

Separated Children and Legal Aid Provision

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Legal Aid in immigration for refugee children

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into force on 1 May 2012. However, the new legal aid provisions will not come into effect until 1 April 2013. In the field of immigration, the scope of legal aid provision is drastically restricted. Whilst asylum legal aid will still be funded, most non-asylum immigration will not be.

There are no child-specific provisions in immigration legal aid. However, where the person is an unaccompanied asylum seeking child or any minor needing legal advice and assistance, there are a few additional contract requirements and a specific type and level of funding and remuneration is available within the immigration category of law to providers. This leaflet sets out issues in legal aid for children as they are before the LASPO changes come into effect and then sets out how we anticipate they will change from April 2013.

Levels of legal aid service

There are three levels of services in the immigration law category:

Controlled Work

- **Legal Help (LH)** this covers advice and assistance on matters within the Immigration category of law (such as making an application for asylum or other permission to stay in the UK) but excludes the issuing and conducting of proceedings in a court/tribunal and advocacy.

● **Controlled Legal Representation (CLR)** this covers representation before the First-tier and Upper Tribunals of the Immigration and Asylum Chamber (appeals and applications for permission to appeal to the Tribunal only).¹

● **Licensed Work**

This is funded either by an emergency funding certificate often granted by the legal representative under powers devolved from the Legal Services Commission (LSC) or a funding certificate granted and issued by the LSC. It covers legal representation in the higher courts,² which can take the form of either full representation in the higher courts or Investigative Help.

Legal Help or Funding Certificate?

The general rule is that if the child is party to court proceedings or court proceedings are contemplated then a certificate should be applied for. However, some work prior to issue of a claim should be carried out under the Legal Help scheme so there is clearly some overlap.

The general rule is that Legal Help should be used for:

● **Initial investigative work** to get to a point of being able to ascertain prospects of success in proceedings, but see below.

● **Work under Pre-action Protocols**

The work necessary to comply with any steps prior to issuing proceedings in the High Court should be carried out under Legal Help unless this work is to be carried out under Investigative Help or full representation.

¹ Funding Code Criteria, section 13 - Immigration.

² The High Court, Court of Appeal and Supreme Court, but including judicial reviews transferred from the High Court to the Upper Tribunal under rule 27, Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2006/2698).

Work under Investigative Help (IH) Licensed Work

In cases where the costs of investigation are likely to be substantial³ Investigative Help should be considered. Where the prospects of success on a claim are unclear, Investigative Help may be available. It covers the cost of investigating a potential claim in the higher courts. It is described by the LSC as a preparatory step before the grant of legal aid for full representation. It covers only reasonable work necessary to investigate the strength of a proposed claim. It does not cover the issue and conduct of proceedings, but can do so in limited circumstances.⁴ Investigative Help can be amended to cover full representation. Full representation will cover all reasonable work in legal proceedings.

Who is a Child?

A child is a person under the age of 18.

An unaccompanied asylum seeking child for the purpose of immigration controlled work funding means:⁵

- a child who is under 18 or claims on ‘reasonable grounds’ to be under 18; and
- is making a claim for asylum in his or her own right; and
- who is separated from both parents; and
- is not being cared for by an adult who, by law or custom, has responsibility to do so.

Most asylum and immigration controlled work is normally remunerated at a fixed fee. However, advice and assistance to unaccompanied minors on their asylum claims and representation on their asylum appeals is remunerated at hourly rates.⁶

³ As a guideline, six hours of work or £400 of disbursements, Funding Code paragraph 10.3.3.

⁴ Funding Code, Chapter 10 Investigative Help, available at

http://www.legalservices.gov.uk/docs/cls_main/Funding_code_chp10_Investigative_Help.pdf

⁵ Paragraph 8.1, 2010 Standard Civil Contract, Section 8 - Immigration Specification.

⁶ Paragraph 8.83(k) Immigration Specification, see also fixed and hourly rates in 2010 Standard Civil Contract Payment Annex.

Where a child's age is disputed by the UK Border Agency, for legal aid funding purposes the legal aid provider will assess for themselves whether the client 'claims to be under 18 on reasonable grounds' and if they do then funding will be on the basis they are a child. An expert report is not required for this purpose.⁷ If the age dispute is resolved to decide the person is over 18 then the person ceases to be treated as an unaccompanied asylum seeking child and the case moves to another level of funding. If the child merely turns 18 in the course of the case then attendance by representative at an interview will not automatically be covered⁸ and if the case moves to a different level of service it will, from that stage, not be paid for on an hourly basis as an unaccompanied asylum seeking child case.

What is an asylum claim?

