



Legal Aid  
Agency

# Immigration and Asylum Upper Tribunal Appeals

Background Information on the transfer of Immigration and Asylum Upper Tribunal work from Controlled Legal Representation to Licensed Work

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## 1. Background

Statutory appeals to the Upper Tribunal in Immigration and Asylum have historically been funded as Controlled Legal Representation, usually as a continuation of the Matter Start opened for the original First-Tier Tribunal case. On the 1 September 2018 these appeals were transferred to Licensed Work, coinciding with the implementation of the 2018 Standard Civil Contract. The purpose of this document is to set out background information on the legal aid rules that apply to these applications under the new regime.

When reading this document, particular attention should be paid to the transitional provisions that are set out in section 2. These provisions will dictate whether or not an appeal to the Upper Tribunal should continue to be funded under Controlled Legal Representation under the previous rules or as Licensed Work. Unless otherwise stated, the content of this note reflects the circumstances where the transitional provisions do not apply.

## 2. Transitional Provisions

The transfer of Immigration and Asylum Upper Tribunal appeals from Controlled Legal Representation to Licensed Work was facilitated by the *Civil Legal Aid (Procedure, Remuneration and Statutory Charge) (Amendment) Regulations 2018*<sup>1</sup>. Regulation 5 of this statutory instrument contains transitional provisions which mean that many of these appeals will continue to be funded as Controlled Legal Representation under the previous rules.

When dealing with an appeal to the Upper Tribunal, it is important for providers to consider whether these transitional provisions might apply. The transitional provisions state that the following work in the Upper Tribunal continues to be funded as Controlled Legal Representation:

1. Any Controlled Work case started before 1 September 2018;
2. Any further application for civil legal services for an appeal to the Upper Tribunal arising out of such a case.

Therefore, providers will need to check whether the appeal arises out of Controlled Work that was started prior to 1 September 2018 (e.g. when the original legal help form was signed). This includes:

1. Any case where the original advice and/or First-Tier Tribunal hearing was carried out by a different provider;
2. Any case that is remitted back to the Upper Tribunal from the Court of Appeal where the original Controlled Work matter for the early stages of the appeal was opened prior to 1 September 2018.

Providers will be reminded of the transitional provisions when they apply for funding on CCMS. However, caseworkers may need to make further enquiries if information on the application suggests that the matter should be funded Controlled Legal Representation instead of Licensed Work (e.g. if it appears the client was assisted under a Controlled Work matter started prior to 1 September 2018) or the situation is not clear. For the first few months of implementation, providers may wish to make it clear within the application for Licensed Work itself why the transitional provision do not apply to avoid receiving queries of this nature.

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<sup>1</sup> <http://www.legislation.gov.uk/ukxi/2018/803/contents/made>

## Controlled Legal Representation

Where a case is to be funded as Controlled Legal Representation the rules to be applied will be those in the Standard Civil Contract 2013, which for the avoidance of doubt are set out in this document:

[http://webarchive.nationalarchives.gov.uk/20180808195415/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/441393/category-specific-rules-immigration-and-asylum.pdf](http://webarchive.nationalarchives.gov.uk/20180808195415/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/441393/category-specific-rules-immigration-and-asylum.pdf)

In particular, providers should note:

- If the provider undertook the First-Tier Tribunal application, the Upper Tribunal appeal continues under the same Matter Start (paragraph 8.29)
- CLR in relation to an application for permission to appeal and, appeals before the Upper Tribunal is funded as hourly rates (paragraph 8.77(d))
- The contingent payment regime that is in place for applications for permission to appeal (paragraphs 8.93 to 8.96)
- That providers can make an interim claim for disbursements at regular intervals (paragraph 8.104) and apply for prior authority for an uplift for advocates (paragraphs 8.90 -8.93)

### 3. Boundary Between Controlled Work and Licensed Work

Subject to the transitional arrangements above, a Controlled Legal Representation matter now comes to an end after the initial First-Tier Tribunal hearing has been determined. Paragraph 8.65 of the Immigration and Asylum Category Specific Rules to the Standard Civil Contract 2018 (“the Category Specific Rules”) states the following<sup>2</sup>:

“Stage 2 will end at the point that a determination is made that a Client qualifies or does not qualify for Licensed Work in relation to the submission of an application for permission to appeal to the Upper Tribunal or where the Matter otherwise ends earlier.”

