> ***We believe that good quality advice can benefit the client and we wish to continue to develop quality representation in the area of asylum and immigration.***

There is therefore no suggestion here of the budgetary backcloth driving proposals which compromise "effective" or "good quality advice" or "quality representation" or (in s.4(1) terms) are designed to allow assistance for eligible asylum claimants which do other than meet their needs effectively. Our analysis proceeds on that basis. We are frankly relieved, as doubtless would be the Court, to find that it is not the Government's stated intent for impecunious asylum-claimants to be provided with sub-standard legal assistance. We are fortified in that view by descriptions of MFLs as designed to allow the representative to discharge their function "properly" (eg. para 22: see paragraph 13 below), and to the objective of reducing "unnecessary" expenditure reflected in this consultation question (DCA consultation paper question 2):

> ***Are there any other ways in which unnecessary expenditure can be reduced ?***

12. We turn to the central aspect regarding legality, on which we have been asked to focus. It raises this unanswered question. How did DCA/LSC arrive at the benchmarks of 5 hours for initial advice (DCA consultation paper para 24) and 4 hours to prepare an appeal (para 33) ?[12] What is the basis on which it is said that DCA/LSC could reasonably satisfy themselves that "effective", "good quality advice" and "quality representation" could "properly" be provided within those benchmarks ? By reference to what information, evidence or research is it suggested that work beyond those time-limits is "unnecessary" ? How are the time-limits reasonably justified, in the reasoning process, whether as (a) appropriate time standards for typical cases[13], let alone (b) maximum time standards, still less (c) fixed maximum limits ?

(4) Public law standards

13. We do not see how, even on purely conventional administrative law standards, such obvious questions can be left unaddressed and unexplained. We do not think, for example, that a Court would accept that this is a decision as to budgetary-prioritization, or mere allocation of scarce resources, which DCA and LSC are entitled to leave unjustified and unexplained (cf. paragraph 9(2) above). As we have explained, the setting of proposed MFLs involves conclusions (or at least suppositions) that competent representatives can provide a service of proper quality within those time-limits, as maxima, and even in complex cases. That is not a conclusion of budgetary-prioritisation; it is a conclusion as to adequacy and meeting needs. DCA/LSC's approach is not indifferent to questions of adequacy and need. That is no doubt why, for example, the legal help MFL is, we recall, expressed by reference to enabling the representative "properly" to discharge their function, as follows (DCA consultation paper para 22):

> ***We intend to introduce a maximum number of hours' advice at this initial stage, which will allow the representative to properly brief the client (with an interpreter) on the asylum process and draft a statement on the client's behalf, and in that way advance the client's case.***

14. Nor is the legal analysis solely a question of bare unreasonableness (or "irrationality"). Alongside and linked to the requirement of reasonableness, conventional principles

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[12] We emphasise, though not the focus of this opinion, that similar questions arise in relation to the MDLs proposed by LSC in relation to disbursements.

[13] In *Duncan* (paragraph 9(3)(b) above) there were standard fees (which could be increased if further work was needed) which were a "real figure of costs per case calculated on a national basis" (see [226]).

impose the following basic standards of public law legality:

(1) There is a recognised duty on a public authority, prior to its decision, to take reasonable steps to acquaint itself with relevant material: ie. there is a duty to equip itself with the information necessary to make an informed decision.[14]

(2) The general duty to act reasonably requires, in appropriate contexts, that key conclusions be supported by some evidential basis: ie. there is a duty not to reach a conclusion on an issue without there being a proper evidential basis for doing so.[15]

(3) The duty of fair consultation requires that the information said to underpin the proposals be made available to consultees for them to make informed and intelligent comment on it: ie. there is a duty of candid disclosure of the reasoning behind what is proposed.[16]

15. The consultation documents in this case do not contain an explanation, still less a reasonable explanation with some evidential underpinning, shared with consultees, as to how it could reasonably be concluded (or even supposed) that proper help and representation can be provided for asylum-claimants, in typical and in more complex cases, within the fixed time-limits. There seem to be two possibilities:

(1) DCA/LSC are proceeding in the absence of such information/evidence. That would be a breach of the requirements described at paragraphs 14(1) and (2) above.

(2) DCA/LSC believe that they have such information/evidence, but have chosen not to make it available to consultees for comment. That would be a breach of the requirement described at paragraph 14(3) above.

16. That is sufficient to explain the adverse conclusions which we have reached (paragraph

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[14] *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, 1065B (Lord Diplock); *R (DF) v Chief Constable of Norfolk Police* [2002] EWHC 1738 (Admin) at [45].

