

National Audit Office consultation on legal aid

Consultation on legal aid

Response of the Immigration Law Practitioners' Association

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Introduction

1. The Immigration Law Practitioners' Association ('ILPA') is a professional association and registered charity, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. 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 inquiries.
2. This is a response to the Consultation of the National Audit Office ('NAO')¹ on legal aid. Our response focuses on asylum and immigration legal aid. Our response to this Consultation should be read in conjunction and seen against the background of responses and briefings that ILPA has produced on immigration and asylum legal aid matters. The NAO will know of ILPA's long involvement in this area, including in its evidence to the NAO on Legal Aid in July 2014.² Most recently, in August 2022, ILPA responded jointly with the Public Law Project on the Ministry of Justice's Consultation 'Immigration Legal Aid: A consultation on new fees for new services', making recommendations and urging the Lord Chancellor to use his powers to secure the sustainability of the sector.³ However, the necessary arrangements have not been made.⁴ Instead, the LAA announced⁵ that it was extending the 2018 Standard Civil Contract, until 31 August 2024 to permit 'time to consider findings from the planned Ministry of Justice Civil Legal Aid Review' and 'then consider how any changes could be introduced into future civil contracts'.⁶ Therefore, the present unviable situation is secured for at least a further year, pending the outcome of whatever may come from the Review of Civil Legal Aid.

¹ National Audit Office, 'Consultation on legal aid'

<<https://link.webpolsurveys.com/Participation/Public/1d4ca70f-e4e3-40fe-9d3e-93dccb680384>> accessed 20 July 2023 (hereinafter 'Consultation').

² ILPA, 'ILPA Evidence to the National Audit Office: Legal Aid' (19 July 2014)

<<https://ilpa.org.uk/wp-content/uploads/resources/29091/14.07.21-ILPA-response-to-National-Audit-Office-consultation-on-changes-to-legal-aid.pdf>> accessed 21 July 2023.

³ ILPA and PLP, 'ILPA and PLP Response to Ministry of Justice Immigration Legal Aid consultation on new fees for new services' (10 August 2022)

<<https://ilpa.org.uk/ilpa-and-plp-response-to-ministry-of-justice-immigration-legal-aid-consultation-on-new-fees-for-new-services-10-august-2022/>> accessed 21 July 2023.

⁴ ILPA and PLP, 'Joint statement on the Government's response to the consultation on immigration legal aid fees' (30 January 2023)

<<https://ilpa.org.uk/ilpa-plp-joint-statement-on-the-governments-response-to-the-consultation-on-immigration-legal-aid-fees/>> accessed 20 July 2023.

⁵ Legal Aid Agency, 'Civil news: extension of civil contracts until 31 August 2024' (3 October 2022)

<<https://www.gov.uk/government/news/civil-news-extension-of-civil-contracts-until-31-august-2024>> accessed 21 July 2023.

⁶ Ibid.

3. Below are ILPA's responses to the questions posed in the NAO's Consultation on legal aid. Where possible, these responses have also been provided through our completion of the survey online.

Question 1: Are you responding as an individual or on behalf of an organisation?

4. We are responding as an organisation, the Immigration Law Practitioners' Association (ILPA).

What areas of law does your organisation work in? (select all that apply)

5. Predominantly, we work in immigration and asylum, and public law. We have chosen that we are funded by other sources, as ILPA does not provide legal advice or representation, but does receive funding from other sources for its charitable work.

In what capacity does your organisation provide legal advice/support to individuals? (select all that apply)

6. Other: We do not provide legal advice/support, and as above, we have chosen that we are funded by other sources, as ILPA does not provide legal advice or representation, but does receive funding from other sources for its charitable work.

Has your organisation worked on cases funded by legal aid?

7. I'm not sure: ILPA has been involved in cases in the past, and I am unaware if they were funded by legal aid.

Question 2: 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.

8. The impact is severe, but was obvious and anticipated: more individuals are without immigration and asylum legal representation for lengthier periods of time.
9. Our members report that their asylum and immigration legal aid practices are financially unsustainable and unviable. There are four key reasons for this. The first reason is the exclusion of most non-asylum immigration matters from the scope of legal aid, including cases based on the right to respect for private and family life under Article 8 of the European Convention of Human Rights. The second reason is fees are inadequate and have not risen with inflation (for example, fixed fees have not increased since they were introduced in 2007,⁷ but rather were cut

⁷ The Community Legal Service (Funding) Order 2007.

in 2011⁸). The third reason is that providers face serious cash flow problems arising from an insufficient number of billing stages to claim their costs at regular intervals to avoid suffering from Home Office and Tribunal backlogs. The fourth reason is the complexity of the legal aid billing system and high administrative burdens placed on providers by the Legal Aid Agency.

