Legal Aid Agency

Appeals Manual

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Contents

Introduction & definitions 4

About the Panel 6

Communications 7

Oral hearings and Committees 7

Confidentiality 8

Accountability and indemnity 9

Equal treatment 11

Conflict of interest 12

Remuneration 13

Dealing with a review 14

Procedures for oral hearings and Committees 16

Public Law issues 19

Decisions and reasons 21

Jurisdiction and function 26

Costs appeals 30

Controlled work 32

Licensed work 34

Assessments under the Standard Crime Contract 34

Fraudulent claims 37

INTRODUCTION AND DEFINITIONS

This manual is designed to help new and existing Review Panel members by providing relevant information about acting as an Independent Costs Assessor (ICA) or Independent Funding Adjudicator (IFA). This manual includes information to help those adjudicators who sit on the Special Controls Review Panel and the Criminal VHCC Panel. The appointment and status of Panel Members and the role requirements are set out in the Review Panel Arrangements (“the Arrangements”). This manual is based on but is a not a substitute for The Legal Aid, Sentencing & Punishment of Offenders Act 2012 (LASPO) and the regulations made under it, the provider Contracts and the relevant Costs Assessment Guidance for Civil and Criminal proceedings.

From 1st April 2013 legal aid has been administered by an executive agency of the Ministry of Justice (MoJ), known as the Legal Aid Agency (LAA). One of the changes back in 2013 was to create a national Review Panel comprising members whose skill sets are a better match to the volume and nature of the appeals we expect to receive. Workload is now spread more evenly among the Panel Members and the single panel allows better communication with members about changes in practices and procedures designed to improve consistency of decision making.

The members are appointed by the Lord Chancellor. A Chair and Vice Chair are appointed.

The Arrangements were revised in readiness for the creation of the Legal Aid Agency in April 2013. Although the process of administration of appeals after 1st April 2013 differs from the way that process has existed since October 2006, the role of the adjudicator or assessor remains broadly the same.

Note the definitions of the following terms used in this manual:

“**Independent Funding Adjudicator**” (IFA) and “**Independent Costs Assessor”** (ICA) refer to a single Panel Members appointed under the Arrangements to deal with appeals or reviews of decisions by the Director under paras.1(a),(b),(f) or (g) of the Arrangements.

““**IFA”** or “**ICA**” means an Independent Funding Adjudicator or an Independent Costs Assessor.

“**Agency”** means the Legal Aid Agency.

“**CEO**” means the Agency’s Chief Executive Officer, or his or her nominee. The Legal Aid Agency’s CEO may also hold the office of Director of Legal Aid Casework.

“**Committee**” means a panel of Assessors or Adjudicators as provided for by Regulation 45(3) of the Civil Legal Aid (Procedure) Regulations 2012 and by Paragraph 6.78 of the Standard Civil Contract Specification 2018 or Paragraph 8.26 of the Crime Contract Specification 2017.

“**Committee Chair**” means the panel member selected to chair a particular Committee.

“**Contracts”** means the current criminal and civil contracts between legal aid providers and the Agency.

“Director” means the Director of Legal Aid Casework.

“**Panel Chair**” means the Chair of the Review Panel.

“**Panel Member**” means an Independent Funding Adjudicator or Independent Costs Assessor and includes SCRP members.

“**Regulations**” means the Civil Legal Aid (Procedure) Regulations 2012

“**Review Panel**” means the panel created by the Arrangements, and from which Independent Funding Adjudicators and Independent Costs Assessors and the Committees which carry out their function under the Arrangements are appointed.

“**Special Controls Review Panel**” (SCRP) means a Committee comprising a panel of two or more Adjudicators who will provide advice on any issue or any case referred to them which is relevant to the funding of a case treated as Special Case Work that is subject to special controls. SCRP members are specialist IFAs and are appointed to a SCRP panel, a sub-panel of the overall Review Panel.

“**SCRP Chair**” means the Chair of the SCRP.

“**SCRP Vice Chair**” means a nominated individual who can act as SCRP Chair should the SCRP Chair be unavailable.

“**Vice Panel Chair**” means a nominated individual who can act as Panel Chair should the Chair be unavailable.

“**Arrangements”** means the Review Panel Arrangements.

ABOUT THE REVIEW PANEL

The Review Panel is an independent body made up of solicitors, barristers, Fellows of the Chartered Institute of Legal Executives and Costs Lawyers who act as IFAs and ICAs to consider reviews of decisions made by Agency staff. Where necessary, members of the Review Panel will be asked to form small Committees (usually comprising three Panel Members) to hear more specialist or high profile appeals.

A sub-panel, the Special Controls Review Panel (SCRP), exists to provide separate Committees of two or more Adjudicators to consider any issue or any case referred to them which is relevant to the funding of a case treated as subject to special controls (see Regulation 58). SCRP has its own Chair, but its members may also act as IFAs or ICAs deciding appeals made on cases outside of the special controls procedures.

Provisions for the appointment of Panel Members and for the administration of the Review Panel are set out in the Arrangements.

Members are appointed to the Review Panel in accordance with the criteria and guidance contained in the Arrangements. New Panel Members are appointed by the Lord Chancellor. Appointments are for a maximum period of five years and Panel Members may be reappointed, but the Governance Code of the Commissioner for Public Appointments restricts the office holder to no more than two terms and no more than 10 years in any one post.

When considering whether to recommend reappointment, the Agency may have regard to the skill sets existing within the Review Panel, the needs of the business, the availability of suitable nominees to fill any skill gaps, and any specialist skills that the retiring Panel Member possesses. The Governance Code states there is no automatic presumption of reappointment and the Agency is required to appraise the past performance of the candidate as satisfactory.

The Review Panel has a Chair and one or two Vice-Chairs.

The Review Panel Arrangements set out the criteria for membership. All Panel Members are required to report immediately any changes in their employment including their degree of involvement in legal aid casework.

In accordance with the Review Panel Arrangements, we will send you an Annual Declaration of Eligibility for you to confirm you still meet the membership requirements. We also ask you to confirm your up to date specialisms. Appellants do sometimes carry out their own checks of the specialist areas of Panel Members on the internet. If you declare expertise in areas of law which are not corroborated on your own website we may ask you for further information.

Communications

Panel Members will receive information from the Agency by email save where there are data security issues. You should take reasonable steps to ensure your computer and IT systems are secure and use office based or CJSM email accounts rather than Hotmail or Gmail addresses. You will receive guidance on all aspects of legal aid practices and procedures that affect your work as adjudicators and assessors. Changes relevant to the role of the Review Panel will be provided to you in a timely fashion.

The Agency will from time to time provide information and training on the procedures, practices and performance of the Agency and areas considered relevant to the role of the Review Panel.

Oral hearings and Committees

Oral hearings

Since 2006 the majority of appeals have been considered without an oral hearing. If you feel information is missing it is open to you to make direct contact with the appellant or their solicitor. Alternatively, you can ask the Agency for the missing information but bear in mind the role of the IFA is to adjudicate, not to investigate.

An appeal to an IFA will be considered without an oral hearing unless the IFA considers one is in the interests of justice under Regulation 45(2).

Appeals referred to the Special Controls Review Panel must be considered without a hearing unless the Panel considers that it is in the interests of justice for the individual, the Director or any person authorised by the individual or the Director to make oral representations before the Panel - Regulation 58(5).

An appeal to an ICA will, again, usually be dealt with on the papers. Either the provider or LAA, however, may request an oral hearing on the basis that they consider there are exceptional circumstances which means that concerns or issues cannot be addressed in writing (paragraph 6.75 Civil Specification). The ICA may direct an oral hearing, either on the basis of the application from either party or because s/he believes that their review of some or all of the issues under the appeal cannot be concluded properly without hearing oral submissions (paragraph 6.77 Civil Specification). Where an oral hearing is directed, both parties are entitled to attend.

