

## SCOTTISH LEGAL AID BOARD

### BEST VALUE REVIEW: IMMIGRATION AND ASYLUM

#### SUMMARY

In the ten or so years since persons seeking asylum were first dispersed to Glasgow, the cost of advice, assistance and representation in the fields of both asylum and immigration has grown very significantly. Expenditure from the legal aid fund on advice and assistance and civil legal aid relating to immigration and asylum matters totalled just under £5 million in 2010. Given this increase and some concerns expressed to the Board about the nature of supply of legal services and the operation of the asylum system more widely, the Board has undertaken a review to establish whether the current system offers appropriate access to legal advice, assistance and representation in a manner which represents best value for the Fund.

#### Key findings:

##### *Expenditure*

- Expenditure on advice and assistance/ABWOR has increased from £2.7million in 2006 to £4.5 million in 2010
- The average cost of a case has grown in the same period from £400 to £498.
- 91 firms received a payment from the legal aid fund for relevant advice and assistance/ABWOR work in 2010, but only 20 firms earned over £10,000 in that period
- The top two firms earned between them over £1.3 million.
- In addition to advice and assistance and ABWOR, a further £0.5 million was paid in relation to civil legal aid work on judicial and statutory review. Changes in coding make it hard to compare with earlier periods, but the figures suggest a significant increase in the last three years.

##### *Availability and accessibility of legal services*

- Although concentrated in relatively few firms, there do not over recent years appear to have been significant difficulties in accessing legal services in this field for those who need them.
- Research commissioned by the Board suggests that solicitors provide a valuable service to their clients at the beginning of their asylum process.
- Nevertheless, some clients remain unclear about the process they are part of or how they should approach it.
- Much of the difficulty appears to emanate from the way in which the wider asylum system operates: timescales are often short, and clients may be unable to access a solicitor until after their initial interview with the Home Office.
- This leads some to follow the advice of peers, rather than professional advisers, which may have a prejudicial effect on the client's application for asylum.
- Earlier access to legal advice may improve the client's perception and experience of the system, but may also improve their chances of receiving a positive decision at the outset.
- Data from a pilot in England is inconclusive about the costs and benefits of a different approach: a further extended pilot intends to explore this further. The Board is attracted by a system that results in more sustainable initial decisions by UKBA, but is concerned that the initial pilot appeared to show no reduction in the number of unsuccessful appeals.

### *Merits testing*

- The findings of the English pilot also highlight a key difference between the legal aid system in place in Scotland and that in England and Wales.
- Representation in appeals against decisions of UKBA is provided by a solicitors in Scotland under Assistance by Way of Representation, with no form of merits test. The Board is concerned that this may lead to some unmeritorious cases being appealed, both at first instance and beyond. The E&W system has merits tests at each stage.
- A similar concern exists in relation to judicial review. Board data suggests that a great many such cases are initiated under the current 'special urgency' regulations, which means that they can begin without scrutiny by the Board of their merits.
- While many such cases are undoubtedly urgent, the number and proportion that are subsequently refused by the Board is again perhaps suggestive of some unmeritorious cases being progressed, only to fall at an early stage.
- In such cases, it is possible for first orders to have been obtained, leading for example to the suspension of removal orders, before the subsequent application for legal aid is submitted, let alone decided. If legal aid is refused, solicitors and counsel remain eligible for payment for the work already carried out.
- The Board has recently published a best value review of the special urgency system. As set out in that review, several changes to the operation of the special urgency provisions have been proposed and indeed a number of amendments to the relevant regulations have been made.
- One of the amendments enables the Board to refuse an application for authorisation to undertake urgent work where it is not satisfied that the statutory merits tests for legal aid are met. This will enable the Board to refuse to authorise urgent work where it does not appear reasonable in all of the circumstances for the work to proceed.
- Although not developed specifically in relation to judicial review cases, this change will enable the Board to challenge what might appear to be cases of dubious merit before urgent work begins, rather than when the application for civil legal aid is received.

### *Dungavel and the cost of travel*

- Most firms which undertake asylum and immigration work are located in Glasgow, where most asylum seekers reside, or Edinburgh, where the Court of Session is located.
- The other main centre for asylum and immigration casework is Dungavel House Immigration Removal Centre, which is supplied in the main by providers based in Glasgow and, in the last couple of years, Dundee.
- The volume of cases emanating from Dungavel has increased dramatically in the last two years, with expenditure on cases for those detained there more than tripling from £219,000 in 2008 to £713,000 in 2010. A significant amount of the cost relates to travel, which is also environmentally damaging.
- While Dungavel has perhaps been under-served at some points in the past, the current level and cost of assistance appears disproportionate.
- The Board has particular concerns about the approach to bail applications, which makes up a very significant part of some firms' business in Dungavel but which does not appear to be approached by some in a cost-effective way.
- Recent changes to legal aid regulations by the Scottish Government have reduced the fees available for travel across all forms of legal assistance, civil and criminal. This change may result in alterations in the approach of some firms to their business in Dungavel, helping to make it more efficient and cost-effective.
- However, the Board is also keen to ensure that an appropriate and consistent level of service is available to those detained in Dungavel. To achieve this, the Board will shortly make available a grant to the Immigration Advisory Service, part of which will go towards the delivery of an onsite service at Dungavel.

## BACKGROUND

The purpose of this paper is to report on the work undertaken and the findings of the Board's immigration and asylum best value review. The purpose of the review itself was to identify whether those seeking asylum or with issues relating to immigration could access appropriate legal advice, assistance and representation in a manner which represents best value for the Fund. The Board views such representation as important work, which involves a particularly vulnerable client group.