10. Combined, these result in fewer specialist immigration and asylum practitioners to take in-scope legal aid and Exceptional Case Funding (ECF) matters, with vulnerable persons who cannot afford private representation going without any legal representation due to practitioners refocusing their practices on higher paying work. The providers that do still take on matters are extremely stretched and almost always at full capacity. Demand far outstrips supply.
11. The scale of advice deserts has been well documented by Jo Wilding.⁹ In the years since LASPO's enactment and the NAO's audit in 2014, many practitioners have taken on a greater proportion of private immigration and asylum work to legal aid immigration and asylum work, have focused on better paying legal aid work, or have abandoned legal aid work altogether. As reflected in ILPA's July 2023 legal aid sustainability survey, private work or grants often subsidise loss-making legal aid work.¹⁰

"We rely on grant funding to supplement our legal aid casework. Legal aid funding comes with huge risks and cannot cover all of the real costs of running a practice, looking after our staff and doing quality work for clients."

Not for profit organisation and immigration legal aid provider in London and Yorkshire

"Currently we have other funding which subsidises legal aid and legal aid requires more support from management and admin than any other funder."

Not for profit organisation and immigration legal aid provider in South West England

⁸ The Community Legal Service (Funding) (Amendment No.2) Order 2011 reduced the fees and rates payable in the 2007 Order by 10%. The Civil Legal Aid (Remuneration) Regulations 2013 parallel the fees in the 2011 Order.

⁹ Jo Wilding, *No access to justice: how legal advice deserts fail refugees, migrants and our communities* (2023) <https://assets.website-files.com/5ea9ba3a86899781dfe3c099/62bc314261e2f338e0953848_No%20access%20to%20justice%20-%20how%20legal%20advice%20deserts%20fail%20refugees.%20migrants%20and%20our%20communities.pdf> accessed 20 July 2023;

Jo Wilding, *Droughts and Deserts: A report on the immigration legal aid market* (2019) <https://www.researchgate.net/publication/333718995_Droughts_and_Deserts_A_report_on_the_immigration_legal_aid_market> accessed 20 July 2023; Jo Wilding, *The Legal Aid Market* (2021, Bristol University Press).

¹⁰ ILPA, 'ILPA's Legal Aid Sustainability Survey' (19 July 2023)

'ILPA-Legal-Aid-Sustainability-Survey-Results-Spreadsheet: Sheet 2 - 2. Current Providers Summary' 12 out of 17 carry out private work and see page 6 of the Appendix with Additional Comments

<<https://ilpa.org.uk/results-of-ilpas-legal-aid-sustainability-survey/>> accessed 20 July 2023.

“we are a not for profit so we supplement legal aid immigration work with grant funding- however, we should not have to do that. Grant income is unstable and is short term funding that does not allow us sustainably financially plan.”

Not for profit organisation and immigration legal aid provider in London

“My practice at present is approximately 60% legally aided. I meet the extreme shortfall in part by increasing my private rates for low/medium income clients who are no[t] eligible for legal aid but are not able to pay anything approaching my commercial rate. With inflation in the last 1 1/2 years this has ceased to be a viable model and I am going to have to reduce my legally aided work significantly in order to remain viable. Like many practitioners, I rely (in order for my practice to be commercially viable) on cross-subsidising legally-aided work; this particularly includes cross-subsidisation from inter partes awards in successful certificated claims. This is an unreliable way of cross-subsidising; will become even less so if graduated fees are extended in civil claims; and in any event is reducing my capacity to do legally aided CLR work.”

Barrister in East Midlands and London

“Our firm can only continue to do any legal aid because we have drastically increased the quantity of private work. This in turn has further reduced our capacity for legal aid work, and despite being longstanding legal aid providers, if our practitioners start to do less and less legal aid, we run the risk of losing our expertise in this highly specialised and complex area of law.”

Solicitor, London

“The remuneration rates are far too low to support a practice that is not cross-subsidised either by profitable private work or grant funding”.

Solicitor, South East England

12. As legal aid becomes less sustainable each year, existing firms and chambers become unable to retain existing practitioners and train and recruit new practitioners in the specialist areas of immigration legal aid (such as asylum, trafficking, detention, and domestic violence). Loss of expertise in these complex areas of law will take years to restore and rebuild, as practitioners are unlikely to return to a poorly paid field.

“Although we have a very loyal and committed immigration team, there is no one to replace them. Our restricted pay scales, the overlapping and conflicting regulation, bureaucratic and Kafkaesque systems of the LAA make it difficult to attract new staff. The operation and conflict between regulators SRA and OISC make it difficult and costly to train new staff to take part in immigration legal aid work....We do attract very talented interns who do a six-month placement in our offices. They are extremely impressed by our work, but they also see the amount of hard work, stress and battle that is needed to

get our clients' cases completed and paid. They express the opinion that although they want to work in immigration they don't want to work in legal aid.... on one occasion we received no application to fill a full-time IAAS-qualified caseworker role."

Not for profit organisation and immigration legal aid provider, London

"It is very very difficult to recruit lawyers with experience and offer conditions that will support and retain them in order to offer and grow a quality service. It is almost impossible to recruit in the north of England. If we do not have staff we can retain, we cannot take on the risk of opening a lot of files, and we cannot earn income that will be realised in a few years to sustain the service. We will not have sufficiently experienced lawyers in the sector to train new lawyers and supervise their work."