Oral representations can be heard by a single Panel Member and need not be before a Committee.

Committees

Where the IFA or Director consider the appeal is of exceptional complexity or importance the appeal may be referred to a Committee of two or more IFAs under Regulation 45(3).

If a costs appeal is felt to be of such complexity and/or value an ICA may refer the appeal to a panel of three ICAs under paragraph 8.26 of the 2017 Standard Crime Contract Specification (as amended) or paragraph 6.78 of the 2018 Standard Civil Contract Specification.

In determining whether the appeal is complex, regard should be had to the intricacy and obscurity of the disputed issues as against common areas of dispute and any unprecedented difficulties faced by the appellant in their attempt to comply with the Regulations or Contract.

Is the subject matter of the appeal exceptionally (not just unusually) complex? Is the case of particularly high value? Is it a particularly high profile case? What is it about this appeal that sets it apart from most other appeals?

Special Case Work appeals are always considered in a Committee by the Special Controls Review Panel.

If you conclude that the appeal should be referred to a Committee, you will also have to decide whether it should be conducted on the papers only or whether there are grounds for allowing an attended hearing (see above).

Confidentiality

Information sent to the Agency for the purposes of appeals would normally be subject to legal professional and or litigation privilege between the provider and client, and is also likely to be "personal data" and thus covered by the non-disclosure provisions of LASPO 2012 (Sections 33 to 35), the Data Protection Act 2018 and the UK General Data Protection Regulations.

Sometimes the information might also be commercially sensitive to the provider and subject to other disclosure rules.

For this reason, unlawful disclosure, collection or storage of information can constitute a criminal offence and leave you liable to civil penalties under Sections 33 and 34 of LASPO 2012 and the Data Protection Act 2018 if a breach occurs.

You should therefore treat review papers (reports, bundles and ancillary documentation) as strictly confidential. You should not discuss appeals other than with the parties to that appeal, in Committee or, if you need to discuss the matter with another Panel Member, with that member, having firstly ensured that he or she is not conflicted in any way (and keeping a full attendance note of the conversation). If a Panel Member contacts you to discuss an appeal you are similarly bound to keep any appeal information confidential.

The Agency, as with most public bodies, is subject to the provisions of the Freedom of Information Act 2000 and there may be times where we are required to disclose information about the Review Panel (including, for instance, volumes of appeal handled, remuneration rates and Panel Membership). In addition, in the context of litigation (or even complaints), your notes or other appeals documents will be disclosable. Please ensure that you write everything with the expectation that both the appellant and a judge will see it.

We will not give an appellant your address or contact details nor will we confirm your name if it is evident that there may be some risk to you in our doing so.

Accountability and Indemnity

As a Panel Member, you will be expected to carry out this important public duty by strict implementation of the Legal Aid Legislation and Arrangements as well as the relevant provisions contained in the Contracts.

In exercising this public function, you must adhere to the key principles of public law. Your decisions must be unbiased and fair and may ultimately be subject to judicial review. It is essential that every decision you make is properly justified with adequate and appropriate reasons.

The Agency and the Ministry of Justice have agreed the following indemnity for Panel Members in carrying out their functions:

> *The Agency will indemnify Panel Members in carrying out their functions under these Arrangements provided that they have acted honestly, in good faith and in accordance with the statutes, regulations and procedures applicable to the decisions they have made.*

The Agency will determine the applicability of the indemnity according to the facts of any particular case. The indemnity is subject to the Panel Member's compliance with *the Seven Principles of Public Life.* They are:

Selflessness

Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.

Integrity

Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisation that might influence them in the performance of their official duties.

Objectivity

In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

Accountability

Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

Openness

Holders of public office should be as open as possible about all decisions and actions that they take. They should give reasons for their decisions and restrict information only when wider public interest clearly demands.

Honesty

Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

Leadership

Holders of public office should promote and support these principles by leadership and by example.

In practice, the need for the indemnity to come into effect will arise only in very exceptional circumstances. Any judicial review proceedings in relation to a Committee decision or a single Panel Member decision are invariably taken against the Agency and not against the individual Panel Members concerned even though, in legal terms, it may be the decision of the Panel Member that is properly the subject of the challenge.

Equal Treatment

As a public body the Agency has statutory duties in respect of equality and diversity. Since 2010 many of these obligations were grouped together under the Equality Act which covers the following protected characteristics:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation

The Equality Act provides that a public body must, in the exercise of its functions, have due regard to the need to:

a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act

b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it

c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it

These obligations also extend to a person who is not a public body but who exercises public functions.

Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard in particular to the need to –

- Remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic

- Take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it

- Encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low

As a Panel Member you must have regard to, and act in accordance with, all equality and diversity obligations.

Conflicts of Interest

A conflict of interest is likely to arise where you are asked to review a matter (without limitation):

- in which you or your firm are instructed or have advised; or
- in which you or your firm have a financial interest; or
- where the appellant is someone with whom you have anything more than a passing friendship or relationship; or
- where the appellant is someone that you have employed in the recent past; or
- where you are involved with the appellant in any other way (e.g. in a voluntary capacity or because you were previously employed by them); or
- where you or your firm stand to gain direct benefit from the appeal outcome.

Your decision must be – and must be seen to be – an objective one. It is your responsibility to be aware of the possibility, in any case, of there being a conflict of interest and when identified to declare this. If you have a conflict of interest you must withdraw from dealing with that particular appeal. You should immediately return the papers to the regional office and confirm, in writing, that there is a conflict and the reasons for that conflict.

If there is a committee hearing and it comes to light that one of the committee members has a conflict of interest then that member must withdraw from the meeting while the case is considered and must not return to the meeting until requested to do so by the other committee members. The minutes of any meeting should record the name of any member who has declared a conflict of interest with details of the matters in respect of which the conflict has arisen.

An agenda for any Committee you are asked to attend should be sent to you a week or more before the meeting to allow time for preparation. Whilst administrators will attempt to avoid including agenda items in which you may be involved professionally, this is not always possible. Accordingly, having read the agenda you should be alert to the possibility of it including reviews in which you or your firm may be involved.

If you recognise such a case, you should stop reading the papers immediately and return the them to the Agency.

You may act for the applicant in a case coming before a Panel Member or Committee, provided that you take no part in the adjudication or assessment and, if you have first been asked to do so, be sure that you declare your interest in writing as the reason for your withdrawal.

Where you have adjudicated upon an appeal submitted to you as an IFA or ICA (either alone or in Committee) you must not act or continue to act for the opponent of the applicant. Even if you do not recall the details of the case, it would be undesirable for you to act. Adjudicating on such an appeal should not prevent another member of your organisation acting or continuing to act in the matter.

Remuneration

Panel Members are paid through the Judicial Payroll and payments are normally made on the last day of each month. As Panel Members are "office holders" as defined in the relevant revenue law, the Agency is required to pay basic rate income tax and NI contributions on all payments to Panel Members. If you are an existing Panel Member then you should already have completed the necessary forms to go onto the Agency's payroll – if not then please request those forms from the appeals administrator.

Being on the Judicial Payroll does not mean that you are an employee of the Agency. You remain an independent office holder. Payment through our payroll department is only necessary because of our income tax and NI obligations.

Panel members will be remunerated at a rate of £52 per hour (exclusive of VAT) for work acting as a sole IFA or ICA.

Where a Committee is convened under paragraph 5 of the Arrangements the Chair shall be remunerated at the rate of £180.85 (excluding VAT) per half day and the other IFAs or ICAs forming the Committee shall be remunerated at the rate of £143.55 (excluding VAT) per half day.

