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JUSTICE

Legal Aid and the Nationality and Borders Bill

A Joint Briefing by Public Law Project and JUSTICE for House of Commons Committee Stage

About Public Law Project

Public Law Project ('PLP') is an independent national legal charity. We work through a combination of research, policy work, training and legal casework to promote the rule of law, improve public decision-making and facilitate access to justice.

About JUSTICE

JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

Executive Summary

The overarching aims of the New Plan for Immigration include to 'increase the fairness and efficacy of our system...'. In presenting this Bill, the Home Secretary's stated aim is to 'make courts and immigration tribunals more efficient'¹ while 'improved access to legal advice is intended to help people raise such matters as early as possible and avoid last minute and repeat issues being raised.'² As presented, the Bill makes limited provision to achieve these aims by introducing **(1)** up to 7 hours of legal aid advice on any aspect of immigration law for those served with a Priority Removal Notice (**clause 22**) and **(2)** 'add-on' provision for legal advice in relation to a referral into the National Referral Mechanism for those who are receiving advice on any other 'in scope' immigration or asylum matter (**clause 54**), and in any case where Exceptional Case Funding is granted in an immigration case (**clause 55**).

We acknowledge the manifesto commitment of the current Government to 'access to justice for ordinary people'. As charities concerned with access to justice we share this aim, and we regard the Government's recognition that access to legal advice needs to be improved under the legal aid scheme as a promising policy development. However, we are concerned these provisions will not be effective in ensuring that individuals are able to resolve issues with their immigration status at an early stage. To achieve that objective, people require access to competent legal advice on all aspects of immigration and asylum law at all stages of the process. That advice will ensure that the appropriate application is made with the best available evidence at the earliest opportunity; it will also increase the likelihood that those who have no basis to remain in the UK are advised of this at an early stage and can make arrangements for a safe and dignified return to their country of origin.

¹ Nationality and Borders Bill, Second Reading debate, 19 July 2021, Hansard, Volume 699, <<https://hansard.parliament.uk/Commons/2021-07-19/debates/FC19E458-F75D-480D-A20D-CD1E7ADC937E/NationalityAndBordersBill#contribution-66D04844-7C9F-40EE-8A70-A9D32F8ABE77>>. Column 706.

² Nationality and Borders Bill, Explanatory Notes (Bill 141-EN) <<https://publications.parliament.uk/pa/bills/cbill/58-02/0141/210141.pdf>>. Para 29.



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The Home Secretary's objective of securing a fair and efficient system will not be realised through the provision of advice only at the point when a person is being prioritised for removal by the Home Office and has been served with a 'priority removal notice' (**Clause 22**). It is important to note that the Home Secretary **may** serve such a notice before taking removal action but is not required to do so.

Conversely, the Bill fails to make provision for access to legal advice for those served with notice of removal directions –despite this being the acknowledged purpose³ of the new statutory minimum notice period for removal directions (in **Clause 43**). A person served with notice of removal directions may never have received a 'priority removal notice' and so never had the opportunity to access the 7 hours of legal aid advice. Alternatively, it may have been months or years since they had that opportunity and their circumstances may have changed.

The provision of legal aid to individuals who seek redress is not simply a matter of compassion, but a key component in ensuring the constitutional right of access to justice, itself inherent in the rule of law⁴ and an essential precondition of a fair and democratic society. Failure to provide it can amount to a breach of fundamental rights⁵ under the common law and/or the European Convention on Human Rights.

Owing to fundamental and longstanding flaws in the current civil legal aid scheme, we consider the current proposal will not be effective and that the stated aims can only be achieved by additionally restoring legal aid for all immigration matters, at all stages of the immigration system. We explain these points in further detail below. In addition, we draw attention to the need to urgently address the accessibility and sustainability of the legal aid scheme if the additional legal aid provision in the Bill is to be effective in practice.

In order to extend the availability of legal aid for immigration cases, we recommend that the Bill be amended (as detailed in separate document) as follows:

1. Insert a new clause to provide for civil legal aid to be available in respect of all immigration matters at all stages (subject to financial eligibility and merits criteria) (**see Amendment 1**), or alternatively for those who are liable to removal or deportation (**see Amendment 2**)
2. Amend clause 22 to ensure the new legal advice offer in the Bill is available when a person is served with notice of removal directions under clause 43(1), and not only when they are served with a Priority Removal Notice under clause 18. (**Amendment 3**)

These amendments are necessary, not only to ensure fairness and access to justice for those subject to immigration controls, but in order to meet the Home Office aims of creating a fairer and more efficient system.