An asylum claim is a claim that it would be contrary to the United Kingdom's obligations under the 1951 UN Convention Relating to the Status of Refugees and its 1967 Protocol or Article 3 (right not to be subjected to torture, inhuman or degrading treatment) of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms for a person to be removed from or required to leave the United Kingdom.

For the purpose of Controlled Work funding, any other type of application for permission to remain in the UK outside the definition of an asylum claim is treated as an immigration matter. An immigration matter also includes family reunion, travel document applications and registration applications as British citizens.

Unless specialist legal advice is required, there is normally no funding for assistance with form filling.⁹ For instance, there is normally no immigration legal aid funding for advice and assistance with applications for travel documents, or for registration or naturalisation as a British citizen.

⁷ Paragraph 29.16, Funding Code, Chapter 29 - Immigration.

⁸ Volume 2 - Civil, Part C, Directions and Arrangements, asylum interviews, para 2C-024.

⁹ See paras 8.83 and 8.56 of the Immigration Specification. See also para 29.15 of the Immigration Funding Code.

Controlled Work and Means

The completion and signing of controlled work forms must normally be done at the legal aid provider's office.¹⁰

Evidence in support of the child's financial means must be provided before financial eligibility is assessed and evidence of the means of the person with care of the child may also need to be provided (see below).

However, financial documentary evidence may not be required where the personal circumstances of the person, such as age, mental disability or homelessness, make it impracticable. In the absence of evidence, providers must write a detailed attendance note giving reasons for lack of evidence of means¹¹ at the outset. Evidence should be provided as soon as practicable afterwards. The longer the time that a child is being provided with advice and assistance, the harder it will be to justify the lack of evidence of means on file and therefore for the provider to receive funding from the LSC.

Where a child is receiving assistance from the local authority, their letter must spell out clearly the type and level of financial support that the child is receiving. The local authority should also confirm the relevant provision of the Children Act 1989 under which the child is being assisted or cared for.

Furthermore, financial means must be reviewed where there is a significant change in the child's circumstances.

Signing legal aid forms, capacity and instructing: who is the client?

The client will be the person who applies for or receives funded services.¹² The details in the Controlled Work forms should therefore normally be those of the child.¹³

¹⁰ B2(2) - para 3.12, 2010 Standard Civil Contract – Specification (October 2011).

¹¹ Paragraph 12.2.12, Volume 2E (Financial Eligibility) of Legal Services Commission manual.

¹² Community Legal Services Financial Regulations 2000, SI 2000/516, Reg 2 (1).

¹³ Paragraph 3.24, Contract Specification 2010.

The form is normally signed and instructions are normally given on behalf of the child by a parent, guardian, litigation friend or other person in whose care the child is.¹⁴

Where there is good reason why none of the above specified persons can make the application on the child's behalf, an 'other person' may sign the form and instruct on the child's behalf. However, the 'other person' must have sufficient connection to the child and knowledge of the child's problems and financial circumstances.

Alternatively, where there are good reasons such that the specified persons cannot make the application and the child is old enough to give instructions and understands the nature of the work being carried out under legal aid on his or her behalf, the child may sign the legal aid form and give instructions.¹⁵ This would normally be a child who is 16 or over, but s/he may be younger if those instructed are satisfied that the child is able to instruct. There is no general presumption at present that a child aged 16 or 17 may make their own application for funding.

Just because another person has made the application for funding for the child does not exclude the child from having a say in, or even taking decisions in, his or her own case.

Other person's resources

The resources of a parent, guardian or any person who is responsible for maintaining a child, or who usually contributes substantially to the child's maintenance, will be treated as the child's resources, unless having regard to all the circumstances, including the age and resources of the child and any conflict of interest, it appears inequitable to do so.¹⁶

The meaning of a 'person' includes a company, partnership, body of trustees and any body of persons, whether corporate or not.¹⁷ It therefore includes

¹⁴ *Ibid.* para 3.24

¹⁵ *Ibid.* para 3.19-3.20, B4.

¹⁶ Community Legal Services (Financial) Regulations 2000, SI 2000/516, Reg 11 (3).

¹⁷ *Ibid.*, Reg 11 (5).

the local authority which is maintaining a child under s.17 or s.20 of the Children Act 1989.

The Immigration Funding Code, the set of rules used by the LSC to decide what individual cases they will fund through civil legal aid, confirms that in all asylum matters it is considered inequitable for foster parents'/social workers' income and capital to be aggregated with that of the child. Although this paragraph of the funding code has been poorly drafted, the Commission appears to accept that there might be a conflict of interest between a child and the local authority supporting the child in asylum claims made by minors. The local authority should therefore not be expected to meet this child's legal costs for advice and assistance on his or her asylum claim.¹⁸

Other than the above exception, in immigration and asylum cases, unless a conflict of interest or other circumstances making aggregation inequitable are established, the resources of a person who is responsible for maintaining a child will be treated as the child's resources.

