

Islington Law Centre and the Migrant and Refugee Children's Legal Unit

Response to the National Audit Office

Consultation on legal aid

21 July 2023

Introduction

For 50 years, Islington Law Centre has been a key resource for the local community and, especially since the implementation of the legal aid changes in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, across London. Its Community-Facing Immigration Team (CFIT) provide legal advice and assistance to a range of people, prioritising cases involving destitute families and vulnerable migrants (for example, unaccompanied children, victims of trafficking, clients with psychiatric conditions and clients who lack capacity). The team frequently take on complex asylum and immigration applications and appeals, including Judicial Reviews. CFIT provide weekly advice surgeries at Hackney Migrant Centre and Haringey Migrant Support Centre. These organisations provide support to undocumented and documented migrants and refugees by supporting them to access legal advice and other services.

The Migrant and Refugee Children's Legal Unit (MiCLU) is based at Islington Law Centre. MiCLU aims to uphold and improve the rights of asylum-seeking, refugee and other migrant children and young people across the UK. We do this through a mix of direct representation, strategic litigation, legal education, and policy analysis and comment. The voices and experiences of these children and young people are at the heart of our work. We provide advice and assistance to asylum-seeking children and young people which is funded via legal aid, and also undertake publicly funded work with undocumented young people and vulnerable young people to support them to regularise their presence in the UK.

What impacts, if any, have the changes in types of cases covered by legal aid since LASPO had on individuals with legal issues? Where possible please provide specific examples, without giving personal information.

This response largely relates to the impact of LASPO from an *immigration sector* perspective given our expertise in this area.

The main impact of LASPO in this area has been to reduce the availability of free legal advice on key immigration issues which particularly affect those with low or limited income:

- Refugee family reunion;
- Article 8 ECHR claims;
- Those who are undocumented or unable to prove their right to remain.

Since 2013, access to advice in relation to family reunion (FR) for refugees has reduced drastically. Prior to LASPO, FR applications were frequently undertaken almost immediately on grant of refugee status by the same representative who had undertaken work on the individual's asylum claim. Following three years in which such advice could not be provided to clients, expertise and availability of advice has atrophied. Refugees are mostly told that FR advice is not available under legal aid and are thus unable to benefit from FR unless they can pay for advice.

For those with Article 8 claims, LASPO coincided closely with the creation of the 'hostile environment' and changes to Immigration Rules relating to Article 8 rights introducing a 10 Year Route to Settlement (10YRS) for some applicants. This route was tied to their low income amongst other factors. The 10YRS requires applicants to make repeated applications for 30 months' leave to remain, paying fees or obtaining fee waivers to maintain lawful residence. There has been a particular impact on this cohort of individuals of being unable to access sources of free legal, high quality advice. Lack of advice has prevented some individuals from applying at all, has meant that individuals are not aware of the availability of fee waivers, and have accrued debt to pay immigration fees and for legal advice. Some families have prioritised the applications of breadwinners over other family members due to financial issues as a result, leaving children undocumented and therefore vulnerable.

Lack of access to sources of free immigration advice resulting from LASPO was a significant contributory factor to the Windrush scandal. The combination of hostile environment measures, and the reduction in the availability of free advice meant that members of the Windrush generation had nowhere to turn when suddenly and incorrectly told that they were unlawfully present in the UK. This prolonged the period of individual suffering for those affected, but also prevented the systemic issue being understood and raised with government, because there were so few lawyers seeing those affected, as the numbers able to access advice were so small. The majority of those affected could not access legal advice. Lawyers therefore remained unaware of the scale of the problem, with individuals assuming they were the only one facing the problem, and lawyers not appreciating how widespread the issue was until several years had passed and they witnessed the same issue arising for more clients.

What additional costs or savings to other public services or wider society, if any, have these examples had?