[15] *Reid v Secretary of State for Scotland* [1999] 2 AC 512, 541G-G (Lord Clyde); *R (Price) v Carmarthenshire County Council* [2003] EWHC 42 (Admin) at [23].

[16] *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213, at [108]; *R (Lloyd) v Dagenham London Borough Council* [2001] EWCA Civ 533 (2001) 4 CCLR 196 at [13] ("consultation axiomatically requires the candid disclosure of the reasons for what is proposed").

5 above). However, the matter does not end there. It seems to us that there are several additional matters which would rightly cause a public law court to look to DCA/LSC for a cogent explanation as to how the proposed MFLs are justified. The MFLs, although a new and controversial proposal, do not come to be proposed in a vacuum.[17] A number of further reference points are relevant. We shall describe the main ones in the following paragraphs.

(5) The funding code and ILPA guide

17. In the first place, there are important pre-existing requirements of "reasonableness" for publicly funded work under the Funding Code, together with quality standards (SQM), and monitoring initiatives. These seek to ensure that legal help and representation are being provided where and to the extent that they are needed, by reference to time taken which is justified by the nature of the work done and the case in question. That is an important framework. It will mean, for example, that there is already (or should be) guidance, experience and evidence of what is meant by proper work needing to be done and proper time needing to be taken, by those who meet DCA/LSC's quality expectations and are not within the minority engaged in what DCA describes as sub-standard work or overcharging.

18. Also highly relevant is the Practice Guide drawn up by ILPA in May 2002, entitled *Making an Asylum Application: A Best Practice Guide*. The Guide carries the endorsement of LSC, whose then Chief Executive explained (foreword p.vii):

> ***Access to early, good quality legal advice plays a key part in the effective and fair operation of the asylum system. If the asylum seeker's case is properly put forward this in turn allows the immigration services to make the best decision on that case. This has advantages not only for the particular client, but also for the system as a whole by reducing unnecessary appeals and uncertainty.***

19. In relation to initial legal help, the Guide explains (chapter 3) that the initial stages will necessarily involve several important matters. They may very well need to be dealt with through an interpreter, and with the adviser being satisfied that each has been fully understood. The main points are that: (a) the legal representative is meeting the client for the first time and needs to establish a relationship of understanding and trust in which instructions and information are freely forthcoming so that advice can be given and received; (b) the representative will need to explain what is happening, what their own

[17] Cf. *Duncan* (paragraph 9(3)(b) above) at [384], referring to mental health work as unfamiliar to LSC, compared with other more familiar fields.

role is as adviser, and ensure that the process and what is expected of the client is understood, as well as explaining what the next stages will be, and in particular the asylum interview; (c) the representative needs to take full instructions and assist the client to tell their story, including by reference to any evidence in the individual case and the objective evidence regarding the relevant country; and without making assumptions (eg. based on ethnicity). Preparing the asylum-seeker's case in readiness for the asylum interview has always involved identifying and preparing a focused statement of case, which the Guide describes (p.xi) as:

> ***the critical and often determining factor in any application ... (including one for asylum) ...***

20. The Guide also explains the important consideration of ensuring that the mode of interview involves an environment which is conducive to free and candid narrative given to a stranger (see too UNHCR Handbook para 190). As the Guide explains to legal representatives (p.32):

> ***Interviews should be open and non-confrontational. Do not make assumptions about history, language or current and previous experience. Similarly, language and literacy should be established not assumed. There should be recognition of the difficulties of speaking through an interpreter. The following procedures will help to alleviate your client's anxiety:***
> - ***aim to minimise interruptions***
> ...
> - ***listen with sensitivity to what your client is saying***
> - ***ensure that your client understands each stage of your advice***
> - ***offer regular breaks for refreshment***
>
> ...

21. As regards the asylum interview, designed to ensure that the Secretary of State is able to make a proper and informed decision on the asylum merits (HC395 para 328), "establishing the facts of the case" (HC395 para 340), the ILPA Guide explains (p.69) that:

> ***the interview in these cases poses a very particular test to an asylum applicant...***

The Guide describes (chapter 8) the importance of the interview and the legal representative's role, before it (pp.70-73) during it (pp.74-76) and after it (p.77). That role includes being present, and being alert to difficulties in the client's full and proper participation, difficulties with the interpreter (to ensure that the client understands and is being understood), and the need to respond (on the basis of instructions) with any matter or document which arose.