Not for profit organisation and immigration legal aid provider, London and Yorkshire

"We are endlessly struggling now to cover basic expenses, including salaries and to attract and retain staff. We have been without an office manager for a year as we cannot afford a competitive salary."

Private firm and immigration legal aid provider, South East England

"Firms cannot recruit and retain caseworkers (nor afford support staff) as the rates mean salaries for caseworkers (and thus for support staff) are low...On current rates, little profit can be made - so there is no incentive to recruit new caseworkers (at significant expense) to become the next tranche of legal aid lawyers."

Private firm and immigration legal aid provider, West Midlands

"It is impossible for us to recruit and retain staff on low salaries. We cannot afford to pay decent salaries due to the extremely low level of remuneration for publicly funded immigration and asylum work. Our organisation has shrunk from 5 solicitors to 1 and in our last 3 recruitment rounds we have been unable to recruit either an immigration solicitor or caseworker."

Not for profit organisation and immigration legal aid provider, London

13. All of this means there is a great unmet legal need for non-asylum immigration advice and representation. Individuals require expert legal advice and representation due to the incredible complexity and frequency of change of the UK's immigration and asylum system and the National Referral Mechanism. Broadening the scope of legal aid is needed to ensure that these individuals can find legal representation and access justice, and to help revitalise the legal aid sector in specialist areas of the law. However, long-term financial support—through increasing

rates and removing unpaid work and work conducted at risk—is urgently needed for recruitment and retention of specialist practitioners to address the deficit in supply.

Question 3: What additional costs or savings to other public services or wider society, if any, have these examples had?

14. LASPO's reduction in the scope, and the failures, of immigration and asylum legal aid have had and will continue to have clear consequential cost implications for the rest of the system, not least for the expenditure of the Home Office, devolved Government, and local authorities, due to the delay in fair resolution of claims and challenges as a result of the reduced capacity of practitioners to sustainably assist in cases.

Costs of Support

15. A clear cost is the support that is provided, often until an individual's immigration status is resolved or they are free from the hostile environment measures or restrictions on the work they can undertake.
16. Support is provided under sections 4(2), 95 and 98 of the Immigration and Asylum Act 1999, while certain claims are ongoing.¹¹ At the end of December 2022, 60,678 individuals had either section 4 or 95 support, and 49,493 individuals had section 98 support in initial accommodation.¹²
17. Support is also provided by local authorities under section 17 of the Children Act 1989 for children in need and their families, including those who do not have access to recourse to public funds through their immigration status and those waiting for the outcome of an immigration application or appeal. In the financial year 2021 to 2022, '3423 households with no recourse to public funds were provided with accommodation and financial support by 72 councils at a collective annual cost of £64 million'.¹³ Showing the crucial importance of resolution of status with the appropriate conditions, of the 1210 family households that had their support

¹¹ Asylum support under section 95 of the Immigration and Asylum Act 1999 is available for individuals with ongoing asylum claims or claims under Article 3 of the European Convention on Human Rights, who are destitute or about to become destitute, and their dependants. For fresh human rights and asylum claims that cannot be fairly pursued outside the UK, support under section 4(2) of the Immigration and Asylum Act 1999 may be available. Section 98 support is a temporary support that is provided to individuals seeking asylum who appear to be destitute and who are awaiting the outcome on their application for section 95 support.

¹² Commons Library, 'Asylum Statistics: CBP01403-Annex---Supported-asylum-seekers-by-local-authority' (1 March 2023) <<https://commonslibrary.parliament.uk/research-briefings/sn01403/>> accessed 20 July 2023; Home Office, *National Statistics: 'How many people do we grant protection to?'* (25 May 2023) <<https://www.gov.uk/government/statistics/immigration-system-statistics-year-ending-march-2023/how-many-people-do-we-grant-protection-to#support-provided-to-asylum-seekers>> accessed 20 July 2023. Home Office statistics indicate that at the 'end of March 2023, there were 112,294 individuals in receipt of asylum support'.

¹³ NRP Network, 'NRP Connect data report' <<https://www.nrpnetwork.org.uk/nrpf-connect/nrpf-connect-data>> accessed 20 July 2023.

withdrawn and case closed, ‘83% exited support following a grant of Leave to Remain or a change in immigration status that allows access to public funds’.¹⁴

Costs of Non-Legal Aid Immigration Advice

18. Further to the grant funding detailed in Question 1, Jo Wilding provides a detailed overview of the extent to which local authorities are funding non-legal aid advice in England and devolved governments are funding immigration legal advice in Scotland and Wales.¹⁵
19. 49 local authorities in England¹⁶ and 5 local authorities in Wales¹⁷ responded to a freedom of information request and stated that they fund or commission immigration legal advice in some form. Moreover, the Welsh Government has ‘supported Asylum Justice, the only OISC Level 3 organisation providing free immigration and asylum representation in Wales’.¹⁸ The May 2023 report notes that funding for this immigration legal advice ‘came from a wide range of budgets including children’s social care, adult social care, family services, migration-specific budgets or specific resettlement funds, variations on communities funding, corporate core grants, partnerships funding and, increasingly, public health funding, DLUHC funds or the Homelessness Prevention grant. This suggests that the impacts of legal aid cuts have displaced need into many spheres of local government in England.’¹⁹

