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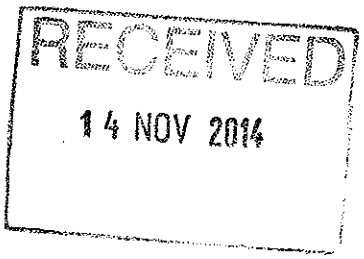
Date: 13th November 2014

The Scottish Legal Aid Board
LP 2
Edinburgh 7

FOR THE ATTENTION OF: [redacted] SS



Dear Sirs

Sheriff Court Audit [redacted]

The Scottish Government has now paid the Audit Fee and I now enclose a copy of the Report issued by me today.

Yours faithfully

F.M.McConnell
Joint Sheriff Court Auditor

SHERIFFDOM OF LOTHIAN & BORDERS AT EDINBURGH

REPORT

By

F.M. McCONNELL
Joint Auditor
12 Drumsheugh Gardens
Edinburgh

In relation to a claim for certain expenses submitted by [redacted]

"The Assisted Person"

To

THE SCOTTISH LEGAL AID BOARD

EDINBURGH 6th OCTOBER 2014

The assisted person was represented by Messrs Morton Fraser, Solicitors, Edinburgh in relation to his appeal for asylum.

The assisted person was Sri Lankan national of Tamil ethnicity. While he had in the past resided in the UK, his English was limited and it was necessary to engage the services of an Interpreter.

He was bereft of funds and for the initial stages was granted Advice and Assistance. It became apparent that the work covered under this scheme would be insufficient to enable the application for asylum to proceed. In these circumstances the agents applied for an increase in expenditure utilising a form provided by SLAB "Template 2 Asylum" to which I will return later in this report.

In support of the application it was alleged that the applicant had been tortured by agencies of the Sri Lankan Government. Leaving to one side the mental damage suffered he suffered significant physical injury including severe scarring. His agents upon being instructed considered it essential to obtain a detailed medico-legal report to provide evidence as to whether the scarring was consistent with his allegations of torture. It was necessary to refer the applicant for examination as a matter of urgency. I was advised that it was vital to establish that the scarring was consistent with the applicant's account and the longer this was delayed the more difficult it would be to determine that the scarring related to injuries suffered during the period in question. Reference was made to a decision of the Upper Tribunal in the case of KV – Sri Lanka (2014) UKUT 00230 (IAC).

Against that background the agents decided to instruct the Medical Foundation for Freedom from Torture which specialises in providing clinical assessments of the physical and psychological effects of torture in a medico-legal context with reference to the Istanbul Protocol. The work of the organisation is, I am advised, recognised by the Home Office as being persuasive in the determination of claims for asylum where there are allegations of torture.

It is the agents position, and they have prior experience in such applications, that they could not instruct a medico-legal report without first obtaining a full statement from the applicant detailing precisely what he claimed happened to him. Their experience suggested that a file note or a precognition was not appropriate. The applicant was in an extremely vulnerable position and it was essential that the Medical Foundation was properly instructed with all the

facts. They therefore took a full statement and it is the framing of this statement which is central to the dispute in this case.

The statement in question was produced. Reference was made to MacPhail Sheriff Court Practice at p. 517 para. 15.07 which describes a precognition as "a written statement in intelligible form". It was emphasised that this was a statement taken in support of the application so that those charged with determining it were in possession of the whole factual background.

In the event SLAB have abated the charge for framing the statement notwithstanding the specific terms of "Template 2 Asylum". The agents were advised by SLAB that it was conceded it was necessary to meet the applicant and obtain full details in support of his claim for asylum but that could have taken the form of a file note.

At this stage one has to look at the terms of the Template for asylum cases. This reads as follows:-

"In applying for an increase under the template you confirm that under the existing limit:

- You have met the client
- You have taken instructions about a claim for asylum
- You have advised them on making a claim
- Work covered by the template.

We will grant an increase in authorised expenditure to £950.00 to cover:-

- Lengthy meeting with client to take detailed information and statement
- Formal statement of evidence form or help the client to complete statement of evidence form.
- Correspond with Immigration and Nationality Directorate (IND)
- Formal statement of additional grounds

- Correspond with clients about progress
- Examine decision of IND
- Meet with client to discuss decision, advise on the outcome and advise on prospect of appeal if necessary
- Pay interpreter

What was argued for the agents was that the work covered by the template was arranged segmentially so that a "lengthy meeting with client" precedes both the framing of a statement of evidence or helping the client to complete the evidence form. It was said that the detailed " - - - - statement" referred to in the first bullet point is something quite distinct from :–

I) the statement of evidence form which is referred to in the second bullet point and ii) any statement prepared after and in response to an adverse decision by the Secretary of State in respect of the asylum application. This is clear from the language of the first bullet point which provide for a lengthy meeting with the client to take detailed information and a statement which precedes the "framing of a Statement of Evidence Form"

If one construes the bullet points literally the agent is authorised to take a detailed statement at the outset i.e. before any asylum interview or the Secretary of State's determination. The language of the template is clear and unambiguous without qualification.

Once the increase in expenditure is granted solicitors ought to be able to expect that the work done and covered by the template will be paid.

It was further argued by the agents that in the end by "front loading" the application so that the authorities have possession of every relevant fact and circumstance that they were in a better position to determine the applicant with a full set of the facts and circumstances before then. This had the effect

of cutting down on the level of appeals. Reference was here made to IPLA Representation of Asylum Appeals – a best Practice Guide Para 2 of the guide is entitled "How to Avoid an Appeal – by making a good application" The introductory paragraph reads as follows:-

"Appealing against a negative immigration decision is stressful, can be slow and will be expensive with for the applicant or the Legal Aid budget. It is far better to avoid the appeal process entirely by ensuring the initial application is made properly and the application whether to the Home Office or an entry clearance officer is likely to result in a sustainable decision".

The Guide goes on to say this:-

"Respect for your client is wholly compatible with a rigorous interviewing style. A fear of tackling ambiguities in your client's instructions will get in the way of providing effective representation. If there are inconsistencies in your client's account these must be discussed at the first opportunity. Instructions which are incoherent, incomplete or which suggest that the basis of the application has not been adequately established will prevent the application from being effectively progressed and can be fatal to the appeal".

The Guide is helpful in relation to the preliminary work to be done. Where a client is interviewed a decision has to be taken whether to submit a written statement either before or after the interview p42 goes on "If a statement is submitted there will be a legible record of what your client has to say instead of a handwritten record of an interview which may not be particularly legible. This could assist the IND case worker in coming to a decision in this case. Even if a decision is taken not to submit a written statement to IND it is advisable to prepare one. This will help your client to order his thoughts. It will also assist in the preparation of any subsequent appeal.

The function of a statement is to present the salient points of your client's claim in a coherent and concise way. The statement should clearly establish why your client is at risk of persecution, serious harm or some other human rights abuse. If the information contained in the statement is ambiguous it will fail to explain why your client is in need of international protection. At the outset therefore, think very carefully about what the statement is trying to communicate.

The statement should reflect as directly as possible your client's idiom and experiences. There should be a clear distinction between your client's testimony and any written representations you may wish to forward with the statement. Try to ensure that your client's asylum claim is plausible and as coherently argued as possible. References in written representations to external research materials which you may choose to append to the statement must be pertinent".

The Guide then goes into some detail as to how the statement should be taken and what information should be included in it.

At page 69, there is a passage entitled "Where no Statement or SEF has been submitted". This reads as follows:

"Without a statement or SEF your client may have a lengthier and more traumatic interview. You should consider whether a statement needs to be prepared for your client to hand in at interview ... or whether your client will rely on being able to provide comprehensive information at the interview. This decision will have to be taken by your client in the light of your advice, which will be based on your assessment of your client's ability to remember everything that has happened to him (which could be difficult given the nature of the interview and your client's ability to remember everything that has

happened to him which could be difficult given the nature of the interview and your client's likely nervousness), whether your client will be able to give a good and coherent account of what has happened and whether will in fact provide an adequate opportunity for your client to fully explain his claim".

The ILPA best practice guidelines were published in 2002 and have not been revised since to reflect changes in the asylum application process. They were drawn up to reflect an era when a Statement of Evidence Form (SEF) had just been withdrawn from use (currently the asylum process is entirely SEF-less, with the key exceptions of cases involving unaccompanied asylum seeking minors and cases where trafficking is alleged). However, while the legislative and policy landscape around asylum, legal aid fee schemes and asylum application timetables have since changed, in broad terms the best practice referred to in ILPA's guide is still relevant to those aspiring to produce quality asylum legal work in 2014.

In the circumstances, it was submitted by the Agents that taking and drawing a statement from the Applicant, is a reasonable, prudent and necessary step to take. This was an efficient use of time and authorised expenditure and represents a step or work clearly envisaged as reasonable by those responsible for drafting Template 2. Asylum. Standing the terms of Template 2. Asylum, it was submitted that the refusal to allow a charge for framing the statement is unreasonable.

In response I had the benefit of written submissions prepared by SLAB. It is common ground, I think, that anyone claiming asylum goes through a screening process. They are interviewed to determine what the situation is in the person's country; to establish why that person cannot return to their country; and why they seek asylum in the UK. Any claimant is entitled to

have legal representation at the interview as an observer but they cannot contribute to the interview or ask any questions. SLAB does not pay for a solicitor to attend the interview because a transcript is made available.