³ Para 493 of the [explanatory notes](#) to the bill.

⁴ R (Unison) v Lord Chancellor [2017] UKSC 51, at [6] and [66], per Lord Reed.

⁵ R (Gudanaviciene) v Director of Legal Aid Casework [2014] EWCA Civ 1622, at [56], per Lord Dyson MR.



Background: access to immigration advice under the Legal Aid, Sentencing and Punishment of Offenders Act 2012

Unless amended, the provisions in the Bill that concern legal aid will fall short of achieving the Home Office objective of ensuring access to legal advice at an early stage to reduce late and repetitive claims. The legal aid provisions are both reliant on existing legal aid provision, which since 2000 has been significantly reduced, resulting in restricted access to justice for individuals, and are unsustainable due to legal aid deserts and the stark gap between need and readily accessible services. The majority of non-asylum immigration work was removed from the scope of legal aid in England and Wales by the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012.⁶ This change significantly altered the way that civil legal aid operates. Changes were made not only to the scope of legal aid, but also to the procedures and processes that clients and lawyers had to follow in order to access funding for legal services. After nearly ten years of LASPO, the removal of significant areas of law from the scope of legal aid continues to restrict access to justice, meaning people who cannot afford to fund legal advice are often unable to access advice on highly complex areas of law.

The Post-Implementation Review (PIR) of LASPO concluded that rather than generating value for money, some stakeholder feedback suggested that implementing the £15 million reduction in spending on legal aid came at the expense of efficiency and equity in allocating public resources.⁷ The PIR found: “in particular, stakeholders have pointed towards issues pertaining to self-representation by particularly vulnerable groups and the risk of losing broad legal expertise in all immigration matters as providers specialise in asylum law”.⁸

The Exceptional Case Funding scheme is an unnecessary barrier to access to advice

The Exceptional Case Funding (ECF) scheme was introduced to ensure that individuals would still be able to access legal aid where their human rights would otherwise be breached. Increasingly, people have been able to get ECF through the scheme for immigration cases. Since the cases of *Gudanaviciene* and *I.S.*⁹ the number of applications for immigration ECF and the grant rate have significantly increased and continue to rise. They remain higher than applications in any other area of law.¹⁰ In the last financial year, (2020/21) there were 3,338 ECF applications, of which 2,335 were for immigration matters. Of these, there were 2,014 grants of immigration ECF, representing a very high grant rate of 86.25%.¹¹

⁶ Legal Aid, Sentencing and Punishment of Offenders Act 2012. Schedule 1, Part 1.

⁷ For further discussion of this, see: Kirsten Hudak and Dr Emma Marshall, ‘The case for broadening the scope of immigration legal aid’ (Public Law Project, April 2021) <<https://publiclawproject.org.uk/content/uploads/2021/04/Legal-aid-briefing.pdf>>.

⁸ Ministry of Justice, ‘Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)’ (February 2019, CP 37) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf>. Para 283.

⁹ Katy Watts, ‘Exceptional Case Funding’ (Public Law Project, 2018) <<https://publiclawproject.org.uk/resources/exceptional-case-funding-briefing/>>.

¹⁰ Ministry of Justice, ‘Legal Aid Statistics: January to March 2021’ (24 June 2021) <<https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2021>>.

¹¹ Ibid.



Although introduced as a safeguard where fundamental rights may be at risk,¹² ECF operates as a barrier to access to justice. Despite high grant rates in immigration, potentially thousands of vulnerable people still fail to access the ECF scheme, with the overall number of ECF applications consistently failing to reach the anticipated levels of 5,000 to 7,000 applications per year.¹³ The intended purpose of ECF is that where an individual's rights are at risk of being breached (or are actually being breached), they should have access to legal advice and representation. The scheme is most effectively accessed with the help of legal aid providers, but providers are systemically disincentivised from making applications, as the process is time-consuming and completed at risk of not being paid unless the application is successful.¹⁴ The complexity of the application process, the delays in decision-making, and the absence of an effective urgent case procedure are well documented.¹⁵ Evidence shows that ECF contributes to making the legal aid scheme for providers unviable.¹⁶ Individuals can apply to the scheme themselves, but application numbers are relatively low due to the inaccessibility of the scheme. The application process is complex and requires submission of detailed evidence, which makes it difficult for individuals to navigate on their own. Many direct applicants to the scheme rely on the help of charities who have built expertise in assisting with applications.