Cost of the Backlog

20. During the passage of the Illegal Migration Act 2023, the Minister for Immigration, Robert Jenrick claimed the asylum system costs ‘£6 million a day in hotel accommodation’.²⁰ The Act’s Economic Impact Assessment stated that ‘as of May 2023, the supported population has more than doubled to approximately 114,000, and the average per person per night support cost has risen to £90’.²¹ However, applicants are housed in hotels, in part, due to the significant backlog in the asylum system. At the end of March 2023, the Home Office’s data showed a total of 133,607 cases (relating to 172,758 people) awaiting an initial decision, which is larger than the previous

¹⁴ *ibid.*

¹⁵ Jo Wilding, ‘*It’s a no-brainer’: Local authority funding for immigration legal advice in the UK* (May 2023) <<https://justice-together.org.uk/wp-content/uploads/2023/05/JT-Local-authority-funding-for-immigration-v3.pdf>> accessed 20 July 2023.

¹⁶ *ibid* 12-13. In England, 14 local authorities mentioned ad hoc funding or ‘spot purchases’ of immigration advice, 18 local authorities had a target-group focused funding arrangement, 20 councils in England had provider-focused funding, and 24 out of 33 London boroughs that responded had funded some form of immigration advice.

¹⁷ *ibid* 10.

¹⁸ *ibid* 11.

¹⁹ *ibid* 13.

²⁰ HC Deb 27 June 2023, Vol 735, Col 149.

²¹ Home Office, ‘Impact Assessment’ (HO 0438)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1165397/Illegal_Migration_Bill_IA_-_LM_Signed-final.pdf> accessed 20 July 2023.

peak backlog of 125,000 main applicants in 1999, and has increased rapidly from the end of March 2018 when there were 22,100 cases.²²

21. It is plainly the case that access to high quality legal advice and representation, from the outset, is likely to result in better prepared cases and in more efficient consideration by the Home Office, courts, and tribunals. Representatives can assist the Home Office in clearing the backlog. For example, new streamlined asylum processes, such as the asylum questionnaire, rest on the ability of legal representatives to assist applicants to complete questionnaires fully and accurately to avoid the need for the Home Office to seek further information or conduct interviews.²³ Representatives also act in the interests of justice by ensuring efficient progression and early resolution of challenges and appeals with fewer avoidable adjournments. However, the current failure to make legal aid sustainable has the opposite effect. Applications prepared poorly, without the necessary legal assistance, are more likely to be incorrectly refused and overturned on appeal.²⁴
22. Sustainable and early access to legal aid is necessary to reduce these ancillary costs.

Question 4: In your view, how is the government performing against its objective to target legal aid to those who need it most?

23. In immigration and asylum, it is performing poorly.
24. The government must be looked at as a whole, and not merely through the lens of the Ministry of Justice. This is relevant in considering the impediments to the Lord Chancellor discharging his duty under LASPO, first and foremost, to secure the availability of legal aid.²⁵
25. The government has not addressed unmet legal need, such as individuals (a) who are locked out by out-of-date means testing, but who cannot afford to pay for private representation; (b) who are out of the scope of legal aid, but who would qualify for ECF if they could find a provider willing to take the time/risk to make an application; and (c) who cannot find a legal representative due to the legal aid deserts and lack of capacity amongst specialist practitioners.

²² Home Office, *National Statistics: 'How many people do we grant protection to?'* (25 May 2023) <<https://www.gov.uk/government/statistics/immigration-system-statistics-year-ending-march-2023/how-many-people-do-we-grant-protection-to#asylum-applications>> accessed 20 July 2023.

²³ ILPA, *Joint Open Letter to Home Secretary Re: Remedying the 'Asylum Questionnaire'* (1 March 2023) <<https://ilpa.org.uk/joint-open-letter-to-home-secretary-re-remedying-the-asylum-questionnaire-1-march-2023/>> accessed 20 July 2023.

²⁴ Ministry of Justice, 'Tribunal Statistics Quarterly: January to March 2023' (8 June 2023) <<https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2023/tribunal-statistics-quarterly-january-to-march-2023#immigration-and-asylum>> accessed 20 July 2023. Around 50% of the 7,700 First-tier Tribunal appeals against Home Office decisions were allowed/granted. However, the degree of avoidable costs incurred in the justice system is unknown.

²⁵ Legal Aid, Sentencing and Punishment of Offenders Act 2012, section 1(1).

These individuals may include individuals most in need, such as those seeking asylum, victims of modern slavery and trafficking, and victims of domestic violence applying for indefinite leave to remain.