22. In its consultation document, DCA has stated that the representative's attendance at the interview is "not guaranteed" (DCA consultation paper para 23), on the basis (para 21) that:

> ***We believe that in the majority of cases, attendance by the representative at these interviews is unnecessary, of no benefit to the client and a waste of public funds.***

This is doubtless a matter on which representations will be made by consultees. We confine ourselves to two comments:

(1) First, the "evidence" to which DCA refers (para 21) is:

> ***evidence of attendances at substantive interviews with the Home Office by clerks with little or no experience who often fail to take full and complete notes of the interview. These clerks will rarely intervene in the interview process and are unable to advise clients regarding their cases.***

We can readily see that evidence of this nature illustrates situations of substandard representation wasteful of public funds. However, it begs, rather than answers the question whether asylum-claimants do or do not need *proper* representation at the asylum interview. We note that, in conjunction with the April 2003 time standards (paragraphs 30-31 below), LSC explained that a representative was required to "justify attendance each time" but that assistance at interview was "normally reasonable" (see eg. GCC (solicitor) contract specification p.213).[18] As the Legal Aid Board's May 1999 recommendations *Access to Quality Services in the Immigration Category* had earlier explained (para 3.13), by reference to a Report of the Advisory Committee on Legal Education and Conduct, "attending the asylum interview with the client" was then recognised as one of three "key tasks" at the initial stages of an asylum claim.

(2) Secondly, as to ability to attend the interview not being "guaranteed", LSC explains (LSC consultation paper draft specification para 13.2.11):

> ***we would not expect to see attendance at interviews in routine cases. Time, including travel and waiting, spent in accompanying clients to interviews will form part of the relevant Advice Limit.***

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[18] We note too that the ability of the particular asylum-claimant to be accompanied by his representative was referred to as one of the safeguards in *R (Mapah) v SSHD* [2003] EWHC 306 (Admin) at [50], alongside the Secretary of State's system (at [63]).

We have difficulty with the logic of this. The suggestion appears to be that it would be in a case with special features, requiring extra care and attention by the representative, that attendance at the interview within the 5 hour MFL would be expected. We think this illustrates the practical problems with the MFLs and their rigidity. It is surely precisely in a case with special features, requiring extra care and attention by the representative, that attendance at the interview within the 5 hour MFL would be impossible, because the 5-hours will be needed; or would be damaging to the care and attention prior to the interview, being reduced so as not to use up the 5-hours.

23. As regards appeal to the adjudicator, the ILPA Guide explains (pp.87-88, chapter 14) the detailed work necessary in drafting grounds of appeal and preparing an appeal. They include the fact that a client interview may be necessary, not least because of the need to sign the grounds of appeal to confirm the client's agreement (p.87), the importance of the grounds of appeal addressing all the points in the decision letter and not using short-form standard grounds (p.87); the need for human rights arguments to be sufficiently detailed (p.88); the importance of witness statements and other documents (pp.104-105), and the importance of a properly prepared bundle and skeleton (pp.106-107).

24. Far from suggesting a wish to compromise on these principles of providing a quality service, described in the Practice Guide and arising in the context of the reasonableness requirement and quality standards, the DCA consultation paper emphasises (para 4) that:

> ***focused written representations in initial applications ... can add major value to the asylum process as a whole.***

DCA later says (para 24) that:

> ***We see the key to putting the client's case to be the statement of case prepared on behalf of the client by their representative and setting out the reasons for applying for asylum which is then submitted to the Home Office.***

DCA describes this intended approach[19] (in one of the consultation questions: Q3) as one of:

> ***concentrating funding on the preparation of a statement of case at the initial stage.***

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[19] In *Duncan* (paragraph 9(3)(b) above), LSC's evidence to the High Court (see [63]) was that "advice and assistance is potentially the most important part of the overall scheme... The experience of the client at this first point of contact is crucial to the success of the scheme".

Similarly, there is no suggestion of a wish to compromise on recognised standards and guidance as to the proper preparation of appeals to an adjudicator.

25. In relation to the approach of requiring high practitioner standards at the initial stages, it should be remembered that this is in line not just with the importance of asylum claims but with the fact that asylum is a context where the asylum-seeker is expected to make prompt and full disclosure. This is reflected in the immigration rules (HC395 paragraph 340), which provides:

> ***A failure, without reasonable explanation, to make prompt and full disclosure of material facts, either orally or in writing, or otherwise to assist the Secretary of State to establish the facts of the case may lead to refusal of an asylum application...***

(6) Rigidity and injustice

26. There are a number of reference points which emphasise the crucial importance of flexibility to allow for special circumstances (eg. difficult or complex issues) of an individual case. To begin with, the exclusive contracting regime contained in the 1999 Act was preceded by the Report to the Lord Chancellor by Sir Peter Middleton (September 1997) and the White Paper *Modernising Justice* (December 1998). The Middleton Report said this (para 3.23):