It is accepted by SLAB that following upon an interview the solicitor will meet the client (and interpreter if appropriate) to review the transcript for any discrepancies which need to be corrected. They say there is no need to take a statement at this stage as the client is given the opportunity to check any corrections to the transcript. These can then be intimated to the Home Office. When the need for a statement was queried the agents set out their reasons as follows:-

"We submit that taking a statement from our client is necessary work at this stage. Without a proper statement we are unable to assess the prospects of the client's asylum claim. Asylum claims turn on the specific facts and we could not assess whether or not he falls within the risk categories set out in the relevant country guidance case without a full account of his circumstances. If our opinion had been that he did not fall within these categories then our advice to the client may have been that it would be in his best interests to pursue a different form of visa.

We also need to review the screening interview and full SEF asylum interview for errors. The client is in a vulnerable position with regards these as he cannot speak English and can struggle to understand what the interviewers are driving at, and he cannot fully understand the interview transcripts. There are set time limits within which to correct any errors in these and we require to check them against a full account of his circumstances and highlight any issues that arise to him. Minor discrepancies can give rise to major credibility

issues in the Tribunal and so we must take a detailed rather than a general account of his circumstances.

Finally, a witness statement is necessary in order to instruct a medico-legal report on the client's scarring, which is a key piece of evidence. It can take some weeks to gain an appointment for this and a further eight weeks after the appointment for the report to be produced. If we wait until after the Home Office refuse the client's application, then we risk not having key evidence available in time for an appeal hearing".

For the Board it was argued that the taking of the statement at this particular stage of the proceedings was unnecessary and premature.

With regard to the Medico-Legal Report Service a minimum requirement requests either a detailed narrative of the client's account of events or the asylum interview transcript. In this case the solicitor had in his possession a copy of the asylum interview transcript – no more was required for obtaining a report. This transcript contains details of the nature of the torture and the relevant background to his claim. In the event following upon further information being provided to the Home Office a decision was made to grant asylum. The Medico-Legal Report was not needed and there was no need for the case to go before a Tribunal.

With regard to the Template it was acknowledged that this had not been amended to say that it will only cover taking a statement where the SEF form is required by the Home Office (this form is only required in very rare and exceptional circumstances) but in any event experienced practitioners are aware of Home Office requirements.

With regard to fees allowable to solicitors SLAB had this to say:-

Solicitors are entitled to payment in terms of Regulation 17 of the Advice and Assistance (Scotland) Regulations 1996.

"17. (1) Subject to paragraph (2) below, fees and outlays allowable to the solicitor upon any assessment or taxation mentioned in regulations 18 and 19 in respect of advice or assistance shall, and shall only, be –

(a) Fees for work actually, necessarily and reasonable done in connection with the matter upon which advice and assistance was given, due regard being had to economy, calculated, in the case of assistance by was of representation, in accordance with the table of fees in Part 1 of Schedule 3 and, in any other case, in accordance with the table of fees in Part II of Schedule 3"...

The Board's published guidance explains that it only pays for taking a precognition to the extent that it is necessary – that is, when it is likely that the matter will proceed to litigation, not where it is simply a matter which is capable of proceeding to litigation.

Whilst it is acknowledged asylum applications are granted without the need for a Tribunal in only a minority of cases it remains that there was no decision refusing asylum that might have lead to appellate proceedings before the Tribunal.

By way of response to these submissions on behalf of the Board the agents expanded somewhat on their initial submissions. Referring to their Account of Expenses they made the point that by allowing the charge for meeting the client and taking the statement that in itself is an acceptance by SLAB that it was reasonable and necessary to take a statement. If that be the case it followed that it was appropriate to record that statement. It was strongly

argued that in the context of these proceedings it was manifestly reasonable and necessary to finance the statement

There was an inconclusive discussion on the distinction between a precognition and a statement, but for the purposes of this taxation I doubt if any distinction is material to the determination of the issue in this case. I do, however, accept that there is a clear distinction between a file note (however recorded) and a statement or precognition.

The agents made reference to the status of the guidelines making the obvious point that these were only for guidance. But in any event the language of the Template was clear and unambiguous and that they had a legitimate expectation to be paid for taking and forming the statement. They take issue with the Board submitting as a matter of fact that the statement was taken after the asylum interview and indeed after the transcript was made available to them. I was referred to the Account of Expenses and the entries dated 10/6/13, 2/9/13, 30/10/13 and 2/11/13 which reflect the fact that the information gathering exercise was not restricted to the meeting.

Turning to the SEF interview record they submitted that often such records do not cover the whole picture; that the interview itself is structured somewhat formally and may not disclose the full circumstances of a particular case. In this case they point out that the record does not disclose how the client claimed to have been tortured. In his statement the client stated, "They also inserted some ice cubes and other objects into my anus which was very horrible and painful and they put a gun to my private parts and threatened that they were going to shoot me there which caused intense fear". This is not reflected in the transcript of the interview.

In the end after these extensive submissions the issue was whether it was reasonable and necessary for the agents to frame the statement. The Board have no issue in paying the agents for meeting the client and taking the statement but not for framing it. They do not accept that it was necessary to frame a statement for submission to the Medico-Legal Report Service. What was required was, "A detailed narrative of client's account such as a witness statement or SEF interview record is necessary as a minimum.". The Board further submitted that the forming of the statement was "premature" in so far as no hearing was fixed and indeed no hearing was ever fixed.

In the course of their submissions the Board did not depart from their principal submission that the framing of the statement was not reasonable and necessary *Esto* a statement was required it need not have been so extensive. Most of the factual background was adequately and properly covered in the interview transcript; at most all that would have been needed was a very short supplementary statement covering any omissions.

With regard to the terms of the Template it was submitted that this was a useful device for the benefit of both the Board and solicitors in making and considering applications for increases. There was a degree of administrative convenience for both parties. It was, it was said, made clear in the Accounts Guidance at Part V, Chapter 5.10 of the Civil Legal Assistance Handbook that "a template increase is not a block fee for the work done but is simply an upper limit set on the basis that you will be undertaking the usual work in connection with the particular, identified stages of the proceedings, you still have to carry out the work and justify it on a detailed basis at the accounts stage".

In this case the agent's position is that they did carry out the work authorised by the template which they detailed in their account. But the Board's position is that the template does not, in terms, say that they will pay for framing the statement which is the issue here.

The agents emphasised the necessity in this type of case to "front load" the application. Provide a full and detailed statement was good practice and might obviate the necessity of an appeal where a determination had been made on grounds which were lacking in specification. Taking a statement could involve a number of sheets of written script. Such was the nature of these cases that there was a degree of urgency in dealing with them. It may not always be the case that the individual who took the original statement would deal with further procedure. It made sense to reduce the handwritten notes to a formal statement not only for the benefit of the other agencies involved but for good and sensible case management. When one considers the length of the formal statement could it be seriously said this would have been left as a long handwritten file note. With regard to the submission that framing the statement was premature it was submitted that one should have careful regard to what the client was facing; there was 1) a degree of urgency and 2) the issue of scarring and the healing process. There was no merit to this objection. In this case the agents did not attend the original interview. A perusal of the transcript of the interview would suggest that the client was responding to structured questions. His responses, via an interpreter, may not accurately reflect not just the factual background but the nuances. It had to be kept clearly in mind that this could be a life and death situation and that the client would be in a highly stressed and emotional condition.

DECISION

What has to be determined is whether the framing of the statement was reasonable and necessary with due regard being had to economy Ref 17 (1)(a) Advice and Assistance (Scotland) (Consolidation and Amendment) Regulations 1966 (S1 1996) No. 2447 (S192).

The template states that work covered includes "a lengthy meeting with the client to take detailed information and a statement". It therefore authorises the taking of a detailed statement before any asylum interview or a decision of the Secretary of State determining the application. The agent therefore had a legitimate expectation of payment. In Abdi v Secretary of State for the Home Department (2005) EWCA Civ 1363Laws L J said this:-

"Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public... Accordingly a public body's promise or practice as to future conduct may only be denied and thus the standard I have expressed may only be departed from, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that

any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances".

It seemed to me that what was promised in the template was clear and unambiguous and subject to the work done being reasonable and necessary ought to be paid. Back therefore to the central question, was the framing of the statement reasonable and necessary? It seemed to me that it is either expressed or implied in the rules (including Legal Aid) governing the fixing of fees that the concepts of necessity, fairness, reasonableness and economy are paramount. These concepts are not susceptible to any precise definition as would be necessary to give them utility as practical tests, they are convenient labels and the best an Auditor can do is, pragmatically, apply his own experience and judgement to particular circumstances.

The agents argued forcibly that efficiency savings would be achieved by front loading resources at an early stage. A report "Providing Protection" published by Justice, ILPA and the Asylum Rights Campaign in 1997 had this to say:-

"This involves front loading of resources. It also involves a reasonable allocation of time. Concentration on speed and cost-cutting at this stage will tend paradoxically to add to the length and expense of the system as a whole, because poor decisions will automatically and often successfully be challenged".

