

# ILPA's response to the Justice Committee's future of legal aid inquiry

## Summary

- Legal aid at an early stage is beneficial to all those working within the immigration and asylum sector, applicants, the Home Office, and the Court or Tribunal.
- The ECF process acts as a barrier to access to justice, given the high volume of grants and widely acknowledged complexity of immigration law, this should be brought back into scope.
- The South West in particular has suffered as a result of legal aid cuts.
- The current fixed fee makes it extremely difficult for firms to remain financially viable.
- The Post-Implementation Review did not carry out an adequate assessment of the purported cost savings.
- The Legal Aid Agency needs to improve the functioning of the Detained Duty Advice Scheme.
- Investment in the sector is needed urgently, even then the damage will take years to reverse.

## Introduction

ILPA is a professional association founded in 1984, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law, including legal aid work, which is why we are providing this response. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official enquiries.

## How LASPO has impacted access to justice

### Access to justice and the effectiveness of the Home Office

The reduction in fees and removal of most non-asylum cases from the scope of legal aid has made it very difficult for many people to access a lawyer to assist in their immigration and asylum matter. If the UK government is to be able, as is its stated aim, to provide a safe haven to those fleeing

persecution, oppression or tyranny<sup>1</sup> then this must come with an acknowledgement of the crucial role played by legal aid within the immigration and asylum system. A well-prepared case at an early stage can play a vital role in assisting the Home Office to make the right decision first time, and to do so in a timely manner. Front-loading resources is therefore of the utmost importance. For many people who have arrived in the UK, they are unable to access a lawyer at an early stage as there is so little capacity in the sector. The result of this is that the first time many people are able to access legal advice is when they are detained pending removal. This situation does not assist the Home Office, the Courts, the lawyers and least of all those who are facing removal which is potentially unlawful.

It is in all parties' interests for the Ministry of Justice to put resource into the sector in order to build capacity. The Lord Chancellor has a range of powers under s. 2 of LASPO with which to do so<sup>2</sup>. Early access to legal advice was a point raised by the Public Accounts Committee as recently as July 2020, and accepted by the Home Office as a relevant factor in preventing late asylum claims in their recent report on Immigration Enforcement.<sup>3</sup> The Home Office accepted that better quality legal advice at an earlier stage may influence its ability to successfully remove people from the UK.<sup>4</sup>

The Home Office also accepted that they have not investigated the availability of good quality legal advice much earlier in the process, and whether legal aid would have an impact on the number of late claims.<sup>5</sup> The Public Accounts Committee made a recommendation that they should do so.<sup>6</sup> However investigation is not necessary in relation to the availability of good quality legal advice as the evidence has already been provided in Refugee Action's report 'Tipping the Scales: Access to Justice in the Asylum System'<sup>7</sup> and Dr Jo Wilding's report 'Droughts and Deserts: A report on the immigration legal aid market' published in June 2019. In relation to the impact on late claims, it is common sense that where it is not possible to see a lawyer at an early stage, then claims will only be made once a person does see a lawyer, which for many people is only when they are in immigration detention. Evidence has also been provided on this point, including as detailed in the Joint Committee on Human Rights' 2019 report on Immigration Detention.<sup>8</sup>

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<sup>1</sup> <https://www.conservatives.com/news/home-secretary-priti-patel-fixing-our-broken-asylum-system>

<sup>2</sup> Including the ability to make grants or loans to individuals to obtain advice or to organisations to provide services or facilitate access to them.

<sup>3</sup> <https://committees.parliament.uk/work/372/immigration-enforcement/>

<sup>4</sup> <https://publications.parliament.uk/pa/cm5801/cmselect/cmpubacc/407/407.pdf> page 6

<sup>5</sup> Public Accounts Committee, Oral evidence: Immigration Enforcement, HC 407, Tyson Hepple at Q99

<sup>6</sup> <https://publications.parliament.uk/pa/cm5801/cmselect/cmpubacc/407/407.pdf> pages 6 and 7

<sup>7</sup> <https://www.refugee-action.org.uk/wp-content/uploads/2018/07/Access-to-Justice-July-18-1.pdf>

<sup>8</sup> Joint Committee on Human Rights, report on Immigration Detention HC 1484 | HL 279 | Published 07 February 2019 <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1484/1484.pdf> para 46

## ECF

The rationale for excluding most non-asylum cases from the scope of legal aid was that these were straightforward applications simply requiring form filling and the collection of documents. However, this is not a fair reflection of the nature of the majority of immigration applications. It is widely acknowledged that immigration law is incredibly complex to navigate<sup>9</sup>. The Home Office are aware of this and a project to simplify the rules is underway, however this does not include simplification of Home Office policies or resolve the complexity of the law. It will remain the case that legal advice will be needed for many people in order to effectively navigate the immigration system. Those who are financially eligible for legal aid are more likely to have complex applications as they are less likely to be able to meet the financial requirements needed for access to the more straightforward application routes. Given this complexity and the implications of the decisions, which impact on people's personal lives as well as their ability to access basic services, the government should re-examine whether it is reasonable to exclude immigration cases.