> ***Provided flexibility is built into the system, I consider that contracting offers a sound basis for the legal aid scheme.***

The White Paper said this about flexibility and complex cases (para 3.19):

> ***Contracts for particular types of case will include flexibility at the margins to deal with cases of other types. This will allow providers to deal with novel or unusual cases, and complex cases that fall across several categories.***

27. The *Duncan* case (paragraph 9(3)(b) above) is also illuminating in relation to rigidity and flexibility. The following passages from the judgment indicate how significant the in-built flexibility was, from the point of view of considering standard fees and limited case starts in that case:

> ***The initial limit of the advice and assistance scheme for any individual case in all the areas of work relevant to this case was two hours' work, which the Board might extend, depending on the need for further work. [115]***

> ***Mr Orchard [for LSC] denied that there was any such cost "ceiling". He said that the figures in the contract specification had been set at the reasonable point at which each case should be reviewed by the Board, and a further extension granted only if it was justified... [345]***

[Mr Orchard] emphasised that there was no absolute ceiling on the costs of an advice and assistance case, but only a cost limit for the purposes of a review by the Board and a further extension being granted, if appropriate. However expensive an individual advice and assistance case might be, the supplier would be paid for all work reasonably done, provided it was an authorised matter start, and provided that any financial extension above the relevant cost limit had been obtained. [346]

The Board's evidence ... shows that the scheme has an inbuilt flexibility, and Ms Mackintosh has been told repeatedly that if she needs more case starts in the early months of the scheme, she has only to ask, and the Board will pay, on a proper assessment, for the work she does on each authorised case... [576]

Given the flexibility which is inherent in the scheme, we can see nothing irrational in the Board's choice of the periods from which baseline figures were obtained ... [579]

This kind of flexibility is absent in relation to the present proposed MFLs.

28. Also on the subject of inflexibility, the following passages from *McLean* (paragraph 9(3)(c) above) capture an important concern:

I share the concerns which ... Lord Clyde and Lord Hobhouse ... have expressed about the potential for injustice which is inherent in the fixed payment regime. A scheme which provides for various items of work and the associated outlays to be paid for in stages, for each of which a prescribed amount will be paid as a fixed fee, will not necessarily be incompatible with the Convention right to a fair trial. But the greater the inflexibility the greater is the risk that occasionally, especially in exceptional or unusual cases, the scheme will lead to injustice. [Lord Hope at [45]

As has been pointed out, the critical defect in the 1999 Regulations is their inflexibility... [Lord Hobhouse at [80]]

29. The *McLean* case (paragraph 9(3)(c) above) is important in another respect, which involves a further important point of contrast. In that case, although the standard fees were fixed and not extendable, the Privy Council attached considerable significance to the fact that they were standard fees which would "even out" over the course of an overall caseload, because they would be payable when generous, and when inadequate, by reference to actual time spent. The following passages are material:

[A] solicitor whose name is on the register can expect to be instructed in a variety of cases ... It can be assumed that from his point of view what matters is his overall return over a given period ... [Lord Hope at [21]]
[T]he time and outlays which the solicitors have expended on this case so far is already far in excess of the amount which they can expect to recover by way of a fixed fee. But the assumption has to be made that what matters to them is the effect of the 1999 Regulations across the whole spread of the work which they do by way of criminal legal assistance over a given period... [Lord Hope at [41]]

I see nothing wrong in principle in a scheme which proceeds upon a basis of fixed sums for specified work. Moreover in so far as the approach adopted recognises that different cases will require different amounts of work, and that different cases will have different degrees of profitability, the policy of adopting a basis of a fixed sum may not in itself be unreasonable if in its general operation the solicitors engaged in the work covered by the regulations, taking as it were the rough with the smooth, will find the amounts acceptable. And it is right to recognise that the scheme is not altogether rigid. In a rough and ready way account is taken of the extra costs involved in a long trial, reflecting the extra work involved... [Lord Clyde at [70]]

There is much to be said for schemes of legal aid which reduce the bureaucracy involved provided that they do not undermine the principle that the lawyer should receive fair remuneration for the work done... [The] scheme contemplates that in a proportion of cases the solicitor will be acting without reasonable remuneration. This may lead to a situation ... where there is a direct breach of the [ECHR] because the requisite legal assistance is not being given to the accused or an indirect breach where the legal assistance is being given on a basis which negates the equality of arms. It is true that a fixed fee system does not necessarily have this effect in all cases; indeed, unless unduly parsimonious, it will probably involve an element of over-generous remuneration in a proportion of cases... [Lord Hobhouse at [79]]

This provided a suggested answer to the problem of inflexibility (above). It is not an answer which is available with the present proposals (paragraph 6(2) above).

