

# ILPA Evidence to Public Accounts Committee Call for Value for Money from Legal Aid Inquiry

## 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. Our response focuses on immigration and asylum legal aid. The Committee's inquiry is based on the recent report of the National Audit Office ('NAO'), which focused on the effectiveness of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO').<sup>1</sup> To inform the report, ILPA responded<sup>2</sup> to the NAO's online consultation and was interviewed.

## Summary of Evidence

3. The measures introduced by LASPO have failed to achieve the MoJ's stated aims. At public expense, LASPO has:
  - a. increased unnecessary litigation by leaving individuals to navigate complex immigration and asylum matters without legal representation, resulting in avoidable refusals, that subsequently prompt appeals to the tribunal;
  - b. significantly reduced the availability of legal aid for those who need it most, including vulnerable persons seeking asylum and whose fundamental rights are at stake;
  - c. shifted the costs of supporting migrants onto other areas of public expenditure, notably local authorities and courts;
  - d. placed costly and unnecessary administrative burden onto the LAA to audit and monitor compliance with an increasingly complex contract, often to the detriment of providers.

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<sup>1</sup> National Audit Office, 'Government's management of legal aid' (9 February 2024) <<https://www.nao.org.uk/wp-content/uploads/2024/02/governments-management-of-legal-aid.pdf>> accessed 15 February 2024 ('NAO Report 2024').

<sup>2</sup> ILPA, 'ILPA's Response to National Audit Office's Consultation on Legal Aid' (21 July 2023) <<https://ilpa.org.uk/ilpas-response-to-national-audit-offices-consultation-on-legal-aid-21-july-2023/>> accessed 27 February 2024 ('ILPA's Response to National Audit Office's Consultation on Legal Aid').

4. The immigration and asylum legal aid market is unsustainable. Fees are severely outdated, there are significant cash flow problems, and providers undertake extensive unbillable work, which has led to providers reducing their legal aid provision or leaving the market altogether. Presently, demand for legal aid services in immigration and asylum far outweighs supply.
5. The current state of affairs compromises access to justice. Individuals with in scope matters cannot find providers with capacity for their case, let alone those who might be eligible under the onerous exceptional case funding ('ECF') scheme.

## Effectiveness of LASPO

6. LASPO significantly reduced the scope of legal aid in immigration and asylum, despite immigration matters representing a small portion of pre-LASPO legal aid expenditure.<sup>3</sup> It reversed the prior position, in which an area of law was in scope unless specifically excluded, by instead excluding all matters not specifically included in the scope of legal aid. Most non-asylum work is no longer in the scope of legal aid, with narrow exceptions such as for immigration detention cases and applications for leave to remain made by victims of domestic violence or trafficking.<sup>4</sup> LASPO was introduced as part of a package to deliver the MoJ's aims to:
  - a. discourage unnecessary and adversarial litigation at the public expense;
  - b. target legal aid to those who need it most;
  - c. make significant savings to the cost of the scheme; and
  - d. deliver better overall value for money for the taxpayer.<sup>5</sup>
7. However, the reduction of scope has been ineffective in achieving these aims.

## Unnecessary litigation

8. The impact of LASPO increases unnecessary litigation and puts strain on the court system at public expense.
9. Individuals with legal issues that fall outside of LASPO's restricted scope, who cannot afford private representation or obtain ECF (which is notoriously challenging<sup>6</sup>), are left without legal representation. Issues out of scope include, for example, claims for leave to remain on the basis

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<sup>3</sup> Fabian Society, 'The Right to Justice. The Final Report of the Bach Commission' (September 2017) <[Bach-Commission\\_Right-to-Justice-Report-WEB-2.pdf \(fabians.org.uk\)](#)> accessed 29 February 2024, page 32.

<sup>4</sup> NAO Report 2024, Figure 1.

<sup>5</sup> Ministry of Justice, 'Reform of Legal Aid in England and Wales: the Government Response' (June 2011) <<https://assets.publishing.service.gov.uk/media/5a7c0fa040f0b63f7572b1a2/8072.pdf>> accessed 27 February 2024, §10.