In my view it is of vital importance that the client has, at the early stages, access to legal advice and that all steps are taken at the early stages to ascertain precisely what his circumstances are and detailing the factual background to his plight. A great deal may depend on the quality of the information gathered to ensure the best possible case is presented to the authorities.

SLAB have a heavy responsibility in ensuring that the monies allocated to Legal Aid is wisely distributed and spent and while I have sympathy with their situation in dealing with cases such as this I have come to the conclusion that the framing of the statement (the agents having met client and taken a statement) was reasonable and necessary. One can readily distinguish between framing a statement of a builder who it is alleged damaged a wall and framing a statement such as the instant one which may have life and death consequences. For the reasons advanced by the agents I consider that it was essential, in the particular circumstances, that they framed a very detailed statement at the stage they did, so that there was no doubt as to their client's position in having to face the possibility of harrowing and stressful proceedings. Those agencies who have to report and determine difficult questions of asylum deserve the fullest possible information in intelligible form.

For these reasons I taxed the entry for framing the statement as presented and without abatement.

JOINT AUDITOR

TAXATION EDINBURGH SHERIFF COURT AUDITOR

16 JULY 2014 @ 11:15 AM

9 MELVILLE CRESCENT, EDINBURGH

RE: [redacted] AA3925039513

SUBMISSIONS ON BEHALF OF THE SCOTTISH LEGAL AID BOARD

Background

Morton Fraser granted Advice and Assistance to [redacted] concerning his claim for asylum.

[redacted] is from Sri-Lanka and had studied in his country of origin, prior to obtaining a visa to study in the UK. When studying in Sri-Lanka he was involved with the Liberation Tigers of Tamil Eelam (LTTE). He also attended protests in London during his stay in the UK while he attended university. On completion of his studies in the UK [redacted] returned to Sri-Lanka with the intention of obtaining a job, and to be closer to his family. However, when he arrived in Sri-Lanka he was arrested at the airport by government officials for his involvement with the LTTE. During his period in confinement he was subjected to torture leaving him with scars and other injuries. With the assistance of his brother-in-law he escaped from government confinement and made his way back to the UK. [redacted] immediately claimed asylum when he landed at Glasgow Airport.

Asylum process

Anyone claiming asylum in the UK must attend a screening interview to officially register their asylum claim. At the screening interview photographs and fingerprints are taken; together with details confirming the identity of the person claiming asylum, where they came from and their reasons for claiming asylum.

Following the screening interview a case worker is appointed and a date is given for the asylum interview. The purpose of the asylum interview is to determine what the situation is in the person's country; to establish why the person cannot return to their country; and why they are seeking asylum in the UK.

The person is entitled to have a legal representative at their interview as an observer. However, they cannot contribute to the interview or ask any questions. The Board does not pay for a solicitor to attend the interview as a transcript is made available.

Following the interview the solicitor will meet with the client and where needed an interpreter to go through the transcript to identify if there are any discrepancies that need to be corrected. There is no need to take a statement from the client at this stage,

as the client will be given the opportunity to go over and check the corrections to the transcript for accuracy prior to these being sent to the Home Office. Details of the changes are normally sent to the Home Office in the form of a letter.

The Home Office will issue their decision usually within 6 months. If asylum is refused a letter is sent to the client and their solicitor detailing the reasons for refusal. The client has 10 days (providing they are not in detention) to appeal the decision. At this stage the solicitor will normally go through the reasons for refusal letter and will take a detailed statement from the client forming the basis of their appeal, which is lodged as evidence in the appeal process. A statement for the purpose in support of the actual appellate proceedings is entirely reasonable as it is a necessary part of process.

Issue in dispute

Following the asylum interview [redacted] representatives took a detailed statement from him running to 14 pages in length. Their reasons for taking a statement are as follows:

"We submit that taking a statement from our client is necessary work at this stage. Without a proper statement we are unable to assess the prospects of the client's asylum claim. Asylum claims turn on the specific facts and we could not assess whether or not he falls within the risk categories set out in the relevant country guidance case without a full account of his circumstances. If our opinion had been that he did not fall within these categories then our advice to the client may have been that it would be in his best interests to pursue a different form of visa.

We also need to review the screening interview and full SEF asylum interview for errors. The client is in a vulnerable position with regards these as he cannot speak English and can struggle to understand what the interviewers are driving at, and he cannot fully understand the interview transcripts. There are set time limits within which to correct any errors in these and we require to check them against a full account of his circumstances and highlight any issues that arise to him. Minor discrepancies can give rise to major credibility issues in the Tribunal and so we must take a detailed rather than a general account of his circumstances.

Finally, a witness statement is necessary in order to instruct a medico-legal report on the client's scarring, which is a key piece of evidence. It can take some weeks to gain an appointment for this, and a further eight weeks after the appointment for the report to be produced. If we wait until after the Home Office refuse the client's application, then we risk not having key evidence available in time for an appeal hearing".

Board's submissions

We agree that it is entirely appropriate for the solicitor to meet with the client to go over the transcripts to make any necessary amendments. However, for the reasons given above it is our position that taking a statement from the client at this stage is premature. Further there is no decision from the Home Office that could lead to an appeal at this point in time; nor does legal aid require to be applied for, as an appeal if proceeded with is dealt with under ABWOR. ABWOR was not required in this case, as there were no proceedings before the Tribunal.

Following the asylum interview a report was instructed from the Medico Legal Service. The Medico Legal Report Service referral form as a minimum requirement requests either a detailed narrative of the client's account of events; **or** the SEF interview record (asylum interview transcript). Other documents that must accompany the referral are those **documents that are in the possession of UKBA** and may include a witness statement signed and dated; the screening interview record; the SEF interview record (asylum interview transcript) and the UKBA decision letter (if a decision has been received).

In this particular case the solicitor was in receipt of the asylum interview transcript prior to instructing the report and therefore the client's statement was not needed; further the client's statement had not been sent to the Home Office and therefore was not a document in the Home Office's possession.

In our view the asylum transcript would have been sufficient in this case for the purpose of instructing a report; as this gives details of the nature of the torture the client claims to have suffered and provides all the necessary information relevant to the background of the client's claim.

Following the client's asylum interview a translated letter from his mother was submitted to the Home Office in support of the client's asylum application. The Home Office having considered this together with the information elicited from the client at the asylum interview decided to grant asylum. The Medico Legal Report was therefore not needed and was subsequently cancelled.

Effectively, the client's claim for asylum was accepted without the need for Tribunal proceedings.

Templated increases

Provision exists allowing a solicitor to grant increases in authorised expenditure for certain subject matters, subject to the appropriate criteria having been met. Template 2 anticipates work that the solicitor is likely to carry out when providing advice to a client making an application for asylum. This includes meeting with the client to take a statement for the purpose of completing an SEF form. Completion of an SEF form is now only required in certain circumstances, as the Home Office for a number of years has not required this in all cases. Where such a statement is requested this is required prior to the asylum interview. It is acknowledged that the templated increase has not been amended to say that it will only cover taking a statement where an SEF form is required by the Home Office. However, practitioners dealing with asylum applications will be aware of the Home Office requirements. In any event the statement in this case was taken after the asylum interview.

Authorities - precognitions

Manual of the Law of Evidence in Scotland, W.J. Lewis [1925] page 172 - A written statement of the matters which witnesses are expected to give as evidence on oath when in the witness box, and is as a guide generally essential for the proper leading of the evidence at the diet of enquiry.

I.D. MacPhail, Sheriff Court Practice, 2nd Edition, page 473 - A written statement in intelligible form of the matters which a witness is prepared to give in evidence in the witness box.

J A Beatons, Green & Son, 1982 - A preliminary examination of a person who may be required to give evidence in a criminal trial or a civil proof. The purpose of obtaining a precognition is to acknowledge in advance of the trial or proof of the evidence the witness will be able to give about facts which are likely to emerge as relevant in which it will require to be proved. The likely evidence is set out in a document, also called a "precognition". Scots law terms and expressions.

Although the definitions vary in emphasis, it is clear that a precognition is a statement taken to discover what evidence a witness will give in court or before a tribunal hearing.

Fees allowable to solicitors

Solicitors are entitled to payment in terms of regulation 17 of the Advice and Assistance (Scotland) Regulations 1996.

"17. (1) Subject to paragraph (2) below, fees and outlays allowable to the solicitor upon any assessment or taxation mentioned in regulations 18 and 19 in respect of advice or assistance shall, and shall only, be -

(a) fees for work actually, necessarily and reasonably done in connection with the matter upon which advice and assistance was given, due regard being had to economy, calculated, in the case of assistance by way of representation, in accordance with the table of fees in Part I of Schedule 3 and, in any other case, in accordance with the table of fees in Part II of Schedule 3"...

The Board's published guidance explains that it only pays for taking a precognition to the extent that it is necessary - that is, when it is likely that the matter will proceed to litigation, not where it is simply a matter which is capable of proceeding to litigation.

A copy of the Board's guidance is attached for reference.

Whilst it is acknowledged asylum applications are granted without the need for a Tribunal hearing in only a minority of cases, it remains that there was no decision in this case refusing asylum that might have lead to appellate proceedings before the Tribunal.