Claims for payment may be referred to the Agency and Panel Chair where there is disagreement between the Review Panel member and the Agency about the reasonableness of time taken to decide any case or cases. A pro rata allowance for annual leave and public privilege holidays is built into the rates detailed above. The rates paid therefore incorporate an element which represents your entitlement to paid annual leave under the Working Time Regulations 1998.

DEALING WITH AN APPEAL

Introducing the procedure

We expect that you would be able to consider appeals at your own offices as and when they came in from the Agency's appeals administrators. The timescales that we operate in order to keep our KPI targets must be met. However, they do allow you some flexibility in how you deal with the appeals.

Often, particularly when an appeal is urgent, appeal documents may be scanned and emailed to you and you will be able to email back your decision.

The process

The procedure differs in legal terms between funding decisions under the regulations and costs assessment. In relation to the former, the Regulations (regulation 44) expressly provide for a right of internal review by the Director. The applicant/legally aided individual must exhaust this process before deciding whether to appeal the review decision to an IFA. Even in costs matters, when the Agency receives an appeal it will undertake a detailed internal review of the original decision. This may lead to changes to the original decision and any such changes will be raised with the appellant, giving them the chance to withdraw the appeal if appropriate.

If it is evident to the internal reviewer that information is missing then we will try to obtain that information from the appellant. However, it is for the appellant to provide the information that supports their appeal, and if they purport to do so the Agency's reviewers will not return the appeal and ask for more evidence in order to strengthen the appellant's case.

The appeals administrators who contacts the panel to arrange for appeals to be decided will liaise with the IFAs or ICAs to ensure that appeals are distributed on as fair a basis as possible, and with regard to the categories of law and work-types (applications or claims for costs) that each member has confirmed that he or she specialises in.

If, after internal review, the appeal is to continue then the internal reviewer will prepare the appeal bundle and report. This will then be sent to the Appeals Administrator who will choose from the pool of Panel Members with the necessary specialist knowledge to deal with the appeals. Having taken account of specialisms, the Administrator will then allocate in order from a centrally held database, to ensure that the work is allocated fairly among Panel Members. The administrator will then copy the papers, finalise the bundle and send the papers to you (either as a single appeal if urgent or in a batch of appeals.). Once you receive the pack of appeals papers you will have a maximum of 14 calendar days to consider them, come to your decision, write up your decision (with detailed reasons) and send it back to the administrator. You can do this by email. Where you are sent a small number of appeals to consider we may liaise with you to agree an earlier target date for return of the papers where the matter is particularly urgent.

When considering an appeal you must also consider whether it is an appeal that should properly be dealt with at an oral hearing or by a three member Committee. These types of appeal should only come up in truly exceptional circumstances and more guidance on when these occur is given above . If you consider that either is necessary then you should notify the administrator who will make the necessary arrangements.

Writing up your decision

A "Decision and Reasons" sheet should accompany each appeal report. An electronic version of this sheet is available to enable you to email your decision back to the Agency. You should use this to record your decision and the reasons for it. If you consider that the Agency's original decision was wrong, you need to explain why that was the case under the heading "Feedback for LAA office where their decision is considered incorrect". This will assist us in identifying where additional training and guidance needs to be given or where system changes may be necessary.

Note, however, the very different jurisdictions applicable to appeals under the Contracts (paragraph 6.80 Civil Specification) and the Regulations (regulations 46 and 47).

Likewise, if there is an obvious error on the part of the provider, you should highlight it so that they do not repeat that error in future.

Once you have written up your decision you should sign and date the sheet and return it to the Administrator who will convert it into a decision letter. Where the appeal papers were posted to you, please send your notes and all agenda papers to us so that we can refer to them if there is a subsequent judicial review challenge. You should not retain any papers or dispose of them yourself.

PROCEDURES FOR COMMITTEES AND ORAL HEARINGS

If you do decide that a matter should go to an oral hearing or to a Committee, the following guidance may help.

Where the appeal meets the criteria for a personal attendance, oral representations can be heard by a single panel member or a Committee.

Quorum and decisions

Three Panel Members of a Committee will form a quorum, but where only two Panel Members are present they shall form a quorum for the purpose of dealing with any matters in which they are in agreement.

The decisions of Committees are by a majority vote and, in the case of an equality of votes; the Committee Chair of the meeting has a second or casting vote. (Any Panel Member forming part of a dissenting minority may ask that his or her name appear on the minutes as dissenting.)

Appointment of the Chair

When convening any Committee other than SCRP, the Chair and other suitably qualified and experienced Panel Members will be selected in rotation for that Committee from the Review Panel, having regard to specialist skills and knowledge, taking into account any potential conflict of interest.

Conduct of Hearings

The Committee Chair has primary responsibility for the conduct of the meeting and for ensuring that the Committee gives proper and adequate reasons for its decisions.

Minutes are kept of each Committee meeting with the names of Panel Members present being recorded. The minutes should consist of the agenda, the Committee's decision and reasons for it and any other relevant note. The Committee Chair is responsible for ensuring that minutes of the meeting are properly recorded and signed by him or her. The Committee may make directions as to the on-going conduct of appeal. In a complex case, the Committee may for example decide that it wants one or both parties to submit further evidence or to file skeleton arguments, in which case they may adjourn and direct accordingly.

Appellants must be afforded a fair and reasonable opportunity to present their case. Justice must not only be done but must be seen to be done. The appellant should leave the Committee room feeling that he or she has had a fair hearing. The Committee Chair should be courteous but firm.

Where the appeal meets the criteria for a personal attendance, those appearing may not know how to proceed and will look to the Committee Chair for guidance. The Committee Chair should introduce himself or herself and the Committee members by name.

Committee meetings are confidential, primarily in order to protect the interests of the publicly funded client, although they may also involve commercially sensitive information concerning providers. Therefore, persons not engaged in the hearing (such as members of the press) will not be admitted. Information for the hearing is provided solely for the purpose of properly disposing of such hearing. Where an appellant has given notice that he or she will attend or be represented but does not attend at the appointed time, the Committee should put back

consideration of the matter until either the person attends or until all other matters have been dealt with.

The role of the Committee Clerk

The Agency will appoint a Committee Clerk who attends the meeting to help the Committee conduct its business. As well as making arrangements for clients and their representatives who attend hearings, he or she will be able to provide information from the Agency's file for the Committee.

The Committee Clerk should not be the member of staff who made the original decision to refuse the application or assess the costs.

The Committee Clerk will keep a record of the meeting. This should include the time the individual appeal began and ended and as much as practicable about what was said. Any submissions (particularly new submissions not on the papers) made by the appellant should be recorded as well as any questions asked by the Committee and the replies given. It will of course be essential to record the decisions taken and the reasons given by the Committee.

The committee clerk may, when asked by the Committee Chair, advise the Committee about decisions of previous Committees and other matters of guidance issued by the Agency but will not take part in the decision making process.

Requests for adjournment

The Committee need only entertain requests for adjournments which they consider reasonable. There may be some cases where wholly new issues are raised where an adjournment may be necessary in the interests of justice.

A Committee is therefore not necessarily confined to the issues raised or reasons given by the caseworker when reaching their decision. However, where the issues raised by the Committee are substantially different to those raised by the caseworker then the Committee will need to consider whether the appellant has been given a fair opportunity to address those issues. Where an appellant attends or is represented at the hearing, they can generally be given that opportunity at the hearing, as the person attending (especially if a solicitor) should be expected to be familiar with the file and the nature of the hearing and therefore be expected to deal with any issues that arise.

If it is felt necessary, the Committee could grant a short adjournment, say half an hour or so, to allow the appellant to formulate his or her arguments on the new issues raised. Exceptionally, it may be necessary to adjourn the hearing altogether, for example where the appellant is required to provide further evidence.