Any advice given by an existing provider to a client on whether to apply to the Upper Tribunal, including any work carried out on making the application for Licensed Work, would form part of the Stage 2(b) fee.

If, however, the client goes to a different provider at this point a new matter could be opened to provide initial advice and assistance on the appeal, and, if appropriate, to apply for a certificate. This matter would be funded under hourly rates, as per paragraph 8.76(e) of the Category Specific Rules, and would be subject to the £100 cost limit set out in paragraph 8.79.

Other than the initial advisory work highlighted above, any subsequent provision of civil legal services for an appeal to the Upper Tribunal would be funded as Licensed Work. For the avoidance of doubt, this would include making the initial application to the First-Tier Tribunal for permission to appeal to the Upper Tribunal.

Providers should, however, note that where a determination is made that the client qualifies for emergency representation using delegated functions (see section 6 below), paragraph 10.15 of the Cost Assessment Guidance 2018 confirms the following<sup>3</sup>:

“Work carried out following a delegated [...] grant of legal aid, including the completion of forms reporting the exercise of delegated functions and applying for a substantive legal aid certificate will be within the temporal scope of the legal aid certificate. Further, since legal aid certificates are issued with effect from a particular date, but not a particular time, work carried out before the actual exercise of delegated functions but on the same date will also be within the temporal scope.”

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<sup>2</sup> <https://www.gov.uk/government/publications/standard-civil-contract-2018>

<sup>3</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/737499/Costs\\_Assessment\\_Guidance\\_2018\\_-\\_Version\\_1.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/737499/Costs_Assessment_Guidance_2018_-_Version_1.pdf)

## 4. Merits Criteria

The specific merits criteria for applications for legal aid to appeal to the Upper Tribunal have not been amended following the transfer to Licensed Work. As under Controlled Legal Representation, these criteria are primarily set out at regulation 60 of the *Civil Legal Aid (Merits Criteria) Regulations 2013*. The merits criteria in this regulation are summarised below.

### 1. Standard Criteria

The following “standard criteria” must be met before the application can be granted:

- a) the individual does not have access to other potential sources of funding (other than a conditional fee agreement) from which it would be reasonable to fund the case;
- b) the case is unsuitable for a conditional fee agreement;
- c) there is no person other than the individual, including a person who might benefit from the proceedings, who can reasonably be expected to bring the proceedings;
- d) the individual has exhausted all reasonable alternatives to bringing proceedings including any complaints system, ombudsman scheme or other form of alternative dispute resolution; and,
- e) there is a need for representation in all the circumstances of the case including—
  - i. the nature and complexity of the issues;
  - ii. the existence of other proceedings; and
  - iii. the interests of other parties to the proceedings.

### 2. Cost benefit

The following “cost benefit” criteria apply:

- If the case is not of “significant wider public interest” then the “reasonable private paying individual test” must be met
- If the case is of “significant wider public interest” then the “proportionality test” must be met.

### **3. Prospects of success**

The case needs to have at least one of the following “prospects of success” for legal aid to be granted:

1. Very Good (Above 80%)
2. Good (60-80%)
3. Moderate (50-60%); or,
4. Marginal (45-50%), Borderline, or Unclear and:
  - a. the case is of significant wider public interest;
  - b. the case is one with overwhelming importance to the individual; or
  - c. the substance of the case relates to a breach of Convention rights.