PART V - ADVICE & ASSISTANCE ACCOUNTS - CHAPTER 6
THE ACCOUNT - FEES

6.26 Precognitions

As shown at paragraph 6.8, in connection with the initial meeting with the client, the Table of Fees for advice and assistance provides for an inclusive fee "for taking and drawing precognitions". This subsumes not only framing the precognition but the time charged for taking it. There is no framing charge under advice and assistance.

The ABWOR Table of Fees has no equivalent omnibus fee, the charge being a combination of a time charge (under paragraph 1A) and a framing charge (under paragraph 1C).

6.27 When is a precognition properly chargeable?

You should attach a copy of the precognition, where it exceeds two pages, to the account when claiming for taking and drawing a precognition.

Two matters need to be addressed:

- Firstly, the document must be a precognition, not just a file note. (See paragraph 6.28, "What is a precognition?".)
- Secondly, to be a reasonable charge, it must have been necessary to take a precognition. (See paragraph 6.29 "Was the precognition necessary?")

These matters are dealt with in turn.

6.28 What is a precognition?

A precognition has been defined as (click below):

- ***Glossary of legal terms and Latin maxims.***

Click here for definition ▾

A preliminary written statement of the evidence which a witness may be expected to give. It is usually paraphrased after interview with the witness and prepared in the first person. It is not signed, and is not binding.

- ***Manual of the Law of Evidence in Scotland, W.J. Lewis [1925] page 172***

Click here for definition ▾

A written statement of the matters which witnesses are expected to give as evidence on oath when in the witness box, and is as a guide generally essential for the proper leading of the evidence at the diet of enquiry.

•*I.D. MacPhail, Sheriff Court Practice, 2nd Edition, page 473*
Click here for definition ▾

A written statement in intelligible form of the matters which a witness is prepared to give in evidence in the witness box.

•*J A Beatons, Green & Son, 1982.*
Click here for definition ▾

A preliminary examination of a person who may be required to give evidence in a criminal trial or a civil proof. The purpose of obtaining a precognition is to acknowledge in advance of the trial or proof of the evidence the witness will be able to give about facts which are likely to emerge as relevant in which it will require to be proved. The likely evidence is set out in a document, also called a "precognition". Scots law terms and expressions,.

Although the definitions vary in emphasis, it is clear that a precognition is a statement taken to discover what evidence a witness will give in court or before a tribunal hearing.

We will only pay for the precognition or the part of the precognition relevant to the person's own account of events, restricted to the salient facts. Any information you add, not given by that person, will not be allowed - for example, the legal position, the consequences for your client or your client's remedies. The precognition should only contain matters based on the facts within the person's own knowledge, which are likely to or could be used for giving evidence should the matter proceed to litigation. We will only allow those precognitions, or parts of precognitions, where it is clear that the information in that person's account of events has been used or would have been used in evidence at a court or tribunal hearing.

Matters we will abate - and which should not be framed - include:

- a lengthy narration or restatement of information on a form or an initiating document;
- details of the client's personal and financial circumstances;
- entries reflecting discussions between the solicitor and the client, perhaps providing further information at a later meeting, which are more correctly considered as file notes covered by the time charge.
- information on case law or comments which have clearly not been made by the client;
- irrelevant or extraneous information.

6.29 Was the precognition necessary?

You should only take a precognition where it is necessary - that is, when it is likely that the matter will proceed to litigation, not where it is simply a matter which is capable of proceeding to litigation. We will not pay for framing a precognition when it turns out to have been unnecessary.

For example, if a client seeks advice on interdict and you send a letter to resolve matters and no further action is required, you do not need to take a statement at the first meeting. If the client needs to apply for legal aid, you can take a statement then. You will need recent information to apply for legal aid for interdict, and could not use a precognition of an old incident. You do not, therefore, need to take a statement of each and every incident.

Taking a routine precognition from a client, containing little information which advances the case and sometimes simply reflecting instructions from the client on various matters which are more properly dealt with by a file note, is not chargeable.

On occasion you may need to include a brief note about the client's financial circumstances where that information is relevant to a tribunal hearing and may be led in evidence. However, you should not unnecessarily extend the financial information already provided in the advice and assistance form unless or until a hearing is fixed.

Even when it is necessary to frame a precognition, some precognitions contain far more detail than the evidence the client or witness will have to give in the witness box, We will not allow a charge for a precognition to the extent that it contains:

- detailed information about the client's financial circumstances, benefits and
- other extraneous matters; and/or
- a verbatim account of a meeting.

You are paid a time charge for taking such detail and it remains on your file for further use. It need not form part of a precognition for which a separate framing charge is payable in appropriate circumstances.

Where a precognition is unnecessary or excessively lengthy, we will either abate the charge or reduce the number of sheets.

[redacted]

NOTE ON DIET OF TAXATION ON 16 JULY 2014 AT MELVILLE CRESCENT

[redacted] and I attended the taxation at 11.15 am on Wednesday 16 July 2014. I [redacted]y of the Board's written submissions to the Auditor and to the other side, with the intention of leading the Auditor through the Board's arguments by reference to the written submissions. However, the other side also had what looked like more detailed written submissions, and other documentation produced at the time.

Auditor (AUD)

[redacted] (IO)

AUD – "I believe the issue is framing a statement and the particular stage in the proceedings rather than relying on a file note, and the question as to whether to do so was necessary".

IO – Ian referred to his written submissions including, apparently, a Note by Counsel but this was not produced as it was of general application and had been obtained in respect of another client. It was explained that authority would need to be obtained before counsel's note could be produced (and even then it may only be produced to the Auditor). Ian also produced a copy of the statement and explained that an increase had been granted on the basis of a template which "*authorises us to take a statement"*. It was explained that this was the most important document which Ian would be relying.

AUD – Again the Auditor noted the distinction between a file note and a statement. He observed that the client is subjected to quite a rigorous interview to establish his position. The solicitor can be present but cannot intervene. (The Auditor was basically working his way through the Board's note). "Like a summary stated case this is an adjusted transcript – a document that narrates the interview plus subsequent observations for consideration by the Home Office? It is clearly important – it is the founding document for the basis of the application.

If you have a transcript as adjusted and a file note, is it necessary to prepare a formal statement?"

IO – "The solicitor spoke to the applicant before the interview. You need to speak to someone who *doesn't speak English*. You have to get the full background details and the complete story; yes, you can keep it as a file note or *you can also keep it on a statement*. *Solicitors move on so the solicitor may not be there at a later stage. You need a detailed precognition*.

Under A&A, as you are aware, there is an initial limit of £95. SLAB template no. 2 (IO referred to bullet point one) says that you can have a meeting and take a statement. We will be relying on legitimate expectation in this entry being paid".

AUD – "So you are saying that it is good case management?"

IO – "*Yes, the client may say at a later stage I didn't ask you to do all that. So it is necessary"*.

AUD – "And of course you are working to a short timescale?"

IO – "Yes, we have to *do the statement in short compass/restricted timescale*. In this case the client has scarring from his time in custody and needed a medical report to comment on the injuries sustained by the client. Sometimes these injuries are self-inflicted". (The legal assistant who was also there referred the Auditor to a UT case referring to age of scarring up to six months and the need to obtain early medical vouching).

IO continued – "A medico- legal report form cannot be accepted without a statement, or a statement of evidence form (SEF), or an asylum interview transcript". (I noted that the reference to this transcript was stated very quickly and very quietly).

AUD – "My practice, as a litigation lawyer years ago would be, in certain circumstances, to dictate a file note to help anyone who had to read it. I don't know if there is any different between a formal statement and a typed file note, or whether the Board pays for a file note*".

IO – "We are not paid for a file note".

AUD – "This is not again about case management – the record being the formal statement?"

IO – "Yes. *McPhail states that you should take a precognition. How do you know what the case is/remedy etc? You have to go over this with the client". [Feel I have to comment here. McPhail only recommends that a solicitor takes a precognition in circumstances where the case is proceeding to a hearing and a solicitor requires a formal note as to what the client will say in evidence. Also, a solicitor does not need to frame a precognition to "go over" matters with the client.*

At this stage the Auditor thought that the best way forward, given the documentation that had been produced and exchanged at this diet would be to continue consideration to a further diet for written responses to each side's submissions. The documentation to be made available to the Board in order to allow it to prepare a response would be

- Counsel's Note (but only if it could be shared);
- the medico-legal form;
- the instruction of the medico-legal report; and
- the statement.

A further diet was set for **12 August 2014 at 11 am**.

The documentation has now been made available by e-mail of 24 July 2014 (on file).

*We don't – essentially a framing charge.

RESPONSE TO WRITTEN SUBMISSIONS

ON BEHALF OF

THE SCOTTISH LEGAL AID BOARD

TAXATION (CONTINUED DIET), EDINBURGH, MELVILLE CRESCENT – TUESDAY 12 AUGUST 2014 @ 11 AM

RE: [redacted]AA/3925039513

The Board has the following observations to make on the written submissions previously produced to the Auditor by Messrs Morton Fraser, Solicitors, Glasgow.

BACKGROUND

The background set out in the submissions, with the exception of the last two bullet points, is not in dispute. As can be seen from the Board's written submissions, the Board recognises the need for appropriate advice, and the need for an interpreter and a medico-legal report if required in the circumstances of the case.