Where the appellant does not attend the hearing and is not represented, then the Committee should bear in mind that the appellant will not have had the opportunity to consider or make representations on any entirely new issues raised and it will more often be necessary for the Committee to adjourn the matter in order to provide an opportunity for this to occur. It should be noted however that where a particular issue has been previously raised and addressed as part of the caseworker's assessment or the subsequent representations then the mere fact that the Committee reaches a decision on that issue that is more adverse to the appellant will not give rise to the necessity for an adjournment. The Committee is entitled to reach its own views on the arguments put forward and give its own reasons for its decisions. The test is whether the issues raised are substantially different and whether an adjournment is therefore necessary in fairness to the appellant.

Where an adjournment is granted, the Committee should consider giving directions as to the timetable for submitting any further representations or evidence.

Where a Committee decides not to allow a request for an adjournment they should give reasons for their decision and then proceed to deal with the matter.

Time allowed for representations

No predetermined time limit should be placed on the time for oral representations. However, the Committee Chair should indicate as soon as he or she is satisfied that the main arguments in support of a case have been put and should invite those presenting the case to close. In extreme circumstances, the Committee Chair may have to call a halt to oral representation where the main arguments have been established.

Note that the contents of the above section are subject to the differences of jurisdiction of IFAs and ICAs as discussed in more detail below.

PUBLIC LAW ISSUES

Judicial Review

The area of judicial review concerns the Review Panel in two ways: in relation to the conduct of reviews (either at hearing or on the papers only), and in relation to the decisions made.

Conduct of reviews

The decisions of ICAs, IFAs and Committees, being decisions made on behalf of a public authority and subject to administrative law, are judicially reviewable. In practice, this will normally only arise when you have made the final decision in a case and will normally be where, for example you refuse an application for a review of the Director's decision. But in principle any decision about the conduct of a review may be subject to an application for judicial review.

The grounds for judicial review have developed over the years and may to some extent overlap. Examples of where a decision of a public authority can be quashed by the court on judicial review are where it is **illegal**, **unreasonable**, or procedurally **unfair**; or **does not comply** with retained EU or Human Rights Convention law.

Illegality

Obviously any decision must be made in accordance with the law. You must not, for instance, apply the wrong provisions of legislation or contract..

Irrationality

The court cannot replace what a public body has done with what it would have done. But it can quash a decision that was not reached according to logical principles, or was 'Wednesbury unreasonable' (see *Associated Provincial Picture Houses v Wednesbury Corporation* 1947 2 AER 680).

The IFA or Committee must:

• take relevant considerations into account

• not take into account irrelevant considerations

• not make a decision outside the range of responses open to a reasonable decision-maker.

In some cases the IFA or Committee will agree with the original decision, but it should take care not to fall into the trap of merely adopting the previous decision because it is an easy option, or because it seems to be roughly right.

Procedural Impropriety

A decision may be quashed on judicial review grounds if the decision maker has not followed the procedures that it has established for itself, or if those procedures are unfair. One possibility for challenge might arise if representations have been received from the opponent of an appellant and these were put before the IFA or Committee without the appellant having an opportunity to comment on them.

It is therefore the Agency's policy to allow clients to comment on representations made by the opponents or third parties, and you should ensure that this has been done. In the context of representations by the opponent it is worth remembering that it is not your function to 'try' the factual, legal or evidential issues involved in the case for which Legal Aid is sought. Caution should therefore be used when considering opponents' representations, although they may be very useful in directing yourself to those points (particularly as to merits and cost benefit) which the client or his or her legal advisers need to have addressed in their appeal papers.

If there is to be a hearing then it is important that the person affected by a decision has been given a fair hearing before the individual IFA, ICA or the Committee. Committees should give a full opportunity for representations to be made by the client or his or her legal advisers, so that they can be fully acquainted with all the relevant considerations before making their decision.

For the same reason, guidelines exist to ensure that you do not consider applications and appeals where you may have an interest in the outcome. Not every connection with one of the parties will mean that it is unfair for a particular individual to determine a review or appeal. The test of bias is whether a fair minded and informed observer, in possession of the facts, would conclude that there was a real possibility of bias. But where an ICA or IFA sits alone, the kind of connection that would make a decision vulnerable to challenge may be less than it would where the same person was a member of a Committee.

It is also part of your duty under Article 6 of the European Convention on Human Rights, within the Agency's decision making process, to ensure a fair procedure in dealing with an appeal.

Legitimate expectation

As a public body, the Agency is sometimes faced with arguments that it has created a legitimate expectation that it will decide a matter in a certain way. The general position, however, is that, subject to Human Rights Act or retained EU provision, a public authority cannot be required by legitimate expectation or estoppel to act *ultra vires*. More broadly, the possibility that the Agency might, ultimately face a public law challenge is not usually a matter of relevance to IFAs and ICAs. The exception to this is that an IFA could, pursuant to regulation 46(1)(b) suggest that a decision of the Director is unlawful on this basis, but such a decision would be advisory only. The contract and regulations do not give ICAs and IFAs the supervisory jurisdiction to quash or mandate decisions on behalf of the Agency.

Inadequacy of reasons

An appellant will be able to attack a decision that was lawful, reasonable and otherwise reached fairly if the reasons given for it are inadequate. Writing full reasons can be tedious work, but if you do not do it properly the review or appeal may well have to be carried out all over again.

Adequate reasons should:

- set out all the factors the ICA, IFA or Committee had regard to
- explain why an unsuccessful appellant's arguments were not accepted
- show how the decision follows from the application of relevant considerations to the facts

It is not good enough for someone to design reasons, after a decision was reached that could have been the reasons for that decision but were not.

DECISIONS AND REASONS

Public duty and public money

Your decisions affect both access to justice and payments for legal services from public money. Therefore, you must make consistent, fair and justifiable decisions. It is important that the appellant understands the reasons why you have made you decision in his or her case.

Clients have a right to know why they are being refused or are losing Legal Aid or why their certificate is not being amended. Likewise, providers are entitled to know exactly why their costs are being reduced. Sometimes, just receiving a full explanation of why a decision was made will lead the appellant to withdraw the appeal.

All of us working for the Agency (whether as employees or Office Holders) are public servants and we are accountable to our stakeholders. As an absolute minimum, those stakeholders can expect us to explain and justify our decisions. Try to put yourself in the position of the appellant – does your decision letter make sense and fully explain why you made the decision that you did?

The duty to give reasons

The duty to give reasons falls on you. It is not appropriate for you to give a general indication of your reasons and leave the regional office to formulate them in detail.

The quality of reasons is particularly important when you refuse funding or uphold the discharge or revocation of a determination. It will also be particularly important in relation to cost appeals when the decision concerns a large sum or affects a large number of cases. Each and every item reduced or disallowed must be addressed by the ICA. The discipline of having to provide clear and sufficient reasons for decisions helps to ensure that the decision is a good one.

An applicant or appellant will be able to attack a decision that was lawful, reasonable and otherwise reached fairly if the reasons given for it are inadequate. This may result in the review or appeal having to be re-heard.

Adequate reasons should:

- set out all the factors the IFA, ICA or Committee had regard to
- explain why an unsuccessful appellant's arguments were not accepted
- mention under which fee scheme the item or items have been allowed/disallowed
- show how the decision follows from the application of relevant considerations to the facts

Over recent years the responsibility to give detailed and reasoned decisions has been highlighted by a number of judgments in judicial reviews against the Legal Aid Board, the Legal Services Commission and the Agency. The impact of the Human Rights Act, the increase in judicial review applications and the introduction of the judicial review protocol have all focused judges' minds on the requirement for public bodies to give proper reasons for their decisions.