The review was set against a backdrop of escalating case costs in the public funding of such legal services. As shown in the table below, despite a dip in expenditure in 2007, the costs of advice and assistance (including assistance by way of representation) have risen again for the last three years and now stand at a higher level than in any previous year. The increase in expenditure has been driven by both higher volumes and greater costs per case.

	2006	2007	2008	2009	2010
Number of cases paid	6,831	5,780	7,243	8,061	8,976
TOTAL Paid inc VAT	£2,735,574	£2,301,732	£3,260,257	£3,759,866	£4,471,493
Sol Fees Inc VAT	£2,243,090	£1,845,326	£2,615,101	£2,980,810	£3,505,617
Total Outlays inc VAT	£492,484	£456,406	£645,156	£779,056	£965,875
Average cost per case	£400	£398	£450	£466	£498
Average fees per case	£328	£319	£361	£370	£391
Average outlays per case	£72	£79	£89	£97	£108

The Board was concerned that this pattern did not seem to fit with the overall reduction in new asylum applications over recent years. The number of decisions issued by the United Kingdom Borders Agency has not reduced as fast as new applications for asylum, and in fact increased in 2009. This was due in part to a speeding up of the decision making process but also in part to the clearing of a long-term backlog of undecided asylum applications, known as legacy cases. Nevertheless, as the expenditure and volume trends are at odds with what may have been expected, the Board decided to review this area, looking at patterns of provision as well as the interaction of the asylum and legal aid systems.

The review therefore not only looked at the legal aid system, but also at the operation of tribunals, the UKBA and how solicitors were representing their clients.

To support the review, the Board commissioned Progressive Partnership to undertake research with those seeking asylum to explore their experience of the early stages of the asylum process. The report of the research helped inform the Board's developing thinking and the key points are summarised below. A short research briefing and the full report are also published alongside the Best Value review.

During the course of the review, the Board engaged with several key stakeholders, including the Law Society of Scotland (the Society), United Kingdom Border Agency (UKBA), the Scottish Refugee Council, G4S (who run Dungavel Immigration Removal Centre on behalf of UKBA), the Scottish Immigration Law Practitioners' Association, the Scottish Court Service and the First-tier Tribunal (Immigration and Asylum Chamber) (the tribunal).

## ISSUES EMERGING FROM THE REVIEW

### *Availability of solicitors*

In the early days of dispersal of asylum seekers to Scotland, there was some concern that too few firms and solicitors were available to represent those making claims for asylum. While a small number of firms had for many years been providing an immigration law service, the number of dispersed asylum seekers meant that the level of potential legal need was of an altogether different order.

Fortunately, the established immigration firms took on significant amounts of asylum casework, along with a number of law centres and a small number of other firms. The Board also employed two solicitors during the first round of its 'Part V' projects, and both were hosted by Glasgow-based law centres to help boost the number of solicitors offering an asylum law service. As asylum dispersal was restricted to Glasgow, the supplier base remained largely restricted geographically, although a number of Edinburgh based firms also started to offer an asylum and immigration service, partly because of the regular need for action in the Court of Session.

The number of firms was never very large. However, other than in the first two or three years following the start of dispersal, it appeared that the volume of cases each firm was able to take on was, in general, sufficient to meet the needs of those seeking asylum, especially as the numbers dispersed started to reduce, as well as the wider population with immigration issues.

The table below shows, for 2009/10, the number of cases paid and total earnings from advice and assistance/ABWOR of the top twenty firms, each of which earned over £10,000 including VAT in the year in question. It should be noted that many of the firms in the table will also have received income for advice in relation to judicial review and also from civil legal aid cases involving statutory or judicial review.

<b>Firm</b>	<b>No. of Cases</b>	<b>Total Paid inc VAT</b>	<b>Solicitors Fees inc VAT</b>	<b>Outlays inc VAT</b>
1	2067	£877,041	£683,801	£193,240
2	573	£459,845	£339,203	£120,642
3	462	£381,936	£272,155	£109,781
4	1231	£334,482	£280,105	£54,378
5	421	£329,131	£238,275	£90,857
6	468	£317,666	£285,936	£31,730
7	429	£309,093	£239,096	£69,997
8	626	£268,747	£238,145	£30,601
9	491	£267,757	£212,851	£54,906
10	604	£237,924	£181,243	£56,681
11	184	£134,303	£101,694	£32,609
12	315	£116,313	£95,498	£20,816
13	98	£105,535	£75,552	£29,984
14	282	£86,805	£59,847	£26,957
15	47	£48,058	£39,849	£8,208
16	190	£47,115	£40,261	£6,854
17	171	£39,212	£33,444	£5,768
18	77	£36,469	£29,577	£6,892
19	36	£11,895	£10,259	£1,636
20	25	£11,445	£5,771	£5,674
Other (71 firms)	179	£50,721	£43,057	£7,664
<b>Total</b>	<b>8976</b>	<b>£4,471,493</b>	<b>£3,505,617</b>	<b>£965,875</b>

Beyond the top twenty, a further 71 firms submitted at least one account in relation to asylum or immigration. However, the top twenty accounted for 99% of all expenditure. While it may at first appear that this is a small number of firms to represent almost all national provision, it has to be borne in mind that the business tends to be very heavily concentrated in Glasgow, although significant volumes of immigration and, to a lesser extent, asylum business is present in Edinburgh also, as well as more sporadically around the country.