Changes brought on by LASPO have impacted public services and communities in a very negative way. Inability to access legal aid has meant no access to justice for a large number of people, which has undoubtedly put additional pressure on sectors, such as public services and the voluntary sector. Due to the nature of our work, we are unable to provide exact statistics, therefore our examples are largely anecdotal. However, having worked with our client group for many years, we believe that our observations are a good indication of wider trends throughout the UK.

By taking a large number of matters out of the scope of legal aid, LASPO has made legal assistance beyond the reach of many individuals from migrant backgrounds. This has frequently resulted in people being unable to extend or regularise their status. Having unresolved immigration status means being unable to work and support one's family legally, which can easily lead to destitution or exploitation. Individuals and families with children in such circumstances are unable to access public funds because of their immigration status and have been pushed into poverty and destitution. Community-based and faith-based organisations, such as charities, churches and mosques, have had to play a much greater role in prevention of destitution and child poverty, as people have had to increasingly rely on NGOs rather than the state for vital assistance.

Individuals who have No Recourse to Public Funds (NRPF) due to their immigration status or conditions cannot access mainstream housing or welfare benefits. However Local Authorities (LA) do have duties, particularly to families with children, or vulnerable adults with care needs. Further pressure has been heaped on LA NRPF teams, who are more and more frequently confronted with families and children in dire poverty or at risk of becoming homeless and are required by law to alleviate this. These services plug a vital gap, which has been greatly widened by the impact of LASPO. Prior to LASPO, LA NRPF teams were very much smaller than they are presently. Their roles and the need for their services have expanded in correlation with the damage inflicted by LASPO, by increasing the numbers of people unable to regularise their stay due to lack of specialist advice, and by increasing the length of time taken to regularise.

We believe that there has also been great additional cost to other services, such as the NHS. Being unable to regularise one's status and being pushed into poverty can have a serious and lasting impact on one's physical and mental health, which leads to an increase of people experiencing mental health crises and urgently seeking treatment. Stress-related illnesses, such as strokes, as well as entrenched homelessness-related addiction issues are also not infrequent amongst this group, which greatly impacts on police and emergency services. There have also been instances of preventable deaths from conditions, which could have been treated, had the individuals felt able to speak to a doctor. Many people without status are afraid to speak to health professionals, as they fear being reported to the Home Office. Sadly, this can often lead to exacerbated, often undetected health conditions, with tragic consequences.

Charities and LAs have often had to step in to assist individuals, who are experiencing the above and who previously would have been able to obtain legal assistance and regularise their status under legal aid. Such charities are not generally set up to provide specialist legal advice that would be key to supporting people to access mainstream services. As such they are only able to address the ‘symptoms’ of irregular status such as poverty and homelessness without being able to resolve the underlying cause – irregular migration status. In turn, this means they cannot move service users onto mainstream support and the need for charitable support is prolonged. Individuals requiring basic food, shelter and clothing often have nowhere else to turn. What is more is that other charitable aims fall by the wayside, from social and emotional support to building communities.

We are also aware of schools having to step in to assist NRPF families with the basics, such as free meals and uniforms for the children. Schools are increasingly spending large amounts of money making sure their pupils are fed, clothed and in a position to learn at a time when budgets are already dwindling.

Increasing reliance on the charitable sector means that it is harder to track the impact of LASPO, because data is not centrally held, and is fragmented across different charitable organisations. However, charitable funding to the migration sector has increased significantly since 2013. Whilst this may on the surface be seen as a positive thing, it is less clear whether this means that funding to other deserving causes is reduced, and it is a matter of concern for governments to outsource essential services to the charitable sector.

In your view, how is the government performing against its objective to target legal aid to those who need it most?

In our view the government has failed in this regard. Vulnerable individuals are unable to access justice, and the government has shown no interest in or attention to the question of whether vulnerable groups require access (or better access) to legal advice. In fact, the government has not, to our knowledge, sought any information about where and by whom legal aid is needed most and has not made changes accordingly. It is therefore hard to understand how the government intends to achieve its objective where it is not actively seeking this information.