(7) The time standards

30. One very compelling feature of the present case concerns LSC's previous "time standards". The position is this. Against the backcloth of the funding code and the requirement of reasonableness LSC considered the question of what periods of time were regarded as necessary in order to provide proper immigration advice and assistance, and adopted a position which it has maintained subsequent to endorsement of the ILPA practice guide. Time standards were introduced into the GCC for private solicitors. In the current (April 2003) version of the contract specification for immigration work there is "guidance specific to the immigration category" set out in "general rules" (GCC (solicitors) contract specification p.213). The GCC (nfp) (January 2003) explained that "category specific time standards will be introduced in 2003-4 following further consultation with your Representative Body", and described the position which would apply when those standards came into effect (GCC nfp contract specification p.127). A consultation document had indeed been issued (October 2002), with a draft specification (draft nfp specification 25.9.02), to which RLC had for its part responded (20.12.02).

31. It is important and illuminating to appreciate the position which LSC was then adopting

and putting forward as appropriate, in relation to time standards. In particular:

(1) The time standards being imposed (solicitors) and proposed (nfp) were arrived at in a budgetary context needing to ensure value for money. For example, the October 2002 consultation said (p.2) that it was outlining:

> ***necessary changes to secure value for money.***

(2) The time standards for asylum cases refer to the expectation of the legal representative spending up to 12 (or 14) hours on initial legal help. That is made up of listed components (marked here [a] to [g] for illustrative purposes). The specification includes the following (GCC (solicitors) contract specification p.218; also draft nfp specification 25.9.02 pp.120-122):

> ***Initial limit.***
> ***[a] The initial limit of 2 hours ... is normally sufficient to cover the preliminary interview with a client who is not detained, perusal of documents, assessment of status and the merits of the case, and to advise the client on procedure, merits, costs and availability of funding from the Community Legal Service.***
>
> ***[b] It would not be unusual for you to justify an extension of up to 2 hours ... in complex cases...***
>
> ***Reporting outcomes. [From para 17:***
> ***[c] You may require 0.5-1 hour ... at various stages throughout the life of a case to report to ... clients the outcome of, say, an application or course of enquiry, and to advise them of the options or courses open to them. You will certainly need to advise ... clients of the outcome of the initial application.]***
>
> ***PAQ (Political Asylum Questionnaire) -***
> ***[d] a further extension of up to 4 hours ... should normally be sufficient to cover the completion of the Political Asylum Questionnaire, including supporting documentation.***
>
> ***Advising, Preparing and Attending PAQ interviews -***
> ***... a further extension of up to 6 hours ... should normally be sufficient to cover [e] advising the client on the matters raised and preparing for and [f] attending the interview...***
>
> ***[g] Additional time may be required following the interview if specific issues were raised which could prejudice the application and which you will need to clarify with the client.***

(3) The questions which these standards raise in relation to the current proposals are important, yet unaddressed: In respect of which of these components recognised by LSC in April 2003 ([a]-[g]), to what extent, and on what basis, is it now said

that (a) the step is not necessary in providing proper and effective advice and representation or (b) the time needed for the step is to be regarded as reduced ? On what basis is interview attendance (component [f]), recognised as appropriate by LSC in April 2003, now deleted as unnecessary (paragraph 21 above) and how moreover does removal of that component reduce a time standard from 12/14 hours to 5 ?

(4) The same points can be made in relation to time spent in preparing an appeal to the adjudicator, and the MFL of 4 hours (paragraph 3(2) above). The time standards (GCC (solicitors) contract specification pp.218-219) were as follows:

> ***Preparation and lodging of appeal to adjudicator -***
> ***[A] Where the Home Office refuses Asylum, a further extension of 1 hour ... should normally be sufficient to cover the preparation and lodging of the appeal.***
>
> ***Preparation for the appeal hearing before the adjudicator -***
> ***[B] A further extension of up to 4 hours ... is normally reasonable to prepare for the appeal hearing. Extensions beyond 6 hours ... should not be common although [C] in particularly complex cases concerning a number of countries extensions of up to 8-12 hours ... may be justified.***

(5) There is then this further crucial point. LSC's time standards were benchmarks designed to describe what was proper in a typical case (paragraph 6(1) above). As, for example, the nfp contract specification (pp.127-128) explained in describing proposed standards (already found in the solicitor GCC specification):