### *Asylum seekers' experience of the asylum process*

As well as being interested in the number of firms and the amount of work they undertake, the Board was also keen to explore the impact of the services being provided. To this end, the Board commissioned a project to explore the experiences of those applying for asylum. The research was qualitative in nature in order to provide a more detailed view of asylum seekers' experiences. The interviews carried out as part of the research covered the respondents' perceptions and understanding of the asylum system and their interaction with their legal advisers.

The report of the research is published alongside this review. In general, the research found that clients felt reassured by the advice they received from their solicitors and that this helped prepare them for their Home Office interview and understand the process more generally. Contact with solicitors was regular and appreciated.

However, not all interviewees had been able to access a solicitor prior to their Home Office interview, which appeared to be taking place earlier than anticipated during the fieldwork period. While those who had seen a solicitor often remained confused about the process as a whole, those who had not seen a solicitor were even more so. In the absence of professional advice, some took advice from friends, relatives or other contacts. Perhaps unsurprisingly, this advice was not always in line with that provided by solicitors. For example, one interviewee was advised that the best approach to the Home Office interview was to lie. Clearly such an approach carried with it a significant risk of prejudice to the asylum application, with credibility often being a key issue on appeal and changes in narrative being viewed as inconsistency.

Overall, the research suggested that better information could be made available to those seeking asylum to help them understand the whole process, including the appeal process. However, this is not without its own problems, as legal professional and others working with this client group are acutely aware of the risk of information overload, particularly early on in the process. Nevertheless, the Board is keen to work with others to explore the information made available to asylum seekers, both at the outset and as their case progresses, and by their legal advisers, the immigration authorities and other support agencies, with a view to ensuring that accurate and comprehensive information is available and accessible for those who want it.

### *Early legal advice*

Related to the research findings is a consideration of the timing of access to legal advice. As already noted, some interviewees did not see a solicitor until their Home Office interview was either imminent or had already taken place and this may have led to them being disadvantaged. In this regard, the Board has reviewed the findings of the UKBA/Legal Services Commission pilot on early legal advice, run in Solihull from November 2006 to December 2007<sup>1</sup>.

The pilot changed the way in which legal representatives were involved in the early stages of a claim for asylum. It sought to shift the solicitor's input from being mainly around the appeal stages to the initial interview, with the aim of facilitating better first-time decisions and fewer onward appeals. As part of the pilot, solicitors were able to assist their clients before, during and

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<sup>1</sup> <http://www.parliament.uk/deposits/depositedpapers/2009/DEP2009-1107.pdf>

after the initial Home Office interview, and were able to interact directly with Home Office caseowners.

The evaluation suggests that this approach was viewed positively and did indeed lead to fewer decisions being overturned on appeal. The involvement of solicitors throughout the initial decision-making process was felt to have improved asylum seekers' perceptions of the fairness of the process:

“Caseowners and legal representatives both reported that they thought there was a greater understanding and acceptance by the applicant of the reasons for a negative decision. Caseowners and legal representatives commented that because the applicant had been involved throughout the whole process the applicants seemed to appreciate that they had been able to put their case fully.”

Despite this, the data collected for the purposes of the evaluation do not suggest any reduction in the number of cases progressing to appeal, just that fewer appeals were successful as the original negative decisions were more sustainable. This means that the potential of the pilot to reduce costs does not appear to have been maximised.

The front-loading of legal costs to facilitate the early resolution of cases is an approach that has been adopted in other areas in Scotland, and under-pinned the reforms to the High Court and summary justice over recent years. By paying more for early advice, the hope is that more cases will resolve at an earlier stage, thereby reducing the overall costs to the public purse in terms of legal aid and, in the case of asylum, tribunals and asylum support.

The Solihull evaluation is inconclusive on this point. While it identifies a very significant *potential* for cost-saving, the fact that no fewer appeals went forward meant that this potential was not realised, at least as far as legal aid costs are concerned: the LSC paid more for early advice but still also paid for appeals. While not all of the costs would be additional (where the solicitor has already been involved, the cost of preparing an appeal would presumably reduce), it was expected that the greater engagement of both solicitors and clients in the decision-making process would reduce the number of appeals going forward, thereby reducing overall costs.

However, the evidence gathered from solicitor case files suggested that “there appears to be a misapplication of the merits test that would warrant further statistical and quality monitoring” i.e. unmeritorious cases were being granted by solicitors, despite the greater insight provided by earlier and fuller involvement.

A further pilot is now being run across the West Midlands, with more detailed data being collected to allow a more comprehensive evaluation of the costs and benefits of early legal advice. The Board will review the findings of this extended pilot when they are available before coming to a view as to whether a similar approach would be desirable and feasible in Scotland. However, it appears that other changes to the system in Scotland would likely be required were a ‘Solihull’ approach to be adopted here.

### *Merits testing*

The current position in Scotland is that a solicitor can grant advice and assistance, or assistance by way of representation (ABWOR), to any financially eligible client who wishes to appeal a decision of UKBA to the tribunal. No form of merits test is applied, other than in the fairly narrow circumstances of appeals to the upper tier of the tribunal where the first tier has not given permission to appeal. Here the solicitor applies the test but the Board retains the right to review the application of that test and refuse payment if it deems the application of the test was flawed. By devolving the application of the merits test to the solicitor, the strict timescales for the

processing of the appeal are not impinged upon and the client's access to legal advice can continue before the tribunal.