The Board does not accept, and this point will be dealt with in greater detail below, the statement that the solicitors could not instruct a medico-legal report without a full statement. The Medico-Legal Report Service case referral form, which is before the Auditor, clearly states, at page 3 (in brackets) that, *"A detailed narrative of client's account such as a witness statement or SEF interview record is necessary as a minimum…"*. Referring to the agent's account, a charge was made for perusing and considering asylum interview notes (28 sheets) on 2 September 2013. This is the SEF interview record, headed, Statement of Evidence Form (SEF) Combined Interview and NINO Application, and is also, before the Auditor. It was after this point that the meeting took place with the client, on 30 October 2013, and the client's statement was framed, on 1 November 2013.

For this reason, the Board maintains its position that in the circumstances of this case the solicitor did not require to frame a statement (a charge was allowed for meeting client and taking statement).

THE ACCOUNT

Clearly the agents and Board have been unable to agree the framing charge to which reference has been made. It is noted that for the purposes of the agent's submissions, no differentiation is made between a precognition and a statement. Whilst the Board does not consider the status of (or any distinction between) a precognition and a statement, respectively, to be central to this issue, it should be pointed out that all references to this document are to a "statement", from the entry at 30 October 2013 for "attendance at meeting with client and interpreter obtaining details for client's statement", to the entry in dispute, dated 1 November 2013, for "framing client's statement". Also, the justification for preparing a statement is the need to instruct a medico-legal report and, as indicated, the references to the relevant documents in the medico-legal report case referral form is to a "statement".

There is nonetheless a danger in this matter that confusion is being caused by the imprecision or differing contextual usages of critical terms.

Albeit perhaps restricted to those who practice or operate in or around the Scottish legal system, ~~T~~the Auditor will be ~~aware~~ familiar~~of~~ with the~~is~~ well established formal distinction~~fference~~ between a statement and a precognition. A statement in this sense is a direct, unfiltered, unreconstructed, verbatim record of a client's/witnesses position. A precognition is a construct, compiled, filtered and adapted from details made available by the client/witness, retaining accuracy, but ultimately structured to assist in some later work/task (such as a the leading of evidence in a court hearing). Importantly, a precognition, by definition, is never emitted by a witness. It requires the separate work of framing, based on detail gathered.

The formal distinction between precognition and statement is often absent from common parlance. Problems can arise if these terms are interchanged, and it is not uncommon for "statement" in common parlance to be used for what is really "precognition". That is not a criticism, but the danger of confusion and imprecision as to meaning requires alertness to the differing usages.

As indicated, the issue in this taxation is not so much about any formal distinction between statement and precognition, but the foregoing distinction helps in establishing a clarity of definition which does assist in the following submission.

The root of the issue in this taxation is really more about the distinction between the gathering of material, and what is then done, necessarily and reasonably, with due regard to economy, with that material in terms of presenting it. The Board's position, very simply is that the gathering of appropriate and relevant material[1] is a proper charge. What is then done with that material is the subject of dispute.

One of the definitional issues that it would be useful to clear up at the outset the notion of "taking a statement" or "obtaining a precognition" is applied in way which does not adequately make clear (a) whether the work is referring to the gathering of material or the subsequent processing of that material, or (b) whether, in the context of the use fo "statement", "statement" is being used in the context of "verbatim statement" or "precognition".

What we appear to be ~~talking~~ concerned about in the context of this taxation is the charge being made for the work of framing, structuring and presenting details obtained from the client at the earlier meeting. That work, if the foregoing more formal definition is applied, is the framing of a precognition, not a verbatim statement. This is not to suggest any inaccuracy in the resulting document, but as a matter of fact, the document although described as a statement, is not (nor in fairness is it suggested to be), a verbatim, spontaneous ~~, indeed,~~ a statement by the ~~client – a direct, detailed, verbatim statement of the client's position, rather than a precognition which is essentially a private document inadmissible as such in evidence [see McPhail, Sheriff Court Practice (3rd Edition) at 15.07 to 15.16].~~ client of his own words as they were emitted.

~~If~~ Assuming that the Auditor considers that this document is indeed a precognition, reference is made, as indicated in the Board's submissions, to its Guidance, and the

[1] What is relevant and appropriate will always be, however, case dependent.

expressed position of the Board that the framing of a precognition in these circumstances would have been premature since no hearing had been fixed and, indeed, no hearing was ever fixed in this case. It should also be noted that McPhail, in the passages quoted, is actually referring to precognitions of witnesses and the Board believes the comments are of limited application in the context of a statement taken from the client as to his position.

THE ABATEMENTS

Reference is made in the agent's submissions to the terms of the correspondence passing between agents and the Board. The Board believes that the correspondence is of limited value in disposing of this issue.

It is stated that the agents required to *carefully* note the full background details from the applicant, in the presence of the interpreter to ensure the agents have the *full* details and to enable them to assess the *exact* requirements in respect of the legal remedy he seeks. With respect these are the standards that the Board would expect of any solicitor taking instructions from any client in respect of any matter, and the fact that the client in this case requires an interpreter (funded by the Board) does not place any higher standard on a solicitor. The work was undertaken: there are no disputes about that. This, in the analysis adopted earlier, is the gathering of material.

As stated in the agent's submissions, the Board does not dispute that it was reasonable to meet with the client and obtain background details. It is then stated that the Board insist that the details should be retained as a file note, for which the Board is not prepared to make payment. This is wrong. A file note, taken contemporaneously, is included within the time charge for the meeting. The Board will not pay for the separate act of *framing* ~~the~~ a separate file note unless it is necessary.

The question is asked whether it was reasonable to obtain a precognition. The critical issue here is to get to the root of the separate issues that the phrase "obtain a precognition" involves. What that really means is (a) was it reasonable to meet with the client and gather particulars and (b) was it reasonable thereafter for the solicitor to undertake the separate work of preparing a document, structuring, ordering, filtering and presenting that material in the manner that the solicitor saw appropriate. It is the agent's submission, particularly where there are language ~~difficulties, that~~difficulties, which it is important to obtain full and detailed instructions in the form of a precognition, which can be put to the client in the presence of the interpreter to ensure the background information is complete and the agent can give full and proper advice. The agents went further, in the course of oral submissions, in the context of what was considered to be good case management, by stating that the client may say at a later stage, "I didn't ask you to do all that". So it is always necessary to frame a precognition.

The Board disputes these contentions at two levels.

Firstly, as a general statement, the Board does not accept

- that the only way in which full and proper instruction can be taken is by framing a statement/precognition, either for the purposes of properly advising a client or in the context of good case management. As regards the latter, it has long been recognised that the Law Society will recognise a contemporaneous file note as supportive of a solicitor's position on instructions given by a client without the need for a statement/precognition to be drawn; and

- that the general position is necessarily altered by the fact that English is not the client's first language. That is the reason why an interpreter is made available.

Secondly, we should remind ourselves that this taxation relates to

(1) a particular type of proceedings following a set process; and
(2) the particular circumstances of this case.

If one asks whether it was reasonable to obtain a precognition ~~(or, as the Board would prefer, a statement, in this case)~~ the answer would have to be no, but it is important to recognise that there is more than one element to the question and more than one element to the answer. While it was reasonable, in this case, to have a meeting with the client and "obtain" details, it was not reasonable to undertake the separate and distinct work of framing the "precognition". The agents had already perused and considered the asylum interview transcript and, on the same day (2 September 2013) attended a meeting with the client and interpreter discussing the asylum interview. The statement, of which the Board has now had sight, differs little from the detailed terms of the interview record (the formal transcript) and, it would appear, adds nothing to the narrative surrounding the circumstances in which the client was tortured. The stated reason for taking a statement *in this case* is the need to instruct a medico-legal report. As discussed, the agents were already in a position to provide the SCF interview record.

THE TEMPLATE

It was stated in oral submissions that an increase had been granted on the basis of template 2 which *authorised* the solicitors to take a statement. It was stated that this was the most important document on which the agents would be relying as it raised the issue of legitimate expectation of payment for taking a statement.

This statement and the observations set out in the written submissions display what the Board considers to be a fundamental misunderstanding of the template arrangements.

In normal circumstances, once a solicitor reaches the initial limit of authorised expenditure set down in the Act and regulations, the solicitor would have to seek an increase in authorised expenditure and, in that process, explain in detail what work the solicitor would intend to undertake in that case (to the extent that it is known). This process would have been repeated perhaps two or three times in this sort of case in the past. To avoid the work generated in that process, the Board introduced template increases some years ago listing the work which *may* arise in the course of advice on the subject matter and setting a maximum limit of authorised expenditure.

It is made clear in the Accounts Guidance at Part V, Chapter 5.10 of the Civil Legal Assistance Handbook, that "a template increase is not a block fee for the work done but is simply an upper limit set on the basis that you will be undertaking the usual work in connection with the particular, identified stages of the proceedings. You still have to carry out the work and justify it on a detailed basis at the accounts stage".