26. As we have indicated in our response to Questions 2, 5, and 6, there is a large number of vulnerable individuals, who require legal representation for assistance with their protection and human rights claims, and who are without it. There is nothing to indicate that any government department takes responsibility for monitoring this, including to ensure that the Lord Chancellor complies with his duty under section 1(1) of LASPO. The Legal Aid Agency claims that they do not have this data. The Home Office will be aware of whether a large number of applicants have a representative on record. However, it is unclear whether the Ministry of Justice obtains, monitors, and checks the Home Office's data against its own data.
27. Immigration legal aid is in a downward spiral and, while this has been the case for many years, no action has been taken to change the trajectory. In a cost of living crisis, in which the public sector is offered pay rises, to be paid for by migrants,²⁶ immigration legal aid rates for those providing essential advice and representation to migrants in need of it, have not had their rates increased in 15 years, but have instead had them cut.
28. Nevertheless, practitioners have been and are expected to shoulder the effects of the government's ambitious immigration plans since LASPO. There has been an enormous amount of legislative activity, including the Immigration Act 2014, Modern Slavery Act 2015, the Immigration Act 2016, the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, Nationality and Borders Act 2022, Judicial Review and Courts Act 2022, and the Illegal Migration Act 2023 in addition to a host of secondary legislation. There is also a significant amount that is in policy rather than law. The Immigration Rules are changed through thousands of amendments each year. This is the ever changing landscape that practitioners face and with which they must keep pace.
29. However, many of these legislative, policy, and practice decisions of the government impact the ability of those who need it most to access legal aid.
30. For example, when the Prime Minister decided to eradicate the sizable backlog of thousands of initial asylum claims (made before 28 June 2022) overnight,²⁷ representatives were expected to drop everything at a hat or have their clients face dire consequences. There was no apparent regard to the capacity of the limited pool of immigration and asylum legal aid providers to assist with thousands of claims, at speed, under threat of individuals' asylum claims being withdrawn.

²⁶ HC Deb 13 July 2023, Vol 736, Col 526.

²⁷ Prime Minister Rishi Sunak, 'PM statement on illegal migration: 13 December 2022' (13 December 2022) <<https://www.gov.uk/government/speeches/pm-statement-on-illegal-migration-13-december-2022>> accessed 20 July 2023; Letter from Home Secretary to Rt Hon Dame Diana Johnson MP (29 January 2023) <<https://committees.parliament.uk/publications/33804/documents/184602/default/>> accessed 20 July 2023.

Instead, in a counterproductive manner, focused on driving efficiencies in the Home Office above all else, the government initially wished for a wholly new asylum claim questionnaire to be completed, such that Home Office caseworkers would not need to look at previously submitted questionnaires or witness statements. There was no additional remuneration to cover this work unless the case had reached the escape threshold, at which point for the pleasure of the Home Office the work would use additional public funds to reiterate matters already submitted to the Home Office.

31. As a further example, without sufficient consideration being given to these limitations on capacity and legal aid deserts, individuals seeking asylum are moved and dispersed into contingency accommodation, such as hotels, barracks and military sites, in parts of the UK without available legal aid representatives to provide advice in person. ILPA raised this numerous times in relation to Napier Barracks, including in response to the Home Office's Consultation on 'Napier Barracks planning application',²⁸ and in evidence to the Independent Chief Inspector of Borders and Immigration.²⁹ Nevertheless, further accommodation centres on military sites and barges are planned, where individuals in great need of legal aid are likely to fail to receive it.

Question 5: 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. In these examples, why have the individuals been unable to access legal aid?

32. Yes, frequently.
33. ILPA regularly hears of individuals unable to access legal aid, of practitioners and providers without capacity to take on cases, and of organisations without the ability to refer individuals to immigration and asylum representatives.
34. For example in August 2022, one of our members, a registered charity in London, informed us that they had tried to place their 'full list of cases with 24 different legal aid providers and not a single case was taken on', including a high number of initial asylum claims and asylum appeals.

²⁸ ILPA, 'ILPA's Public Statement on the Home Office's Consultation on 'Napier Barracks planning application' (29 January 2022)
<<https://ilpa.org.uk/wp-content/uploads/2022/02/ILPA-Public-Statement-Napier-Barracks-Consultation-2.pdf>>
accessed 20 July 2023.

²⁹ ILPA, 'ILPA's response to the ICIBI's Call for Evidence: An inspection of the use of hotels and barracks as contingency asylum accommodation' (19 February 2021)
<<https://ilpa.org.uk/wp-content/uploads/2021/02/2021-02-19-ILPA-response-ICIBI-Asylum-Accommodation.pdf>>
accessed 20 July 2023.

“This leaves us in an extremely difficult position, because we are left 'holding' these cases with no capacity to step in as legal representatives for our clients and no capability to commission the expert evidence these cases often need. Our community programme works with people with particularly complex needs, so our clients are very vulnerable and often least able to present their cases unrepresented.

We are in a position now where clients are having to go through their whole cases unrepresented. We have just found out one of our clients who is a survivor of torture and is destitute (in section 4 Home Office accommodation, which means he receives no cash support) has borrowed £1500 so he can pay a solicitor privately, because his asylum appeal faced being struck out otherwise. He now owes one person £1,500 - who is demanding repayment - and the solicitor another £2,000 for his appeal. He has no savings and receives no cash income and so is now considering some kind of labour exploitation situation to try and pay his legal fees. If we tried to scrape together some money to help him, then what about the two dozen other people on our referrals list...