It should be noted that solicitors in England and Wales operate under contract with the Legal Services Commission. For asylum and immigration work, the legal aid rules stipulate that solicitors must apply a merits test before taking on an appeal, based on a 50/50 or better prospect of success. In onward appeals, the tribunal also has the power to determine after the event that the practitioner should not be paid where there was no significant prospect that the appeal would be allowed on reconsideration. In addition, the contract terms mean that a firm is at risk of losing its contract if its actual success rate falls below a certain level (currently 35%). Given the actual overall success rate in England and Wales of around 30%, it follows that the failed appeals are more likely to involve unrepresented appellants.

On the face of it, indicative data on the outcomes of asylum appeals suggest a significantly lower success rate in Scotland compared to England and Wales. This would therefore appear to support the hypothesis that the use of merits testing in England and Wales, combined with solicitors' contractual obligations, is acting as a filter in ensuring that the cases with the poorest prospects of success are not taken to the tribunal.

As noted above, the concept of a merits test for asylum and immigration appeals is already accepted in Scotland but only under very specific circumstances. The understandable concern for practitioners is that any wider application of the merits test will negatively impact on their clients' ability to obtain representation. Certainly some concern has been expressed that the arrangements in England and Wales make it difficult for those with borderline or even reasonable prospects of success to obtain representation as solicitors are inclined to err on the side of caution and only take on the strongest cases, particularly for onward appeals.

Nevertheless, merits testing is a feature of almost every other form of legal aid for civil proceedings. The only other significant exception is mental health, also the subject of a recently published best value review, partly because of concerns that the system is too open to the pursuit of unmeritorious tribunal applications.

The issue therefore warrants further discussion with stakeholders and we would accordingly welcome views. Given the current timescales for the hearing of appeals, it appears likely that ABWOR will continue to be the favoured type of legal assistance, as opposed to civil legal aid. This is certainly the approach that was taken with recent changes in appeal structures. For employment tribunals, the Board applied a merits test before ABWOR can be granted. However, the timescales for lodging an employment tribunal application are not as restrictive as those for asylum and immigration appeals. Careful consideration would therefore need to be given to the potential impact on the wider system of a process that required applications to be made to the Board to take merits decisions.

The other option, as used presently both for various forms of ABWOR in criminal proceedings and in the narrow range of asylum and immigration appeals for which a merits test is currently applied, is for the solicitor to take the decision, with the Board able to review their application of the test at a later date. While this allows solicitors to proceed without reverting to the Board, it also introduced a degree of uncertainty as to whether the grant will subsequently, in effect, be rejected by the Board.

Views are sought on the principle of merits testing in relation to all stages of asylum and immigration appeals and the options for its implementation in practice.

### *Judicial review and special urgency*

The Board is also concerned that many judicial review cases in relation to immigration and asylum proceed prior to the application of the existing civil legal aid merits tests by the Board. This is because a great many such cases are initiated under the current ‘special urgency’ regulations. These regulations allow certain steps to be taken, some only with the prior approval of the Board, prior to the submission of an application for legal aid.

The regulations exist to enable steps to be taken to protect a client’s position in a timescale that would be unworkable were a full civil legal aid application to be submitted and the Board to take a decision. While the Board’s speed of decision-making has increased markedly over recent years, the statutory requirement to allow time for an opponent to make representation to the Board means that a minimum of two weeks must elapse before the Board can make a decision (unless the opponent makes representation within this period or intimates that they do not wish to make representations).

However, analysis of Board data suggests that a very high proportion of cases for judicial review on immigration and asylum matters start out under special urgency, but relatively few are subsequently granted. Many such cases are undoubtedly urgent, as the client will often be facing imminent deportation or removal from the country and a judicial review may be the only step that can prevent this happening.

However, the number and proportion of cases that are subsequently refused by the Board is perhaps suggestive of some unmeritorious cases being progressed, only to fall at an early stage. In such cases, it is possible for first orders to have been obtained, leading for example to the suspension of removal orders, before the subsequent application for legal aid is submitted, let alone decided. If legal aid is refused, solicitors and counsel remain eligible for payment for the work already carried out.

UKBA has expressed considerable concern that unmeritorious cases are raised against them, purely for the purposes of obtaining first orders which result in a removal being cancelled. In many cases, once first orders are granted there is nothing further to argue, as the grounds of review relate to the removal directions, which are cancelled when first orders are granted.

In his review of the civil courts, Lord Gill recommended the introduction of a requirement to obtain leave to proceed with an application for judicial review. This would have the dual purpose of encouraging early concessions by respondents and also preventing unmeritorious claims from proceeding.

Figures obtained by practitioners and seen by the Board suggests that over the last two to three years, UKBA has lost many more judicial review cases than it has won, as measured by the figures for awards of expenses. Nevertheless, the Board’s own data remains of concern.

Over the last three calendar years, 84% of all legal aid applications for judicial review of an immigration or asylum decision involved work carried out under the special urgency provisions. Over that period the number of applications for civil legal aid has increased by 142%, from 182 to 440. The number of legal aid certificates issued, however, has only risen by 35% from 130 to 176. This means that the grant rate has fallen from 71% to 40%. A good proportion of the decline in the grant rate has been driven by one firm, which over the period increased its number of applications in relation to judicial review from 43 to 187. Coinciding with this increase, the firm’s grant rate fell from 70% to 24%.