Whilst it is acknowledged that there has been some widening of the ECF scheme, this has not been introduced voluntarily by government in order to meet identified needs. Any widening of the ECF scheme has been achieved solely via litigation brought by litigants excluded from access to legal aid despite their vulnerabilities. In the majority of cases (e.g. challenges related to ECF for immigration matters generally, or for individuals with disabilities) the government defended its position through the courts, and did not concede despite Claimants putting forward compelling evidence. In relation to immigration advice for unaccompanied and separated children, it is acknowledged that the government did at

least concede that litigation before the case progressed to a final hearing, but significant evidence had to be placed before the Lord Chancellor before that concession was achieved, and that concession was likely linked to the findings in previous litigation such that the government was aware that its position was not accepted by the courts. Despite its stated aim to target legal aid at those who need it most, the government has interpreted provision for survivors of trafficking and domestic violence restrictively and sought to avoid providing legal aid to those individuals.

The dismantling of the legal aid sector that has resulted from LASPO has significantly reduced the availability of legally aided advice even where such advice remains within the scope of legal aid. We receive numerous requests for representation of asylum seekers, including children and young people who cannot find a legal aid representative willing to take their case. Individuals from specific countries (eg. Albania) or those with complex cases particularly struggle to obtain representation. We are frequently contacted by social workers, trafficking support workers and are aware from contacts in LA children's services that asylum seeking children are not able to obtain legal advice and representation in relation to their claims. We are also aware of numerous vulnerable families who cannot access representation to support them to regularise or maintain their immigration status.

We also note that access to justice for those in prison and for their family members is a significant issue. We are aware anecdotally through our casework of imprisoned parents who have been unable to access advice and assistance in relation to contact with their child where the child's other parent does not wish to promote this. This is a matter of significant concern given that it relates to the rights of a child to have contact with their parent, but lack of legal aid prevents this. Most prisoners will have limited access to any resources with which they can pay for legal advice and will be disadvantaged in accessing services that will assist in applying for ECF or that offer free advice. Prisoners will also have limited communication opportunities. Children, particularly very young children will be equally unable to access advice that meets their needs in this regard. It does not appear that the government has considered this at all when removing legal aid for most family law advice.

Another example in relation to family law advice, is in relation to access to legally aided mediation. In our anecdotal experience, when seeking to refer clients, such services are in practice inaccessible.

Have you seen examples of eligible individuals who are unable to access legal aid in the past three years? We define eligible individuals as individuals who meet the means test requirements and whose case is in scope.

Yes, frequently.

In these examples, why have the individuals been unable to access legal aid?

ILC's CFIT delivers outreach in two local migrant charities and is regularly contacted by colleagues from across the legal aid and third sector to provide second-tier advice. The 'in scope' matters regarding which we provide advice invariably concerns initial and fresh asylum claims, trafficking claims, health-based applications under Article 3 ECHR and domestic abuse.

From the work with our partner organisations, we know that the vast majority of clients we advise at outreach cannot be placed with providers, with waiting times of six months average and in excess of six months not uncommon. Even placing initial asylum claims has become near impossible, such that third sector organisations are focusing significant resources on supporting individuals going through the asylum process without representation to know their rights. The chances of gaining representation are further reduced for clients whose case raise any degree of complexity, such as may be the case for individuals who have been trafficked, where the age of a child is disputed, 'mixed' cases in which issues also relate to Article 8 rights or deportation.

As a London-based legal aid provider and an organisation serving our local community, generally, our clients live if not nearby then within or close to London. However, in the last 6 months, we have been contacted by referring organisations and LAs from well outside our area and from across England, seeking representation for their clients, including from Bournemouth, Brighton, East Sussex, Essex, Hampshire, various locations in Kent, Leeds, Nottingham, Surrey, Woking, and others.