Key principles for good decisions

There are a number of principles that should be borne in mind both when looking at the original caseworker / internal review decision and when constructing your own review decision and letter. They are:-

- It is rarely ever sufficient to say that you are upholding the original decision for the reasons given. This is especially so where there has been new information in the appeal papers. You must explain why you have reached the same decision as the original caseworker – despite the new information.

- If the decision was taken for more than one reason then all of the relevant reasons must be given. It is not sufficient to give just one reason when, in fact, there are several.

- The reasons for the decision must be proportionate to the issues in the case. The more complex the issues the more detailed the reasons.

- Reasons must be sufficiently informative so that the appellant understands why the decision was made. In technically complicated areas the reasons may not always be immediately understood by the client but they should always be susceptible to being understood by the client's provider.

- It must be clear that every relevant aspect of the case and all relevant information has been properly and fairly considered. It is desirable to differentiate between relevant and irrelevant information.

- The reasons should not only properly inform the appellant but also be readily apparent and apparently justifiable to any judge considering an application for judicial review.

- Where you are disagreeing with an opinion of counsel (which you are perfectly entitled to do), your reasons for doing so must be clear.

- Findings of contentious facts must be clearly stated with clear reasons. Where you do not accept factual contention made by the appellant, there must be a clear reason for not doing so.

- Similar considerations apply to conclusions of law. Where you disagree with the interpretation of the law by the appellant you must give clear and sufficient reasons for doing so. Where appropriate the factual conclusions from which the legal conclusions result should be clearly stated.

Grounds and Reasons

It is important to distinguish these two categories. The grounds for the decision will be based on the criteria in the legislation or Contract. The decision should then go on to give a reason or reasons as to why the particular case has failed the criteria or particular contract term.

Example

> "I have refused your application on the basis of Regulation 42 of the Merits Regulations. Although I accept that the prospects of success are good (60%-80%), I do not consider that the likely damages would exceed likely costs by a ratio of 2:1. I note that your provider has assessed your claim as worth £10,000, but my view is that

> this figure should be discounted by 50% in view of the fact that the defendant appears to have limited assets with which to meet a judgment."

It is not necessary to reproduce regulations or guidance verbatim. The reference will suffice.

The key is to ensure that you state both the *ground* upon which you are making your decision (e.g. the likely damages will not exceed the likely costs by 2:1) and then explain the *reasons* for coming to that conclusion (e.g. the claim is only actually worth £5,000 as the defendant doesn't have the assets to meet the judgement). You have to avoid stating just the ground for the decision without then giving a reason or reasons for it.

In relation to prospects of success and cost benefit, it will be very important to ensure that grounds are provided by reference to the appropriate criteria and that, in addition, sound reasons are given for departing from the assessment either of the client's legal representatives or the Agency. In some cases, the differences between "unclear", "marginal", "borderline" or "poor" prospects of success may be determinative of the application and you will need to give reasons as to why one category or other has been applied.

Similar considerations apply to cost-benefit. Whatever the relevant ratio of likely damages to likely costs, these must be closely addressed with sound reasons for arriving at the relevant cost-benefit matrix. As you will be disagreeing with either the client or the Director, it is essential that detailed reasons are given for the assessment of both likely costs and likely damages.

Whenever the conduct of the client is the basis for a decision against him/her, particular care needs to be given to the reasons that must show not only that any excuse advanced by the client has been carefully considered but also clear reasons why that excuse has been rejected.

Decisions on Withdrawal/Revocation

If withdrawing a determination for failure to co-operate you must (giving reasons at each stage):

- Establish the requirement that the client has failed to provide information or documents or attend a meeting where required to do so under regulations.
- Find that there is no good reason for such failure. If any excuse advanced by the client is rejected, the IFA will need to say why.
- Decide that the decision to withdraw the determination should be upheld.
- State why revocation as opposed to other withdrawal of the determination (or vice versa as the case may be) is appropriate.

If upholding a withdrawal of a determination because the client has made a statement or representation knowing or believing it to be false, you must (giving reasons at each stage): -

- Establish the requirement that the client has made statement or representation knowing or believing it to be false (either when making an application or when supplying information under procedures or regulations). In merits cases, the fact that the court has not accepted a client's case or version of events will not be enough in itself to lead to withdrawal of a determination under this provision. In means cases, it should be noted that a fact may be material even where it ultimately would not have affected the eventual assessment –see *R v Legal Aid Board ex parte Doran* (the Times July 221996). Material means something significant and capable of influencing the reasoning of a reasonable assessing officer. However, the issue of whether or notthe fact would have affected the assessment is relevant to the issues set out below;
- Decide to uphold the withdrawal of the determination. The main factors here are the size and extent of the false statement or representation or whether the non-disclosure was deliberate or not and the effect (if any) on the assessment of merits or of means.
- State why revocation as opposed to other withdrawal of the determination (or vice versa as the case may be) is appropriate. In the case of *R v Legal Aid Board ex parte Bateman*, (involving a revocation for non-disclosure of financial assets under the Legal Aid Act 1988 regulations) Sir Justice Munby stated:

  ' The Committee…. had to do at least three things: (i) it had to give reasons which, implicitly if not explicitly, recognised that it had two separate discretions to consider (ii) it had to give reasons which, implicitly if not explicitly, explained why, if it decided on revocation, it had come to the conclusion that revocation was the appropriate sanction and why the lesser sanction of discharge was not adequate to meet the needs of the case and (iii) unless the case involved dishonesty or deliberate and deceitful concealment it had to identify the particular factors which justified a decision to revoke'.

Revocation will have serious consequences to the client. They will lose any cost protection and will be obliged to repay the publicly funded costs of the case (which impact the Agency too as the matter will be passed to our Debt Recovery Unit and often costly steps will be taken to recover the monies paid). Conversely, withdrawal of the determination may sometimes be no penalty at all since even if the case is continuing the client can always

re-apply for legal aid. Factors to be taken into account in deciding whether to revoke or withdraw the determination may include, but are not limited to:

- The seriousness of the false statement or representation.
- The importance of the case to the individual.
- Whether the false statement, representation or non-disclosure was deliberate or dishonest or innocent albeit negligent.
- Whether the applicant has personally benefited from the false statement, representation or non-disclosure.
- Whether the false statement, representation or non-disclosure would not have made any difference to the assessment of means or merits, in which case revocation will not usually be appropriate except in the most serious of cases.

Reasons for decisions pursuant to regulation 46(1)(b) Procedure Regulations

Here the ground for the decision will be that the decision Director was, or was not as the case may be, unlawful or unreasonable. Either way it is important that full reasons are given for your decision. Where the matter has been referred back to the Director in order to reconsider the matter the Director will need to know precisely why. If this requirement is not met, you may find that you face a formal request by the Director for more detailed reasons.

If a review is being dealt with in these circumstances you will need to identify any provision of the legislation it is alleged is not being followed and give reasons for your own decision in relation to that issue. Other alleged unlawfulness, such as taking into account irrelevant matters or not taking account relevant matters should also be clearly explained.

Where you consider any exercise of the Director's judgement or discretion to have been unreasonable, then it is, of course, important to state why rather than simply explaining why you would have reached as different conclusion.

When you decide to uphold the Director's decision, then the grounds will tend to be standard i.e. that you did not consider that the Director acted unlawfully or unreasonably. You should however go on and give reasons by reference to the points raised by the review/appeal request.

Further Information

There is no formal requirement to give reasons where further information which emerges for the first time in the appeal is referred back to the Director without you having reached a decision. However, good practice is that in those circumstances brief reasons should be given as to why the referral has been made. Those reasons should be directed to why you

a) Regarded the further information as material.

b) In the light of its materiality, you felt it appropriate not to reach a decision on the review.

Where in your view, the further information is such that you should nonetheless decide the review (whether for or against the client) full and proper reasons should be given which should include why the further information had not been referred back to the Director.