This situation is unsustainable.”

Frontline Charity, London

35. Government figures from 2022 suggest that around half the number of people seeking asylum do not have access to legal aid advice.³⁰ An October 2022 report by the Anti Trafficking and Labour Exploitation Unit (ATLEU) reveals a staggering 90% of support workers surveyed struggled to find a legal aid immigration lawyer for a survivor of trafficking and modern slavery in the past year, with devastating impacts.³¹ Bail for Immigration Detainees (BID) recently published a Legal Advice Survey based on 42 people being held in Immigration Removal Centres, with only 14 with a lawyer funded by legal aid.³² Before the legal aid cuts came into force, 79% of people had legal representation of which 75% were legal aid, and the figures have remained far lower ever since.³³ The survey found that after legal aid cuts, in May 2013, just 43% of people had a lawyer in their immigration case, and only 29% had a legal aid solicitor.³⁴ Significant capacity within these sectors is spent on searching for legal representation, detracting from the ability to

³⁰ Dr Jo Wilding, ‘New Freedom of Information data indicates half of asylum applicants are unable to access legal aid representation’ *Refugee Law Initiative* (4 November 2022)

<<https://rli.blogs.sas.ac.uk/2022/11/04/new-freedom-of-information-data-indicates-half-of-asylum-applicants-are-unable-to-access-legal-aid-representation/>> accessed 20 July 2023.

³¹ Anti Trafficking & Labour Exploitation Unit (ATLEU) “‘It has destroyed me’: A legal advice system on the brink’ (2022) 4 <<https://drive.google.com/file/d/15xlzaXCpN2eyXSlw7Ubx2Au1lr6mRXRF/view>> accessed 20 July 2023.

³² Bail for Immigration Detainees, ‘Autumn Legal Advice Survey’ (December 2022) <https://hubble-live-assets.s3.amazonaws.com/biduk/file_asset/file/716/221205_LAS.pdf> accessed 20 July 2023. Those individuals were all BID clients. Not all were individuals seeking asylum.

³³ For more detail, see BID’s ‘Legal advice in immigration detention: a 10-year review’ <https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/1293/10_Years_of_Legal_Advice_Survey.pdf> accessed 20 July 2023.

³⁴ See Bail for Immigration Detainees, ‘Autumn Legal Advice Survey’ (December 2022) above,

support the core needs of survivors, individuals in need of protection, and other vulnerable persons.

36. In 2022, we understand another ILPA member, Refugee and Migrant Forum Of Essex & London (RAMFEL), was unable to refer three out of four asylum seeking clients for legal aid representation. Therefore, many people seeking asylum must independently navigate a complex system in what is often not their first language.
37. Evidence gathered by Detention Action in 2021 showed that the Detained Duty Advice Scheme through which 30 minutes of free legal advice are provided to people in detention (after which the representative must undertake means and merits test) was operating with persistent fundamental defects, including people not knowing whether they had a legal representative willing to take on their case at the end of the session and being denied representation on the basis of complexity or provider capacity.³⁵
38. In our response to Question 2 we identified some reasons for the inability to access legal aid, because it is unviable and unsustainable for providers, due to the limited scope of legal aid, the administratively burdensome ECF process, where time spent on unsuccessful applications is not remunerated, billing processes that require work to be done at-risk or go unpaid (such as the fixed fee system before a provider reaches the escape threshold and is paid at hourly rates), inadequate and out-of-date fees, cash flow problems arising from insufficient billing stages and backlogs, all resulting in insufficient capacity to meet demand and address legal aid deserts.

Question 6: 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? Please include how, if at all, you feel the scheme could be made more effective.

39. Exceptional Case Funding remains a significant barrier to access to legal representation and to justice.
40. The time consuming ECF applications to the Legal Aid Agency, which are only remunerated if successful, have resulted in a great many providers finding the at-risk application process to be unsustainable. Even in cases where a third party organisation, often a frontline organisation which is not a legal aid provider, is able to assist an applicant to successfully make the application, they struggle to refer the case to a legal aid provider.
41. The often insurmountable barrier posed by ECF has left a number of applicants, whose immigration cases pertain to the right to respect for private and family life under Article 8 of the European Convention on Human Rights, without legal representation, as they cannot find legal aid representation and they cannot afford private representation. The lack of representation may

³⁵ *R (Detention Action) v Lord Chancellor* [2022] EWHC 18 (Admin).

lead to extremely dire and dangerous consequences within the immigration context. Due to their inability to present their case with legal assistance, they may face unlawful removal and breach of their human rights.

