

DRAFT STATUTORY INSTRUMENTS

2007 No. XX

IMMIGRATION, NORTHERN IRELAND

**LEGAL SERVICES COMMISSION, NORTHERN
IRELAND**

**The Legal Aid (Asylum and Immigration Appeals) (Northern
Ireland) Regulations 2007**

Made - - - -

April 2007

Coming into operation -

30 April 2007

These Regulations are made in exercise of the powers conferred upon the Secretary of State for Constitutional Affairs by section 103D(4), (5) and (6) of the Nationality, Immigration and Asylum Act 2002(a).

The Secretary of State has consulted the Lord Chief Justice of Northern Ireland, the Law Society of Northern Ireland, the General Council of the Bar of Northern Ireland and such other persons as he thinks appropriate in accordance with section 103D(7) of that Act.

In accordance with section 112(6) of that Act, a draft of this instrument has been laid before Parliament and approved by resolution of each House of Parliament.

Accordingly, the Secretary of State makes the following Regulations:

Citation and commencement

1. These Regulations may be cited as the Legal Aid (Asylum and Immigration Appeals) (Northern Ireland) Regulations 2007 and shall come into operation on 30 April 2007.

Interpretation

2.—(1) In these Regulations—

“the 2002 Act” means the Nationality, Immigration and Asylum Act 2002;

“the 2003 Order” means the Access to Justice (Northern Ireland) Order 2003(b);

(a) 2002 c. 41; section 103D was inserted by section 26 of the 2004 Act
(b) S.I. 2003/435 (N.I. 10)

“the 2004 Act” means the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004(a);

“business day” means any day other than a Saturday or Sunday, a bank holiday, Christmas Day, 27th to 31st December or Good Friday;

“the Commission” means the Northern Ireland Legal Services Commission established under Article 3 of the 2003 Order;

“counsel” means a barrister in independent practice;

“fast track proceedings” means any immigration review proceedings in relation to which, pursuant to an order under section 26(8) of the 2004 Act, the time period for making an application under section 103A(1) of the 2002 Act(b) is a period of less than 5 days;

“immigration review proceedings” means—

- (i) applications to the High Court under section 103A of the 2002 Act (including applications which are considered by a member of the Tribunal pursuant to paragraph 30 of Schedule 2 to the 2004 Act), and
- (ii) proceedings for the reconsideration of an appeal by the Tribunal pursuant to an order under section 103A of the 2002 Act;

“legal aid” means legal aid given under Article 9 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981(c);

“section 103A application” means an application under section 103A of the 2002 Act;

“section 103D order” means an order under section 103D(1) or section 103D(3) of the 2002 Act;

“solicitor” has the meaning assigned to it in Article 27 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981;

“the Tribunal” means the Asylum and Immigration Tribunal established under section 81 of the 2002 Act, as substituted by section 26(1) of the 2004 Act.

(2) References to a section by number alone refer to the section so numbered in the 2002 Act.

General restrictions on power to make section 103D orders

3.—(1) The High Court or the Tribunal shall only make a section 103D order in immigration review proceedings where an appellant is represented by a solicitor acting pursuant to a grant of legal aid.

(2) The High Court or the Tribunal shall not make a section 103D order in fast track proceedings.

(3) Regulations 4 to 7 apply in relation to immigration review proceedings in which the High Court or the Tribunal has power, under section 103D(1) to (3) and this regulation, to make a section 103D order.

Criteria for making orders under section 103D(1)

4.—(1) The appropriate court must exercise the power to make an order under section 103D(1) in accordance with this regulation.

(2) If, upon a section 103A application, the appropriate court makes an order for reconsideration, it must not make an order under section 103D(1).

(3) If the High Court makes a reference under section 103C, it must make an order under section 103D(1).

(a) 2004 c. 19

(b) 2002 c. 41; section 103A was inserted by section 26 of the 2004 Act

(c) S.I. 1981/228 (N.I. 8)

- (4) If the appropriate court dismisses or makes no order on the section 103A application, it may make an order under section 103D(1) only if—
- (a) there has been a change in any relevant circumstances or a change in the law since the application was made; and
 - (b) at the time when the application was made, there was a significant prospect that the appeal would be allowed upon reconsideration.
- (5) In this regulation, “the appropriate court” means—
- (a) the High Court; or
 - (b) a member of the Tribunal who considers a section 103A application by virtue of paragraph 30 of Schedule 2 to the 2004 Act.