<sup>6</sup> ILPA's Response to National Audit Office's Consultation on Legal Aid, §39 - 42.

of the right to private and family life under Article 8 of the European Convention of Human Rights ('ECHR').

10. It is clear from our members' experiences, which is reflected in research undertaken by others including Dr Jo Wilding<sup>7</sup> and Public Law Project,<sup>8</sup> that the system is also failing to meet demand for legal services that remain in scope. Therefore, even applicants, whose matters are in scope, are forced to represent themselves. The supply crisis is caused, in part, by the narrowing of the immigration and asylum legal aid market, which led practitioners with expertise in a particular area that was no longer in scope to leave legal aid to focus on their area of expertise.
11. An increase in immigration and asylum applications from individuals without representation promotes unnecessary litigation rather than deterring it. As set out in our response to the MoJ's most recent call for evidence on legal aid, 'in the previous two years alone, two incredibly complex statutes which have wide-reaching implications for immigration and asylum law have passed,<sup>9</sup> on top of twelve Statements of Changes to the Immigration Rules,<sup>10</sup> vast amounts of secondary legislation, and the Safety of Rwanda (Asylum and Immigration) Bill currently before Parliament'.<sup>11</sup> The Immigration Rules are frequently criticised by the judiciary for their unnecessary complexity resulting from convoluted drafting.<sup>12</sup>
12. The increasing complexity of immigration and asylum law, together with the characteristics of this client group, including English often not being their first language, high levels of trauma, and mental health difficulties, exacerbate the challenges of self-representation. In this context, there is a high chance that unrepresented individuals may misunderstand the rules, the merits of applications, and underestimate what is expected of them in respect of evidence, resulting in poorly prepared applications or applications that would not have been made had they appreciated the likelihood of success. This results in refusals and, therefore, unnecessary

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<sup>7</sup> Dr Jo Wilding for Refugee Action, 'No Access to Justice: How Legal Advice Deserts Fail Refugees, Migrants and Our Communities' (May 2022) <[https://assets.website-files.com/5ea9ba3a86899781dfe3c099/62bc314261e2f338e0953848\\_No%20access%20to%20justice%20-%20how%20legal%20advice%20deserts%20fail%20refugees%2C%20migrants%20and%20our%20communities.pdf](https://assets.website-files.com/5ea9ba3a86899781dfe3c099/62bc314261e2f338e0953848_No%20access%20to%20justice%20-%20how%20legal%20advice%20deserts%20fail%20refugees%2C%20migrants%20and%20our%20communities.pdf)> accessed 28 February 2024.

<sup>8</sup> PLP, 'Access to immigration legal aid in 2023: An ocean of unmet need' (September 2023) <<https://publiclawproject.org.uk/content/uploads/2023/09/Oceans-of-unmet-need-Sep-2023.pdf>> accessed 15 February 2024.

<sup>9</sup> The Nationality and Borders Act 2022 and Illegal Migration Act 2023.

<sup>10</sup> UK Visas and Immigration, 'Immigration Rules: statement of changes' (Updated 7 December 2023) <<https://www.gov.uk/government/collections/immigration-rules-statement-of-changes#statement-of-changes-to-the-immigration-rules:-2022>> accessed 15 February 2024.

<sup>11</sup> ILPA, 'ILPA Response to RoCLA call for evidence (21 February 2024)' <<https://ilpa.org.uk/ilpa-response-to-rocla-call-for-evidence-21-february-2024/>> accessed 27 February 2024 ('ILPA Response to RoCLA 2024'), §68.

<sup>12</sup> In November last year, Lord Sales commented in *R (on the application of Afzal) v Secretary of State for the Home Department* [2023] UKSC 46, at §91, '[i]n cases dealing with this part of the Immigration Rules, judges have repeatedly commented on their poor drafting. Poor drafting needlessly creates difficulties and uncertainties which lead to expensive litigation.'

litigation, in cases which may have been resolved in advice or during their first application, had they been supported by a legal representative.