## 5. Financial Eligibility

The financial eligibility criteria for applications to the Upper Tribunal have also not changed following the transfer of this work from Controlled Legal Representation to Licensed Work. This will, therefore, mean that the means assessment for these cases will be slightly different to other civil non-family certificated cases.

As with other certificated work:

- Legal Aid can be granted for Upper Tribunal work even if the individual is subject to asylum controls which state they have 'no recourse to public funds'
- Individuals who are properly in receipt (directly or indirectly) of Income Support, income-based Jobseekers Allowance; income-related Employment and Support Allowance, Guarantee Credit or Universal Credit qualify automatically on income, but capital must still be assessed
- As well as the resources of the individual, the resources of their partner are assessed and taken into account under Regulation 16(1) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013; third party resources may be taken into account in certain circumstances, as provided for under Regulation 16(5)
- Assessments for asylum and immigration cases are carried out applying the usual deductions/allowances from gross income and capital as provided for under the regulations, to determine disposable income and capital. For example if the individual's means are aggregated with a partner, and/or if the household includes dependants, the standard allowances are deducted in the usual way and for the usual amount (unless the 'dependant' has a separate income of their own requiring an adjustment to be made).

The following differences apply:

- The eligibility limits for income are the same i.e. gross monthly income £2657 and disposable monthly income £733, but the disposable capital limit is £3000 (Regulation 8(3))
- The individual will not be required to pay a contribution if their income and capital are within the eligibility limits – Upper Tribunal work is non-contributory (Regulation 44(2)(a)(i)(bb))
- An individual who is directly or indirectly in receipt of Asylum Support provided under s.4 or s.95 of the Immigration and Asylum Act 1999 is 'passported' through the means test for both income and capital (Regulation 6(1)(b)). Individuals in receipt of s98 emergency support are not passported.
- The capital test is simplified for individuals with an interest in a business or trust. The business borrowing value or unutilised capital value of an individual's business (i.e. those who are self-employed, in a partnership, or stand in an analogous position in relation to a company) is not calculated.

- Similarly, for Upper Tribunal Work only, there is no need to calculate the capital value of a trust fund (Regulation 36(1)(a)). However, if the individual owns shares in a company, the value of those shares can be assessed and included in the assessment. Also, if the individual has received / is receiving / is expected to receive income or capital from a trust fund, that money can be assessed and included in the assessment.

## **Evidence of Means**

The Lord Chancellor has issued guidance stating there should be flexibility in the evidence of means required to demonstrate financial eligibility<sup>4</sup>. Namely, if an individual's circumstances are such that they are struggling to provide the relevant documents to show they are financially eligible the legal aid provider should upload through CCMS as much evidence as is available (with reference to the normal requirements) and notify the LAA the circumstances for not providing full documentation when the application is made. The LAA will consider whether, based on the evidence that has been provided, the individual can be determined to be financially eligible.

Notwithstanding the above, the Lord Chancellor's Guidance also has a section on the evidence required in respect of Asylum Support:

“Confirmation from the Home Office or Migrant Help that the individual is in receipt of support. Written evidence must be no more than 6 months old. Asylum Support may also be evidenced by completing the LAA's Asylum Support enquiry form [once this has been published by the LAA] or otherwise a detailed telephone note confirming: Asylum Support reference number, type and amount of Asylum Support (ss.4, 95 or 98) received, date and details of individual and department confirming support.”

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<sup>4</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/757026/Guide\\_to\\_determining\\_certificated\\_work.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/757026/Guide_to_determining_certificated_work.pdf)

## 6. Delegated Functions

Under authorisations made by the Director of Legal Aid Casework, providers have been delegated functions to make determinations on all applications for emergency representation except in relation to<sup>5</sup>:

1. Judicial reviews (other than certain homelessness cases where delegated functions are available);
2. Applications where the determination that the client qualifies for civil legal services is dependent on the case having “significant wider public interest”; and,
3. Applications for “Exceptional Case Funding” under section 10 of the Legal Aid Sentencing and Punishment of Offenders Act 2012.