Where work is undertaken under the special urgency provisions and legal aid is subsequently refused, the solicitor (and counsel) involved are still eligible for payment. In 2010, the Board made payments totalling £73,000 for 105 cases where legal aid was refused but urgent work had

been undertaken. This compares to £59,000 and 61 cases in 2008. The firm referred to above received payments for 46 such cases in 2010, at a total cost of just under £20,000, compared to just under £60,000 for 36 cases paid under a grant of civil legal aid (the amount of work undertaken in cases that are refused will tend to be less than in those that are granted, meaning lower cases costs). Both figures exclude the cost of counsel, which will also be payable as counsel is required for all judicial review cases. In 2010, the payments to this firm represented 13% of all payments following a grant of legal aid, but 27% of all payments for urgent work where legal aid was refused.

The firm is not alone either in claiming payment in refused cases or in increasing its volume of applications; they simply exemplify what has been seen over the last two years. The increase in volume and reduction in grant rate means that total expenditure in refused urgent cases is likely to increase further. We are therefore keen to explore whether all of these cases represent a good use of taxpayers' money and, if not, what can be done to ensure that only meritorious cases are going forward under legal aid.

In this regard, the Board has recently published a best value review of the special urgency system more generally. As set out in that review, several changes to the operation of the special urgency provisions have been proposed and indeed a number of amendments to the relevant regulations have recently been made.

One of the amendments enables the Board to refuse an application for authorisation to undertake urgent work where it has given the applicant the opportunity to set out the merits of the case but the Board is not satisfied that the statutory merits tests for legal aid are met. This will enable the Board to refuse to authorise urgent work where it does not appear reasonable in all of the circumstances for the work to proceed.

Although not developed specifically in relation to judicial review cases, this change will enable the Board to challenge what might appear to be cases of dubious merit before urgent work begins, rather than when the application for civil legal aid is received. We will be monitoring the impact of these changes.

Depending on what changes to judicial review procedure flow from Lord Gill's recommendations, we will have to keep the operation of the legal aid arrangements under review.

#### *Dungavel Immigration Removal Centre (Dungavel IRC)*

Analysis undertaken by the Board shows significant growth in intimations over the last two years. This has not been evenly spread across those firms undertaking this type of work. In fact, the most striking growth is amongst new firms entering the market or significantly increasing their market share in recent years. In particular, one firm has gone from being a relatively minor provider to number two in the last two years. Significantly, this firm is not based in either Glasgow or Edinburgh, the two main centres for this area of work.

A great deal of this firm's business of relates to clients who are detained at Dungavel House Immigration Removal Centre in South Lanarkshire. The number of grants of assistance to clients detained at Dungavel has seen particular growth, with several of the aforementioned new providers also having a substantial share of their client base at Dungavel. The table below shows the number of grants of advice and assistance to those detained in Dungavel over the last five years, sorted in order of the firms making the most grants over that period.

As the table shows, the total number of cases tripled between 2008 and 2010. The starting point for the growth was late 2008 and a number of areas within the Board had identified a concern

about this sudden and very significant change. In particular, the Board's Accounts Assessment team had concerns with accounts relating to Dungavel.

Firm	2006	2007	2008	2009	2010	5 year total	% of firm's 2010 cases
A			142	1415	1058	2615	84%
B	117	315	387	347	634	1800	29%
C	315	286	8			609	N/A
D	106	320	25	2		453	0%
E	274	85	22	16	13	410	3%
F			79	197	100	376	12%
G				7	145	152	96%
H	38	42	23	12	6	121	1%
I					98	98	91%
J	15	19	16	5	5	60	1%
K			6	21		27	0%
L	13	1	2	1		17	0%
M	3	5	1	3	4	16	1%
N			11	3		14	0%
O					14	14	5%
P					12	12	8%
Q	7	3		1		11	N/A
R		1	2	2	4	9	2%
S	5	1		1	1	8	1%
T		2		5		7	0%
Other firms	14	6	3	8	18	49	1%
Total	907	1086	727	2046	2112	6878	22%

The cost of advice for clients in Dungavel has risen markedly in line with the increase in grants. While most accounts relate to advice and assistance or ABWOR in relation to asylum and immigration, an increasing number relate to judicial review, both advice and assistance and civil legal aid, as well as a wide variety of other matters, both civil and criminal. The total cost of all of these different kinds of provision for clients in Dungavel in 2010 was £713,000, compared to £634,000 in 2009 and £219,000 in 2008. Given this very significant increase in costs, it was decided that this issue should form a key element of the review.

Dungavel is located in South Lanarkshire, over 30 miles from Glasgow and over 50 miles from Edinburgh. It is not easy to reach and this may have contributed to the apparent reticence of practitioners in providing services at Dungavel. This led to a situation where few firms delivered a service in Dungavel and access to necessary legal services therefore became difficult for those detained in the centre. The centre has a capacity of just over 200 beds, and centre management advised the Board that turnover was constant, with around 200 new receptions being recorded each month. As new detainees almost invariably want legal advice on their detention and wider immigration/asylum issues, this constant turnover creates a substantial and constantly renewed demand for legal services.

Successive reports from HM Inspector of Prisons (HMIP) between 2002 and 2006 observed that access to such services was difficult for those in Dungavel and recommended that more be done to encourage firms to attend. The earlier reports also expressed concern that detainees were being exploited financially by some advisers, that the quality of advice and presentation was sometimes poor and detainees were not always told of their right to apply for bail. Following these reports, centre management circulated all firms in Scotland. The main response came from a firm based in Dundee, some 100 miles from Dungavel.

As the table above shows, the firm started undertaking work for clients in Dungavel in late 2008 and their levels of business grew quickly. During 2010, the firm made 1058 intimations in respect of clients in Dungavel. This constituted 50% of all cases emanating from Dungavel and around 84% of all immigration and asylum business for this firm.