The steadily increasing grant rate of ECF for immigration matters suggests there is little economic value in creating additional bureaucratic review and administration of applications that are overwhelmingly granted. There is no evidence that confirms the ECF scheme is an efficient use of public expenditure, as the Government has not collected the data needed to show that the scheme represents value for money.¹⁷ As immigration cases are subject to increasingly high grant rates each year, it raises the question of whether applying the scheme for immigration cases actually represents a false economy where the cost of processing applications outstrips the cost of providing legal aid for early advice across all areas of immigration.

¹² LASPO introduced a revised ECF scheme intended to be a 'safety net to ensure that legal aid was available when an individual's human rights were breached'. See: Ministry of Justice, 'Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)' (February 2019, CP 37)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf>. Para 118 and 1165.

¹³ Justice Committee, 'Impact of Changes to Civil Legal Aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 Eighth Report of Session 2014–15' (May 2015)<<https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf>>.

¹⁴ See: Public Law Project, 'PLP survey shows lack of faith in legal aid scheme' (January 2020)

<<https://publiclawproject.org.uk/uncategorized/improving-exceptional-case-funding-providers-perspectives/>>

¹⁵ Ministry of Justice, 'Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)' (February 2019, CP 37)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf> and Ministry of Justice, 'Legal Support: The Way Ahead. An action plan to deliver better support to people experiencing legal problems' (February 2019, CP 40)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777036/legal-support-the-way-ahead.pdf>.

¹⁶ Kirsten Hudak and Dr Emma Marshall, 'The case for broadening the scope of immigration legal aid' (Public Law Project, April 2021) <<https://publiclawproject.org.uk/content/uploads/2021/04/Legal-aid-briefing.pdf>>.

¹⁷ The PIR was also unable to conclude on whether the overall ECF scheme represents value for money for the taxpayer. See: Ministry of Justice, 'Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)' (February 2019, CP 37)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf>. Para 595.



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PLP's research paper, "[The case for broadening the scope of immigration legal aid](#)",¹⁸ documents how the limited scope of legal aid for immigration matters has negatively impacted on access to justice in practice for those who must seek ECF in order to enforce their human rights. Further, it considers why broadening the scope of legal aid is necessary to ensure access to justice, and in particular highlights the need to, at a very minimum, bring human rights immigration cases back within the scope of legal aid based on the right to respect for private and family life under Article 8 of the European Convention on Human Rights. Current policy on immigration legal aid does not only concern individuals with immigration cases, it has a wider impact on British society. Article 8 immigration cases concern the rights of individuals to live with their family or remain in their communities.

Earlier this year, the future of legal aid was considered by the Justice Committee who published a report calling for an overhaul of the current system designed around the needs of those who use it, with a greater number of providers able to access the necessary funding to ensure consistent access to legal aid lawyers for those who need legal assistance.¹⁹ Emphasis on the significant reform needed to ensure a fair system, and the inadequacy of current practice, highlights the need for urgent and substantive action.

The Justice Committee found that the lack of adequate Government response to similar concerns raised in 2015 and 2019 is unsatisfactory, recommending that the ECF scheme be improved so that those without sufficient financial means are on equal terms with those that can afford representation and so that it is accessible to individuals who apply without the help of a lawyer. The Joint Committee on Human Rights has also previously recommended that the Government consider bringing all immigration matters engaging Article 8 right to a private and family life back into the scope of legal aid.²⁰

Finally, we reiterate the findings of the JCHR in its report on immigration detention. Noting the availability of legal aid in criminal cases to challenge both detention *and* the underlying charges, and comparing that with immigration, it highlighted the false economy that likely results from restrictions on immigration legal aid:

*'Restricting legal aid to such [detention] challenges without addressing the underlying immigration case may undermine the effectiveness of such challenges. It may also be a false economy. Not only is detention itself expensive, but there are likely to be costs elsewhere in the system, if the lack of legal aid means it takes longer to settle someone's immigration status and wastes more court time with unrepresented individuals. It could be cheaper overall if legal advice were provided at the outset, so that all issues could be properly considered when the issues first arise and thereby reduce the need for repeated court interventions.'*²¹

¹⁸ Kirsten Hudak and Dr Emma Marshall, 'The case for broadening the scope of immigration legal aid' (Public Law Project, April 2021) <<https://publiclawproject.org.uk/content/uploads/2021/04/Legal-aid-briefing.pdf>>.