13. Alternatively, individuals without legal advice may lack knowledge of their ongoing eligibility for status, or lack the tools to apply independently, and as a result become undocumented and forced into the shadow economy, exposing them to a higher risk of exploitation. If they subsequently become aware of their rights, an immigration application at this later point is likely to be more complex and increase the risk of the individual not being able to meet suitability requirements under the rules. Such legally complex cases are more likely to result in litigation than straightforward applications.
14. It would be sensible, with the aim of discouraging unnecessary and adversarial litigation in mind, to prioritise the early resolution of cases, rather than simply locking cohorts of individuals out of the scope of legal aid.

#### Legal aid for those who need it most

15. The MoJ is failing to target legal aid towards those who need it most, in two crucial ways. First, individuals with in scope matters cannot access legal aid due to insufficient provider capacity. Second, the ECF scheme is failing to safeguard the fundamental rights of those in need of legal aid.
16. The Government kept asylum matters in scope on the basis that:

*In these cases, they are about the immediacy and severity of the risk to the individual: if an applicant for asylum is returned to an unsafe country, they could suffer persecution, torture or death. [...]*

*When making their case, asylum applicants may have recently fled persecution or torture. In these circumstances, it may be difficult for them to navigate their way through the asylum process without legal assistance. In addition, applicants for asylum may be traumatised and so find it more difficult to represent themselves.<sup>13</sup>*

17. The Government was correct to recognise that this client group would suffer particular detriment were they to be unable to access legal aid. Yet, the Lord Chancellor is failing to secure that legal aid is truly available to people seeking asylum.<sup>14</sup> Capacity in immigration and asylum legal aid is

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<sup>13</sup> Ministry of Justice, 'Proposals for the Reform of Legal Aid in England and Wales' (November 2010) <<https://webarchive.nationalarchives.gov.uk/ukgwa/20111013060755mp/http://www.justice.gov.uk/downloads/consultations/legal-aid-reform-consultation.pdf>> §4.39 and 4.40.

<sup>14</sup> Under s 1(1) of LASPO: 'The Lord Chancellor must secure that legal aid is made available in accordance with this Part'.

in continual decline. Dr Jo Wilding found that ‘there was a deficit of at least 6,000 between the number of new asylum applications and the number of new immigration and asylum legal aid matters opened’ in the year ending 2021;<sup>15</sup> at least 43% of asylum applicants in the year ending 2022 were unrepresented;<sup>16</sup> and at least 51% of people who claimed asylum were unrepresented in the year ending 2023.<sup>17</sup> These calculations are done by comparing the number of matter starts against the number of asylum applications within a given period. Therefore, they are an underestimate, as matter start statistics are not disaggregated by matter type, and some matters will not be asylum applications.<sup>18</sup> This data aligns with reports from support organisations indicating that legal aid cases are becoming increasingly difficult to refer, and from providers that the growing demand is increasingly difficult to meet. The LAA cannot point to the number of unused matter starts as a measure of available capacity. Stating that legal aid is available for particular matters does not target it at those who need it most. A legal representative must also be available to deliver the theoretical service.

18. The Government purports that the ECF scheme acts as a safety net, by allowing legal aid to be made available to individuals where fundamental rights or EU law are otherwise at risk of being breached. The reality is that ECF is a barrier, rather than a gateway, to legal aid. To summarise the evidence ILPA recently provided to the MoJ on this matter:
  - a. individuals may be unaware they qualify for ECF and may have been misadvised that legal aid is not available for their case, even though they would be eligible through ECF. This suggests the ECF statistics do not reflect the true extent of need for legal aid in immigration cases where fundamental rights would otherwise be breached.
  - b. providers are only remunerated for preparing an ECF application if it is successful, and are often without sufficient capacity to prepare an application in any event. Charities and support organisations are compelled to complete ECF applications on behalf of their clients, ahead of making a referral, but cannot be remunerated for their time spent on these applications. This is particularly concerning given that the NAO states in its 2024 Report, ‘Some vulnerable individuals making direct applications may, for example, not have the legal knowledge to demonstrate how their case meets the criteria. Taking an overall average over the period from 2020-21 and 2022-23, on average, LAA granted 20%

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<sup>15</sup> 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 15 February 2024.