ILC also receives a vast number of enquiries from all areas of the UK and globally for assistance with immigration cases. The demand by far outstrips the number of clients we can take on and assist; however, we are conscious of the impact of saying 'no' every time we receive an enquiry or communicate with referring agencies in the context of the current capacity crisis. In particular, we receive a high number of referrals for newly arrived migrants, many of whom are asylum applicants. Government statistics are that 45,000 people were detected arriving in the country by small boats in the year ending March 2023. The need for representation for this client group is pressing and remain a priority with the passage of the Illegal Migration Bill (IMB) through Parliament.

Further contributing factors, paired with changes to Providers' funding models are: the absence of 'standard service' timeframes and backlogs for Home Office decisions causing, among other issues, long delays in which Providers cannot access remuneration for work carried out; and the impact of the Covid-19 pandemic which further reduced access to existing services.

Given the dearth of legal aid provision, it has become virtually impossible for individuals to self-refer to legal aid providers. As a result, third sector organisations largely have to intervene to support individuals to access advice.

Unsupported individuals will struggle to access legal aid provision because of the bureaucracy surrounding evidence of financial eligibility. This is exacerbated by the difficulties in obtaining proof of asylum support from the Home Office such that eligible individuals cannot prove their eligibility to the high standard required by the LAA. Providers cannot risk undertaking work where they do not have evidence of means because of the punitive approach taken by the LAA if claims are made for work done where evidence of eligibility is not considered sufficient.

In addition, in relation to initial asylum applicants, legislative changes have added not only complexity but also volume to the work needed on each case. For example, prior to the enactment of the Nationality and Borders Act 2022 (NBA 2022), individuals fleeing certain countries (e.g. Eritrea and Syria) might have had what could be considered a 'straightforward' asylum claim if nationality was accepted, as the Home Office country policy and guidance accepts that country conditions there are such that most, if not all, nationals would have a well-founded fear of persecution if removed to any part of that state.

Since the coming into force of the NBA 2022, however, applicants with a prima facie strong claim to asylum may nevertheless not have a 'straightforward' asylum claim due to the potential for inadmissibility and off-shoring provisions being applied on the basis of events which occurred post-flight from the country of origin during the journey to the UK, and previously there was also the risk of being granted 'Group 2' type of leave if their claim succeeds. Similarly, the provisions of the IMB will result in any one client requiring assistance with multiple matters, further reducing capacity providers with capacity to accept this type of work.

The 'exceptional case funding' scheme is intended to fund cases outside the scope of legal aid, where a failure to do so would result in a breach of the applicant's rights under international law. How effective do you feel the exceptional case funding scheme is in its current form? How could it be made more effective?

Exceptional Case Funding (ECF) is a key issue in our sector. When LASPO was introduced ECF wasn't available in immigration matters. This resulted in Providers immediately ceasing to offer advice in areas that were out of scope. Litigation on the lawfulness of restricting ECF in this way, and on the lawfulness of the ECF regime more widely, began.

Litigation did not effect practical change until 2016, so from 2013 - 2016 it was impossible for individuals to access immigration advice under legal aid. After litigation forced changes to the scheme, grants of ECF in immigration matters began increasing, and continued to do so until 2019 since when the number has plateaued. Immigration is now the area of law in which the largest number of ECF grants are made. There has been a huge impact on the sector and on individuals in terms of the advice available, with individuals and firms

leaving the legal aid sector, and loss of expertise in relation to issues for which legal aid was unavailable for a lengthy period.

By 2016, changes to the sector had already crystalised, expertise had been lost, funding models had changed. Most firms who had provided advice on immigration matters pre-LASPO only did so on a paid basis if at all; by and large, legal aid work was only undertaken in relation to 'in scope' such as asylum matters. There is no financial incentive for firms to return to giving advice on immigration, with the complexity of the Immigration Rules contrasting sharply with the low fixed fee of £234. ECF is viewed as a financial risk, because initial work must be undertaken 'at risk' until ECF is granted. At least in the early period, ECF applications were time-consuming and potentially unremunerated.