Controlled Work: Sufficient Benefit and Merits: The Sufficient Benefit Test and Legal Help (LH)

In Legal Help cases, advice and assistance may only be provided where there is sufficient benefit to the client, having regard to the circumstances of the matter, including the personal circumstances of the client, to justify work or further work being carried out.¹⁹

The sufficient benefit test applies as a cost benefit test for Legal Help.²⁰ It is primarily a test of whether a reasonable private paying client of moderate means would pay for the legal advice and assistance. The emphasis of the test, however, is on whether to continue work, rather than on making an assessment at the start of the case. In particular, the test recognises that, at this level of service, even in a matter with poor prospects of success, the client may well consider it worthwhile to pay for initial advice, including the advice that the case

¹⁸ Paragraph 29.11 (2) Funding Code, Chapter 29 – Immigration.

¹⁹ Funding Code, General, Section 5, para 5.2.1.

²⁰ Part C, Funding Code: Decision making guidance, Chapter 4, Merits, costs and damages, paragraph 4.11.

is not worth pursuing further. The more Legal Help is provided, however, the more that cost benefit will need to be taken into account.

Merits and Controlled Legal Representation (CLR)

Controlled Legal Representation will normally be refused if the prospect of achieving a successful outcome for the client is unclear or borderline or poor, inasmuch as the prospects of success are clearly below 50% and the claim is likely to fail (save for cases that have significant public interest²¹ or human rights issues or are of overwhelming importance to the client).²²

The case is of overwhelming importance to the client if it concerns the life, liberty or physical safety of the client or his or her family, which will often be true of asylum cases; or the case raises significant issues of human rights; or the case has a significant wider public interest, that is, the proceedings have the potential to produce real benefits for members of the public other than the client and his or her family.

An example of poor prospects of success would be a second or subsequent asylum or human rights application, where the same facts have already been determined before an immigration judge on a previous application and dismissed and there has been no relevant change of circumstances.

The second part of the merits test for CLR is whether the 'likely benefits to be gained from the proceedings justify the likely costs.' In practice most asylum appeals will satisfy this test but there may be cases where a non-asylum appeal may justify a refusal of funding. Where the answer is no, the provider will need to refuse CLR unless the case has significant public interest.²³

There is one CLR merits test which applies to both children and adult cases. However, that the appellant is a child will inevitably affect the chances of success of the appeal and so is not ignored. Further, Chapter 29, paragraph 29.29.4-5 of the Immigration Funding Code makes clear that where an unaccompanied minor has a right of appeal on asylum grounds and *prima facie*

²¹ For more information as to the meaning and test in public interest cases, see Funding Code: Public Interest, Chapter 5:

http://www.legalservices.gov.uk/docs/cls_main/Funding_Code_-_Chapter_5_-_Public_Interest_-_April_2010.pdf

²² Funding Code, section 13, Immigration, para 13.4.

²³ Paragraph 29.21 of the Immigration Funding Code

comes within the relevant Convention, then CLR should be granted on the basis that the child will meet the merits test to at least the borderline level. The ‘applicant’s age ... may be a contributory and weighty factor in determining refugee status’.²⁴ This statement was made by the LSC out of concern that many children were not appealing against the refusal of recognition as a refugee when granted discretionary leave, contrary to their best interests. However, this concession may not apply to those children where their age is disputed.²⁵

Refusal of Controlled Legal Representation on merits (CW4 form)

If CLR is refused or withdrawn, a CW4 form must be completed with the date and reasons for the decision. A copy of this must be given to the child or those acting on his/her behalf within five days of the decision being made. A copy must also be kept on file. The child or those acting on the child’s behalf must also, within five days, be advised on his/her right to a review.²⁶ However, where the Tribunal appeal hearing date has already been set, the review application to the Legal Services Commission on the refusal of funding must be made immediately and the urgency of this should be clearly stated on the form.

A maximum of 30 minutes can be claimed by providers under Legal Help for the completion of the CW4 form.²⁷

The immigration specification and funding code requires that the provider assists the ‘client’ with the review of a decision or withdrawal of funding only if instructed by the client, but good practice requires a more proactive approach where the client is a child.

Although a new legal representative may take a different view of the merits of a refusal on a grant of funding and grant CLR funding, appellants generally should follow the route of appealing to the Independent Funding Adjudicator (IFA). A representative who does grant funding without an Independent Funding Adjudicator decision would be strongly advised to make a detailed attendance

²⁴ LSC Immigration Services Team newsletter, 20 June 2005, page 25, at <http://www.legalservices.gov.uk/LSCImmigrationNewsletterfinal.pdf>

²⁵ Paragraph 29.29 (6) of the Immigration Funding Code.