In practice, we have seen that the Exceptional Case Funding (ECF) process does not mitigate the fact that the scope of legal aid has been so drastically limited. The ECF application process is time consuming, onerous, and leads to delay (even when it is indicated that a matter is urgent). The built-in presumption that when something was urgent a solicitor would prepare and submit the funding application and then proceed to work on the matter pending a decision was never realistic. A sensible practitioner, mindful of their financial responsibilities, will not take on work when they do not know how or if it will be funded. The result of this is that providers are more unlikely to take on urgent or complex matters, or to decline to make ECF applications altogether.

This needs to be considered in the context of the grant rate for ECF applications, which was 87% for the period April to June 2020, and 83% for the quarter before that (the high grant rate is unrelated to the pandemic). Instead, the ECF process acts as a barrier to access to justice and means that people who should be getting access to legal aid are not.

If an ECF application is made and is successful, the next barrier is the extremely low fixed fee which is £234. It is simply not financially viable for firms to take on these types of cases in any significant number.

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<sup>9</sup> See e.g. <https://www.lawgazette.co.uk/law/tribunal-judges-criticise-far-too-complex-immigration-system/5064449.article>, <https://www.judiciary.uk/wp-content/uploads/2018/04/speech-lj-irwin-pnba-complexity-and-obscurity-16042018.pdf> (page 14), *Khan v SSHD* [2017] EWCA Civ 424 [21], *Sapkota & anor v SSHD* [2011] EWCA Civ 1320 [127] and *Pokhriyal v SSHD* [2013] EWCA Civ 1568 [4].

ILPA's position is that more immigration cases need to be brought back in scope so that the barrier of the ECF application process is removed. The grant rate of well over 80% is strong evidence that those immigration cases that were removed from scope should be reinstated. At an absolute minimum all work for those in immigration detention should be brought in scope, as they will require urgent assistance which cannot be properly facilitated within the ECF process. Refugee family reunion should also be brought into back into scope, as it is complementary work to asylum which remains in scope.

### South West

Plymouth, Cornwall, Devon and the wider South West region was already a legal advice desert in immigration law at the time LASPO was introduced. Plymouth has been a dispersal area for asylum seekers since 2000 and receives one of the highest numbers of asylum seekers in proportion to their population. The major provider of specialist immigration legal advice in Plymouth, Devon Law Centre, closed in October 2010. The then Legal Services Commission (LSC) was fully involved during the closure of Devon Law Centre and was informed about the impending capacity gap. The only other provider gave up its legal aid contract in 2010 after a significant reduction in their allocation of New Matter Starts following the 2009 tender. There was a period of no provision, followed by interim provision and then one provider successfully bid for a Plymouth contract which commenced in March 2012.

A charity based in Devon contacted ILPA for this response and reported that a major part of their work is supporting 'undocumented' migrants or people who have claimed asylum but are appeal rights exhausted. The charity assists clients in obtaining ECF, which they describe as more of an administrative role rather than a meaningful exercise, particularly as all their ECF applications have been granted. The difficulty comes when they need to find a solicitor. In Devon, there is only one organisation with a legal aid contract, with only one solicitor available for the whole of the county. In Exeter and across Devon, there are people who require immigration advice and are on low income or no income at all, and destitute. Unfortunately, since last year, it has become even more difficult to get immigration advice for cases that have been granted ECF, as solicitors are not accepting ECF cases. A large legal aid law firm had opened a new office in Cardiff, however a few months later the office had to be closed, and it was difficult to get representation for those cases. Furthermore, ECF does not cover travel expenses for clients, and so the charity has to cover these costs themselves, from a small Emergency Fund, which they cannot guarantee will always have money available to cover these expenses.

