

**EXPLANATORY MEMORANDUM TO  
THE COMMUNITY LEGAL SERVICE (ASYLUM AND IMMIGRATION  
APPEALS) REGULATIONS 2005**

**2005 No.966**

1. This explanatory memorandum has been prepared by the Department for Constitutional Affairs and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Description**

- 2.1 This instrument prescribes the procedures to be followed by the new Asylum and Immigration Tribunal and the High Court when retrospectively awarding legal aid for challenges to decisions of the Tribunal. The Asylum and Immigration Tribunal is created by section 26 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (AI(TC)). The power for the Tribunal and the High Court to award legal aid is contained in section 103D of the Nationality, Immigration and Asylum Act 2002 (NIA) as inserted by section 26 of the AI(TC) Act. These regulations come into force on the 4 April 2005. The regulations are subject to affirmative resolution.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1 These Regulations are made by the Secretary of State for Constitutional Affairs under s.103D of the Nationality, Immigration and Asylum Act 2002, as inserted by section 26(6) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

Regulation 1

- 3.2 This regulation commences these Regulations on 4<sup>th</sup> April 2005. Section 26 of the 2004 Act is to be brought into force on that date by a commencement order to be made by the Lord Chancellor under section 48(3)(a) of that Act.

Regulation 2

- 3.3 This regulation provides that these Regulations have effect only in relation to an appeal decided in England and Wales. By virtue of s.103D(8), that section has effect in relation to an appeal decided in England, Wales or Northern Ireland. Separate draft Regulations are to be laid before Parliament making corresponding provision in respect of appeals decided in Northern Ireland. Those Regulations will include some necessary differences, particularly to r.3 and 9, as a consequence of separate legal aid legislation being in force in Northern Ireland.

### Regulation 3

- 3.4 This regulation includes a definition of Legal Representation (the level of service provided under the Community Legal Service which includes representation in proceedings) by reference to the Funding Code approved under section 9 of the Access to Justice Act 1999. The definition of “Legal Representation” is in section 2.1 of the Funding Code, which is available on the Legal Services Commission’s website:

[http://www.legalservices.gov.uk/docs/stat\\_and\\_guidance/funding\\_code\\_part1.pdf](http://www.legalservices.gov.uk/docs/stat_and_guidance/funding_code_part1.pdf).

### Regulation 4

- 3.5 This regulation places general restrictions on the powers of the High Court and the Tribunal to make orders under s.103D(1) and (3). It is made under the enabling powers in s.103D(4) and (5)(c).

- 3.6 In particular, r.4(1) restricts the exercise of the powers to proceedings where an appellant is represented by a supplier acting within the legal aid scheme. It is intended that the Legal Services Commission (or a supplier acting under powers devolved to it by the Commission) will grant Legal Representation to a client before the supplier carries out work, following the normal procedure in legal aid cases, but that the grant of Legal Representation will have the modified effect specified in regulation 10(2).

### Regulation 5

- 3.7 This regulation sets out criteria to be applied by the appropriate court in exercising the power in s.103D(1). It is made under s.103D(4) and (5)(c).

- 3.8 The term “appropriate court”, as used in s.103D(1) and this regulation, is defined in s.103A(9) as meaning, in relation to an appeal decided in England and Wales, the High Court, but by virtue of Sch 2 para 30(3)(a) of the 2004 Act also includes a member of the Tribunal who considers an application under s.103A pursuant to Sch 2 para 30(2).

### Regulation 6

- 3.9 This regulation sets out criteria to be applied by the Tribunal in exercising the power in s.103D(3). It is made under s.103D(4) and (5)(c).

### Regulation 7

- 3.10 This regulation makes provision for reviews by the Tribunal of decisions not to make an order under s.103D(3). It is made under the enabling power in s.103D(4).

- 3.11 Paragraph (3) provides for reviews to be carried out by a senior immigration judge. This title is to be conferred by the Lord Chancellor on certain legally qualified members of the Tribunal, pursuant to the Asylum and Immigration (Judicial Titles) Order 2005 (S.I. 2005/227).

### Regulation 8

- 3.12 This regulation makes provision about the terms and effect of orders under s.103D. It also provides that the amount to be paid under an order, and the person or persons to whom payment is to be made, shall be determined by the Legal Services Commission in accordance with the terms of its contract with a supplier of services. It is made under s.103D(4), (5)(a) and (b) and (6)(a).