²⁶ Paragraph 8.42 Civil Specification 2010, Immigration, Section 8. See also para 29.22 of the Immigration Funding Code, November 2010.

²⁷ Email correspondence from John Facey, Development Officer, Legal Services Commission, 28 July 2010.

note justifying a grant of Controlled Legal Representation without an Independent Funding Adjudicator decision, to be kept on file for the purpose of any future Legal Services Commission audit or assessment.²⁸

‘Multiple applications’ - Applications to stay in the UK on more than one basis

The current immigration specification refers to multiple applications, which are also known as mixed cases, in a number of circumstances of advice on various immigration legal issues and stages. For instance, it applies to situations where a child applies for leave to enter or remain under more than one category of the immigration rules or applies to switch while the other application is pending, and this will constitute one matter start (case for LSC funding).²⁹ This means that where an asylum claim and an Article 8 application are made under the rules this is treated as one matter start. These rules are important for defining the use of allocated matter starts and to identify which payment scheme applies.

The LSC has confirmed, in correspondence, that whether a mixed claim should be treated as an asylum or an immigration matter is left to the provider’s own judgement on whether there is sufficient benefit to the client in the particular element(s) of the advice to receive funding.³⁰

²⁸ Immigration Funding Code, Chapter 29, para 29.22.9 and para 3.47 of the Civil Specification 2010.

²⁹ Paragraph 8.36, Civil Specification 2010, Immigration, Section 8

³⁰ Email from John Facey, Development Officer, Legal Services Commission to Solange Valdez, December 2011- see ILPA website

Unaccompanied asylum seeking children and specific legal aid provisions

There is a positive obligation on legal aid immigration providers to refer an unaccompanied asylum seeking child for advice on public law duties where the child is experiencing problems relating to the relevant local authority's duties under the Children Act 1989.³¹

Where the immigration advice and assistance is in respect of an unaccompanied child, the immigration work conducted on behalf of this child must be carried out by a Level 2 or 3 accredited caseworker.³² The LSC requires all immigration providers to maintain, and to be made available on request, a record of all accredited caseworkers undertaking casework.³³

From 15 November 2010, it became mandatory for immigration caseworkers providing advice and assistance to unaccompanied asylum seeking minors to hold an enhanced Criminal Records Bureau (CRB) check in the 24 months prior to instruction. Again, records of CRB checks of caseworkers advising unaccompanied minors should be kept by providers and made available to the LSC on request.³⁴

Advice and assistance to unaccompanied minors on their asylum claims and representation at their appeals is remunerated at hourly rates.³⁵ This includes work done for age-disputed unaccompanied minors where the providers have assessed that the child claims 'on reasonable grounds' to be under 18.

Providers can also claim for attending screening and asylum interviews with minors and unaccompanied minors³⁶ where it is the minor who is to be interviewed. This may include age-disputed minors, where the provider makes an assessment on reasonable grounds that the child is under 18.³⁷ However, attendance at interviews with non-unaccompanied minors is currently remunerated at a fixed additional payment rate of £266.

³¹ Paragraph 8, The Civil specification 2010, section 8- Immigration

³² *Ibid* para 8.16 and para 4 and CLS work restrictions document, version November 2010

http://www.legalservices.gov.uk/docs/cls_main/WorkRestrictionDocument_Version_Nov_2010_final_JF_0302_11.pdf

³³ Paragraph 8.12, The Civil Specification, section 8- Immigration

³⁴ Paragraph 8.11(d) of the Immigration Specification and Immigration Funding Code, para 29.29.11, Chapter 29.

³⁵ *Ibid.*, para 8.83(k).

³⁶ Paragraph 8.53(f), 8.54-8.55.

³⁷ Paragraph 29.16 (1), Funding Code, Chapter 29- Immigration.

Procurement and access point area restrictions and travelling expenses for attendance at the provider's office

Legal aid providers have geographical restrictions on procurement and access point and can only therefore provide advice and assistance within specified areas. Procurement Area means a geographical area specified by the LSC and Access Point means a Procurement Area which also forms part of a larger area. The LSC publishes these areas on its website. Any procurement and access point restrictions are specified in the contract office schedule issued to providers by the LSC.³⁸

These procurement and access point restrictions will apply unless the prospective client is unable to find a more local provider.³⁹ However, where the proposed client is considered a vulnerable client, the Legal Services Commission accepts that such a person *'should not be expected to have to carry out extensive research or make repeated attempts to find a provider with capacity to take on their case where they are aware of a particular, more distant, provider able to do so.'*⁴⁰ This guidance will apply to children.