> ***useful guidelines as to the time that you would expect to spend, as an average, on particular activities...***
>
> ***The time standards are based on competent and experienced advisers working on cases of average complexity/difficulty for clients without special needs...***
>
> ***The guidelines are only an average, and individual cases may take either more or less time for any number of reasons. The fact that time exceeds the standards in a particular case does not of course mean that the time spent was necessarily unreasonable.***

(6) LSC went on to explain what it had in mind in relation to complex or atypical cases, where work could be expected to take longer than the time standards, saying (nfp contract specification January 2003 p.128):

> ***There are a number of factors that could lead to you exceeding the times.***

Each case must be assessed on its own facts and merits, but there are a number of factors that may justify exceeding the time standards in a particular case, for example:

(a) The complexity of the subject matter.

(b) Difficult or novel point(s) of law outside the mainstream of work in that subject area of law.

(c) The volume of documentation to be considered.

(d) Difficulty in obtaining standard documentation or undertaking standard steps, either through practical difficulties in obtaining documents, or through delay, obstruction, or lack of co-operation from the other side or other relevant administrative body.

(e) The particular characteristics or needs of the client, where this necessitates spending additional time. This would include, learning difficulties, material physical disabilities, or lack of English or other communication difficulties. If the issue is simply that the client is unduly demanding, it may not be reasonable to allow additional time.

and (solicitor contract specification April 2003 p.216):

The following provide a "feel" for complex issues involved in immigration cases.

(a) if you discover a discrepancy in statements, for example, between the information given to the Immigration Officer and information given at a PAQ interview, then extra time might be required to clarify the discrepancy;

(b) ...

(c) if applying for... asylum, a case might be more complex if the applicant has travelled to a number of countries before reaching the UK. Obviously the more complicated the background, the more complex the case;

(d) extra time might be required if you are facing particular difficulties in obtaining documentation from the client's national country. For example, it is obviously easier to obtain a copy of a marriage certificate from, say, Australia, than it might be from a small village in an African country;

(e) you might justify exceeding standard times if documentation is particularly voluminous. This might certainly be so when considering the explanatory statement for refusing a person entry. An explanatory statement is normally between 2-15 pages. Whilst it might not take that much longer to read 15 pages, than, say, 5, it might be an indication of the complexity of the matter and the

number of points to be addressed by the solicitor in reply; (f) a case will become more complex if it mixes an application for asylum with say an application for family reunion as you will be pursuing both avenues at the same time.

(7) Again, obvious and troubling questions arise out of this. What basis is there said to be for taking standards which reflected proper work in a typical asylum case, and drastically reducing it to represent fixed maximum time-limits in which it is said that proper work can be done and even in an atypical, complex case ? This is a drastic and striking change, and which the Court would in our view expect DCA and LSC to have faced up to and grappled with[20], explaining how what was proper and as an average suddenly far exceeds what is proper and as a rigid maximum.

(8) It occurs to us that the following observation is helpful in illustrating how the Court would approach such a situation[21]:

> ***There is ... considerable force in the argument that it is poor administration for the State to come to two different conclusions in respect of the same issues. But that does not answer the question as to whether one or other of those decisions must be unlawful. It does, however, require the court to consider with the greatest care how such a result can be justified as a matter of law.***

(8) Human rights

32. Finally, we draw attention to the rights context. We think this is one of those situations where the central problem of unlawfulness would be established, even without any reference to human rights. The points which we have made thus far, and the public law standards to which they would be relevant, apply conventional principles of administrative law. They do not depend on the subject-matter being concerned with fundamental rights. However, we draw attention to a number of further points. Some of them relate to the Human Rights Act and Article 6 of the ECHR, though we shall explain why a human rights analysis can apply even if Article 6 does not. Although we do not see human rights as an essential precondition, they do have an important reinforcing and enhancing effect, if as we think this is indeed a rights context. That is because human rights inevitably would bring an even closer and rigorous scrutiny of the

[20] Cf. *McLean* at [69] (Lord Clyde, commenting as to the lack of information available to the court, in that case, as to the "adequacy" of prescribed sums by "comparison with the figures prevailing under the earlier regulations").

[21] *R v Department of Health, ex p Misra* [1996] 1 FLR 128, 133 (Latham J).

justification for the MFLs and their rigidity.