#### Regulation 9

- 3.13 Regulation 9(1) modifies the Funding Code by disapplying, in relation to proceedings within the scope of this scheme, the criteria (other than financial eligibility) according to which it is ordinarily determined whether Legal Representation is granted for immigration proceedings. (Section 13.1 of the Funding Code is separately to be amended with effect from 4<sup>th</sup> April 2005, consequentially upon the commencement of the 2004 Act, to provide that Section 13 applies to applications for Legal Representation for a client whose case is before the Asylum and Immigration Tribunal, and in any review of that Tribunal by the High Court or further appeal to the Court of Appeal or House of Lords.)
- 3.14 Regulation 9(2) specifies the effect of a grant of Legal Representation for proceedings within the scope of this scheme, in particular making provision for the Legal Services Commission to fund services consisting of advice on the merits of an application for review, and disbursements incurred by a supplier (e.g. translation and interpretation costs) other than counsel's fees, whether or not a section 103D order is made.
- 3.15 Regulation 9(3) clarifies, for the avoidance of doubt, that section 10(1) of the Access to Justice Act 1999 will apply where Legal Representation is granted for proceedings, notwithstanding that payment by the LSC for services is to be conditional on the making of an order under s.103D. Section 10(1) provides that an individual for whom services are funded by the LSC as part of the Community Legal Service shall not be required to make any payment in respect of the services except where regulations otherwise provide.
- 3.16 This regulation is made under s.103D(4) and (6)(a) and (c).

#### **4. Legislative Background**

- 4.1 Section 26 of the AI(TC) Act establishes a single tier Tribunal called the Asylum and Immigration Tribunal (AIT). It also introduces a new system of higher court oversight for decisions of the AIT and new retrospective legal aid arrangements.
- 4.2 Section 26(6) inserts new sections 103A to 103E into the NIA Act. Section 103A enables a party to an appeal to the Tribunal to apply to the appropriate court for an order requiring the Tribunal to reconsider its decision on appeal on the grounds that the Tribunal may have made an error of law. Paragraph 30 of Schedule 2 of the AI(TC) Act provides for applications made to the appropriate court to be considered initially by a member of the Tribunal for a transitional period from commencement of Section 26 until such date as may be appointed by Order of the Lord Chancellor.

- 4.3 Section 103D provides for legal aid for applications and reconsiderations under section 103A to be awarded retrospectively by the AIT and the High Court. Section 103D does not apply if the application is made by a party to the appeal other than the appellant or for cases funded under fast track processes.

## **5. Extent**

- 5.1 This instrument applies to England and Wales

## **6. European Convention on Human Rights**

- 6.1 The Secretary of State for Constitutional Affairs has made the following statement regarding Human Rights:

In my view the provisions of the Community Legal Service (Asylum and Immigration Appeals) Regulations 2005 are compatible with the Convention rights.

## **7. Policy background**

- 7.1 The AITC Act contains measures to support the Government's proposals on asylum reform. This includes unifying the immigration and asylum appeals system into a single tier of appeal with limited onward review or appeal. To reduce exploitation of the system the Act also introduces retrospective legal aid arrangements for the onward review stage of the process.
- 7.2 The consultation paper, *The Asylum and Immigration Tribunal – The Legal Aid Arrangements for Onward Appeals*, outlining the proposals for the new arrangements, was published on 8 November 2004. The consultation ended on 17 December. 34 responses were received.
- 7.3 The scheme is being introduced to discourage weak applications for onward review. This will ensure that the AIT and the High Court are not overloaded with unmeritorious cases and that public money is focussed on applicants with genuine claims.
- 7.4 Under the new arrangements legal aid will be awarded retrospectively at the end of the process, usually by the Tribunal judge following reconsideration and in a limited number of cases, following the determination of the review application.
- 7.5 If an application is unsuccessful at the review stage, in the majority of cases, legal aid will not be awarded. This element of risk will ensure suppliers carefully assess the merits of a case before agreeing to provide representation, which in turn will reduce the potential volume of onward reviews. If an application is successful and a reconsideration is ordered, legal aid will be awarded automatically if the reconsideration is successful. If the reconsideration is unsuccessful legal aid will be awarded if the Tribunal thinks that at the time the review application was made the case had significant prospects of success.

7.6 If following reconsideration the AIT decides not to award legal aid the supplier can apply to the Tribunal to have this decision reviewed.

## **8. Impact**

8.1 A Regulatory Impact Assessment was conducted for the AI(TC) Act. The view of the Small Business Service was that the changes proposed are largely social. Whilst it recognises that there is some impact on specific business sectors, this income only exists as a function of the current immigration appeals system and should not necessarily have been viewed by those businesses as sustainable income from the public purse. The DCA's view is that this position has not changed because the regulations support the original aims of the AI(TC) Act.

## **9. Contact**

9.1 Katie Spencer at the Department for Constitutional Affairs Tel: 020 7210 8909 or e-mail [katie.spencer@dca.gsi.gov.uk](mailto:katie.spencer@dca.gsi.gov.uk) can answer any queries regarding the instrument.