The work reasonably and necessarily undertaken by a solicitor will differ from case to case. The template allows for a "lengthy meeting", but the meeting may not necessarily be lengthy. Again, the template allows for the solicitor taking detailed information and, indeed, a statement. (Note: not a "detailed …statement" as stated in the agent's

Importantly, the templates do not exclude work which ancillary to the listed work where that work is reasonable and necessary. As it happens, and as stated in the Board's submissions, the Board may well pay for framing of a statement in circumstances where there are significant differences between the client's position and the position as set out in the SEF interview record. The template allows for the framing of a statement of additional grounds but, of course, this is not a charge that will be made against the Fund in the event that there are no additional grounds, nor does that aspect have any direct relevance to the current issue.

In short, the template takes the form of a list of work which may or may not require to be undertaken in any given case and, although it lists the work in more or less the order in which it would be undertaken, it is not a legal document to be subjected to detailed interpretation.

Importantly, in the circumstances of this case, the argument put forward by the agents under this section is that the Board authorises a solicitor to have a lengthy meeting with the client and that the statement "must also be something that is drafted before the interview". It is a matter of fact that the statement was taken after the asylum interview in this case and, indeed, after the transcript was made available to the agents. So, even on the agent's own interpretation of the terms of the template, it does not apply in this case.

It is stated, without any vouching, that there appears to have been a "settled" or "regular and consistent practice" on the part of the Board to grant automatically increases in authorised expenditure to cover items listed on the template – including the lengthy meeting with the client to take information and a statement, the latter in the sense of noting the material, where relevant to do so. It is not disputed that the Board, as a matter of course, is prepared to grant a standard template increase in authorised expenditure at a set sum in this type of case, but that is very different, of course, from any regular or consistent practice of paying for the separate work of framing a statement as a distinct document in these circumstances. Importantly there will be circumstances where it is not reasonable or necessary to gather or note comprehensive details or statements. As the agents are aware, the Board does not pay, as a matter of course, for a solicitor to take a statement (either in the sense of gathering the material or framing a subsequent document) either before or after an asylum interview – and certainly not after the availability of an asylum interview record. The fact that a solicitor can ~~take~~ note a statement, where reasonable and necessary, and the separate issue that thereafter, in some circumstances, it may be reasonable and necessary to frame the separate statement document (which would more accurately be referred to as a precognition) and be paid for it under the template does not give rise to the standard required to establish legitimate expectation of payment in all cases for both (a) the noting of the statement and (b) the framing of the statement. Depending on the circumstances and context the Board's position (and any reasonable legitimate expectation) may be:

(i) neither (a) nor (b) is reasonable and necessary,

(ii) only (a) is reasonable and necessary, or

(iii) (a) and (b) are reasonable and necessary.

The Board's position put simply is that this case is type(ii)

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Lastly, reference is made to the terms of ILPA, Representation at Asylum Appeals – a Best Practice Guide. The Board would have no dispute as to the general principle that it is far better to avoid an appeal process by ensuring that an initial application is made properly.

It is noted that the ILPA Best Practice Guidelines were published in 2002 and were, essentially, drawn up to reflect an era when a statement of evidence form (SEF) had just been withdrawn from use. It may well have considered that a statement might be necessary, as a matter of course, in the absence of an SEF. However, the current position would appear to be adequately reflected by the fact that the current Medico-Legal Report Service recognise a witness statement *or* an SEF interview record and it is difficult to see, not only in the circumstances of this case, but in the circumstances of most cases why a detailed statement would be required in circumstances where an equally, or more, detailed transcript is available dealing with the essential issues and reflecting the client's answer to the questions set out in that transcript.

RESPONSE TO ADDITIONAL WRITTEN SUBMISSIONS

INTIMATED BY

THE SCOTTISH LEGAL AID BOARD

RE: [redacted]AA/3925039513

Continued diet of taxation - 28th August 2014 at 11.30 am

Morton Fraser would respond to the additional written submissions received from SLAB using the same headings as follows:-

1. Background.

In the final paragraph of the opening heading "Background" in SLAB's additional submission, it is noted that a charge was allowed for meeting client and taking statement. By allowing the charge for meeting the client and taking the statement, it is submitted that this in itself is an acceptance by SLAB that it was reasonable and necessary to take a statement. The issue appears to be the manner in which the statement was recorded. Having accepted that it was reasonable to meet the client and take a statement, in the agent's submission it must follow that it is reasonable and necessary to record that statement. If it is not recorded, then there would quite properly be an argument that the agent did not have due regard to economy as otherwise the content of that statement would be lost and the exercise of taking the statement would be a wasted effort. In the agent's submission, recording a statement even in a file note does not negate the statement. The file note then simply becomes a file note containing a statement, or a file note in room and place of a statement/precognition. The issue would then truly be an issue of semantics. The Auditor and the Board have in any event seen the statement and in conceding it was reasonable and necessary to meet with the client and take his statement, in

the agent's submission it must also be accepted that it was reasonable to record that statement. It is notable that the Board accept (The Abatements, paragraph 3) that payment for the separate act of framing a separate file note will not be made unless it is necessary. It is submitted that the recording of the statement was necessary and that the agents have acted reasonably and with due regard to economy by meeting with the assisted person, taking a statement and recording the information in the form of a statement.

2. The Account.

It is agreed that for the purposes of the agent's submissions, no differentiation is made between a precognition and a statement. For the purposes of this taxation, the dispute is not one of semantics. In the Board's submission, problems can arise if these terms are interchanged, and it is not uncommon for "statement" in common parlance to be used for what is really "precognition". The interchange of the terms is perhaps best demonstrated by the use of the word precognition in the Board's table of fees and the word statement in the authorised expenditure increase template. The use of the word precognition appears in the advice and assistance tables of fees for ABWOR (assistance by way of representation) matters and for matters other than by means of ABWOR. If there is any confusion in this particular case, the table of fees and the template seem to be a clear source of that confusion.

In the agent's submission, there is a very clear distinction between a file note and a statement. The Auditor's vast experience in dealing with taxation of accounts on a regular basis over a number of years will have allowed him access to case files from a variety of agents. The Auditor will have seen that often file notes are particularly brief, recording little more than the date and duration of the activity, and a very brief description of the activity.

The Board's submission is that the gathering of appropriate and relevant material is a proper charge (paragraph 6 THE ACCOUNT). It is submitted that the Board's position regarding the recording of that information is unreasonable, in the face of what they clearly set out on the template as items of work for which they will make payment.

3. The Abatements.

The agents refute that the terms of the correspondence passing between agents and the Board is of limited value in disposing of this issue. The agents are entitled to take correspondence emanating from the Board at face value and act in legitimate expectation that correspondence sets out the Board's clear intentions.

The Board does not dispute that it was reasonable to meet with the client and obtain background details.

The Board's submission (bullet point 2) is that they do not accept the general position is necessarily altered by the fact that English is not the client's first language. By having a statement available setting out the relevant material, further unnecessary attendances with the client in the presence of an interpreter might be avoided. The Board's submission clearly overlooks the obligation of the agents to act reasonably and with due regard to economy.

4. THE TEMPLATE

Whilst reference is made to Accounts Guidance at Part V, Chapter 5.10 of the Civil Legal Assistance Handbook, the Auditor is reminded that the Guidance is not mandatory. Neither the Auditor nor the agents are bound by its terms.

The template is in clear terms. Subject to adjustment of any final account with the Board or taxation before the Auditor, the agents are entitled to

take the template at face value. It is submitted that the terms of the template leave the agents with a legitimate expectation that they will be paid for taking a statement from the client. The language of the template is unequivocal, advising the Board **will** grant an increase **to cover** the specified work.

It is of course accepted that the template takes the form of a list of work which may or may not require to be undertaken in any given case. What is clear however is that authorised expenditure must be in place before agents undertake the work. The Board submit It is a matter of fact that the statement was taken after the asylum interview in this case and, indeed, after the transcript was made available to the agents. That is clearly not the case as can be seen from the account. The Auditor is referred to entries in the account dated 10/6/13, 2/9/13, 30/10/13 and 1/11/13 from which it can be seen that the information gathering exercise was not restricted to one meeting.

The Board's final submission is that " Medico-Legal Report Service recognise a witness statement or an SEF interview record". As the Auditor will have seen from the referral form, these documents are a **minimum** requirement. The final aside in any event appears to be more than a little subjective. Again, the Auditor will clearly see from the referral form that Medico-Legal Report Service require a narrative of the client's account. With respect, the aside raises an issue of semantics the Board earlier asserted was not the issue.

Often, the SEF is insufficient to provide a narrative of the client's account. This can be because the SEF does not necessarily set out events in chronological order and this can lead to confusion. It can also be insufficient where the Home Office have failed to ask appropriate questions to draw out all the necessary details of the client's account.

For instance, in this case the SEF does not contain full details of how the client claimed to have been tortured. At paragraph 20 of his statement the

client states *"They also inserted some ice cubes and other objects into my anus, which was very horrible and painful, and they put a gun to my private parts and threatened that they were going to shoot me there which caused intense fear."* This is not reflected in the SEF interview.

As it is important that the Medical Foundation are provided with a detailed narrative of the client's account it was necessary to produce a detailed statement to ensure this information was placed before the expert and to ensure there was no confusion regarding chronology.