33. Plainly, this is not a situation where Article 6(3)(c) (state legal aid for criminal defendants) is in play, unlike *McLean* (paragraph 9(3)(c) above). The question then is whether Article 6(1) is engaged, as it can be (see *Duncan* at [93]) in a civil legal aid context. One objection might be that the initial stages of an asylum case have an insufficiently close nexus to "court" proceedings to fall within access to law guaranteed in Article 6(1). Another question would be whether asylum cases are capable of involving a determination of a "civil right". The logic of those objections would involve the stark proposition that the United Kingdom Government could, consistently with Article 6, remove state legal assistance to impecunious asylum-claimants. If Article 6(1) is engaged, the question would be whether in the present circumstances the adoption of the proposed MFLs would violate Article 6 standards of fairness and justification.

34. The Article 6 arguments are not straightforward. We have already explained how this case engages traditional administrative law principles (paragraph 14 above). We shall go on to explain (paragraph 35 below) that, even from the point of view of rights and justification, the common law would be likely to speak even if Article 6 is silent. With those introductory observations in mind, we turn to consider the Article 6 points (paragraph 33 above):

(1) In relation to the "civil right" point, we are aware of the decision in *MNM*[22] which approaches immigration cases, including as involving "public law" rights which do not therefore engage Article 6. For our part, we doubt whether that approach in an asylum/human rights case is sound or satisfactory and predict that its life expectancy would be short if challenged head-on. Its foundation is *Maaouia*, which was not an asylum case, and a waning distinction between public and private law rights. The language of "public authority prerogatives"[23] is apt to describe general immigration control[24], but seems inapt to describe the state obligation in international and domestic law not to remove a person with refugee/Article 3 rights. Indeed, there is something baffling and unjust about an

[22] *MNM v SSHD* [2000] INLR 576 at [15], applying *Maaouia v France* (2000) 33 EHRR 42 at [35].

[23] *Harrison v SSHD* [2003] EWCA Civ 432 at [29], applying *Ferrazini v Italy* (2002) 34 EHRR 1068 (a tax case) at [29] (see also *Maaouia* at [28]).

[24] See *Maaouia* at [35] ("expulsion of aliens"); *Harrison* (nationality); *R (K) v Lambeth London Borough Council* [2003] EWHC 871 (Admin) at [65] ("immigration decisions") and *SSHD v Khadir* [2003] EWCA Civ 475 (an ELR case) at [86] ("immigration control").

approach where property interests (even those which arise by virtue of an international instrument[25]) are recognised as a "civil right" worthy of protection under a human rights Convention, but a right recognised in domestic public and statutory law (as well as in international instruments) to be protected against very serious harm is not so recognised.

(2) In relation to the "nexus" point, this seems to us to merge with issues of interference and justification. If asylum is a "civil right" being determined by the state, then we doubt whether legal advice and assistance at the stage of making the asylum claim could prevent Article 6 being engaged, especially when the groundwork is directly relevant to pursuing if necessary (but seeking to avoid the need for) an appeal to the IAA[26], and when the initial stages are (as DCA/LSC recognise) a vital one, not least because asylum claims can be irretrievably prejudiced[27] at those stages (see paragraph 25 above). Whether Article 6(1) is violated would depend on scrutinising the nature of the restriction and the justification put forward, having regard to the municipal parallel of the Strasbourg "margin of appreciation" and recognising the permissibility of reasonable restrictions in legal aid.[28] In applying the protections as to proportionality and arbitrariness which inform the "fair balance" test[29], Article 6 will ultimately scrutinise whether and on what basis, in circumstances where a lawyer's services are indispensable, the proposed levels and their rigidity constitutes an effective denial of the asylum-claimant's opportunity to put their case "properly and satisfactorily" (ie. in a "competent and effective" manner: cf. *McLean* at [61]). That is the principle in *Airey v Ireland* (1979) 2 EHRR 305 at [24] and [26]. Its application would take us back, reinforced by human rights jurisprudence, to the examination of the key question which we identified at the outset of this opinion (paragraph 5(2) above).

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[25] See *Beaumartin v France* (1994) 19 EHRR 485 at [28].

[26] Cf. *Duncan* (paragraph 9(3)(b) above) at [329] (considering initial access to a lawyer in the MHRT context).

[27] Cf. *Murray v UK* (1996) 22 EHRR 29 at [66].

[28] *Duncan* at [457] (citing *Ashingdane v UK* (1985) 7 EHRR 528 at [57]); *McLean* (paragraph 9(3)(c) above) at [40] and [63]; *Thaw v UK* (1996) 22 EHRR CD 100.