¹⁹ House of Commons Justice Committee, 'The Future of Legal Aid', (July 2021) <<https://committees.parliament.uk/publications/6979/documents/72829/default/>>.

²⁰ Joint Committee on Human Rights, 'Enforcing Human Rights', (July 2018) para 55 <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/669/66906.htm#_idTextAnchor024>.

²¹ Joint Committee on Human Rights, 'Immigration Detention', (February 2019) <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1484/148406.htm#_idTextAnchor022>



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Increase in legal advice deserts

PLP's research has shown that the cuts to early advice introduced by LASPO in most areas of legal aid have resulted in the formation of 'advice deserts', which threaten access to justice.²² The closure of advice and not-for-profit organisations has led to significant areas of the country where there are no immigration legal aid providers at all.²³ In 2015, a report by the House of Commons Justice Committee on the impact of changes to civil legal aid, criticised the Government for the lack of information concerning the geographical coverage of advice.²⁴ Advice deserts, then, are areas where the supply of legal advice is unavailable or severely limited in practice.²⁵ In addition, even in areas where immigration legal advice is available, there is an "an overwhelming gap" between need and capacity or supply.²⁶ Cuts to legal aid have also had unintended consequences, as highlighted by NACCOM and Refugee Action where access to advice even for those whose cases are in scope has been restricted.²⁷

There is also significant evidence that the restricted scope of immigration legal aid contributes to issues with sustainability within the sector. Without addressing these issues, the proposed changes have the potential to place further pressure on the legal aid scheme, rendering the proposed 7 hours of advice ineffective at ensuring fairness and efficacy. Where individuals are unable to obtain advice, it may create further complications for any potential removal process, or in cases where individuals do obtain advice, they may find that they have substantive legal claims that go back into the system at a higher cost to the taxpayer. Bringing immigration legal aid back into scope would help to make the sector more sustainable and assist in addressing advice deserts, making it more likely that those who need immigration advice can access it at an early stage. This will contribute to the Home Office's aims of making the whole system fairer and more efficient.

Importance of early access to legal advice

Further, the benefit of access to early legal advice was recognised by the former Secretary of State for Justice, David Gauke MP, who in the Government's review of LASPO, acknowledged the importance of early advice, which can stop a small problem escalating into a full-blown crisis.²⁸ More recently, the Bar Council argued that addressing problems at the earliest point is "absolutely key" in stopping problems escalating, and if they do escalate, they can be better informed as to what to focus on.²⁹

²² Mary Evenden, 'Legal aid and access to early advice' (Public Law Project, April, 2018)

<<https://publiclawproject.org.uk/content/uploads/2018/05/Legal-aid-and-access-to-early-advice.pdf>>.

²³ See: Dr Jo Wilding, 'Droughts and Deserts' (2019) <[http://www.jowilding.org/assets/files/Droughts and Deserts final report.pdf](http://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf)> on reasons for the market failure in immigration and asylum legal aid and map (p. 9) identifying local authority areas with no immigration and asylum providers.

²⁴ Ibid, p. 10.

²⁵ Ibid, p. 40.

²⁶ Dr Jo Wilding, Maureen Mguni & Travis Van Isacker, 'A Huge Gulf: Demand and Supply for Immigration Legal Advice in London' (June 2021) <<https://www.phf.org.uk/publications/a-huge-gulf-demand-and-supply-for-immigration-legal-advice-in-london/>>.

²⁷ NACCOM & Refugee Action, 'Tipping the Scales: Access to Justice in the Asylum System' (May 2018)

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

²⁸ Ministry of Justice, 'Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)' (February 2019, CP 37)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf>.

²⁹ Justice Committee, 'Oral evidence: (a) [Court Capacity](#), HC 284; (b) [Future of Legal Aid](#) HC 289, Q107' (12 January 2021),

<<https://committees.parliament.uk/oralevidence/1518/html/>>



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Limited legal aid provisions fail to achieve access to justice

The consequence of these issues is that the limited provision for additional legal aid in the Bill, while welcome, will not achieve the Home Office's aim of creating an immigration system that is fairer and more efficient.