Where an unaccompanied asylum seeking child is not able to instruct another more local provider on his or her asylum claim, and s/he is in receipt of other support from Social Services, his/her travelling expenses to attend the provider's office may be claimed under Controlled Work. This expense must be confirmed by the provider to the child in advance of the journey and it must be the cheapest return route travelling by public transport.⁴¹

Licensed Work

The current Funding Code Criteria state that the Code is flexible enough to consider funding litigation where it is in the public interest to do so. In its guidance on implementing the Code, for instance, the LSC states that a

³⁸ Paragraph 1.30, General Civil Specification

³⁹ Paragraph 8.20, The Civil Specification, section 8- Immigration. See also para 29.26 (4), Funding Code, Chapter 29- Immigration The LSC expects that at least three of the more local legal aid providers are contacted before a non local provider is instructed. The reasons why the three more local providers are unable to act must be recorded on file.

⁴⁰ Paragraph 2.46 of the Costs Assessment Guidance March 2012.

⁴¹ Paragraph 8.50(b) 8.51-62

principle of the Code is to ensure that public bodies '*are accountable for their actions and ensuring that children and other vulnerable persons are protected under the law.*'⁴²

A funding certificate for the purpose of high court proceedings is issued to a child⁴³ and it is solely his/her means that are assessed in the normal way, not those of the litigation friend, children's guardian or guardian *ad litem* who is bringing/defending the proceedings on the child's behalf.⁴⁴

In respect of the means application form of a child in connection with a funding certificate, the applying solicitor should submit the appropriate means form for the child. If the child is under 16 and has no money coming in on a regular basis, Community Legal Services (CLS) Means 4 should be completed. If the child is over 16 or has regular money coming in, form CLS Means 1 should be used. If the child is under 16, the parent, guardian etc. should sign the form on his/her behalf.

Disbursements

The Guidance on what is considered to be a disbursement is provided by the civil assessments guidance, which states that:

'Disbursements' mean counsel's fees, experts' fees, court fees, travelling and witness expenses, interpreter's fees and other out of pocket expenses properly incurred by a fee earner (caseworker/solicitor) which would be properly chargeable to a client.⁴⁵ Counsel's fees are also treated as disbursements for most purposes. However, in immigration and asylum Controlled Work counsel's fees are treated as profit costs, to be met by the solicitor, and not as disbursements.

⁴² LSC Manual, vol 3 part 3,

at:http://www.legalservices.gov.uk/docs/cls_main/Funding_code_chp1_Approach_to_decisionmaking.pdf

⁴³ Regulation 2, CLS Financial Regs 2000

⁴⁴ Funding Code Guidance, para 3.3, "Application on behalf of a child or a person incapable of managing their own affairs

⁴⁵ Paragraph 3.1, Section 3 of the Costs Assessment Guidance, March 2012.

Disbursements under Controlled Work may be incurred in the following circumstances:⁴⁶

- it is in the best interests of the client to do so;
- it is reasonable for the provider to incur the disbursement for the purpose of providing Controlled Work to the client;
- the amount of the disbursement is reasonable; and
- incurring the disbursement is not prohibited.⁴⁷

Although the civil legal aid specification only says 'may' be incurred, professional conduct rules require that they are incurred.

Experts' fees and codified rates

A new regime for experts' fees was begun by the Legal Services Commission on all funded work granted/signed from 3 October 2011.⁴⁸ It states:

'The Commission will not pay more than the codified rates unless there are exceptional circumstances and prior authority has been given to exceed the maximum rates. Exceptional circumstances means that the expert's evidence is key to the client's case and either the complexity of the material is such that an expert with a high level of seniority is required; or the material is of such a specialised and unusual nature that only very few experts are available to provide the necessary evidence.'⁴⁹

Experts not included in the list on Table 14 Payment Annex

The LSC states 'we will fund expert services of a type not listed in Part 14 of the Payment Annex at a rate that we from time to time determine and ... will

⁴⁶ Paragraph 4.21 - 4.24, Standard Civil Contract Specification 2010.

⁴⁷ See table in para 4.2 of the Standard Civil Specification 2010.

