

Draft Regulations laid before Parliament under section 112(6) of the Nationality, Immigration and Asylum Act 2002, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2005 No.

**IMMIGRATION, ENGLAND AND WALES
LEGAL SERVICES COMMISSION,
ENGLAND AND WALES**

**The Community Legal Service (Asylum and
Immigration Appeals) Regulations 2005**

Made - - - - 2005

Coming into force - - 4th April 2005

The Secretary of State, in exercise of the powers conferred upon him by section 103D of the Nationality, Immigration and Asylum Act 2002⁽¹⁾, after consulting in accordance with section 103D(7), makes the following Regulations:

Citation and commencement

1. These Regulations may be cited as the Community Legal Service (Asylum and Immigration Appeals) Regulations 2005 and shall come into force on 4th April 2005.

Scope of these Regulations

2. These Regulations have effect only in relation to appeals decided in England and Wales.

Interpretation

3.—(1) In these Regulations—

“the 1999 Act” means the Access to Justice Act 1999⁽²⁾;

“the 2002 Act” means the Nationality, Immigration and Asylum Act 2002;

“the 2004 Act” means the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004⁽³⁾;

⁽¹⁾ 2002 c.41. Section 103D was inserted by section 26 of the 2004 Act.

⁽²⁾ 1999 c.22.

⁽³⁾ 2004 c.19.

“business day” means any day other than a Saturday or Sunday, a bank holiday, Christmas Day, 27th to 31st December or Good Friday;

“Commission” means the Legal Services Commission established under section 1 of the 1999 Act;

“contract” means a contract between the Commission and a supplier under section 6(3)(a) of the 1999 Act;

“counsel” means a barrister in independent practice;

“fast track proceedings” means any immigration review proceedings in relation to which, pursuant to an order under section 26(8) of the 2004 Act, the time period for making an application under section 103A(1) of the 2002 Act⁽⁴⁾ is a period of less than 5 days;

“Funding Code” means the code approved under section 9 of the 1999 Act;

“immigration review proceedings” means—

- (i) applications to the High Court under section 103A of the 2002 Act (including applications which are considered by a member of the Tribunal pursuant to paragraph 30 of Schedule 2 to the 2004 Act); and
- (ii) proceedings for the reconsideration of an appeal by the Tribunal pursuant to an order under section 103A of the 2002 Act;

“Legal Representation” has the meaning given in the Funding Code;

“section 103D order” means an order under section 103D(1) or 103D(3) of the 2002 Act;

“supplier” means a solicitor or other person who is an authorised litigator within the meaning of section 119(1) of the Courts and Legal Services Act 1990⁽⁵⁾, having a contract for the provision of services including Legal Representation in immigration review proceedings;

“Tribunal” means the Asylum and Immigration Tribunal.

- (2) References to a section by number alone refer to the section so numbered in the 2002 Act.

General restrictions on power to make section 103D orders

4.—(1) The High Court or the Tribunal shall only make a section 103D order in immigration review proceedings where an appellant is represented by a supplier acting pursuant to a grant of Legal Representation.

(2) The High Court or the Tribunal shall not make a section 103D order in fast track proceedings.

(3) Regulations 5 to 8 apply in relation to immigration review proceedings in which the High Court or the Tribunal has power, under section 103D(1)-(3) and this regulation, to make a section 103D order.

Criteria for making orders under section 103D(1)

5.—(1) The appropriate court must exercise the power to make an order under section 103D(1) in accordance with this regulation.

(2) If, upon a section 103A application, the appropriate court makes an order for reconsideration, subject to paragraph (5) it must not make an order under section 103D(1).

(3) If the High Court makes a reference under section 103C of the 2002 Act, it must make an order under section 103D(1).

(4) 2002 c.41. Section 103A was inserted by section 26 of the 2004 Act.

(5) 1990 c.41.

(4) If the appropriate court dismisses or makes no order on the section 103A application, it may make an order under section 103D(1) only if–

- (a) there has been a change in any relevant circumstances or a change in the law since the application was made; and
- (b) at the time when the application was made, there was a significant prospect that the appeal would be allowed upon reconsideration.

(5) The appropriate court may, on an application in writing by a supplier or counsel instructed by the supplier, make an order under section 103D(1) where it has made an order for reconsideration, but no reconsideration of the appeal takes place.

(6) In this regulation, “the appropriate court” means–

- (a) the High Court; or
- (b) a member of the Tribunal who considers a section 103A application by virtue of paragraph 30 of Schedule 2 to the 2004 Act.

Criteria for making orders under section 103D(3)

6.—(1) The Tribunal must exercise the power to make an order under section 103D(3) in accordance with this regulation.

(2) If the Tribunal allows an appeal on reconsideration, it must make an order under section 103D(3).

(3) If the Tribunal does not allow an appeal, it must not make an order under section 103D(3) unless it is satisfied that, at the time when the appellant made the section 103A application, there was a significant prospect that the appeal would be allowed upon reconsideration.

(4) If, where paragraph (3) applies, the Tribunal decides not to make an order under section 103D(3), it must give reasons for its decision.

Review by Tribunal of decision not to make order under section 103D(3)

7.—(1) A supplier, or counsel instructed by a supplier, may apply to the Tribunal in writing for a review of a decision by the Tribunal not to make an order under section 103D(3).

