

# Legal Aid for immigration and asylum appeals under the online procedure

Asylum Aid's Response to the Ministry of Justice's call for evidence

## Asylum Aid

For over three decades, Asylum Aid have built an expert service, providing vital, high-quality legal representation to refugees and people seeking asylum with a particular focus on Survivors of trafficking, unaccompanied minors and stateless people.

We deliver specialist advice and end-to-end casework as well as legal representation in court and tribunals in asylum cases. We support the most difficult and lengthy cases, taking the necessary time and care to build trust with our clients and ensure that the most vulnerable people can obtain legal protection.

As a national specialist in the provision of legal representation for Survivors of trafficking, we use our expertise to seek policy change through strategic litigation and judicial review and we have a strong record of securing policy changes for refugees and asylum seekers.

We are part of the Helen Bamber Foundation Group and together with Helen Bamber Foundation, we are working to raise the standard of care for all Survivors and influencing policy to ensure they receive the protection they need.

### 1. What do you consider to be the key difference between the online system and the paper-based process in place prior to the introduction of the online system?

- Set timeframe for each stage in the online process, including the uploading of the respondent's bundle (RB), uploading the appeal skeleton argument (ASA) and appellant's bundle (AB), the respondent's review and its outcome, and the appeal hearing.

Set stages and related timeframes make the process more transparent/predictable, which helps manage our work better, provided the respondent engages with the process, as directed. This, in our experience, remains a problem under the online system, because the respondent often fails to upload her bundle and/or conduct a meaningful review, which results in an increase of costs.

- Frontloading of evidence by the parties.

Substantive preparation, i.e. evidence/bundles and ASA, at an early stage of an appeal.

- It is easier to communicate with the FTT about issues arising in an appeal at different stages via the 'Make an application' option. The FTT usually responds to applications promptly and pragmatically, and both parties are notified about an application having been made and the

FTT's related decision. This increases predictability within the process, which is key for busy practitioners who often work to competing deadlines.

More transparency within the process and better work management, because parties are notified automatically when one of them makes an application to the FTT, and the FTT's relative promptness and pragmatic approach to responding to such applications.

- There is an onus on the respondent to conduct a meaningful review of her decision under appeal in light of the evidence and ASA and notify the FTT and the appellant of the outcome of that review much earlier in the process.

The FTT's direction that the respondent conducts a timely and meaningful review of her underlying decision, which engages with the evidence and ASA, should help with both work and expectation management, and should reduce the number of last-minute withdrawals of decisions ahead of or at substantive hearings. This, of course, depends on the respondent engaging with the online system, as directed, which in our experience is not always so.

2. For each of the differences identified in answer to question 1, what do you consider to be the impact of those differences on your work?

[answers above in **green**]

3. Please explain how case management review hearings were used prior to the online system, and how they are being used as part of the online system.

Case management review hearings (CMRH) became more sporadic in the years leading up to the introduction of the online system in 2020. They were mostly limited to deportation appeals, and any other appeals that the FTT decided that needed to be case managed for some reason, including where preliminary issues were identified by the parties.

CMRH stage is built into the online system, but in our experience, the FTT lists appeals for a CMRH only if there are outstanding issues before they are ready to be listed for a full hearing.

4. Please explain whether, and if so, at what stage, appeal skeleton arguments were used prior to the introduction of the online system.

According to the previous FTT standard directions, ASAs were to be filed with the FTT and served on the respondent no later than 5 working days before the full hearing. The reality, however, was that ASAs were more often than not handed in on the day of the full hearing. This may have been e.g. because the evidence was not concluded until much closer to the day of the full hearing.

We understand that ASAs were not always provided under the "2a" and "2b" fixed-fee regime, which did not include a separate fee for the drafting of ASAs – or other preparation carried out before the day of the hearing - by counsel.

## 5. What do you consider the role of the ASA to be under the online system?

We do not consider that the role of the ASA has changed materially under the online system. The FTT online procedure directions set out the (expected) structure of the ASA to make it more focused on the relevant issues and with reference to the evidence. This may have been designed with the respondent's review in mind to make it more efficient and effective, provided that the respondent engages with the system, as directed. The ASA plays a crucial role within the appeal-determination process.

## 6. Do you have evidence of any instances under the online system in which an ASA was not required or was not produced? If yes, please summarise your experience and explain why an ASA was not required or produced.

Based on the FTT online procedure directions, an ASA is a standard requirement. This, coupled with the complexity of our clients' appeals, means that ASAs are produced in all Asylum Aid's appeals.

## 7. Can you describe whether, and if so, how, an ASA under the online system differs between asylum and non-asylum immigration case?

ASAs play a crucial role in all appeals, irrespective of whether they are asylum or non-asylum immigration appeals. In fact, given both the complexity of and the pace at which caselaw relevant to human-rights only appeals, including deportation appeals, is evolving, as well as the likely evidential complexity in such appeals, the need for an ASA in non-asylum appeals is as great as in asylum ones.

## 8. How long (in hours) does an appeal skeleton argument take in asylum and non-asylum cases? Do you have any examples/evidence to support this.

There is no brightline distinction in the time it takes to draft an ASA in an asylum and non-asylum appeal. The time it takes depends on a variety of issues, including the respondent's reasons for refusal, evidential and legal complexity, which as stated above tends to be great in human-rights appeals, as well as the experience of the drafter.

Given the crucial role an ASA plays in the online process, including that it may contribute to the respondent's withdrawal of the decision under appeal, thus saving taxpayers' money, ASA's role in the appeal-determination process cannot be overestimated. Of course, this depends on the respondent engaging with the ASA, as directed. This is not always so in our experience; the respondent *often* fails to conduct a meaningful review in light of the evidence and ASA.