⁴⁸ Community Legal Services Funding Order (SI 2007/2441). See also list of experts' codified rates on Table 14, Payment Annex, 2010 Standard Civil Contract, web link:

http://www.legalservices.gov.uk/docs/civil_contracting/Civil_October_2011_Payment_Annex.pdf

⁴⁹ Paragraph 6.62 of the Standard Civil Contract Specification 2010.

have regard to the rates set out in table 14.’ The LSC may require ‘a number of quotes in respect of the provision of the relevant service.’⁵⁰

The maximum hourly rate for independent social workers is £30 per hour for outside London and £33 per hour for London (unless it can be demonstrated that they are undertaking work equivalent to specialist risk assessment for sexual abuse). However, it is possible in exceptional circumstances to exceed this maximum rate depending on the complexity of the matter or where the material is so specialised that there are only a very few experts available.⁵¹ More recent guidance from the Ministry of Justice states that in non-family cases the rates of £33 per hour (London) and £30 per hour (non-London) in family proceedings are to be used as the starting point, taking into account all the circumstances of the case and any evidence supplied by the provider to decide on the correct rate for each case. It goes on to confirm that the Legal Services Commission must justify why any rates that are claimed are not reasonable.⁵²

New Legal Aid changes from April 2013 and the impact of these on children and funding

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 was passed on 1 May 2012, but the new legal aid immigration provisions will not commence until 1 April 2013. The Ministry of Justice has published a number of draft specifications, regulations and policy statements and at the time of writing it is unclear whether these will be amended further. Much of what is in the current Funding Code will be in regulations. The Ministry of Justice has said it does not intend to have a lengthy funding code.

⁵⁰ *ibid* para 6.62

⁵¹ See also *A Local Authority v DS and others* [2012] EWHC 1442 (Fam), where the family court provides guidance on the fee for an independent social worker’s report

⁵² Ministry of Justice Guidance to the Legal Services Commission: *Guidance on Remuneration Rates for Expert Services Determined as Risk Assessments*, October 2012

Legal aid in the area of immigration and asylum will only be available for:

Asylum cases, defined as those cases involving rights to enter and remain in the United Kingdom arising from:⁵³

- The 1951 UN Convention Relating to the Status of Refugees;
- Articles 2 and 3 of the European Convention on Human Rights;
- Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof ('the Temporary Protection Directive');
- Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ('the Qualification Directive').

Immigration, but specifically only for:

- Applications for leave to enter or remain by a victim of trafficking, where there has been a conclusive determination under the Trafficking Convention, or there are reasonable grounds to believe that the person is a victim of trafficking and there has not yet been a conclusive determination that they are not;⁵⁴
- Applications for indefinite leave to remain under the domestic violence immigration rule⁵⁵ and for residence permits on the grounds of a retained right of residence⁵⁶ arising from domestic violence;⁵⁷
- Immigration detention, including bail applications and matters relating to temporary admission and release on restrictions;⁵⁸
- Asylum support where accommodation⁵⁹ is sought.⁶⁰ However, as previously, legal aid will not be available for representation before the First-tier Tribunal (Asylum Support).⁶¹

⁵³ Paragraph 30(1) of Sch 1, Part 1 of LASPO

⁵⁴ Paragraph 32(1), Sch 1, Part 1 of LASPO, of and subject to time restrictions so that the entitlement is not open ended.

⁵⁵ Paragraph 28, Sch 1, Part 1 of LASPO

⁵⁶ Under Reg 10(5) of the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003).

⁵⁷ Paragraph 29, Sch 1, Part 1 of LASPO

⁵⁸ Paragraphs 25-27 Sch 1, Part 1 of LASPO

⁵⁹ under ss. 4 and 95 of the Immigration and Asylum Act 1999

⁶⁰ Paragraph 31, Sch 1, Part 1 of LASPO

All other immigration applications are out of scope. This means legal aid will not be available for applications concerning Article 8 of the European Convention on Human Rights (right to respect for private and family life). Although strong arguments were put forward for legal aid to be preserved for non-asylum immigration cases for children, that was rejected by the government.⁶² Discussions on how such cases will be handled are continuing between stakeholders and the Ministry of Justice.

Judicial Review and funding under LASPO

Judicial review remains in scope⁶³ but in immigration cases is restricted by specific exclusions preventing the provision of civil legal services where:

- Judicial review is sought in relation to an issue in respect of which an appeal or judicial review of the same or substantially the same issue was resolved adversely to the applicant/appellant, less than one year previously;⁶⁴
- Judicial review is sought to challenge removal directions given not more than one year after a decision was made to remove the individual or any appeal against such a decision was determined.⁶⁵

These specific exclusions do not apply to judicial review of a negative decision in relation to an asylum application where there is no right of appeal to the First-tier Tribunal against the decision,⁶⁶ or to judicial review of a certificate that the case is clearly unfounded or could have been appealed against before.⁶⁷ Funding is stated only to be available where *all* (rather than all reasonable) administrative appeals and other alternative procedures which are available to

⁶¹ But note that such cases cannot be conducted under the immigration category, only the housing category, of work; LSC Category Definitions 2013.