JURISDICTION & FUNCTION OF AN IFA

What does the IFA review?

The IFA entertains appeals against decisions of the Director. This includes decisions:

- to refuse to make a determination that an applicant qualifies for legal aid services
- to make a determination subject to limitations or conditions
- to refuse to amend limitations or conditions; and
- to withdraw determinations (whether or not by way of revocation).

You do not review decisions:

- relating to emergency representation determinations made on the basis of limited information
- as to whether an individual qualifies for legal aid services on the basis of financial eligibility (although you can review decisions relating to financial contributions, including whether to waive such contributions)
- as to whether services are described in Part 1 of Schedule 1 to LASPO ("in scope")
- relating to any application made under section 10 LASPO (exceptional case funding).

Controlled Work

Where Controlled Legal Representation has been refused by the provider and the Director has upheld that refusal, there is a right of review to the IFA.

Licensed Work – Refusals

A review will lie against the decision of the Director to refuse an application for a Licensed Work determination (legal aid certificate). This may include cases where the initial refusal was by a provider acting under delegated functions and the Director has upheld that refusal. The right of review also applies where the Director made a determination that the applicant qualifies for legal aid services but not on the terms requested by the application, such as the description of the case, scope limitation or cost limitation. This will also apply where the application was for one level of service but a different form was approved, for example if an application was made for legal representation but instead a determination for family help (higher) was made.

As noted above, the right of review does not relate to emergency representation or refusals on financial grounds.

Licensed Work – Amendments

Where a client is dissatisfied with the Director's decision to amend a limitation to which a determination is subject or refuse an application to amend, the client may ask for the decision to be reviewed by the Director and appealed to the IFA. The IFA has no jurisdiction in relation to amendments of emergency certificates.

Licensed Work – Withdrawal of Legal Aid

A decision by the Director to withdraw or revoke a Licensed Work determination can be reviewed by the Director and appealed to the Adjudicator. The Adjudicator has no jurisdiction to consider the revocation or withdrawal of a determination relating to an emergency determination or the withdrawal of a determination on financial grounds.

The review function

The IFA's role is crucially different from that of the ICA in that he or she cannot "allow" an appeal. You may refer a case back to the Director for reconsideration but not make a determination that an applicant qualifies for legal aid yourself.

There are certain issues, however, in relation to which you can substitute your own decision for that of the Director. In some cases that may effectively determine the outcome of the appeal itself.

Issues the IFA can determine (Regulation 47(1))

The IFA makes a final decision on the following issues:-

i. the prospects of success

ii. whether a case has overwhelming importance to the client

iii. cost benefit for the client (excluding considerations of whether the case has a significant wider public interest)

iv. whether a certificate should be withdrawn or revoked on the grounds of the conduct of the client.

Where the IFA makes a final decision on one of the above issues then the Director must make, amend, or reinstate a determination as applicable if satisfied that as a result of the determination the appropriate criteria are met. You should note, however, that the power to grant remains with the Director and not with the IFA.

It should be noted that in deciding these issues, you will of course be bound by the criteria under the Merits Criteria Regulations. Any decision outside the terms of the legislation will be ultra vires. For example:

- an application for legal representation in a damages claim (with no issues of wider public interest) has been refused by the Director on the basis that in her view, the ratio of costs to damages does not meet the cost benefit matrix under the general merits criteria. The IFA can re-determine the cost benefit issue (i.e. in effect re-determine what the prospects of success and likely damages and costs are in the case) but will still be bound by the matrix. Thus if, after the IFA has reached different conclusions as to costs and prospects of success, the matrix test would still not be met, then the IFA must uphold the Director's decision.

- when considering whether the case is one of 'overwhelming importance' to the client, the IFA has only to consider whether the case will fall within the Regulations definition

of overwhelming importance, not whether the client subjectively would consider the case of overwhelming importance to him or her.

Other Issues

In relation to any issue which arises other than those under Regulation 47(1) the IFA must consider whether the Director's decision under review was unlawful or unreasonable.

Consequently, the IFA's jurisdiction is to be exercised using principles similar to those used in judicial review, the so-called Wednesbury principles. All IFAs will need to be familiar with them.

Unlike the earlier Funding Code Procedures, the Regulations do not refer to unreasonableness in the Wednesbury sense of a decision that no reasonable Director could have made, although there was no intention to change this jurisdiction with the introduction of the LASPO scheme.

It remains the case, however, that a finding of unreasonableness is an objective one, requiring more than disagreement with the Director's decision.

It will also still be helpful to the Director for the IFA to say whether he or she does consider that the unreasonableness of the decision was of a Wednesbury degree.

On a review of this type of issue the IFA can do one of the following:-

a) Confirm the Director's decision

b) Refer the matter back to the Director specifying the grounds upon which he or she is doing so,

   in either case, giving reasons.

When the matter is referred back to the Director, it is then a matter for him or her to decide whether or not to accept the view of the IFA and to confirm or amend his or her original decision as appropriate.

Mixed issues

Many cases will raise both regulation 46 and regulation 47 issues. The above principles apply in that the IFA may refer the decision back to the Director under either or both regulations, with the appropriate decisions on regulation 47(1) matters and/or views on the unlawfulness or unreasonableness of other aspects of the Director's decision.

There is no basis, however, for the IFA, to make any finding adverse to the appellant on a matter not raised by the Director. The jurisdiction concerns agreement or disagreement with the Director's assessment of regulation 47(1) matters and consideration as to whether any other aspects of the Director's decision were unlawful or unreasonable. It is for the Director, pursuant to regulation 48(4) to decide whether to confirm the decision under appeal for reasons than those originally given, in which case a further right of appeal to the IFA will arise.

Nevertheless, there may be cases where an issue relating to the grounds for the Director's decision comes up for the first time on appeal and the Adjudicator feels that the applicant has genuinely not had the opportunity to address it or obtain any further information required. In those circumstances the Adjudicator may be obliged to adjourn the appeal.

Further Information

Regulation 46(4) provides that where, in the course of any appeal to the Adjudicator, further information comes to light which was not before the Director when the decision was made, the IFA if he or she considers that information to be material to that decision, shall ensure that such information is referred to the Director.

This provision will not usually be relevant in relation to Regulation 47 issues, as you can simply take the information into account when determining the issue.

However, in many cases where you are exercising your jurisdiction under Regulation 46, it may be that the Director has acted properly and reasonably on the basis of the information that was then available, but that the further information would be likely to have affected the decision had it been provided earlier. In those circumstances, you may refer the further information back to the Director under regulation 46(4) so that he or she can reconsider the matter.

COST APPEALS – GENERAL PRINCIPLES

Panel members acting in the role of an ICA are appointed to hear appeals of caseworkers' decisions on the assessment of costs. They have both a civil and a criminal jurisdiction and this includes the assessment of costs for Controlled Work and for Licensed Work.

The role of an Assessor

The role of an Assessor is to make a fair and reasonable assessment of the costs claimed. All civil assessments by the Agency (including its ICAs) must be on the standard basis and allow only those costs which are proper, reasonable and proportionate (and where the firm has an Agency contract, only those costs which are claimable under the terms of that contract). The role of the costs assessors was clearly set out by Lord Denning in *Storer v. Wright* [1981] 1 ALL ER 1015, CA. He said:

> *"[The taxing officer] should disallow any item which is unreasonable in amount or which is unreasonably incurred, in short, whenever it is too high, he must tax it down. the only safeguard against abuse is the vigilance of the taxing master. He has a difficult task. With no one to oppose it he has to take much of the solicitor's word for granted, as to the work done. It would be easy for him to let everything through without question. But he must resist that easy course. He must be a watchdog. He must bark when there is anything that arouses his suspicions."*

An Assessor should accordingly bear in mind that he or she is acting in the interests of all the Agency's stakeholders, i.e. the provider and counsel, the legally aided client, and the legal aid fund (in the sense that what is being spent is public money so the amount spent must reflect the concerns of all taxpayers).