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Our Ref: JDH/cs

Please quote the department above and our reference

1 May 2015

Dear Mr McConnell

SHERIFF COURT AUDIT
[redacted] **- 3925039513**

I refer to your letter of 10 April 2015 confirming that a diet of taxation had been assigned for Tuesday 5 May 2015 at 11.15 am. A number of fairly fundamental issues arise in the context of this additional account and, by extension, this diet of taxation. I am writing this letter, as a matter of courtesy, to set out the Board's position in advance of the diet.

As I understand matters, the diet of taxation has been fixed in respect of a further account of expenses, purporting to be in respect of advice and assistance (A&A) provided to the client, but in truth a detailed account at A&A rates in respect of the preparation and conduct of the taxation in respect of which you issued your Report (dated 6 October 2014) on 13 November 2014. The account that has now been lodged for taxation was lodged with the Board on or about January 2015 and, after a brief exchange, was rejected by the Board. The account remains rejected and, therefore, unassessed. The account is not properly charged to the Fund and the diet of taxation is not competent, for the following reasons.

The work set out in the account, and purporting to have been carried out on behalf of the client is not A&A, as defined in section 6 of the Legal Aid (Scotland) Act 1986 (attached). No advice has been provided to the client in the preparation and conduct of the earlier taxation. No assistance has been given to the client. The client to whom A&A was originally provided had and has no interest at all in the activities to which the account is addressed. The work of account preparation, assessment and taxation can never be part of the A&A. It is of some concern that the solicitors have apparently used advice and assistance not for the purposes of giving advice to or assisting the client, but for the purpose of a dispute with a third party over their fees - a course of action which we consider to be wholly inappropriate.

The account itself, even if it had arisen out of A&A provided to the client, is time-barred in terms of the regulations. The last piece of advice that can properly be described as A&A was given on or about November 2013. That is a matter of record. In terms of regulation 18(1) of the Advice and Assistance (Scotland) Regulations 1996 (attached), a solicitor has

one year from the conclusion of the advice under A&A to lodge an account with the Board. As stated, this account was lodged with the Board on or about January 2015, some 14 months after the conclusion of the advice and assistance provided to the client, under LARN 3925039513, on the matter of asylum.

The only appropriate, legitimate account in respect of this advice and assistance certificate has already been the subject of an auditor's decision in terms of regulation 18(4). The auditor's decision is, of course, final and binding on all parties. The taxation was concluded.

The balance of the account was settled by the Board shortly thereafter and there is no more to be done in respect of this account. It was open to the solicitors to move for the expenses of the taxation during the currency of the taxation process. This happens occasionally (it is by no means common) but, in my experience, tends to happen more in circumstances where the solicitor or counsel is represented by a third party. As you are aware, no such motion was made. Had it been made, you could have considered the motion, subject to such representations as the Board may have made, and dealt with it in your Decision. The solicitors cannot demand payment of their costs by the back door, after the event, and after the taxation has concluded.

The subject matter of this A&A was advice on an asylum application and, as you will recall, the work was carried out under the appropriate asylum template. Much was made of the content of this template by the solicitors. Indeed, the template was subject to an almost forensic examination as to what it covered. Your decision was based partly on the concept of legitimate expectation, on the basis that the Board had indicated that a statement could be chargeable and this was argued by the solicitors as an immutable statement that it would be covered. If you recall the template in question, you will see that there is no reference to work undertaken in connection with preparation for and conduct of a diet of taxation. Indeed, it is fair to say that ABWOR is not available for representation at a diet of taxation.

For all these reasons, the account now lodged is not chargeable to the Fund and the process of taxation arising from regulation 18(4) is incompetent.

The issues, set out above, all relate to the legitimacy of the account and the competency of a diet of taxation. The Auditor's powers arise in circumstances where advice and assistance has been provided to a client in terms of the Act and regulations and there is a dispute in respect of the account. No advice and assistance has been provided. Whether or not advice and assistance has been given in any particular circumstances is a decision for the Board to make. It is a decision that the Board has made. The Auditor has no jurisdiction in this matter. In the event that Messrs Morton Fraser disagrees with that decision, there is the option of judicial review.

Other issues arise. The claim, when added to the value of the earlier account as taxed, far exceeds the limit of authorised expenditure set out in the template. A number of the entries in the account would be disputed. However, these are matters of no concern given the range of issues relating to competence.

I will, of course, attend the diet of taxation if it is to proceed. However, I should make it clear that would only be for the purpose of confirming the terms of this letter and formally advising you as to the decision of the Board. I would not intend to take part in any assessment of this account in the event that you choose to proceed. The decision is

not that of the auditor on this occasion, but of the Board. That being the case, and the fact that there is no jurisdiction in terms of regulation 18(4), the Board will not, of course, be bound by any decision that you make as to any taxed amount chargeable to the Fund on this account.

May I also add that in the event that the Board is required to attend on Tuesday next week (leaving to one side the issue of whether the attendance is in respect of a taxation properly constituted or not) the Board will be seeking to recover its costs from the solicitors, that term being used here as a catch-all insofar as it is unclear at this stage whether that would be by way of an award of expenses, or recovery of a loss occasioned by the solicitors' wholly erroneous initiation and engagement with this process and the foreseeable loss that would be caused to the Board by the requirement of attendance.

I have copied this letter to Messrs. Morton Fraser for their interest.

[redacted]

Cc Morton Fraser @ magi.mackay@morton-fraser.com

(2B)[23] The Scottish Ministers shall send the accounts and the statement of accounts to the Auditor General for Scotland for auditing.

(3)[24] [Repealed].

(4)[25] [Repealed].

(5)[26] [Repealed].

(6)[27] [Repealed].

(7) The Secretary of State shall lay before each House of Parliament a copy of every

(a) annual report of the Board under section 3(3) of this Act;

(b) [28][Repealed].

(c) [29][Repealed].

(8) In this section "financial year" means the period beginning with the commencement of this section and ending with 31 March next following and each subsequent period of 12 months ending with 31 March in each year.

PART II

ADVICE AND ASSISTANCE

Definitions

6.[30] (1) In this Act

"advice and assistance" means any of the following

[23] Inserted by the Public Finance and Accountability (Scotland) Act 2000 (asp1), section 26 and Schedule 4, paragraph 6 (in force from 1 April 2000).

[24] Repealed by the Public Finance and Accountability (Scotland) Act 2000 (asp 1), Section 26 and Schedule 6 (in force from 1 April 2000).

[25] Repealed by the Public Finance and Accountability (Scotland) Act 2000 (asp 1), Section 26 and Schedule 6 (in force from 1 April 2000).

[26] Repealed by the Public Finance and Accountability (Scotland) Act 2000 (asp 1), Section 26 and Schedule 6 (in force from 1 April 2000).

[27] Repealed by the Public Finance and Accountability (Scotland) Act 2000 (asp 1), Section 26 and Schedule 6 (in force from 1 April 2000).

[28] Repealed by the Public Finance and Accountability (Scotland) Act 2000 (asp 1), Section 26 and Schedule 6 (in force from 1 April 2000).

[29] Repealed by the Public Finance and Accountability (Scotland) Act 2000 (asp 1), Section 26 and Schedule 6 (in force from 1 April 2000).

[30] As amended by 1) the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, section 74 and Schedule 8, paragraph 36(2), with effect from 30th September 1991; 2) the Tribunals and Inquiries Act 1992, section 18 and Schedule 3, paragraph 20, with effect from 1 October 1992; and by Section 6 of the Convention Rights (Compliance) (Scotland) Act 2001 (asp7), in force from 6 July 2001, which extended the definition of "tribunal".

(a) oral or written advice provided to a person by a solicitor (or, where appropriate, by counsel)

(i) on the application of Scots law to any particular circumstances which have arisen in relation to the person seeking the advice;

(ii) as to any steps which that person might appropriately take (whether by way of settling any claim, instituting, conducting or defending proceedings, making an agreement or other transaction, making a will or other instrument, obtaining further legal or other advice and assistance, or otherwise) having regard to the application of Scots law to those circumstances;

(aa) [31]oral or written advice provided by an adviser-

(i) on the application of Scots law to any specified categories of circumstances which have arisen in relation to the person seeking advice;

(ii) as to any steps which that person might appropriately take having regard to the application of Scots law to those circumstances;

(b) assistance provided to a person by a solicitor (or, where appropriate, by counsel) in taking any steps mentioned in paragraph (a)(ii) above, by taking such steps on his behalf or by assisting him in so taking them;

(c) [32]assistance provided to a person by an adviser in taking any steps mentioned in paragraph (aa)(ii) above, by taking such steps on his behalf or by assisting him in so taking them;

and

[33]"assistance by way of representation" means, subject to section 12B(3) of this Act, advice and assistance provided to a person by taking on his behalf any step in instituting, conducting or defending any proceedings

(a) before a court or tribunal; or

(b) in connection with a statutory inquiry,

whether by representing him in those proceedings or by otherwise taking any step on his behalf (as distinct from assisting him in taking such a step on his own behalf).

(2) In this Part of this Act

[34]"adviser" means a person who is approved by a registered organisation for the purposes of providing advice and assistance on behalf of the organisation and who is the person by whom advice and assistance is provided;

"client" means a person who seeks or receives advice and assistance in accordance with this Part of this Act;

[31] Inserted bythe Legal Profession and Legal Aid (Scotland) Act 2007, section 67 (in force from 30 July 2007).