⁶² There were debates on legal aid for children in the House of Lords on 12 and 27 March and 23 April 2012, and in the House of Commons on 17 April 2012. A letter to ILPA of 26 March 2012 from Lord Wallace of Tankerness, at <http://www.ilpa.org.uk/data/resources/14384/12.03.26-Lord-Wallace-re-legal-aid-for-children.pdf> explains the government's view that most children's cases would be asylum and this remains within scope, and that local authorities could assist them.

⁶³ Paragraph 19, Sch 1, Part 1 of LASPO

⁶⁴ Paragraph 19(5), Sch 1, Part 1 of LASPO.

⁶⁵ Paragraph 19(6), Sch 1, Part 1 of LASPO.

⁶⁶ Mainly refusals of further representations under paragraph 353 of the Immigration Rules.

⁶⁷ Under section 94 or 96 of the Nationality, Immigration and Asylum Act 2002 ('NIAA 2002') (para 19(7)), Sch 1 Part 1, LASPO.

challenge the act, omission or matter, have been exhausted.⁶⁸ This could, for example, mean that there could be no funding of a 'delay' judicial review if a complaint to the Parliamentary Ombudsman could be made or even that the existence of an out of country appeal right in a third country removal case could prevent funding of a judicial review of the removal. Negotiations are continuing to have that amended.

Future Changes in Scope

The Act allows the Lord Chancellor to make changes to vary, add to, or omit the definitions of services which are in scope.⁶⁹

Exceptional cases

Section 10 of LASPO provides for ***exceptional case funding*** for civil legal aid cases which would otherwise be out of scope. Applications for exceptional case funding in the immigration and asylum category of law have to be made to the Director of the Legal Aid Casework section.⁷⁰ Exceptional legal aid is to be provided if the non-provision of legal aid would itself be a breach of

- the individual's Convention rights (Human Rights Act 1998), or
- any enforceable European Union rights, or

Legal aid can also be provided when it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach.

The procedure for exceptional funding is set out in the current Draft Legal Services (Procedure) Regulations.⁷¹ It is intended that there be no right of

⁶⁸ Paragraph 53 draft Merits Criteria Regulations.

⁶⁹ Section 9 of LASPO.

⁷⁰ Paragraph 8.14, (draft) Immigration and Asylum Specification 2012

⁷¹ Part 8: Exceptional cases

appeal against the refusal of exceptional funding. In passing LASPO the government stated⁷² that they did not expect immigration cases to be entitled to exceptional funding under the Human Rights Act and rarely for European Union rights. The principal basis for this is that there is settled case law from the European Court of Human Rights that Article 6(1) of the ECHR is not engaged in immigration matters.⁷³ It can therefore be expected that attempts to get exceptional funding will be difficult, and involve challenges by way of judicial review and quite possibly litigation in the Court of Justice of the European Union and/or the European Court of Human Rights. This would be a very slow process. Arguments are likely to be advanced that Article 6(1) of the European Convention on Human Rights does apply in immigration cases, that procedural requirements of Article 8 of the European Convention on Human Rights can import a requirement for legal aid funding and that Article 47 of the Charter of Fundamental Rights of the European Union will require legal aid in a wide variety of cases involving EU citizens or their families.

Additionally, it may be that considering the Convention on the Rights of the Child (Article 12, the right to be heard and Article 3, the primacy of the interests of the child), applications for exceptional funding for children could be particularly strong (assuming they are financially eligible for legal aid – see above on aggregating the means of the person in whose care the child is). However, the expected slow processes for successfully challenging refusal of exceptional case funding in immigration mean that in most individual cases immigration legal work will need to be conducted before that can be resolved. It may become necessary to seek alternative funding, such as trying to require the local authority to fund the legal assistance needed for the child.

Attendance at asylum interviews under the new provisions

The draft immigration interview exceptions regulations 2012 would make funding available for the attendance at asylum screening and asylum interviews with unaccompanied asylum seeking children and other minors seeking asylum.

[http://www.legalservices.gov.uk/docs/cls_main/03_The_draft_Civil_Legal_Services_\(Procedure\)_Regulations_2012.pdf](http://www.legalservices.gov.uk/docs/cls_main/03_The_draft_Civil_Legal_Services_(Procedure)_Regulations_2012.pdf)

⁷² Lord Wallace of Tankerness, House of Lords *Hansard*, 12 March 2012, col. 129

⁷³ see *Maaouia v France* 39652/98 [2000] ECHR 455 (5 October 2000)

Where a person's age is uncertain, but the Secretary of State treats him/her as a child at an interview, the person will be treated as such for the purpose of funding these interviews.⁷⁴ This means that where the Secretary of State believes a person to be 18 or over (i.e. an age-disputed minor) there will be no funding available for attending asylum interviews. To safeguard the child's interests it would therefore appear necessary for the age dispute to have been resolved or for an injunction to be obtained requiring the UK Border Agency to treat the applicant as a child until it is resolved or to defer the interview. This is more restrictive than the current position (see above) which leaves the decision on whether the client should be funded for representation at the interview with the legal aid provider.