The Assessor has to judge what work was reasonably done, the reasonable time to be spent in relation to that work and what the reasonable remuneration should be. This judgment has to be made after considering the scope of the Legal Aid certificate, the relevant regulations, the terms of any costs order, and any relevant contractual rules, case law or practice directions.

It is important that consistency is achieved as far as is practicable. For this reason the Agency has produced detailed costs assessment guidance which is available to Agency staff, contracted suppliers and to assessors. You should ensure that you are familiar with that guidance. The key documents are:

a) Cost Assessment Guidance for 2018 Contract.

b) Section 4 of Standard Civil Contract Specification - Payment for Controlled Work

c) Section 6 of Standard Civil Contract Specification- Remuneration for Licensed Work

d) Part A Section 8 of 2017 Standard Crime Contract Specification.

e) The Criminal Bills Assessment Manual

f) Civil Finance Electronic Handbook

An Assessor must assess all claims impartially and be able to justify any decision either to disallow costs or reject a claim in writing to either the provider or the funded client.

The following paragraphs summarise some provisions of the Costs Assessment Guidance but are not a substitute for it.

The Standard Basis

The Civil Procedure Rules Rule 44.3(2) states that where the amount of costs is to be assessed on the standard basis, the court will:-

- only allow costs which are proportionate to the matters in issue; and
- resolve any doubts whether costs were reasonably incurred or reasonable and proportionate in favour of the paying party.

The second limb, in particular, should be borne in mind.

The approach to assessment

Assessment takes place on the basis of determining (in accordance with the provisions of the contract) the reasonableness of the work done and whether the time spent was reasonable having regard to the requirements of the contract, regulations and guidance (as applicable) and applying the correct remuneration rate for each item of work. Allowance is only made for work claimed where it is supported by appropriate evidence on the file. The onus is on the provider to provide evidence on the file that the work was done. The Assessor must then assess whether the time spent was reasonable. In other words, would a reasonably competent fee-earner have undertaken the work, has the work actually been performed with reasonable competence and was the time taken to perform the work reasonable. Evidence of the work done should, ideally, be in the form of timed and dated attendance notes but, where relevant, may be evidenced by relevant documentation drafted or read.

The approach to work done

The ICA is not to take into account hindsight but is to try to view the question of what is reasonable from the perspective of the average competent fee-earner doing his or her best for his or her client at the particular time when the work was done.

> *"When considering whether or not an item in a bill is "proper" the correct viewpoint to be adopted is that of a sensible solicitor sitting in his chair and considering what in the light of his then knowledge is reasonable in the interest of his lay client" per Sachs J Francis v Francis & Dickerson.*

Thus the fact that he or she instructed an expert to prepare a report which in the end did not help his or her client's case, or interviewed a witness whom he or she later decided not to call to give evidence should never be determinative of whether the action was at that time reasonable.

Example 1:

Clinical Negligence case involving spinal injury. Orthopaedic surgeon gives a view as to prognosis and as to possible pre existing injury. He indicates than an MRI scan (costing some £600) might affect his view. Solicitor arranges such a scan without obtaining authority from the Agency. It does not alter the surgeon's view. In such a case it would be reasonable to obtain the scan as it reinforces the expert's view and would support his evidence if cross-examined. Indeed it might well facilitate a settlement and thus save costs.

(Note that in relation to applications for Legal Aid dated on or after 3 October 2011 where maximum rates are prescribed in respect of an expert, the Agency will not pay fees in excess of this unless appropriate prior authority has been obtained.)

Example 2:

Action against the Police case, liability in dispute. Plaintiff has two good independent witnesses who gave statements supporting his case. He has details of a possible third witness who is now in Australia. Solicitors instruct agents to trace him and take a statement at considerable cost. This would probably be unreasonable. A sensible solicitor would wait until disclosure of the defendant's witness statements before deciding whether any additional evidence was needed.

This does not mean, however, that the ICA must allow the costs of everything that the provider does. The ICA has to exercise an independent judgment. The fact that an expert report was not used may justify a careful examination of the situation to decide whether it was reasonable to instruct the expert. The fact that a provider made an application to the court which was unsuccessful may lead the ICA to ask whether it was reasonable to have made the application. Providers can be expected to have some regard to the value of the case and the potential proportionate benefit to the client when undertaking any particular step. In a claim for, say, £4000 it may be regarded as unreasonable to spend, say, half that sum on expert evidence without careful consideration of whether the case could succeed without it or whether cheaper evidence might be available. Since the introduction of the Civil Procedure Rules only those costs that are proportional to the amount in issue may be incurred (see CPR 44.3(2)).The next step is to consider the amount of time spent and whether such time was reasonable in all the circumstances of the case. The materials available to you will be the Claim form and, where requested, the provider's file. The amount of time reasonably spent must be considered having regard to the information set out in the claim form and any documentation submitted with it, or on request.

CONTROLLED WORK

The basis of assessment

The costs of Legal Help, Help at Court, Family Help (Lower) and Controlled Legal Representation provided under the Agency's Standard Civil Contract are determined in accordance with the provisions of section 4 of the 2018 Standard Civil Contract Specification Paragraphs 6.54 – 6.81 of the 2018 Standard Civil Contract Specification set out the basis and procedures for assessment of costs. Independent Costs Assessors will be expected to be familiar with the provisions of the Standard Civil Contract Specification. The following should be noted:

> An appeal lies to the ICA or in relation to any decision of the Agency as to the assessment of the cost of Controlled Work (2018 Standard Civil Contract Specification paragraph 6.71 (2018)). The ICA has power to confirm; increase or decrease the amount assessed and may direct that its decision shall apply to any other claims for assessment raising the same or substantially the same issue in relation to that provider. Thus, if the provider is appealing a number of assessments, then the ICA may be able to deal with the appeal in relation to one or more sample assessments and direct that their decision shall apply in relation to the same issues where they appear in some or all of the other outstanding assessments.

Some key contract terms

As all work (whether Controlled or Licensed) undertaken by contracted providers is conducted under the terms of their contract with the Agency, it is necessary to consider some of the most relevant contract terms. Some of the most important are:

2018 Standard Civil Contract Standard Terms - Clause 7.14

In performing contract work you must comply with:

- Relevant legislation
- The Contract

2018 Standard Civil Contract Standard Terms - Clause 7.9

"You must demonstrate to our reasonable satisfaction that you are complying with, and have at all times while it has been in force complied with, this Contract. You must demonstrate this when we are Auditing you and at such other times as we may require in accordance with this Contract."

2018 Standard Civil Contract Standard Terms - Clause 14.6

"We are entitled to assess all your Claims, except where this Contract or legislation provides that Assessment is to be by another body."

2018 Standard Civil Contract Specification - Paragraph6.59

The following points should be noted:

- Time spent on purely administrative matters cannot be claimed
- Generally time spent on legal research cannot be claimed
- Additional costs due to distant location from the client cannot be claimed
- Costs of a KC or two counsel can only be met if there is prior authority
- Overhead costs cannot be claimed

2018 Civil Contract Specification - Paragraph 6.54

"You may only claim for work that has been actually and reasonably done and disbursements actually and reasonably incurred in accordance with the provisions of the Contract and that is supported by appropriate evidence on the file at the time of the Claim and Assessment "

LICENSED WORK

The basis of assessment

The procedures for assessment of costs in other levels of service including family help (higher) and legal representation are set out in section 6 of the 2018 Standard Civil Contract Specification and in particular from paragraph 6.31). The provisions in relation to appeals against decisions as to assessment are contained from paragraphs 6.71 to 6.81 of the 2018 Standard Civil Contract Specification.