From discussion with centre management, it appears that several solicitors from this and other firms visit on a daily basis and that the level of engagement from these firms has significantly reduced the instances of detainees being unable to obtain the services of a solicitor, or having to wait a long time to see one. HMIP in its most recent report also commented positively on the “unusually good access to advice and representation” at the centre, with the number of legal visits increasing very significantly from the earlier inspections and indeed the two private consultation rooms becoming overstretched at times.

At first, it appears that the leading firm attended only when specifically requested by a detainee. However, given that this soon developed into the firm’s presence on a daily basis, a practice appears to have developed whereby the firm (and any solicitor from other firms) conduct pre-arranged meetings with clients in the morning and then after lunch (provided by the centre), a call goes out advising any detainees wishing to see a solicitor that they can do so by presenting in the visiting area. In this way, firms obtain new clients as well as seeing exiting clients in the same visit.

Other firms, having observed this practice, also began remaining at the centre for lunch having seen their existing clients, thereby also accessing new clients. It is notable that two other firms (G and I in the table above) have very quickly built up substantial client loads in this way. Neither firm had previously had any asylum or immigration caseload to speak of, but both are now fairly significant providers, almost entirely focused on Dungavel. This may help explain the reduction in new grants made by the largest provider in 2010, despite the overall number of new grants for detainees increasing slightly.

In one sense, the ‘lunch time call’ is a good arrangement, in that it enables detainees to access a solicitor without having to provide any notice that they would like to do so. It also prevents solicitors having to make separate trips to see each new client, simply seeing new clients while they are already at the centre, thereby keeping costs down.

However, it also appears that it may encourage solicitors to attend the centre on a speculative basis; simply by being there, they may pick up a new client or two. There is a risk that this encourages solicitors to visit their client when a telephone call may be sufficient, simply to ensure exposure to new clients. The degree of travel undertaken results in a very significant level of expenditure from the legal aid fund, as well as being environmentally damaging and a hugely inefficient and intensive use of solicitor resource (a resource that had previously been regarded as being in too short supply).

It has also been suggested that clients of other solicitors may respond to the ‘lunchtime call’ and seek advice from any solicitor present at that time, instead of contacting their own solicitor. While it is perhaps understandable that clients, anxious to find out about their position, might approach any solicitor for advice, this is likely to lead to duplication of effort and runs the risk of healthy competition for clients evolving into an approach that may on the face of it appear not to be consistent with the Law Society of Scotland’s Standards of Conduct for Scottish Solicitors.

It also possible for detainees to contact several firms at the same time when initially trying to obtain the services of a solicitor. This is because the detainee will be given a list of firms that undertake work at the Centre by centre staff and can contact more than one of them, usually via fax. This can lead to a situation in which one firm might attend the centre in response to the faxed request, only to find on arrival that the client has been advised by another firm.

Given these potential difficulties, the Board is exploring with the Society whether specific guidance could be issued to solicitors regarding the acceptance of instructions and provision of advice at Dungavel.

Our examination of some of the work undertaken at Dungavel suggests that a very high proportion of the total cost flows from travel (fees and mileage). It also suggests that some of the work undertaken may not be strictly necessary to protect the client's position. In particular, we have identified some concerns in relation to bail applications.

### Bail

Staff from the centre confirm that the first thing every new detainee wants to establish is whether and when they can get out. HMIP had in earlier reports expressed concern that insufficient advice was provided regarding bail, against a standard expectation that detainees would be advised of their right to apply for bail within 24 hours of arrival (albeit not necessarily from a legal representative). It now appears that this is a standard part of solicitor advice, as it perhaps should be. However, we have some concern both about the way in which some applications for bail are progressed and the frequency with which they may be made for some detainees.

As the table above shows, several firms have fairly extensive Dungavel-based caseloads. Accounts assessment officers identified that one firm, and only one firm, always included a full statement from the applicant alongside the standard bail application form. It also appeared that the firm's practice was to have an initial attendance with the client at which instructions would be taken and the client would be admitted to advice and assistance. If at that initial meeting it was identified that an application for bail would be made, a *separate* meeting would then be held with another member of the firm's staff to take a statement from the client.

This second meeting regularly took place the following day, occasioning an additional journey from Dundee to Dungavel (a 200 mile, 4 hour round trip). When challenged, the firm argued that as the additional trip was undertaken by an unqualified member of staff, who was therefore entitled to a lower rate of legal aid payment, this represented an economical use of time. We were not convinced by this argument as the extra travel time outweighed any saving that might be made on unqualified time with the client. This therefore appears to bear out our concern that the ability to generate significant fee claims from travel might incentivise the making of additional trips, even if the work to be done was in fact necessary.

However, our primary concern with this issue is that it does not appear that the taking of a full statement is necessary for the purposes of making a bail application. Both UKBA and our own accounts assessment staff confirmed that this firm is the only one that appears to take this approach. The bail application form is short, but space is provided for information that might be needed to assist the tribunal in coming to a decision. We discussed the matter with the Senior Resident Immigration Judge, who confirmed that the tribunal does not require there to be a statement accompanying the form and that the tribunal does not refer to such statements in considering the application. It therefore appears that the travel, the attendance and the framing of the statement itself are unnecessary and appear to be undertaken for financial rather than case-related reasons.

A further concern raised by UKBA and the tribunal, and consistent with observations by our own staff, relates to repeated bail applications for detainees whose applications have been rejected by the tribunal. There is currently no limit to the number of occasions on which the same detainee can apply for bail, and no minimum elapsed time between applications. For applicants who are financially eligible, there is nothing to lose in submitting a further application, even if there has been no change in circumstances other than the passage of a short period of time.