Of particular concern in the South West is the lack of access to legal advice for unaccompanied asylum-seeking children, and family reunion applications. In February 2020 Plymouth City Council reported having ten unaccompanied asylum-seeking children (i.e. under 18) and 38 care leavers. A Law Clinic in Plymouth reports that only two providers have been prepared to take on their ECF case referrals in the last two years. The Law Clinic generally needs to search as far as Bristol and sometimes they will try even further than that. For a child in care in Plymouth to travel to Bristol for advice, either the social worker would have to take all day out from other duties to accompany the child or the foster carers would have to travel all the way. Sometimes there has been no one available to accompany them, meaning the solicitor has had to travel to meet the child, and then fight with the LAA to get their travel expenses covered by legal aid.

### Fixed fee

The current legal aid funding system is designed on the presumption that lawyers will be willing and able to carry out a proportion of their work without receiving payment, for example if the value of the work done exceeds the Graduated Fixed Fee then no payment for any additional work will be made unless the value of the work exceeds three times the value of the fixed fee (the Escape Claim Fee threshold) at which point the work will be paid at hourly rates. It is difficult to understand the rationale for this model in the context of facilitating access to justice. In reality many practitioners try to work within the very low fixed fee, and accordingly the amount of work they do on a file will be subject to the artificial constraint of the fixed fee. This means that the primary focus is not on doing all the work that is needed for a client, but limiting it what they do to what they can afford to do. Whether intentional or not, the design of the funding system has led to this unsatisfactory approach.

## Views on the post-implementation review

The Post-Implementation Review states the following<sup>10</sup>:

*'264. However, civil representation spend for both asylum and non-asylum immigration has declined by a greater extent than anticipated. Spend reduced by £7m, rather than £1m, because the volume of cases fell by 1,900, rather than 290 anticipated in the IA. **This could be due to the decline in the number of immigration and asylum receipts more***

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf) page 58

*widely, due to more judicial reviews being funded under Public Law contracts or changes to the judicial review remuneration provisions, discussed in more detail in chapter 3.*

*265. Therefore, immigration scope change has met its objective of making significant savings to the cost of the scheme.’ [our emphasis]*

The conclusion at paragraph 265 is faulty given the section that we have highlighted above, and it appears that there has not been adequate assessment of what costs savings have actually been made and the wider impact. Further, we do not believe that any assessment has been carried out in relation to the burden on the Tribunals of an increase in unrepresented litigants. This also has a financial cost that should be taken into account when considering whether any savings have been made. We also believe that the high volume of failed removals should be considered, given our explanation above as to the role that legal aid cuts have played in these cases. We therefore believe that the position set out in the Post Implementation Review is unsound and a holistic approach must be taken to savings if an accurate picture is to be provided.

## The role of the Legal Aid Agency

ILPA’s primary concern with the role of the Legal Aid Agency at the moment is in relation to their ability to ensure that providers are delivering a quality service to those they are seeking to assist. There appears to be an inconsistency in the quality, some of which is problematic and must be addressed. This concern is specifically related to work that is done under the Detained Duty Advice Scheme, where serious issues around the quality of legal advice have been documented and raised by Bail for Immigration Detainees<sup>11</sup> and Detention Action<sup>12</sup>. This is specialised work, yet it appears that when problems are raised there are no processes in place for the Legal Aid Agency to check up specifically on the detention work that providers are doing, as opposed to the general non-detention work. A lawyer could be competent at non-detained work yet unable to effectively carry out specialised detention work and so the ability to draw the distinction at audit or review is very important. They also seem to have limited data on what providers who attend the DDAS are actually doing, namely what type of files are being opened, if any, and whether firms are applying for Exceptional Case Funding where required. Further, there appears to be a lack of Peer Reviewers with

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<sup>11</sup> <https://www.biduk.org/posts/615-legal-advice-survey-shows-failings-in-access-to-justice-for-immigration-detainees>

<sup>12</sup> Financial Times, ‘Legal advice to detained migrants comes under fire’, 1 July 2019  
<https://www.ft.com/content/b56f39aa-9841-11e9-8cfb-30c211dcd229>

specialised knowledge of detention work. More transparency generally around issues that have arisen, for example the proportion of firms that receive a score of 4 or below on their Peer Review and what action has been taken in response, would be welcome. This is a situation that requires urgent attention.

Further, the Legal Aid Agency decision makers can be difficult to deal with, as for example when practitioners are seeking to extend funding limits, the report that the LAA does not at times appear to have a real grasp of the realities of the work, or understand the legal issues, and so the level of information they require become onerous. Practitioners can spend a lot of unpaid time arguing with the Legal Aid Agency. The Legal Aid Agency can be difficult as they can become an added obstacle to our work, when people are seeking funding urgently they can be slow, and sometimes there is an issue with the quality of their decision making. The Legal Aid Agency should ensure that their forms and processes are designed so that they are not just for their ease, but also to assist legal aid lawyers who are at the coal face. It is in everyone's interests for legal aid to be properly administered and that the public receives value for money. However, when lawyers have to complete complex and lengthy forms and processes, this adds to their workloads, reducing the time they have available to assist their clients.