In light of this, frontline migration charities initially supported individuals to obtain ECF. However in recent years the capacity in the sector has declined to crisis point, and charities are unable to place clients with Providers even where ECF has been granted. Local Authorities also struggle to place children in their care with advisors even though they are entitled to legal aid as of right.

Previously we would have argued that the main issue with ECF is that in the immigration sector it is largely pointless as most people are being granted ECF in immigration cases (we and the frontline migrant organisations we work with have a 100% grant rate), and it is just a layer of bureaucracy that delays everyone (turnaround time is 25 days) and disincentivises provision of immigration advice, that it is a futile diversion of government funds to operate such a scheme.

We would have also argued that immigration work should be brought back into scope of legal aid as the very high grant rate indicates that these are complex cases that require funding. Alternatively, Providers should be given devolved powers to grant ECF.

However, the landscape of the legal aid sector has shifted considerably post pandemic. Due to huge delays in Home Office decision making and the knock-on impact of lawyers not being able to close cases and get paid, means that firms have had to make the decision to reduce the amount of legal aid work they do. There has been a huge reduction in providers conducting legally aided work to the extent that even 'in scope' work cannot be placed with providers (see response to question 4).

In the circumstances, this question on ECF serves no purpose given that Legal Aid providers have reduced the amount of legal aid work they do at all to remain financially viable and what legal aid work they do, is very likely to be that which is in scope. As already stated, many charities that trained themselves and volunteers to make ECF applications on behalf of individuals have stopped doing so because there is no point in obtaining ECF for them only to then not be able to secure them legal representation. No amount of tinkering with the ECF scheme will make it more effective given the significant structural changes that need to be made in order to make legal aid work viable.

Have you or your organisation changed the way you work in response to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) or subsequent changes? For example, changes to: types of legal aid work provided, amount of legal aid work provided, staffing, organisational structures or other efficiencies.

Yes. When non-asylum immigration work was taken out of the scope of legal aid, this had huge implications for the work of the law centre in terms of meeting the needs of our local community. The balance of our work was approximately 60% non-asylum work and a large percentage of those we assisted were vulnerable individuals who would not be able to resolve their complex cases without access to free legal advice and assistance. As referred to above, LASPO came into effect at around the same time of wholesale changes to the Immigration Rules in relation to article 8 ECHR cases together with the panoply of measures to create a 'hostile environment' for migrants.

Given these significant challenges, we had a dual approach which included strategic litigation and the operation of other funding models in order to promote access to justice. Our aim has and continues to be that we must continue to provide access to justice to those whose cases fall outside the scope of legal aid.

ILC was involved in the case of **Gudanaviciene & Ors [2014] EWCA Civ 1622**, acting for a Claimant who was a recognised refugee in the UK but could not access legal advice and assistance relation to a family reunion application. The Court of Appeal ruled that the Lord Chancellor's Guidance on ECF was incompatible with the right of access to justice under Article 6 of the ECHR and Article 47 of the Charter of Fundamental Rights of the European Union; further that the Guidance was not compatible with Article 8 of the ECHR in immigration cases.

ILC also acted for The Children's Society in its claim against the Lord Chancellor and which resulted in the government agreeing to reinstate legal aid for separated and unaccompanied children in immigration cases.

On a day-to-day level, we also tried to step into the hole left by LASPO and ensure that some provision remained for those with immigration issues through the development of other funding models which has included:

- Obtaining funding in partnership with community organisations to provide outreach advice but also to take on cases under project funding. The full casework model had limitations for example there was no funding to incur disbursements for expert evidence.
- A collaboration between the US charity Kids in Need of Defense (KIND), and four other legal advice charities in the UK. KIND UK operates a pro bono programme of legal representation for migrant children and young people where there is inadequate, or no legal aid representation, available. Lawyers from the law centre

train and supervise lawyers from participating City Law Firms who conduct the casework.