There may of course be some circumstances in which the passage of time is itself a relevant change, for example if the original bail application was refused because UKBA stated an intention and ability to remove the detainee within a particular period of time. If UKBA has in fact been unable to do so, perhaps because travel documents did not arrive as expected, a further bail application may in fact be appropriate: the failure to obtain travel documents *may* suggest that these are not going to be readily available and so the detainee is unlikely to be removed in the foreseeable future. However, feedback from stakeholders suggests that the simple passage of time with no such other factors is a more common feature of repeated bail applications.

We understand that the tribunal is considering whether new Procedure Rules should be promulgated to allow consideration of a bail application on the papers, rather than by way of an oral hearing, where it is submitted soon after a previous refusal. Should such rules be introduced, the Board might expect to see a reduction in the number of grants of advice and assistance in relation to bail, or at least a reduction in their cost. Even in the absence of such rules, it appears questionable that public funds should be used to pursue additional bail applications that have little or no prospect of success. It may be appropriate for the Board to develop its own guidance that places the onus on the solicitor to demonstrate that there has been some change in circumstances that would justify an increase in authorised expenditure to enable a further bail application to be made.

#### Securing cost effective delivery at Dungavel

The Board is keen to curtail the inefficiencies currently seen in provision at Dungavel without impacting negatively on the availability of legal services, something that is not only of importance to detainees but also vital to the smooth running of the facility. The staff at Dungavel have told the Board that the ease with which detainees can access legal advice plays a crucial role in reducing tensions within the facility. Nevertheless, the current approach is unsustainable on both cost and environmental grounds. There are several ways in which this issue could be addressed, some of which are already being taken forward.

First, regulations recently promulgated by the Scottish Government have reduced by half the payments available to solicitors for travel. These regulations affect all types of civil, criminal and children's legal assistance and seek to bring payments in Scotland broadly into line with those available in many other jurisdictions. The regulations intend to produce a saving to the public purse for any travel that is undertaken. They may also reduce any incentive that may exist for unnecessary or excessive travel. In this way, the total amount of travel may be reduced, leading to greater savings and environmental benefits.

Second, the Board will consider whether changes in fees – such as the development of block or fixed fees - could help encourage solicitors to take the most efficient approach to the delivery of their service. While this could be extended to apply to advice and representation in asylum and immigration matters more generally, it is perhaps an approach well suited to the particular circumstances of advising clients detained in Dungavel. Decisions as to fees are for the Scottish Government and can only be made via regulations laid in the Scottish Parliament.

Third, the Board is encouraging solicitors to fully exploit the range of ways in which they can contact their clients at Dungavel. For example, detainees at Dungavel generally have ready access to telephones, including often their own mobiles. Detainees also have access to email, albeit without the functionality of attachments. The Board is also exploring with Dungavel management the scope for video-conferencing between solicitors and clients. A similar system is already in regular use between the tribunal and Dungavel for the hearing of bail applications. We would encourage solicitors to use these methods of communication – as many do with other client groups – rather than travelling to Dungavel to see their client whenever contact is necessary.

Each of these steps has to be seen in the context of the Board's wish to ensure that those who need assistance from solicitors and cannot travel to see them – such as those detained at Dungavel – continue to enjoy appropriate access to legal services. Alongside the reduction in travel fees, use of other means of communication and other potential changes to fees, the Board has several options for securing a cost-effective, efficient and stable service for detainees.

- The Board could introduce a duty scheme to Dungavel to manage the delivery of legal services and improve the organisation of access to the facility by practitioners. The Board would make available a duty solicitor to see new arrivals at Dungavel, or others without a solicitor. As with the current criminal custody court duty scheme, regulations could be made under section 31(9) of the Legal Aid (Scotland) Act 1986 to specify that only the duty solicitor would be able to advise such clients. Should a need for further assistance be identified, the duty solicitor could take the client on under advice and assistance.

The Board could specify the criteria for solicitors who wish to be on any such duty plan. To restrict instances of excessive or unnecessary travel, one of the criteria for being on the duty plan could be that the firm must have a place of business within the same or adjacent sheriff court area as Dungavel and/or the tribunal. Alternatively the Board could restrict the payment of travel to only those solicitors with places of business within these areas.

- The Board could directly employ a solicitor to provide advice to detainees at Dungavel. There are two possible models of operation for an employed solicitor service based at Dungavel. The first model would be to employ a solicitor (or solicitors) to provide all of the publicly funded legal advice at Dungavel, supported by the kind of regulations under section 31(9) described above.

The second possible model would be to use the employed solicitor or legal adviser in a gatekeeper role at Dungavel. The employed solicitor/adviser would be the initial point of contact for detainees. The solicitor/adviser would then “triage” them according to their legal advice needs. Those that required further advice or representation would either be dealt with by the employed solicitor/adviser, if they had sufficient capacity, or be referred out to private practitioners with whom the Board has established an appropriate protocol, such as that which operates well between the Board's Civil Legal Assistance Office in Inverness and local private firms.

- Finally, the Board could provide a grant or enter into a contract with a provider or providers to provide a service to those detained at Dungavel. The Board already has the power to provide grants to advice providers for specific areas of work. There are a number of initiatives across Scotland funded by the Board to provide advice in relation to issues arising from the economic downturn. Project agreements specify the type of work to be done and set down reporting frameworks and timescales to allow the Board to monitor the progress of the projects against agreed objectives. Subject to Scottish Ministers' agreement, the Board could enter into similar funding schemes, either with a voluntary sector agency or law firm to provide advice and representation to detainees at Dungavel on a similar model.