Costs under Licensed Work are determined in accordance with the rates as specified in paragraphs 6.10 to 6.11 of the 2018 Standard Civil Contract Specification.

ASSESSMENTS UNDER THE STANDARD CRIME CONTRACT

The basis of assessment

A solicitor dissatisfied with any decision of the Agency as to the assessment of costs of contract work may appeal by making written representations to the Assessor (Part A, Paragraph 8.19 Standard Crime Contract Specification). The Assessor shall re-determine the assessment whether by confirming, increasing or decreasing the amount assessed. The basis of assessment is set out in Part A Paragraph 8.39-8.45 of the Contract Specification. In relation to Controlled work under Associated Civil work, the Assessor may direct that its decision shall apply to any other of the solicitor's claims, which raise the same, or substantially the same issue, provided always that no such decision shall apply retrospectively to any completed assessments, which the solicitor has not appealed within the time limit. (Part A, Paragraph 8.28, Standard Crime Contract Specification)

It should be noted that where the solicitor is appealing a number of assessments, then you may be asked to deal with the appeal in relation to one or more sample assessments and to direct that its decision shall apply in relation to some or all of the outstanding assessments. This prevents a large number of appeals which raise substantively the same issue from coming before you and reduces the administration to both the solicitor and to the Agency.

Crime: Applications for Prior Authorities

The Assessor also has power to deal with prior authority applications. Prior authority applications, which are refused or partially refused by the Agency, are automatically referred to the Assessor (Part A, Paragraph 5.28, Standard Crime Contract Specification).

Applications in proceedings in the magistrates' court and certain High Court proceedings are governed by the Standard Crime Contract.

Magistrates' Court/High Court

The Standard Crime Contract Specification sets out at paragraph 5.27 the types of costs which may be authorised following an application for prior authority. A prior authority may be sought when it is considered necessary for the proper conduct of criminal proceedings falling within

the scope of the Contract in the magistrates' court or High Court for costs to be incurred under a representation order, by taking any of the following steps:

- Obtaining a written report or opinion of one or more experts
- Employing a person to provide a written report or opinion (otherwise than as an expert)
- Obtaining transcripts of tape recordings of any proceedings, including police questioning of suspects
- In magistrates' courts only, where a representation order provides for the services of Solicitor and Counsel, instructing a King's Counsel alone without junior Counsel; or
- Performing an act which is either unusual in its nature or involves unusually large expenditure.

It is the solicitor's responsibility to ensure that the relevant information is submitted to enable a request for prior authority to be properly considered. Applications before the Assessor (or Costs Committee) especially those which are poorly prepared or incomplete are likely to be refused because the Assessor or Committee is unable to establish whether it is reasonable to incur the expenditure requested. This is particularly important in cases where the application is made close to trial and where refusal may cause an adjournment. In certain cases the Committee may consider writing to the court explaining the Agency's reasons for refusal.

The completion of the Agency's application form is only one requirement of an application. Rarely, if ever, will a completed form by itself provide sufficient information and accompanying explanation or documentation will be just as important. Examples (which are not exhaustive) of what may be required to enable the Assessor (or Costs Committee) to establish the reasonableness of a request are:

- A signed statement from the client or a summary of the defence case clearly showing the nature of the defence or mitigation, so as to show how the report will possibly assist the case
- A detailed opinion from the advocate, identifying the need for the report and the way in which it will materially assist the case
- The relevant prosecution evidence
- A minimum of two quotations from proposed experts or a cogent explanation for their absence
- If an application is made close to trial, a clear explanation as to why it could not have been made at an earlier stage
- Where an application is made after any plea and directions hearing, the solicitor should provide a copy of the judge's questionnaire and give details of any directions or observations made by the judge. If the judge has doubt on the need for the expert, then cogent reasons need to be given in support of the application for prior authority.
- Details of approaches made to the prosecution with a view to agreeing forensic evidence and/or reducing or defining the issues with details of the results. If no such approaches have been made, a cogent explanation as to why not.

In cases of very substantial proposed expenditure you may be minded to authorise a preliminary report at a lower cost before considering the expenditure of further costs. It is therefore essential that applications are made in good time before the trial and usually at the latest immediately following the plea and directions hearing.

Authority will be:

- *Granted* if the assessing officer is satisfied that the proper conduct of the proceedings so requires and it is reasonable in the circumstances.

- *Refused* where the application is for tendering expert evidence or the reports in question have been/could be ordered by the court in its consideration of a disposal under the Mental Health Act/probation order with treatment and would thus be payable out of Central Funds.

- *Refused* for photocopying done in-house which is an office overhead (*R v Zemb, 1985)*, unless the circumstances are unusual, or the documents to be copied unusually numerous in relation to the nature of the case, i.e. 500 pages or more.

- *Refused* where the application is for a conference with counsel or to obtain counsel's written opinion (unless counsel is instructed as an expert, rather than as counsel).

- *Refused* where the application is for travelling expenses to attend at a distant court. This is a matter for the determination of costs.

The effect of failure to obtain or refusal of authority for expenditure is that:

- The solicitor's costs may still be allowed on the determination of costs. This is also the case if the amount of an authority is exceeded.

- The solicitor can obtain payment other than out of the fund for experts' fees or bespeaking transcripts where an application for authority has been refused.

The Criminal Bills Assessment Manual provides further information on prior authorities and is used by caseworkers when determining applications.

Crime: Applications to extend the Upper Limit

The Remuneration Regulations set Upper Limits for certain categories of work undertaken under the Standard Crime Contract – in particular, representation orders issued in respect of prescribed proceedings in the Crown Court. The representation order should state on its face the amount of the Upper Limit.

Providers who consider that their costs will exceed the Upper Limit have to apply to the Agency for an extension to that Upper Limit. There is a contractual right of review to an Adjudicator in respect of a refusal by the Agency to grant an extension to the Upper Limit. The Adjudicator's powers in relation to an appeal are to grant the extension, part grant the extension or to refuse the extension (Part A, Paragraph 3.18 of the Standard Crime Contract Specification (as amended in 2022).

Sometimes, a review of decision not to extend the Upper Limit is inadvertently referred to an Assessor rather than to an Adjudicator, but as the question of whether to grant the extension relates to the continued funding of the case, the Contract requires the decision to be made by

an Adjudicator. Panel Members are asked to ensure that they have the requisite appointment as an Adjudicator if they are dealing with a review of a decision not to extend an Upper Limit.

EXTRAPOLATION AND REPRESENTATIVENESS

A provider also has the right to submit an appeal on the basis of the representativeness of a sample. In costs assessment files are chosen randomly by way of a computer program (APT Audit precision tool). When faced with a high value extrapolation a challenge to the "randomness" of the sample may be raised. There is specific guidance for this currently this can be found in the internal review manual. It may be appropriate to make mention of it in here as ICAs may be asked to determine on it as part of a costs assessment or as a standalone issue.

FRAUDULENT CLAIMS

In rare cases, you may conclude that the costs, or an element of the costs, of the cases under review have been recorded for work that has not in fact been carried out and has therefore been fraudulently claimed. There must be clear evidence before such a conclusion is reached, but if you decide that fraud has been involved, it is your duty to deal with it and to go on and assess the files. Any wrongfully claimed costs should be disallowed.

You should openly and clearly state your conclusions and should give your reasons for coming to those conclusions. In some circumstances it may be necessary to adjourn in the interests of fairness or direct that the matter be referred to a three-member Committee and that attendance of the provider be allowed.

The Agency will, on receipt of any decision and reasons that include a finding of potential fraud, refer the matter to the appellant firm's Contract Manager.