42. Matters such as refugee family reunion may fall outside the scope of legal aid in England and Wales. Refugee family reunion applications can be extremely complex, and yet the consequences are very serious as these cases often involve separated adults, facing language barriers, in dangerous situations or territories, with significant evidential burdens (such as the provision of DNA evidence). Due to the complexity of the laws and Rules (as an example new Rules were brought in through a new Appendix Family Reunion (Protection), and until days ago, there were different family reunion requirements for 'Group 2' refugees and those with humanitarian protection than for 'Group 1' refugees), they cannot navigate the systems without access to legal advice. However, as they are outside the scope of legal aid, they will struggle to find a provider willing to take on their case. This was a matter of concern to the Independent Chief Inspector of Borders and Immigration in his 2022 report, 'A reinspection of family reunion applications'.³⁶ Stakeholders informed him that although 'it was likely that an application for exceptional case funding (ECF) for a family reunion application would be successful, legal aid providers (who would be able to take the case to court if it were to be refused) were already stretched to capacity' and 'Legal aid is a safeguard that has become useless ... ECF work is uneconomical and effectively the work is unpaid.'³⁷
43. It is not a sensible use of public funds to keep these immigration matters out of scope, when the grant rate for ECF applications is very high. For example, in immigration, according to the Ministry of Justice's statistics from April 2022 to March 2023, there were 1,962 grants and 2,264 applications (86.66% grant rate).³⁸ In the same months of 2021 to 2022, there were 2,279 grants and 2,612 applications (87.25% grant rate), and in the year prior there were 2,019 grants and 2,334 applications (86.5% grant rate).³⁹ These are consistently high grant rates. Additionally, immigration had the highest number of ECF applications, more than five times the number of the next highest area Inquest (which had 403) and Family (which had 372) in the year April 2022 to March 2023, and much higher grant rates than either of these areas, which were 61% and 43% respectively.
44. Operating a costly and bureaucratic ECF application system is not a good use of public funds and it is unjustified against the grant rate. It would be sensible for areas with high grant rates to be

³⁶ ICIBI, 'A reinspection of family reunion applications' (September - October 2022) paragraphs 9.21 to 9.24 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1137651/A_reinspection_of_family_reunion_applications_September_October_2022.pdf> accessed 21 July 2023.

³⁷ *ibid* 9.21 and 9.23.

³⁸ Ministry of Justice, 'Legal aid statistics England and Wales bulletin Apr to Jun 2022' <<https://app.powerbi.com/view?r=eyJrjoiMGQwNzY5MjQyYUyZS00NWUzLWFE4NzltYWFnN2U3ZDJlMzE1liwidCl6l mM2ODc0NzI4LTcxZTYtNDZmZS1hOWUxLTJlOGMzNjc3NmFkOCIsImMiOjh9&chromeless=1&filter=true/ecf&pageName=ReportSection8455f7194babaadd11c>> accessed 21 July 2023.

³⁹ *ibid*.

brought back into the scope of legal aid to make the best use of the Legal Aid Agency's and legal practitioners' limited resources and to increase access to legal representation and justice in cases involving fundamental rights.

45. For areas without high grant rates, the application process and evidential requirements should be simplified and be financially viable. Practitioners (whether legal aid providers or not) should be paid for the time taken to make an ECF application, regardless of the outcome. Providers should have increased delegated powers to determine eligibility for ECF controlled work.

Question 7: 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.

46. Not applicable. ILPA does itself provide legal aid advice. However, many of its members do.

Question 8: Do you or your organisation intend to make any changes to the amount or type of legal aid work that you provide in the next three years?

47. Not applicable.

Question 9: What do you think are the key challenges and opportunities for providers of legal aid in the next five years?

48. The first key challenge is for the Ministry of Justice and Treasury to tackle the lack of sustainability and financial viability in civil legal aid. ILPA continues to remain willing to work with the government towards this. However, reforms to increase rates and cash flow, and reduce administrative burden and work done at risk or without payment, is crucial. Ensuring there is sufficient supply of legal aid practitioners, that they are retained, trained, and recruited, to meet the demands of the existing immigration and asylum backlog and the future work to come will be a significant challenge. Significant changes are needed to the system of payment to ensure the cash flow of providers, in light of the decision-making delay and backlog, such as through payments on account for controlled work. The Review of Civil Legal Aid, which is not due to report its findings until Spring 2024, should be seen by the Ministry of Justice as an opportunity to make these much needed reforms.
49. In ILPA's July 2023 survey⁴⁰ on the sustainability of legal aid, on average, a sample of not for profit immigration legal aid providers indicated that they would need a minimum fixed fee and hourly rate increase of 129.8%, and, on average, a sample of private legal aid providers indicated

⁴⁰ ILPA, 'ILPA's Legal Aid Sustainability Survey' (19 July 2023) 'ILPA-Legal-Aid-Sustainability-Survey-Results-Spreadsheet' <<https://ilpa.org.uk/results-of-ilpas-legal-aid-sustainability-survey/>> accessed 20 July 2023.

they would need a minimum increase of 42% to fixed fees and 52% to hourly rates, to viably deliver their current level of legal aid services in immigration and asylum. To draw in the potential pool of providers, to encourage them to tender for a contract to provide legal aid services in immigration and asylum, on average, a sample of not for profit organisations indicated they would need more than a 50% increase to fixed fees and hourly rates, and, on average, a sample of private firms indicated they would need a minimum of 100% to fixed fees and 83.3% to hourly rates. Overall, the averages for the sample of potential and current legal aid providers was in excess of an 84% increase to both fixed fees and hourly rates. The two barristers who responded to the survey provided a minimum percentage increase of 40% and 45% to their fees to viably deliver their current level of legal aid services in immigration and asylum.