<sup>16</sup> *ibid.*

<sup>17</sup> Jo Wilding, ‘Over half the people seeking asylum are now unable to access a legal aid lawyer’ *Free Movement* (25 October 2023) <<https://freemovement.org.uk/over-half-the-people-seeking-asylum-are-now-unable-to-access-a-legal-aid-lawyer/#:~:text=At%20least%2051%25%20of%20asylum,of%20new%20applications%20for%20asylum>> accessed 4 March 2024.

<sup>18</sup> *ibid.*

of applications from individuals, compared to over 80% of applications from assisted individuals and providers.<sup>19</sup>

- c. handling an ECF file is administratively burdensome, particularly if the matter has an in-scope element.
  - d. ECF is only granted for Legal Help initially, so if a case goes to appeal, the client needs to apply for a further grant.
  - e. if an application is made, despite these deterring factors, waiting for a decision causes delay for the client, unless the provider is willing to carry out substantive work at risk of ECF being denied.<sup>20</sup>
19. The high volume and grant rate of ECF applications in immigration and asylum, compared to other areas of civil law, indicates a high level of need. In the quarter from July to September 2023, there were 448 grants and 487 applications for ECF in immigration (91.99% grant rate).<sup>21</sup> This was almost eight times the number of grants made in the second highest area, Inquests, which had 57 grants and 103 applications (55.33% grant rate).<sup>22</sup> As found by the NAO in its 2024 Report:

*The high approval rate for immigration applications suggests that these cases are routinely being funded via legal aid. This raises concerns about access to justice, as the exceptional case funding route is more difficult to access. The high approval rate also raises concerns about value for money, as evidence suggests that processing exceptional case funding applications requires more work for the LAA than a standard application. In 2022-23, LAA processed 83% of applications for exceptional case funding within 25 working days, compared to 93% of applications for standard civil legal aid within 20 working days. It is not possible for the LAA to quantify the costs of processing exceptional case funding cases compared to standard cases as staff do not record how much time they spend on exceptional case funding cases.*<sup>23</sup>

20. However, it remains entirely unclear from the MoJ's statistics the number of individuals whose cases are taken on following a grant of ECF. It appears there is a gap in monitoring. The NAO Report states, '[o]ne-off analysis by LAA found that in 2019-20 13% of applications from individuals or assisted individuals that were approved for exceptional case funding did not subsequently take a case forward with a provider. The analysis did not distinguish between

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<sup>19</sup> NAO Report 2024, §2.24.

<sup>20</sup> ILPA Response to RoCLA 2024, §155 - 160.

<sup>21</sup> Ministry of Justice, 'Legal aid statistics tables - July to September 2023'

<<https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fmedia%2F6582bea2fc07f3000d8d4556%2Flegal-aid-statistics-tables-jul-sep-2023.ods&wdOrigin=BROWSELINK>> accessed 21 February 2024.

<sup>22</sup> *ibid.*

<sup>23</sup> NAO Report 2024, §2.26.

individuals who no longer required representation and those who may not have found a provider to take their case. MoJ has not repeated this analysis to explore potential issues with access to justice'.<sup>24</sup>

21. The LAA resource required to process ECF applications, to deliver legal aid to those in need, is a poor use of public funds. With regard to the targeting of legal aid at those in need, the hurdles in applying for and obtaining ECF suggests that the ECF scheme fails to meet this objective.

#### Significant savings to the cost of the scheme

22. While it may be true looking at the bare figures that costs have been saved, evidence shows that many cost reductions can be attributed to shifting, rather than saving. Wider public costs include costs to local authorities and the court system. This view is supported by the NAO's findings.<sup>25</sup>
23. Local authorities incur costs both to support<sup>26</sup> and to source legal advice for those with insecure status. Incentives for doing so include protecting individuals from additional costs further down the line and to support individuals who have been unable to support themselves due to their immigration status (or lack thereof, which prevents them from working and renting), and so have become destitute. One of our members recalls that numerous social services departments have paid the firm private fees for legal services in relation to children in the authority's care registering as British (although the MoJ recognised that such services for separated children should be within scope by adding it to Schedule 1 Part 1 of LASPO in 2019, this measure was taken seven years after the introduction of LASPO<sup>27</sup>).
24. The current system does not allow for the efficient resolution of claims. Reductions in scope and the related failures of the legal aid market have led to more unrepresented individuals, and the diminishing supply of providers means finding representation can take months. Local authorities must bear the cost of supporting destitute individuals for longer than they would need to, if the system prioritised early legal support.