This general position applies to Upper Tribunal cases and allows providers to grant emergency representation for appeals to the Upper Tribunal, including applications to the First-Tier Tribunal or Upper Tribunal for permission to appeal, provided the relevant funding criteria for emergency representation are met. As per conditions 2 and 3 above, delegated functions cannot, however, be used where the application relies on a determination that the case is of “significant wider public interest” or can only be funded via Exceptional Case Funding.

For the avoidance of doubt, the use of delegated functions for emergency representation is no different from the exercise of such powers in other proceedings. In particular, it allows providers to:

1. Make an determination on financial eligibility for the purposes of emergency representation without the need to refer the case to the LAA; and,
2. Amend any cost or scope limitations on a certificate, subject to the following conditions:
  - a. The amendment being limited to work or a stage of the proceedings satisfying the interests of justice test for emergency representation
  - b. Providers not being authorised to amend the time limit to which an emergency certificate is subject
  - c. Providers notifying the Director within 5 working days of the amendment; and,
  - d. No amendment being made to increase a cost limitation beyond £1350 excluding VAT unless justification of exceptional circumstances is provided to the Director

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<sup>5</sup> <https://www.gov.uk/guidance/work-out-who-qualifies-for-civil-legal-aid#tables-of-delegated-authorities>

Providers should comply with all other conditions/requirements that are relevant to emergency representation granted using delegated functions. This includes the need for the case to meet the relevant merits criteria in regulation 46 of the *Civil Legal Aid (Merits Criteria) Regulations 2013* and to notify the Director of Legal Aid casework of the determination within 5 “business days” as per regulation 39(1) of the *Civil Legal Aid (Procedure) Regulations 2012*, (which, in practice, is done by submitting an application via CCMS).

In terms of financial eligibility, providers should be aware that if on the receipt of further information it transpires the client is not financially eligible then the determination will be revoked (see regulation 52(2)(c) of the *Civil Legal Aid (Procedure) Regulations 2012*)).

## 7. Remuneration

### Solicitor Costs

Remuneration under Licensed Work to appeal to the Upper Tribunal is paid via hourly rates. There are two sets of rates payable:

1. For work connected to the initial application to the First-Tier Tribunal, the payment rates are set out in Table 10(c) of Schedule 1 to the Civil Legal Aid (Remuneration) Regulations 2013
2. For work connected to proceedings taking place in the Upper Tribunal, the payment rates are set out in Table 10(a) of Schedule 1 to the Civil Legal Aid (Remuneration) Regulations 2013

#### *First-tier Tribunal*

Activity	London Rate	Non-London Rate
Preparation and attendance	£55.08 per hour	£51.53 per hour
Routine letters out and telephone calls	£3.96 per item	£3.69 per item
Attending tribunal or conference with counsel	£29.30 per hour	£29.30 per hour
Advocacy	£62.64 per hour	£62.64 per hour
Travelling and waiting time	£27.27 per hour	£26.51 per hour

#### *Upper Tribunal*

Activity	Rate
Routine letters out	£6.75 per item
Routine telephone calls	£3.74 per item
Preparation and attendance	£71.55 per hour (London rate) £67.50 per hour (Non-London rate)
Attendance at court or conference with Counsel	£33.30
Advocacy	£67.50 per hour
Travelling and waiting time	£29.93 per hour

### Counsel's Costs

The rates payable for counsel are prescribed in the same way as other civil non-family Licensed Work cases at the codified rates set out in Schedule 2 to the *Civil Legal Aid (Remuneration) Regulations 2013*.

## **Contingent Payment Regime**

Similar to judicial review cases, work on an application for permission to appeal to the Upper Tribunal cannot be remunerated where permission is refused (see paragraph 8.96 of the Category Specific Rules). In these circumstances, remuneration would be limited to any remuneration paid under Stage 2 of the Controlled Work claim.