Criteria for making orders under section 103D(3)

- 5.—(1) The Tribunal must exercise the power to make an order under section 103D(3) in accordance with this regulation.
- (2) The Tribunal may only make an order under section 103D(3) where—
- (a) it has reconsidered its decision on an appeal; or
 - (b) an order for reconsideration has been made but the reconsideration does not take place or is not completed because—
 - (i) the appeal lapses, or is treated as abandoned or finally determined, by operation of an enactment; or
 - (ii) the appeal is withdrawn by the appellant, or is treated as withdrawn because the respondent withdraws the decision or decisions to which the appeal relates.
- (3) If the Tribunal allows an appeal on reconsideration, it must make an order under section 103D(3).
- (4) If the Tribunal dismisses an appeal on reconsideration, it must not make an order under section 103D(3) unless it is satisfied that, at the time when the appellant made the section 103A application, there was a significant prospect that the appeal would be allowed upon reconsideration.
- (5) If an order for reconsideration is made but the reconsideration does not take place or is not completed, the Tribunal must not make an order under section 103D(3) unless it is satisfied that, at the time when the appellant made the section 103A application, there was a significant prospect that the appeal would be allowed upon reconsideration.
- (6) If, where paragraph (4) or (5) applies, the Tribunal decides not to make an order under section 103D(3), it must give reasons for its decision.

Review by Tribunal of decision not to make an order under section 103D(3)

- 6.—(1) A solicitor, or counsel instructed by a solicitor, may apply to the Tribunal in writing for a review of a decision by the Tribunal—
- (a) not to make an order under section 103D(3); or
 - (b) to make a section 103D order under regulation 7(2).
- (2) An application under this regulation must be filed within 10 business days after the solicitor is served with the Tribunal’s decision, or such longer period as the Tribunal may allow.
- (3) A review shall be carried out by a senior immigration judge who was not the member of the Tribunal, or a member of the constitution of the Tribunal, which made the original decision.
- (4) The senior immigration judge may—
- (a) carry out the review without a hearing; or
 - (b) hold an oral hearing, if one is requested by the solicitor or counsel.
- (5) The senior immigration judge may—

- (a) make an order under section 103D(3); or
 - (b) confirm the Tribunal's original decision.
- (6) The senior immigration judge must give reasons for his decision on a review.

Terms and effect of section 103D orders

7.—(1) Subject to paragraph (2), a section 103D order shall have effect as an order for payment of all the costs incurred by a solicitor representing the appellant in the proceedings to which the order relates, including the fees of counsel instructed by the solicitor, for which payment is allowable.

(2) In relation to proceedings in which a solicitor has instructed counsel, the High Court or the Tribunal may in special circumstances make a section 103D order—

- (a) in respect of counsel's fees only; or
- (b) in respect of the costs incurred by the solicitor excluding counsel's fees.

(3) Where paragraph (2) applies, the High Court or Tribunal must give reasons for its decision.

(4) Where an appellant has been represented by more than one solicitor or more than one counsel in the course of immigration review proceedings, a section 103D order shall, unless it provides otherwise, have effect as an order for the payment of the costs incurred by each solicitor and of the fees of each counsel while he was instructed to represent the appellant in the proceedings.

(5) A section 103D order must not specify—

- (a) the amount to be paid by the Commission; or
- (b) the person or persons to whom payment is to be made,

and the Commission shall determine those matters in accordance with the provisions of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 as if the section 103D order was a civil aid certificate issued in accordance with the Legal Aid (General) Regulations (Northern Ireland) 1965(a), save that the Commission may determine that an additional risk premium shall be payable in that case, together with the level of that risk premium.

Signed by authority of the Secretary of State

Parliamentary Under-Secretary of State,
Department for Constitutional Affairs

Dated

(a) S.R. 1965 No. 217, which has been modified by paragraph 4(3) of Schedule 3 to the Access to Justice (Northern Ireland) Order 2003, and to which there have been other amendments not relevant to these regulations

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make provision about the exercise in Northern Ireland of the powers in section 103D(1) and (3) of the Nationality, Immigration and Asylum Act 2002, as inserted by section 26(6) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and amended by section 8 of the Immigration, Asylum and Nationality Act 2006.

Section 103D and these Regulations give effect to a special legal aid scheme for—

- (a) applications to the High Court under section 103A of the 2002 Act by an appellant for a review of the Asylum and Immigration Tribunal's decision on an asylum or immigration appeal, and
- (b) proceedings for the reconsideration by the Tribunal of its decision following an order made on such an application.

When it determines these forms of onward appeal, the High Court or Tribunal can order payment of an appellant's costs out of the legal aid fund. These powers supersede the general power vested in the Northern Ireland Legal Services Commission to grant legal aid funding in civil cases.

Draft Regulations laid before Parliament under section 112(6) of the Nationality, Immigration and Asylum Act 2002, for approval by resolution of each House of Parliament.

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