50. However, this survey does not account for the future drastic changes to the immigration and asylum system.
51. The complexity and need for applicants to respond at speed has increased and will only further increase with provisions introduced by the Nationality and Borders Act 2022⁴¹ and the Illegal Migration Act 2023⁴² (such as accelerated detained appeals, priority removal notices and expedited appeals, suspensive claims and appeals, and indefinite detention in any place the Home Secretary considers appropriate). Rather than ensuring that individuals in need of legal aid will be able to bring claims as early as possible, the speed of these processes and the lack of available legal representation will drive unfairness and result in delay through late claims, a failure to present all relevant grounds and evidence from the outset, and unnecessary litigation at public expense. While the Government has proposed a 15% increase for work done under the Illegal Migration Bill, if it is successful, it will draw away the limited pool of legal aid practitioners from other immigration and asylum cases resulting in further imbalance and large gaps in provision.

⁴¹ ILPA, 'ILPA's response to the TPC's Consultation on Possible changes to the First-tier Tribunal (Immigration and Asylum Chamber) Rules and the Upper Tribunal Rules arising from Nationality and Borders Act 2022' (19 January 2023) <<https://ilpa.org.uk/ilpas-response-to-the-tpcs-consultation-on-possible-changes-to-the-first-tier-tribunal-immigration-and-asylum-chamber-rules-and-the-upper-tribunal-rules-arising-from-nationality-and-borders/>> accessed 21 July 2023; ILPA and PLP, 'ILPA and PLP Response to Ministry of Justice Immigration Legal Aid consultation on new fees for new services' (10 August 2022) <<https://ilpa.org.uk/ilpa-and-plp-response-to-ministry-of-justice-immigration-legal-aid-consultation-on-new-fees-for-new-services-10-august-2022/>> accessed 20 July 2023.

⁴² See ILPA's briefings on the Illegal Migration Bill, including on legal aid in the 'Joint Briefing on the Illegal Migration Bill for Second Reading in the House of Lords (10 May 2023)' and in the 'Joint Briefing on Amendment 155 to the Illegal Migration Bill for Report Stage in the House of Lords, 3 July 2023 (Duty to make legal aid available within 48 hours)' <<https://ilpa.org.uk/ilpa-briefings-on-illegal-migration-bill/>> accessed 21 July 2023.

52. The legal aid deserts must be urgently addressed. In Lincolnshire, where the Home Office has proposed to create a new, large-scale asylum accommodation facility at RAF Scampton⁴³, there is no provision for legal aid at all.⁴⁴ In the South West, where the barge, the Bibby Stockholm, is located in Portland, we are told there are only four legal aid providers remaining: Immigration Advice Service, Elisabeth Dean Solicitors, Bristol Law Centre, and Migrant Legal Project. At present, the proposed solution is to identify legal aid providers from outside the South West willing to provide advice to those accommodated on Bibby Stockholm.
53. Whether vulnerable individuals on the Bibby Stockholm, or in other remote accommodation or detention,⁴⁵ will be able to access in-person legal advice remains in doubt. In the past our members have raised their concerns with providing remote-only advice to particularly vulnerable individuals, due to the difficulty in building the trust and rapport necessary for highly sensitive cases, but also for practical matters such as assessing re-traumatisation during appointments, taking sensitive instructions on matters such as sexual orientation and religious conversion, taking long statements over the phone and checking they are being properly read back and agreed, and reading back psychiatric assessments.
54. ILPA remains willing to work closely with the Ministry of Justice and Legal Aid Agency to urgently reform and remedy immigration and asylum legal aid, before the situation worsens, or before specialist knowledge and expertise among practitioners is lost without the possibility of return.

Question 10: Are you happy for us to contact you if we need to clarify any of the information within your responses?

55. Yes, at zoe.bantleman@ilpa.org.uk.

21 July 2023

Zoe Bantleman

Immigration Law Practitioners' Association

⁴³ Joe Duggan, 'Row erupts over plans for detention centre at RAF base that 'may scupper £300m revamp project' *i-News* (8 March 2023)

<<https://inews.co.uk/news/immigration-detention-centre-plans-raf-scampton-row-regeneration-2194731>> accessed 20 July 2023.

⁴⁴ Jo Wilding, *No access to justice: How legal advice deserts fail refugees, migrants and our communities* (2022, Refugee Action) 19

<https://assets.website-files.com/5eb86d8dfb1f1e1609be988b/628f50a1917c740a7f1539c1_No%20access%20to%20justice-%20how%20legal%20advice%20deserts%20fail%20refugees%2C%20migrants%20and%20our%20communities.pdf> accessed 20 July 2023.

⁴⁵ Home Office, Economic Impact Assessment: Illegal Migration Bill (HO 0438)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1165397/Illegal_Migration_Bill_IA_-_LM_Signed-final.pdf> [131]. As noted in the Economic Impact Assessment, '[t]he location of any potential additional detention centres has not been defined and so cannot be assessed'.