There are two exceptions to this general position, which are set out in paragraph 8.97 of the Category Specific Rules. Namely, all work on an application can be paid where the appeal to the Upper Tribunal:

- arises out of a case that is being dealt with under the UKVI detained Fast Track Scheme; or
- the appeal has been lodged by the UKVI.

In addition, the cost of interpreters and experts are payable on any application for permission to appeal to the Upper Tribunal, regardless of whether permission is granted. This is set out in paragraph 8.98 of the Category Specific Rules.

## **Enhancements**

The normal provisions on claiming enhancements in section 6 of the General Specification to the Standard Civil Contract 2018 apply to these proceedings when funded under Licensed Work<sup>6</sup>. The provisions on applying for prior authority to incur an uplift for advocates at paragraphs 8.89 to 8.91 of Category Specific Rules do not apply.

## **Payments on Account**

As with other Licensed Work, providers can apply for “Payments on Account” in accordance with the rules that are set out in paragraphs 6.19 to 6.30 of the General Specification to the Standard Civil Contract 2018<sup>7</sup>.

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<sup>6</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/738514/2018\\_Standard\\_Civil\\_Specification\\_General\\_Provisions\\_August\\_2018\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/738514/2018_Standard_Civil_Specification_General_Provisions_August_2018_.pdf)

<sup>7</sup> Ibid.

## 8. Onward Appeals and Remittals

This section provides further information on legal aid funding that may be required on a statutory appeal following the final hearing in the Upper Tribunal.

### 1. Onward appeals

In order to apply the Court of Appeal, a party needs to obtain permission to appeal. In the first instance, the proposed appellant would apply to Upper Tribunal for permission, and, if unsuccessful, would then apply direct to the Court of Appeal. The application for permission to the Upper Tribunal would be funded under the extant certificate. Providers will need to apply to the LAA for an amendment to the scope limitation to apply for permission:

**APL75** – “Limited to an application to the Upper Tribunal for permission to appeal to the Court of Appeal”

Any further proceedings in the Court of Appeal would need to be funded under a new certificate using the existing proceeding codes for these matters in CCMS. The application would be determined on the General Merits Criteria and the normal means test will be applicable. The certificate will be subject to its own new scope and cost limits. There is no change to the existing position on delegated functions for these applications.

### 2. Remittals

If a case is remitted back to the First-Tier Tribunal to be redecided then legal aid for this appeal would be carried out as Controlled Legal Representation. A new matter start can be opened for this case, which would be funded as hourly rates (see paragraph 8.76(i) of the Category Specific Rules). The case would subject to the relevant cost and disbursement limits for Controlled Legal Representation.

A new Matter Type II code (“IREM”) has been introduced to make these claims to be used with Matter Type I codes “IAXC” or “IMXC” as appropriate. Further information on using these codes can be found in section J5 of the LAA’s “Guidance for Reporting Controlled Work & Controlled Work Matters”<sup>8</sup>

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<sup>8</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/739110/Guidance\\_for\\_Reporting\\_Controlled\\_Work\\_Version\\_20\\_September\\_2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/739110/Guidance_for_Reporting_Controlled_Work_Version_20_September_2018.pdf)

## 9. CCMS Changes

A number of changes have been made to CCMS in order to facilitate the transfer of Upper Tribunal work to Licensed Work. In particular, four new proceedings codes have been added to CCMS to allow providers to apply for a certificate for an Upper Tribunal appeal:

**IM030/IA031/IH028/IO30**- “to be represented on an appeal or review against a decision of the First-Tier Tribunal to the Upper Tribunal.”

All four proceedings have the same wording and function in the same way. The IA031 proceeding code is to be used for all in-scope applications, regardless of whether the case arises out of an asylum or an immigration appeal. The other three codes are Exceptional Case Funding (ECF) cases only and their use will depend on the underlying subject matter of the case (e.g. if the case is a “Human Rights” matter). CCMS will guide the user through the application process in a way designed for these appeals.

**End of Document**