We would also emphasise that it will often be necessary for the proper presentation of an appeal for the advocate to prepare an updated or supplementary ASA shortly before the substantive hearing. This may be necessary as a result of issues raised by the Respondent in the 'meaningful review', or as a result of developments (in fact, law or evidence) given the passage of time between the filing of the ASA and the substantive hearing of the appeal. It is essential that this work is properly remunerated where required.

9. Anecdotally, we understand that the requirement for an ASA may have resulted in Counsel being more routinely instructed in appeal cases. What are your views on this understanding?

It is the decision of the practice and/or the fee earner whether to instruct Counsel in an appeal. It is not our experience that the requirement for an ASA under the online procedure has resulted in Counsel being more routinely instructed. In any case, the FTT directs that an ASA be provided at a relevant time in the online system and so to comply with that direction, either the instructing representative or Counsel must draft it. The hourly rate for the preparation of an ASA is the same irrespective of who the drafter is.

10. Can you describe whether, and if so, how, an appeal skeleton argument under the online system differs between cases that result in a substantive hearing and cases that do not. Please also comment on whether this differs between asylum and non-asylum cases that result in a substantive tribunal hearing?

An ASA plays a crucial role in all appeals. Its early production under the online system is capable (but not a guarantee!) of contributing to the respondent's decision to withdraw her underlying decision, thus reducing the number of appeals that have to go to a full hearing. Ultimately, however, it is for the respondent to decide following a review whether to maintain or withdraw her decision under appeal. In our experience, the respondent *often* fails to comply with the FTT direction to conduct a *meaningful* review, which results in more appeals going to a full hearing and therefore, increased costs.

As noted above, in cases which go to a substantive hearing, it may be necessary for the proper presentation of the appeal for an updated or addendum ASA to be prepared shortly before the hearing, to reflect developments in law, fact or evidence, or to respond to issues raised by the Respondent at the review stage.

11. Do you consider that the introduction of the online system has had an impact on the work necessary to prepare for a substantive hearing? If so, please explain how and why.

The online system has had an impact on the timing of the preparation/material work for a substantive hearing. As evidence and an ASA are provided relatively early in the process, which can be 'long', and before the respondent's review, it is possible that updated evidence and a supplementary ASA may need to be provided nearer the time of the hearing.

12. Do you consider that the introduction of the online system has had an impact on what happens on the day of the substantive hearing itself? If so, please explain how and why.

As the respondent has the benefit of the appellant's evidence and ASA before her review of the decision under appeal, she is less likely to make last-minute decisions to withdraw or request an adjournment. Appeals are therefore more likely to be heard as listed.

13. Please provide evidence as to whether the previous controlled legal representation fee structure of stage 2a and stage 2b payments based on whether a case went to a hearing, would be suitable for asylum and immigration appeals using the online system?

Considering the likely extent of substantive work required for the preparation of evidence, including statements, expert evidence, country background evidence etc., and the drafting of the ASA, it is impossible to estimate the likely profit costs incurred in the pre-respondent's review stage of an appeal. Hourly rates are sensible, because they are more likely than not to correctly reflect the extent of work having gone into the preparation of an appeal and avoid the need for complex and costly (but unremunerated) administration involved in the making, assessing, and responding to escape-fee claims.

It seems impractical to allow hourly rates for work undertaken pre-respondent's review and a fixed fee for any subsequent work if the respondent maintains her decision and the appeal progresses to a hearing. Furthermore, our experience is that the respondent does not *always* undertake a *meaningful* review, as directed, which is likely to result in further un-anticipated work, including chasing the respondent, communicating with the FTT, and amending/updating ASA.

In our experience, both before and after the introduction of the online procedure, there are no cases that come in under the fixed fee. Most properly prepared appeals are *considerably* over the previous "2b" or "2c" fixed fees. This means that the fixed fee system is not a system of 'swings and roundabouts' but only of swings: providers risk being seriously under-remunerated for proper preparation of appeals without the recompense of ever being paid a fixed fee for less work. The fixed fee system therefore operates to disincentivise proper preparation of appeals and jeopardises the sustainability of providers. Hourly rates are sensible, practical, and justified in FTT appeals. They obviate the need for lengthy and time-consuming escape-fee claims to get paid for the work done.

14. Please describe what type of work you consider to be remunerable under the 'additional payments for advocacy services: substantive hearing' and 'additional day substantive hearing' fees.

Work carried out on the day and in relation to the listed hearing, whether a case management or a full hearing, including a pre- and post-hearing conference with witnesses on the day, advocacy, and post-hearing communication with instructing representative, in counsel-led appeals.

15. Please provide evidence on the protected characteristics and socio-demographic differences of individuals who are using the online system, both legal aid clients and legal aid providers, including instructed Counsel?

We don't have any evidence to provide in response to this question.

16. Please share any additional views, with supporting evidence, in relation to the online system that are not covered by the questions above but that you would like to be considered as part of this Call for Evidence.

It is currently not possible to make an 'early claim' for profit costs in hourly-rate appeals. It would seem sensible to introduce such a claim, similar to that under Legal Help, after the respondent has notified the FTT and the other party of the outcome of her review of the underlying decision in light of the evidence and ASA. It is at this point that it becomes clear whether the appeal will proceed to a hearing and if it does, it is likely to take 'some time', several months perhaps, before the appeal is heard and decided. Providers currently have to wait for a very long time before they can claim for their profit costs incurred in appeals, which causes significant cash-flow problems and puts unnecessary pressure on them.