## Recruitment and retention problems among legal aid professionals

As a consequence of so much work being excluded from the scope of legal aid, many firms have been forced to move away from primarily doing legal aid work in order to remain financially viable in the long term. This means the number of practitioners in this area has been significantly reduced, this then impacts on the amount of time the remaining practitioners are able to devote to legal aid clients. It is also the case, that it makes business sense for the more junior lawyers to deal with the lowest paying work. Expertise is being lost. Also, people with the most complex cases or the most vulnerable clients who need the most experienced lawyers are not likely to be offered a lawyer with the appropriate level of expertise. The loss of expertise is a gradual erosion, which will be difficult to reverse.

Figures provided by the Legal Aid Agency by email to the Civil Contract Consultative Group on 28 September 2020 show that in April 2013, when LASPO came into force, there were 239 firms doing immigration work across 405 offices. In September 2020 this was 186 firms working across 276 offices. Recruitment at immigration supervisor level in London has been reported by some members as extremely difficult. It is even more difficult to recruit outside of London, one organisation reports

having had a vacant post for a senior caseworker since August 2019, efforts to recruit before the pandemic were unsuccessful as no qualified candidates applied for the post. There are no senior caseworkers qualified under the Law Society's Immigration and Asylum Accreditation scheme in the South West.

## The impact of the court reform programme and the increasing use of technology on legal aid services and clients

The level of disconnect between court reform and legal aid has been a matter of great concern for ILPA. This came to the forefront with the introduction of the new stage 2c fixed fee<sup>13</sup>, which was subsequently withdrawn<sup>14</sup>. HMCTS must have a greater understanding of the role that legal aid plays within the courts and tribunal system and must involve the LAA at a very early stage in any organisational or process redesign.

## The impact of Covid-19 on legal aid services and clients

The impact of Covid-19 on immigration and asylum legal aid providers has been extremely serious. After the lock down was announced on 23 March 2020, all Home Office interviews were suspended. Interviews have since restarted but are not at pre pandemic levels. Up until very recently the position has been that legal aid matters can only be billed once the decision has been received and so the cessation in decision making by the Home Office impacted on providers' cash flow and this has had a massive financial impact on providers. Some changes have been introduced effective 7 October 2020<sup>15</sup>, however providers are still concerned that their ability to bill is so reliant on the Home Office processing cases in a system where delays of over a year to even have an asylum interview are fairly common. Providers would like the ability to bill their controlled work files every six months, as this would give legal aid firms greater financial control over their income allowing them to better able to manage and plan their finances. Given this is possible with respect to disbursements, it's unclear why this is not so with respect to profit costs.

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<sup>13</sup> <https://ilpa.org.uk/statement-on-the-new-legal-aid-fixed-fee-from-chambers-21-may-2020/>

<sup>14</sup> <https://ilpa.org.uk/lord-chancellor-concedes-legal-aid-regulations-are-unlawful-11-august-2020/>

<sup>15</sup> <https://www.gov.uk/government/news/civil-news-faster-payments-and-new-fees-for-immigration-work>



## What the challenges are for legal aid over the next decade, what reforms are needed and what can be learnt from elsewhere.

The ability for people to access the immigration status they are entitled to has never been more important, as this impacts on every aspect of a person's life in the UK, including their ability to rent a home, to access the NHS, education, and work. The broader attitude to legal aid needs to be changed. Legal aid is a safety net to protect people from injustice, but it is also an investment in making the immigration and asylum system as a whole function in a more efficient and cost-effective manner. When any restructuring or changes to funding are proposed, a holistic approach to legal aid must be taken. With the LASPO changes, the financial burden was shifted into other areas, including law firms, charities, the courts and local authorities. We know that cuts in one area will impact on other areas, so decision makers must quantify and consider how the cost burden will change, and where will it shift to. Consequences must be carefully thought through and discussed with relevant stakeholders.

Capacity in the sector needs to be re-built as the current decline cannot safely continue. In particular we recommend that grants for legal aid training contracts are reinstated as soon as possible.

Legal Aid must be funded properly. The current Graduated Fixed Fee system, where any work done between the fixed fee and the escape claim threshold risk going unpaid, is not a reasonable funding model. We understand that the Ministry of Justice is to review the sustainability of immigration legal aid, and the starting point for the review must be approached from the position that investment is required.