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<sup>24</sup> *ibid*, §2.24.

<sup>25</sup> *ibid*.

<sup>26</sup> 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 1999 Act may be available. Support under section 98 of the 1999 Act 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. 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.

<sup>27</sup> Section 2, The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Legal Aid for Separated Children) (Miscellaneous Amendments) Order 2019.

25. Litigants in person may incur higher costs for courts than represented litigants, as they will often require more time and support to allow their case to be effectively heard.<sup>28</sup> Additionally, the creation of unnecessary litigation means that many immigration cases in the court system may have been capable of earlier resolution which would save the public expense of the court's time.

### Overall value for money

26. For the reasons outlined, the taxpayer is not receiving value for money. Costs are being shifted, and created, by the inability of the legal aid system to meet the demand for services, and its failure to secure the availability of legal advice at the earliest possible opportunity.

27. The auditing regime of the LAA exacerbates the poor value for money that taxpayers receive. Auditing and monitoring of providers is unreasonably excessive and requires LAA manpower. However, the LAA states this level of auditing is conducted in this manner to satisfy the NAO. The unduly complex contract, which neither contract managers nor providers fully understand, leads to a higher error rate than other areas, and in turn to further audits which are time consuming for all. ILPA recently informed the MoJ that '[w]e have had numerous reports of the LAA attempting to recoup extortionate amounts of money, often to realise further down the line that this is a result of their own mistakes, to the detriment of the provider.'<sup>29</sup> This represents a waste of taxpayer funds. We provide stark examples in the Appendix to this evidence. Though the LAA claims that a high level of scrutiny is due to mistakes being made, the system established to govern immigration and asylum legal aid is fraught with intricacies that are often as great as the complexities in the area of immigration and asylum law.

28. The LAA's fee recuperation requests can also be unreasonable due to the amount requested: for example, one member told us that the LAA deducted 20 pence from one of their files. The making of such minor requests does not appear to be a good use of the LAA's resources or to deliver value for money.

### **Sustainability of legal aid market**

29. The immigration and asylum legal aid market is unsustainable. Fees are outdated, which is exacerbated by extensive unpaid (yet often necessary) work, a billing system which fails to meet business needs, and harsh monitoring by the LAA.

30. As part of the same package in which LASPO was contained, the Government cut legal aid fees by 10% in 2011,<sup>30</sup> when fees were already far behind inflationary growth, having been stagnant since

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<sup>28</sup> NAO Report 2024.

<sup>29</sup> ILPA Response to RoCLA 2024, §44.

<sup>30</sup> 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.



1996. This must be one of the only areas of provision of public services, which has not seen an increase in nearly three decades. As we reported to the MoJ,<sup>31</sup> the results of a survey of ILPA members in June 2023 illustrates the issue:

*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.<sup>32</sup> The overwhelming response from members was that, if legal aid continues to pay at its current rates, the system is unsustainable.*

*A sample of current 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 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.<sup>33</sup>*

31. The survey results further illustrate that, due to inadequate fees, providers are required to subsidise their loss-making legal aid practice by pursuing privately paying work or applying for and managing grants from other sources.<sup>34</sup> This translates into a loss of capacity to undertake legal aid work.