(2) An application under this regulation must be filed within 10 business days after the supplier is served with the Tribunal’s decision not to make an order, or such longer period as the Tribunal may allow.

(3) A review shall be carried out by a senior immigration judge who was not the member of the Tribunal, or a member of the constitution of the Tribunal, which made the original decision.

- (4) The senior immigration judge may–
 - (a) carry out the review without a hearing; or
 - (b) hold an oral hearing, if one is requested by the supplier or counsel.

- (5) The senior immigration judge may–
 - (a) make an order under section 103D(3); or
 - (b) confirm the Tribunal’s decision not to make an order.

(6) The senior immigration judge must give reasons for his decision on a review.

Terms and effect of section 103D orders

8.—(1) Subject to paragraph (2), a section 103D order shall have effect as an order for payment of all the costs incurred by a supplier representing the appellant in the proceedings to which the

order relates, including the fees of counsel instructed by the supplier, for which payment is allowable under the terms of the contract between the Commission and the supplier.

(2) In relation to proceedings in which a supplier has instructed counsel, the High Court or the Tribunal may in special circumstances make a section 103D order—

- (a) in respect of counsel’s fees only; or
- (b) in respect of the costs incurred by the supplier excluding counsel’s fees.

(3) A section 103D order must not specify—

- (a) the amount to be paid by the Commission; or
- (b) the person or persons to whom payment is to be made,

and the Commission shall determine those matters in accordance with the terms of its contract with the supplier.

Modification to the Funding Code, etc.

9.—(1) Where an appellant applies for Legal Representation to bring immigration review proceedings, the Funding Code shall apply subject to the modifications that—

- (a) in Section 5 of the Funding Code Criteria, the criteria in section 5.4 (standard criteria for Legal Representation and Support Funding) shall not apply; and
- (b) in Section 13 of the Funding Code Criteria, sections 13.4 (prospects of success) and 13.5 (cost benefit) shall not apply.

(2) Where Legal Representation is granted for immigration review proceedings to be brought by an appellant, the effect of the grant shall be that—

- (a) the Commission shall, subject to the provisions of its contract with the supplier, pay for—
 - (i) services consisting of advising on the merits of making an application under section 103A; and
 - (ii) any disbursements incurred by the supplier, other than counsel’s fees, whether or not a section 103D order is made; but
- (b) otherwise, payment by the Commission for services provided by the supplier, or by counsel instructed by the supplier, shall be conditional upon the High Court or the Tribunal making a section 103D order.

(3) Where Legal Representation has been granted for immigration review proceedings to be brought by an appellant, section 10(1) of the 1999 Act shall apply, notwithstanding that payment by the Commission for services is conditional upon a section 103D order being made.

(4) This regulation does not apply in relation to fast track proceedings.

Dated

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EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make provision about the exercise of powers in section 103D(1) and (3) of the Nationality, Immigration and Asylum Act 2002 (c.41) for the High Court or the Asylum and Immigration Tribunal to order payment of an appellant's costs out of the Community Legal Service Fund. Section 103D and these Regulations give effect to a special legal aid scheme for—

- (a) applications under section 103A of the 2002 Act by an appellant for a review of the Tribunal's decision on an asylum or immigration appeal, and
- (b) proceedings for the reconsideration by the Tribunal of its decision following an order made on such an application,

under which the High Court or the Tribunal decides when it determines an application or reconsiders an appeal whether to order the payment out of the Fund of costs incurred by the appellant's legal representative.

These Regulations have effect only in relation to an appeal decided in England and Wales.

Regulation 4 places general restrictions on the exercise by the High Court or the Tribunal of the powers to make orders under section 103D(1) or (3). Under regulation 4(1), an order may only be made in proceedings in which the appellant's legal representative is a supplier providing services under a contract with the Legal Services Commission. By virtue of regulation 4(2), the scheme does not apply in fast track proceedings where the time limit for making an application under section 103A of the 2002 Act is a period of less than 5 days.

Regulation 5 specifies criteria to be applied in exercising the power under section 103D(1) to make a costs order on an application under section 103A of the 2002 Act for a review of the Tribunal's decision on an appeal. Regulation 6 specifies criteria to be applied in exercising the power under section 103D(3) for the Tribunal to make a costs order when it has reconsidered its decision on an appeal.

Regulation 7 makes provision for the review of a decision by the Tribunal not to make a costs order under section 103D(3) when it has reconsidered an appeal.

Regulation 8 makes provision about the terms and effect of a costs order under section 103D, and provides that the Legal Services Commission is to determine the amount to be paid pursuant to an order, in accordance with the terms of its contract with the supplier.

Regulation 9(1) modifies the Legal Services Commission's Funding Code under section 9 of the Access to Justice Act 1999, by disapplying the Commission's usual criteria for granting of legal aid for representation in immigration proceedings (other than criteria relating to financial eligibility) in respect of proceedings within the scope of this scheme. Regulation 9(2) specifies the effect of a grant of Legal Representation by the Commission in proceedings within the scope of this scheme, and in particular provides that advice on the merits of an application under section 103A of the 2002 Act, and disbursements incurred by a supplier, will be funded whether or not the court or Tribunal makes a costs order. Regulation 9(3) clarifies that an appellant represented under this scheme shall not be required to make any payment towards the costs of services except where regulations provide otherwise.