As with the other options, it would be possible to restrict the provision of publicly funded advice to clients in Dungavel to the grant-holder. There are currently two ways in which this could be done. First, the Board could deem the availability of grant-funded advice to constitute “other rights and facilities” in terms of regulation 10 of the Advice and Assistance Regulations 1996. This regulation states that advice and assistance shall not be granted where an applicant has available to him other rights and facilities that make it unnecessary for him to obtain advice and assistance. The other option would be for the Board to advise the Government to make regulations under section 31(9), as with the duty scheme option. Such

regulations could restrict the ability to provide legal assistance in specified circumstances to a solicitor made available by the Board.

Of the three models, the third is the most attractive and straightforward from the Board's point of view. Rather than having to coordinate multiple providers on a duty rota or recruit and manage directly employed solicitors, the provision of a grant is well-suited to the type of service required.

### *Immigration Advisory Service*

The Immigration Advisory Service is the UK's largest charitable provider of advice and representation on asylum and immigration matters. Headquartered in London, it has offices throughout the United Kingdom, including a Glasgow office which opened ten years ago. Several of its offices are directly involved in provision of legal services in other facilities in the UKBA detention estate.

For the last six years, the Glasgow office has received a grant from the Scottish Government. This grant was originally provided by the Home Office. When the Home Office decided that it was no longer appropriate for them to directly fund IAS, responsibility for the grant in England and Wales was transferred to the Legal Services Commission, the body responsible for running the legal aid system there. At that time, the Board did not have grant funding powers, so the option of transfer to the Board did not exist. Instead, the grant was transferred to the Scottish Government. In recent years, the grant has supported IAS' delivery of a range of services, including email and telephone advice, surgeries in various parts of the country and immigration casework, primarily for clients who are ineligible for legal aid.

The Board gained grant funding powers under the Legal Profession and Legal Aid (Scotland) Act 2007. We have been in discussion with Scottish Government as to whether it would be appropriate for the Board to take over the IAS grant for some time and Ministers recently decided that, with the Board's economic downturn grant funding programme now well-established, the time was right for responsibility for the grant to transfer. Accordingly, the Board has been working over recent months with IAS, UKBA, G4S and Scottish Government to agree arrangements for the transfer of the grant from 1 April 2011, including agreement of aims and objectives. The Board suggested, and Ministers agreed, alongside a range of general asylum and immigration advice services to be delivered by IAS, part of the grant could be used to ensure consistent and cost-effective delivery of legal services at Dungavel.

It is unclear at present precisely what type and level of service is needed at Dungavel, given the largely supplier led nature of current arrangements and their scope for duplication of effort. The Board therefore intends that the first few months of IAS service delivery be used to gauge the level and nature of need for advice and representation. The Board will analyse information gathered during this initial period and work with IAS and other providers, UKBA, G4S and the Society to develop longer-term options for the delivery of a cost-effective, sustainable and high quality service that is specifically designed to meet the needs of detainees.

## **CONCLUSION**

The Board's review of legal assistance in relation to immigration and asylum shows a very substantial increase in expenditure in recent years, despite significant reductions in the number of new claims for asylum over the period. Most of this assistance is provided by a relatively small number of committed, knowledgeable and experienced solicitors, whose advice is clearly appreciated by vulnerable clients who are often being assisted through a complex, confusing and distressing process.

However, the evidence reviewed by the Board suggests that several aspects of the operation of the system are in need of change to ensure value for money, environmental sustainability and the overall efficiency of the legal aid and wider asylum and immigration systems.

Several recommendations emerge from the Board's review. A number of these have already been implemented or are underway, while others require further analysis, engagement and development. These are set out below.

#### *Implemented*

- The special urgency regulations have been amended to enable the Board to refuse an application for permission to undertake urgent work where the merits of the case are not demonstrated to the Board's satisfaction. This will help prevent unmeritorious judicial review applications from proceeding.
- Regulations have been put in place to reduce the fees paid to solicitors for travel. This will reduce the cost of provision at Dungavel and will encourage solicitors advising clients detained there to do so as efficiently as possible.
- The Board has clarified that it will not pay separately for statements taken in support of a bail application.

#### *Underway*

- The Board is working with the Immigration Advisory Service, UKBA and G4S to arrange for IAS to provide a grant-funded advice and representation service for clients detained at Dungavel. The grant will be effective from 1 April 2011, and will also support a range of IAS' other advice and casework services in relation to immigration and asylum.

#### *Under development*

The Board will:

- seek views on whether it should recommend to Scottish Ministers the introduction of a merits test for appeals to the tribunal against asylum and immigration decisions by UKBA.
- explore with the Society the scope for guidance to solicitors on the provision of advice at Dungavel
- work with stakeholders to review longer term options for the delivery of publicly funded advice at Dungavel
- consider the scope for a move towards fixed or block fees for asylum and immigration work.
- explore with UKBA and G4S the scope for use of video-conferencing for communication between clients and solicitors at Dungavel
- monitor the emerging findings of the Early Legal Advice Pilot being run by UKBA and the Legal Services Commission.
- respond to any changes made to judicial review procedures following Lord Gill's review.

The Board welcomes comments on the issues and proposals set out in this paper. Please send all comments to: Stuart Drummond, [drummondst@slab.org.uk](mailto:drummondst@slab.org.uk).