32. The extent of unpaid work required of providers reduces the real value of fees:

- a. ILPA members' work rarely remains within the fixed fee which they are paid for Legal Help and Controlled Legal Representation. This is likely a result of the failure of the fee to keep pace with inflation, alongside the growing complexity of immigration and asylum law. Immigration and asylum legal aid providers must work twice the value of the fixed fee, before they are paid at hourly rates. If a provider works more hours than the fixed fee remunerates, but fails to meet the level required to 'escape' to hourly rate payments, their extra work would go unpaid. ILPA recently highlighted to the MoJ that, as well as reducing the real value of fees, this creates perverse incentives, as 'providers may be incentivised to do less work than is required on a matter in order to remain within the fixed fee'.<sup>35</sup> If the taxpayer is paying for a service to be delivered, it should be delivered to the best of the providers' ability, in order to secure value for money.

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<sup>31</sup> ILPA Response to RoCLA 2024, §63 - 64.

<sup>32</sup> ILPA's Legal Aid Sustainability Survey 2023, Survey Results Spreadsheet - 3. Potential Providers Summary.

<sup>33</sup> ILPA's Legal Aid Sustainability Survey 2023, Survey Results Spreadsheet - 2. Current Providers Summary.

<sup>34</sup> ILPA, 'ILPA's Legal Aid Sustainability Survey' (19 July 2023) ('ILPA's Legal Aid Sustainability Survey 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 15 February 2024.

<sup>35</sup> ILPA Response to RoCLA 2024, §89.

- b. The administrative burdens imposed by the billing process necessitates unpaid work. Members' experience is that the hours of work they must undertake, in order to be remunerated for the billable work they have done, reduces their capacity for providing legal services to clients.
  - c. Legal aid practitioners are not paid for much of their fundamental work, including client care and training. Without this additional, unchargeable work, legal aid providers would deliver a poorer service that may fail to meet client needs.
33. Members frequently state that they struggle to pay their staff a fair wage due to the financial pressures of operating within the legal aid market. Providers cannot afford for senior lawyers to undertake legal aid work and pay them a salary that reflects their expertise and experience. The impact this has on recruitment and retention of high-quality and experienced staff undermines the market's longevity.
34. Financial unsustainability is exacerbated by cash flow problems. The LAA pays providers for their work in arrears. Delays within the Home Office and Immigration and Asylum Chamber of the Tribunals compound the issue for immigration and asylum providers.<sup>36</sup> Providers must meet disbursements when they arise, without reimbursement until the Legal Help case is concluded.<sup>37</sup> Without up-front investment, it is difficult to enter legal aid, or take on additional cases whilst awaiting the conclusion of others.
35. ILPA members are frustrated with the LAA's monitoring and auditing systems (per §27, above). Audits place an excessive strain on providers' limited capacity. As a consequence of the unreasonable scrutiny of the LAA, '[p]roviders are on constant high alert. Their business and livelihood is at the mercy of the LAA's monitoring activity.'<sup>38</sup> This adds to providers' financial turmoil and damages the viability of their legal aid practice.

## Costs and benefits

36. As outlined above (at §22-25), the failures of the legal aid system shift costs to other areas of public spending.

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<sup>36</sup> Full Fact, 'Has the asylum backlog been cleared?' (3 January 2024) <<https://fullfact.org/immigration/asylum-backlog-cleared/>> accessed 15 February 2024. As of 28 December 2023, the overall asylum stood at almost 100,000 cases.

<sup>37</sup> 2018 Standard Civil Contract Standard Terms, §3.3b, explicitly refers to paying all payments to third parties 'for their work within 30 days from receipt of a valid invoice'.

<sup>38</sup> ILPA Response to RoCLA 2024, §48.