[29] See *Duncan* at [452] (citing *Ashingdane*, as to fair balance and proportionality) and *S and M v UK* (1993) 18 EHRR CD 172 (as to arbitrariness). As to inflexibility and arbitrariness in a human rights context, cf. *R v Governor of Frankland Prison, ex p Russell* [2000] 1 WLR 2027, at [18] ("The limitation of the provision to one meal a day is arbitrary and operates irrespective of the impact on the individual prisoner").

35. Whether or not Article 6 were said to be engaged in the context of deciding asylum status, we do not believe that the domestic Court would accept that there is no rights context here warranting close scrutiny and proper justification for the limits on state-funded legal assistance for asylum-claimants, when they are unable to afford a lawyer (and prevented from working). The Courts are astute to protecting against such limits of the ambit of Article 6[30].

(1) Access to a lawyer is a constitutional right in domestic law, and is part of a broad concept of "access to justice" which is engaged in the context of asylum determinations of the Secretary of State.[31]

(2) Asylum claims have long-since been recognised as requiring high procedural standards, and the Courts have recently endorsed the fundamental importance both of refugee status and of the fundamental right to make an asylum claim.[32]

(3) In the present case, it is not the stated intention of DCA/LSC that asylum-claimants should be denied practical and effective access to a lawyer, removing state legal assistance to impecunious asylum-claimants (paragraph 33 above).

36. In all these circumstances, it would be surprising if the Court did anything other than use human rights as an important and relevant reference point, reinforcing the need anxiously to scrutinise the adoption of the proposed MFLs. The Court would we think be very concerned to see whether lines had been drawn in a non-arbitrary way and it having been demonstrated that there is a reasonable basis for the conclusion that they would be suitable and sufficient to provide practical and effective legal assistance necessary in the proper discharge of the functions of legal representative to the asylum-

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[30] See *MNM* at [16]; also *R (S) v Plymouth City Council* [2002] EWCA Civ 388 [2002] 1 WLR 2583 at [43] (Hale LJ, commenting,in the context of rights of access to legal advice, that: "The common law will protect the exercise of those rights irrespective of whether or not they would be classed as civil rights for the purposes of article 6").

[31] *R v SSHD, ex p Leech* [1994] QB 198, 210A (constitutional right), 212F (rule restricting access to lawyer requiring "self-evident and pressing need"); *R v SSHD, ex p Anufrijeva* [2003] UKHL 36 [2003] 3 WLR 252 at [26] (access to justice in context of asylum determination). Note that the analysis in this case does not involve maintaining a fundamental right to a lawyer of choice, still less an unrestricted such right (cf. *Duncan*).

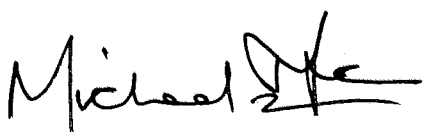
[32] See *R v SSHD, ex p Thirukumar* [1989] Imm AR 402, 414 (highest standards of fairness required in asylum cases); *Saad v SSHD* [2001] EWCA Civ 2008 [2002] INLR 34 (importance of refugee status); and *R (Q) v SSHD* [2003] EWCA Civ 364 [2003] 2 All ER 905 at [115] (right to claim asylum as a fundamental right).

seeker.

(9) Conclusion

37. The MFLs (and MDLs) which DCA and LSC have put forward are proposals at a consultation stage. For the reasons we have given, we think a Court would conclude that such proposals could not lawfully be adopted without DCA/LSC being able to identify material, with which they have acquainted themselves prior to any decision, and which they have disclosed to consultees for comment, capable of providing an evidential basis to support the conclusion that legal representatives would be able to provide a practical and effective service adequately meeting asylum-seekers' needs for legal assistance, within the suggested time-limits, even in atypical and complicated cases. We think that a Court would accept that such material would have to be cogent and persuasive, especially in the light of (a) the nature of the proposals as rigid maxima and (b) the previous conclusions of LSC in the form of its asylum "time standards". Moreover, we think that the material put forward by DCA/LSC cannot be said to have discharged these obligations.

38. Accordingly, it is our view that, unless and until DCA/LSC are able to produce (and disclose to consultees for comment) a clear and cogent case having a proper evidential basis, the proposed MFLs could not lawfully be adopted. That clear and cogent case would need to demonstrate that it can reasonably and justifiably be concluded that legal representatives would be able to provide a practical and effective service adequately meeting asylum-seekers' needs for legal assistance, within the suggested time-limits, even in atypical and complicated cases.



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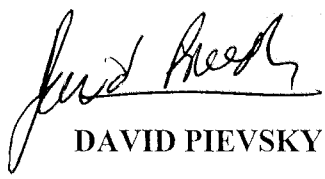

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