The new Immigration and Asylum Specification Draft 2013

This makes specific provisions⁷⁵ under the matter start rules. It states:

'Matter Start rules

1. An Asylum application and any Asylum appeal will constitute one matter. The appropriate UKBA unique client number will be that of the original Asylum application.
2. An immigration application and any Immigration appeal will constitute one Matter. The appropriate UKBA unique client number will be that of the original application given by the UKBA.
3. *Any associated or additional application* to an application within scope of Part 1 of Schedule 1 to the Act *on human rights grounds* will also form part of the same Asylum Matter (emphasis added).
4. Where a Client has made or wishes to make a fresh application for asylum then this new application would constitute a new Matter Start.

⁷⁴ Regulation 2(b), Draft Immigration Interview Exceptions Regulations 2012.

⁷⁵ Paragraphs 8.29-8.33, Immigration Specification, 2013, available at http://www.legalservices.gov.uk/docs/cls_main/Immigration_and_Asylum_Specification_Sep12.pdf

⁷⁶ Paragraph 6-7 Policy Statement- Connected Matters, 2012, see web link: http://www.legalservices.gov.uk/docs/cls_main/09_Policy_Statement_-_Connected_Matters.pdf

5. Where you have an ongoing matter, work undertaken in relation to a determination that the client qualifies for civil legal services provided as Licensed Work, including complying with any pre-action protocol, may be undertaken as part of the same Matter.’

Paragraph three above appears to imply that a mixed case of asylum and Article 8 may be treated as one matter and work which would be out of scope may therefore be carried out under the same asylum matter. This interpretation would appear to contradict the Ministry of Justice *Policy on Connected Matters*.⁷⁶ It is probable that the majority of children’s asylum applications will include Article 8 claims so this issue is of the greatest concern.

According to the Policy Statement on Financial Eligibility and Contributions,⁷⁷ the contents of the current Community Legal Services (Financial) Regulations 2000⁷⁸ will be expected to remain the same. This means that the rule on ‘other person’s resources’ will apply.

In respect of children and Controlled Work, it will continue to mean that the resources of a parent, guardian or any person who is responsible for maintaining a child, or who usually contributes substantially to the child’s maintenance, will be treated as the child’s resources unless, having regard to all the circumstances, including the age and resources of the child and any conflict of interest, it appears inequitable to do so.⁷⁹

In most immigration cases, where any conflict of interest or other circumstances including the age and resources of the child cannot be established and so the child cannot financially qualify for funding, the local authority will continue arguably to be expected to pay for the child’s legal costs in Controlled Work.⁸⁰ Some local authorities accept such an obligation whilst others do not.

A further change is that the draft immigration specification requires the CW4 notice and review form to be served by the legal representative on the client ‘as

⁷⁷ The current Financial Regulations are unlikely to change, see web link: http://www.legalservices.gov.uk/docs/cls_main/11_Policy_Statement_-_Financial_Eligibility_and_Contributions.pdf

⁷⁸ SI 2000/516

⁷⁹ Community Legal Services (Financial) Regulations 2000, SI 2000/516, Reg 11 (3).

⁸⁰ See various ILPA communications on the ongoing Government proposals on the funding of children’s immigration cases. In particular, see Legal Aid and Children in the Care of Local Government, 1/10/12: <http://www.ilpa.org.uk/data/resources/15528/12.10.01-Meeting-re-legal-aid-separated-children-FINAL.pdf>.

soon as possible' and in any event within five days (which is the present deadline). Given the lack of time appellants have available before their appeal hearing takes place in the Tribunal, the tightening of this requirement to inform them of their right to appeal against a refusal of CLR funding, is welcome. The client will have 14 days in which to appeal to the Director of the Legal Aid Casework Team.⁸¹

There is a small but welcome change proposed in the specification to allow referral of an unaccompanied asylum seeking child who is having difficulties about support from his/her local authority to an appropriate specialist adviser be that a family lawyer (as now specified) or a public law, housing or community care lawyer.

There are other minor changes in the draft wording of some of the rules but none seem to be particularly significant, but at the time of writing the wording is not finalised.

⁸¹ Regulation 44(1), The Draft Legal Civil Legal Services (Procedure) Regulations 2012, see web link: [http://www.legalservices.gov.uk/docs/cls_main/03_The_draft_Civil_Legal_Services_\(Procedure\)_Regulations_2012.pdf](http://www.legalservices.gov.uk/docs/cls_main/03_The_draft_Civil_Legal_Services_(Procedure)_Regulations_2012.pdf)



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