## Access to Justice

37. There has been an exodus of practitioners from legal aid due to the market's unviability. As a result, demand for immigration and asylum legal aid services far outstrips supply, which undermines access to justice.
38. In order to truly achieve access to justice, individuals must be able to have their case presented effectively.<sup>39</sup> In immigration and asylum, the lack of access to legal aid representation could present harmful consequences amounting to breaches of fundamental rights, from the risk to Article 8 rights of family separation to the risk to Article 3 rights of *refoulement*. It is insufficient for legal aid to only be available in theory.
39. The capacity gaps in England and Wales, resulting from the sustainability issues set out in this evidence, are deeply concerning. During a recent stakeholder engagement group meeting with the Home Office it was clear that a number of significant delays in Home Office decisions, particularly in relation to the completion of a Statement of Evidence form for unaccompanied asylum seeking children, were due to a lack of legal aid representatives. An ILPA member from a support organisation estimated that it currently takes eight to nine months to successfully refer a service user to a legal aid provider. The delay impedes access to justice and is compounded in the context of emerging statutory provisions which tighten timelines for immigration and asylum applications. Another member, a large legal aid provider, turns away 100 potential clients per month (it is not clear if these clients would all be eligible for legal aid or not, as that assessment would require capacity they do not have).
40. The true extent of unmet legal need is difficult to measure. Despite the Public Accounts Committee recommending, almost ten years ago, that the MoJ deliver on its promise to establish a robust mechanism for identifying gaps in provision,<sup>40</sup> the MoJ continues to lack insight into unmet needs.<sup>41</sup> Without coming to terms with the extent of the problem, it is difficult to see how the MoJ will deliver meaningful access to justice for those who are currently without it.
41. Swift access to justice is the primary objective of the MoJ and LAA.<sup>42</sup> The LAA board is crucial in the delivery of the LAA's objectives, as its role is to advise the Chief Executive on strategy, and on the deliverability of policies.<sup>43</sup> The non-executive members of the LAA Board appear to be

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<sup>39</sup> *R (Gudanaviciene and Others) v The Director of Legal Aid Casework and The Lord Chancellor* [2014] EWCA Civ 1622.

<sup>40</sup> Public Accounts Committee, 'Implementing reforms to civil legal aid' (prepared 4 February 2015) <<https://publications.parliament.uk/pa/cm201415/cmselect/cmpublic/808/80802.htm>> accessed 29 February 2024.

<sup>41</sup> NAO Report 2024.

<sup>42</sup> Legal Aid Agency, 'Our governance' <<https://www.gov.uk/government/organisations/legal-aid-agency/about/our-governance>> accessed 28 February 2024.

<sup>43</sup> *ibid.*

commercially-minded individuals.<sup>44</sup> None appear to have first-hand experience working in legal aid and coping with its challenges. It is difficult to reconcile the Board members' professional backgrounds with the aim of delivering access to justice through legal aid that meets user needs. The importance of meaningful access to justice must not be overshadowed by the aim of cutting spending, especially as cutting expenditure in legal aid is surface-level, and masks the shifting of costs to other areas.

## Conclusion

42. ILPA repeats the recommendations it has made to the MoJ, on steps that are necessary to increase the market's sustainability, therefore inject capacity back into the sector, to deliver access to justice and better value for public money. Above all, rates must be immediately increased in line with inflation, index-linked, and reviewed annually thereafter. In addition we urge the MoJ to:

*i) Expand the scope of legal aid (such as to include claims made on the basis of Article 8 of the European Convention on Human Rights, for which the grant rate of ECF is very high) and reform Exceptional Case Funding (ECF).<sup>45</sup> 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.*

*ii) Abolish fixed fees and remunerate all of immigration and asylum legal aid at hourly rates, to provide a clear, fair, and single method of remuneration which removes work that is uncompensated if it falls between the fixed fee and the escape fee threshold.*

*iii) Address legal aid deserts, and recognise that remote-only advice is not a solution for all, particularly it may be unsuitable for vulnerable individuals.*

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<sup>44</sup> Legal Aid Agency, 'Our governance' <<https://www.gov.uk/government/organisations/legal-aid-agency/about/our-governance>> accessed 28 February 2024.

<sup>45</sup> See §§40-48 of ILPA, 'ILPA's Response to National Audit Office's Consultation on Legal Aid' (21 July 2023) <<https://ilpa.org.uk/ilpas-response-to-national-audit-offices-consultation-on-legal-aid-21-july-2023/>> accessed 5 August 2023. 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). 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). 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.