- Making ECF applications once the scheme became more easily available following litigation.

As a law centre we have been in the privileged position to continue providing a level of service to those in our communities because we have been able to access funding for projects from charitable trusts and the local authority. The risks to these models are that the former limit the years they will fund projects and their priorities will change; in relation to the latter, central government cuts having a knock-on impact.

What do you think are the key challenges and opportunities for providers of legal aid in the next five years?

The legal aid sector has been under significant pressure for more than two decades, and is at the point of collapse. The key challenge for the next five years will be to retain legal aid provision and ensure that it is financially viable for the future. Sadly, it is harder to identify opportunities given the effect of decades of austerity which have increased the need for legal aid services, whilst reducing funding to the sector and therefore access to justice.

In general, providers of legally aided advice are an aging population. The high workload, stress levels and emotional impact of working with vulnerable clients and the very low levels of remuneration mean that it is very difficult to encourage new entrants to the sector, or to retain those who do join. Recruitment in the sector is at an all-time low, with those who leave employment tending to leave the legal aid sector rather than move within it. This may be due to burn out, or the need to obtain more lucrative employment in the context of the increased cost of living.

For many providers of legal aid, there will therefore be significant challenges in retaining staff, or replacing those that retire or leave. There are already many areas of the country that are 'advice deserts' for one or more area of legal aid advice. These deserts are likely to grow unless action is taken to address the exodus of experienced legal aid lawyers, and to encourage new entrants.

The impact of LASPO has been to undermine the professionalism of advice provision in some areas of law by suggesting that such work is merely 'form filling' work that does not require detailed legal knowledge or suggesting that capacity building in community organisations can take the place of advice from those with legal qualifications. This is a serious challenge and results in third sector resources being used to fill the gap left by the lack of legal aid. Not only does this devalue the importance of specialist legal advice, but it also diverts resources in third sector and community organisations away from the areas in which they hold skills and experience, and into activities which are very different in nature and require different skills, supervision and infrastructure.

In addition, the administrative burden of delivering publicly funded work is considerable, and this further undermines the viability of undertaking legal aid work. The need to make detailed ECF applications, applications for authority to incur disbursements, and the punitive approach to billing means that Providers are required to undertake a significant amount of work that is or may be unremunerated, and that even where work is authorised and reasonably undertaken, Providers cannot rely on being paid for the work. In addition, as a Category 1 Peer Review scored agency, that has passed LAA audits with flying colours we are nevertheless subjected to repeated audits, reviews and other 'compliance activity' meaning that fee earners are drawn away from undertaking legal work and required to engage in unfunded tasks. The very low hourly rates of pay do not provide sufficient contribution to overheads to make this financially sustainable.

The responsibility for resolving issues with legal aid lies with the government given that providers themselves have very limited capacity to influence the sustainability of the sector following the intentional dismantling and erosion of legal aid over the last decade.

Steps therefore need to be taken urgently as follows:

- Remunerate legal aid work at a viable and sustainable rate;
- Simplify billing/payment so Providers can access remuneration in a straightforward way that encourages Providers to take on complex work and manage cashflow;
- Reduce the administrative/compliance burden upon Providers, particularly those who have been assessed as providing Excellent or Competence Plus level services under Peer Review and on audit;
- Consider what incentives will encourage quality Providers to remain in the sector;
- Take steps to support retention of staff with expertise ensuring that clients have access to professional and specialist advice;
- Invest in bringing new entrants into the sector and supporting them to remain in the sector;
- Look at providing meaningful support for legal aid lawyers in relation to wellbeing and to combat government hostility and undermining of our professionalism.

Opportunities are harder to identify. The Review of Civil Legal Aid has the potential to offer recommendations to increase the viability and sustainability of legal aid, but it remains to be seen whether government will take these opportunities.