[32] Inserted bythe Legal Profession and Legal Aid (Scotland) Act 2007, section 67 (in force from 30 July 2007).

[33] As amended bythe Legal Profession and Legal Aid (Scotland) Act 2007, section 67 (in force from 30 July 2007), to the extent of adding "subject to section 12B(3) of this Act".

[34] Inserted bythe Legal Profession and Legal Aid (Scotland) Act 2007, section 67 (in force from 30 July 2007).

"statutory inquiry" has the meaning assigned to it by section 16(1) of the Tribunals and Inquiries Act 1992;

"the solicitor" means the solicitor by whom any advice and assistance is provided or, where it is provided by counsel, the solicitor on whose instruction counsel provides it;

"tribunal" includes an arbiter or oversman, however appointed, and references to a court, tribunal or statutory enquiry include references to any court, tribunal or statutory enquiry which is established by law for purposes which are or include those of determining persons' civil rights and obligations and to any person who or group of persons or body or procedure which (however described) is appointed or established by law for such purposes.

Application of Part II

7. (1) Subject to subsections (2) to (4) below, and to any exceptions and conditions prescribed by regulations made under this section or under section 9 of this Act, this Part of this Act applies to any advice and assistance.

(2) This Part of this Act does not apply to advice and assistance provided to a person in connection with proceedings before a court or tribunal at a time when he is receiving legal aid in connection with those proceedings.

(3) Subject to subsection (4) below and to section 9 of this Act, this Part of this Act does not apply to assistance by way of representation.

(4) Except where subsection (2) above applies, this Part of this Act does apply, in the case of civil proceedings before a court or tribunal, to any step which consists only of negotiating on behalf of a person with a view to the settlement of a claim to which the proceedings relate.

Availability of advice and assistance

8. [35] Subject to any provision made in regulations under section 8A(1) and section 11(2) of this Act, advice and assistance to which this Part applies shall be available in Scotland for any client if

(a) his disposable income does not exceed £245 a week[36]; or

(b) [37]he is (directly or indirectly) in [38]universal credit under Part 1 of the Welfare

[35] Amended by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 (asp 15), in force from 30th October 2010

[36] As amended by S.S.I. 2011 No. 217 (in force from 11 April 2011) to the extent of increasing the disposable income limit from £238 a week to £245 a week – this amendment applies only in relation to any case where an application for advice and assistance is made on or after 11 April 2011.

[37] As amended by 1) the Social Security Act 1986 (c.50), Schedule 10, paragraph 61 (in force from 11th April 1988) to the extent of substituting "income support or family credit" for "supplementary benefit under the Supplementary Benefits Act 1976 or of family income supplement under the Family Supplements Act 1970"; 2) the Jobseekers Act 1995 (c.18), section 41(4) and Schedule 2, paragraph 9 (in force from 7 October 1996) to the extent of inserting ", an income-based jobseeker's allowance (payable under the Jobseekers Act 1995)"; 3) the Access to Justice Act 1999 (c.22), section 33 (in force for the purposes of this amendment from 5 October 1999) to the extent of inserting "disabled person's tax credit"; and 4) paragraph 11, Schedule 3 of the Tax Credits Act 2002 (c21) (in force for the purposes of this amendment from 8 April 2003) removing disabled person's tax credit and family credit.

Further amended by The Welfare Reform Act 2007, Schedule 3, paragraph 4, to the extent of substituting ", an income-based jobseeker's allowance (payable under the Jobseekers Act 1995) or an income-related allowance under Part 1 of the Welfare Reform Act 2007 (employment and support allowance)," for "or an income-based jobseeker's allowance (payable under the Jobseekers Act 1995 (C18)),".

[38] Inserted by S.S.I. 2013 No. 137, in force from

Fees and outlays of solicitors

17. (1) Subject to paragraph (2) below, fees and outlays allowable to the solicitor upon any assessment or taxation mentioned in regulations 18 and 19 in respect of advice or assistance shall, and shall only, be –

(a) fees for work actually, necessarily and reasonably done in connection with the matter upon which advice and assistance was given, due regard being had to economy, calculated, in the case of assistance by way of representation, in accordance with the table of fees in Part I of Schedule 3 and, in any other case, in accordance with the table of fees in Part II of Schedule 3; and

(b) outlays actually, necessarily and reasonably incurred in connection with that matter, due regard being had to economy, provided that, without prejudice to any other claims for outlays, there shall not be allowed to a solicitor outlays representing posts and incidents.

(2) The fees and outlays allowable to the solicitor under paragraph (1) above shall not exceed the limit applicable under section 10 of the Act as read with regulation 12.

(3)[61] In the application of paragraph (1) above so far as concerning assistance by way of representation in relation to a summary criminal matter, there is to be taken into account time necessarily spent in travelling to and from the relevant court (other than one in the town or other place where the solicitor has a place of business) or any other place visited for the purpose of preparing or conducting the defence.

(4)[62] Paragraph (3) above does not apply if it would have been more economical to use a local solicitor (where that would have been reasonable in the interests of the client).

(5)[63] This regulation (so far as concerning criminal matters) is subject to the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999.

Assessment and taxation of fees and outlays

18. (1) Where the solicitor considers that the fees and outlays properly chargeable for the advice or assistance exceed any contribution payable by the client under the provisions of section 11 of the Act together with any expenses or property recovered or preserved under the provisions of section 12 of the Act as read with regulation 16, he shall, within one year of the date when the giving of advice and assistance was completed, submit an account to the Board:

Provided that, where civil legal aid has been made available to an applicant to whom in connection with the same matter advice and assistance has been given, the account for such advice and assistance shall be submitted to the Board at the same time as that for civil legal aid; and any work which is charged under civil legal aid shall not be charged in the advice and assistance account.

(2) The Board may accept an account for advice and assistance submitted outwith the period referred to in paragraph (1) above if it considers that there is a special reason for late submission.

(3) Where the Board receives an account in accordance with paragraph (1) above, it shall assess the fees and outlays allowable to the solicitor for the advice and assistance in accordance with regulation 17 and shall determine accordingly any sum payable out of the

[61] Inserted by S.S.I. 2008 No 240 (applies only in relation to a case where the criminal legal assistance concerned is granted or made available on or after 30 June 2008).
[62] Inserted by S.S.I. 2008 No 240 (applies only in relation to a case where the criminal legal assistance concerned is granted or made available on or after 30 June 2008).
[63] Inserted by S.S.I. 2008 No 240 (applies only in relation to a case where the criminal legal assistance concerned is granted or made available on or after 30 June 2008).

Fund and pay it to the solicitor.

(3A)[64] Where the solicitor has given advice and assistance by way of a diagnostic interview then he shall, within 3 months of the date when the giving of the advice and assistance was completed, submit an account to the Board separate from any account or accounts submitted under paragraph (1). No account supplementary to that provided for in this paragraph may be submitted.

(4) If the solicitor is dissatisfied with any assessment of fees and outlays by the Board under paragraph (3) above, he may require taxation of his account by the auditor; the auditor shall tax the fees and outlays allowable to the solicitor for the advice and assistance in accordance with regulation 17, and such taxation shall be conclusive of the fees and outlays so allowable.

Client's right to require taxation

19. (1) In any case where there is no such excess as is mentioned in regulation 18(1) and any fees and outlays in respect of the advice and assistance are payable by the client under the provisions of section 11 of the Act or are payable out of any expenses payable to the client or any property recovered or preserved for the client under the provisions of section 12 of the Act, the client may, if he is dissatisfied with the amount of those fees and outlays, require taxation of those fees and outlays by the auditor; the auditor shall tax the fees and outlays allowable to the solicitor in respect of the advice and assistance in accordance with regulation 17, and such taxation shall be conclusive of the amount of the fees and outlays so allowable.

(2) In any case where the fees and outlays allowable to a solicitor in respect of advice and assistance in accordance with regulation 17 are less than any contribution paid by the client under section 11 of the Act, the solicitor shall refund the excess contribution.

Fees and outlays recoverable from a third party

20. Regulations 17, 18 and 19 shall not apply to fees and outlays recoverable in respect of advice and assistance to a client from a third party and, where such fees and outlays are to be taxed, they shall be taxed as if the advice and assistance were not advice and assistance under the Act.

Right of Board to recover sums paid out of the Fund

21.[65] (1) This regulation applies where after giving a person an opportunity of submitting representations, the Board is satisfied –

(a) that the person has wilfully failed to comply with these Regulations as to the information to be furnished by that person;

(b) that the person has knowingly made a false statement or false representation in furnishing such information; or

(c) that the Board has paid fees and outlays to a solicitor who provided advice and assistance to that person, and at any time prior to or after such payment that person or any solicitor acting on that person's behalf has, in respect of the same matter for which advice and assistance was provided –

(i) received any expenses which (by virtue of a judgement or order of a court or an agreement or otherwise) are payable to that person; or

(ii) recovered or preserved any property (of whatever nature and wherever

[64] Inserted by S.S.I. 2007 No. 60 (in force from 1 May 2007)
[65] As substituted by S.S.I. 2004 No.492 (in force from 4 December 2004)