*iv) Address cash flow problems arising from insufficient billing stages for practitioners to claim their costs at regular intervals to avoid suffering from Home Office and Tribunal backlogs.*

*v) Reduce the administratively burdensome billing and auditing process, by simplifying it, requiring less of providers during audits, placing more trust in providers, and taking a pragmatic approach that prioritises quality of advice.<sup>46</sup>*

Immigration Law Practitioners' Association

6 March 2024

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<sup>46</sup> ILPA, 'Ministry of Justice's Consultation: Legal aid fees in the Illegal Migration Bill Response of the Immigration Law Practitioners' Association' (7 August 2023) <<https://ilpa.org.uk/ilpa-response-to-ministry-of-justice-consultation-on-legal-aid-fees-in-the-illegal-migration-bill-7-august-2023/>> accessed 15 February 2024.

# Appendix: ILPA Evidence to Public Accounts Committee Call for Value for Money from Legal Aid Inquiry

## Audit Case Study 1

A CCA audit was deliberately triggered by their new contract manager, by making minor (non-financial) contract notices. For the CCA, the LAA audited 47 files, nil assessed 10 and made other financial reductions together totalling 56.75% of the costs on files audited. None of the findings had any merit. For example, one finding was that firms were not allowed to reclaim VAT on disbursement costs when charged VAT by a supplier (such as an interpreting agency or an expert). Rule 8.43 of the Unified Contract Civil Specification and Rule 4.39 of the Standard Civil Contract (2010, 2010 amended and 2013 Specifications) allows the LAA to apply this percentage reduction by way of assessment to all other claims for costs submitted since your last CCA audit; or (as in our member's case) in the last 12 months. The LAA, therefore, made a costs reduction of £387,145.54.

There was a right of appeal but, because they then classified our member as a financial risk on the basis they thought our member could not pay, the appeal was non-suspensive and contract sanctions were unilaterally imposed. All profit costs payments were suspended. Our member had to send lists of salaries every month to the LAA so the LAA could sign off enough money for our member to pay their staff, rent, and other operational costs to stay open. However, the directors basically went unpaid for about 6 months.

Our member was summoned to a meeting at the regional LAA office. They describe that they were "humiliated" and told that they would only receive a payment every two months for the next six months and only after an audit was passed before each payment. If they passed three audits in six months, it would go back to normal. The business was affected by the risk of insolvency, if they could not pay creditors. No thought was given to how this affected their clients. The directors were at risk of personal bankruptcy as the Civil Contract requires a personal indemnity, which is not covered by indemnity insurance. The directors had to focus solely on the audit for six months. This wrecked the business. They had to take out bank loans to survive. They describe the emotional toll as heavy.

After the internal appeal, the LAA accepted they had made erroneous findings on virtually all files. The reduction was reduced to £3,688.42, less than 1% of the original LAA claim. However, there was still no admission by their contract manager that he was wrong in his approach or in the process of sanctions, which he continued to enforce.

The appeal continued to an external appeal in relation to three files. In one file, the appeal was found fully in our member's favour. The other two were both hourly rate files. One was for a minimal amount, which our member did not contest due to the time it would have taken weighed against the amount at

stake. In the last file the issue was the amount our member charged the LAA in counsel fees (the counsel profit costs), which was dismissed.

Following the external appeal, the total financial reduction was £256.17.

Our member has still received no apology. The financial losses to their business due to the sanctions imposed were about £100,000.

Bizarrely, the LAA had said to our member: “We are well aware that there are administrative costs (both to you and to us) involved in dealing with appeals. We are therefore prepared to offset these costs by 5% and apply the reduced assessment rate of 51.75% to your claims should you decide that, having considered the findings and this concession, you do not wish to appeal our audit decisions.”

This concession would have decreased the amount of the total costs to £353,035.80 (instead of £387,145.54). Yet, despite placing a value on the costs involved in the process, no money was offered to our member when the errors were found to be those of the LAA.

### Audit Case Study 2

A member of our Legal Aid Working Group was recently told that the LAA would recoup £28,000, 21 days from the notice, from a 2005 file for which the organisation no longer holds records. This would cause unimaginable stress for a provider, who has a short time frame within which to dispute the matter and no evidence to do so. It is utterly unreasonable for the LAA to review files from almost two decades ago, and attempt to claw back payments they already approved.