Statistics published by the Ministry of Justice and Legal Aid Agency show that successful ECF immigration applications are increasing, and immigration cases make up a significant proportion of ECF applications. The figures for 2019/20 showed that only 151 immigration applications for ECF were refused due to the ECF criteria not being met, which was just under 6% of the total number of applications. There is no data available from Government on the operational costs of processing these applications. Given the inconclusive findings of the PIR in respect of the economy, efficiency, effectiveness and equity of the ECF scheme, it is important for the Government to acknowledge the cost of processing a significant number of applications per year for ECF in immigration legal aid in order to determine the small percentage of applications submitted that do not meet the criteria for the ECF scheme. It is also important to consider the other knock-on effects of the current restrictions on legal aid and the limitations of the current proposals within the Bill. For these reasons we recommend the amendments set out above.

Therefore, consideration must be given to bringing non-asylum immigration cases, back into the scope of legal aid, particularly Article 8 cases which concern the rights of individuals to live with their family or remain in their communities.. Doing this would help to address practical barriers for those who need legal aid and enable individuals who cannot afford to fund immigration advice to access advice on highly complex matters, ensuring that they are resolved as early and efficiently as possible. At the same time, it would help to mitigate serious concerns about the operation, inaccessibility and complexity of the ECF scheme and the impact on specific groups. At a very minimum, broadening the scope of immigration matters for which legal aid is available has the potential to increase the sustainability of legal aid practitioners and providers but other reforms, beyond the scope of this Bill, are likely also needed to achieve this.

Ensuring access to justice prior to removal

Clause 43 makes clear in statute the duty on the Home Office to tell people in advance when they are going to be removed from the UK. For more than 10 years, the courts have recognised that this duty to give notice of removal is essential to access to justice and the rule of law.³⁰ For the first time, the Bill places this duty on an explicit statutory footing. The Explanatory Notes to the Bill make clear that the purpose of the notice period is to enable individuals to access justice prior to removal (para 493), and that by legislating for a statutory minimum period, the Bill aims to 'standardise the time to access legal advice' (para 497).

And yet the proposal does not identify how the government will ensure access to legal advice or the quality of advice provided. Although there is a Detained Duty Advice scheme for those in immigration detention centres, this only offers an initial 30-minute appointment at which advisors must assess eligibility for legal aid. It does not address the need for advice on issues outside the scope of the existing legal aid scheme, including claims based on family life for which an application for ECF must be made. Moreover, it is only available to those in immigration detention when served

³⁰ *R (Medical Justice) v SSHD* [2010] EWHC 1925 (Admin); [2011] EWCA Civ 269 and *R (FB (Afghanistan) & Medical Justice) v SSHD* [2020] EWCA Civ 1338.



with Notice of Removal Directions, and not for those who are in the community, or detained in the prison estate. In her report on accessing legal aid for immigration advice, Dr Jo Wilding notes, ‘people detained in prisons are often unable to access any immigration legal advice because there are no advice surgeries and communication with lawyers is difficult’, where ‘detainees have no meaningful choice of provider and cannot change providers if they are dissatisfied.’³¹ Research by Dr Anna Lindley, which was commissioned by the Bar Council, also documents concerns about the Detained Duty Advice scheme, including high levels of demand and delays in securing an appointment.³²

If the purpose of the notice period is – as stated – to enable those facing removal to access legal advice and the courts then it is essential that people served with the notice are able in practice to access that advice. Without amendment, the entitlement to 7 hours of legal aid advice will only be available to those individuals on whom the Home Secretary has decided to serve a ‘priority removal notice’ (Clause 22). It is important to note that she is not required to serve a ‘priority removal notice’ in all cases. In addition, there is likely to be a long interlude of months or even years between service of a ‘priority removal notice’ and notice of removal directions (Clause 43), the required step in all cases before removal actually takes place. That may be for reasons both within the Home Office’s control (such as a delay in considering submissions made in response to the PRN) or outside of them (such as a delay in the country of origin providing a replacement travel document). Individuals will need further advice where there has been a material change in circumstances.

We recommend to that end that:

- Clause 22, which provides for 7 hours of legal aid to be available for those served with a Priority Removal Notice to receive advice on their immigration status and removal, be amended to provide for that advice to be also available when a person is served with Notice of Removal Directions under Clause 43;
- Urgent attention is given to the need to ensure the accessibility, quality and sustainability of immigration advice for those who are served with Notice of Removal Directions, whether in detention or in the community.

³¹ Dr Jo Wilding, ‘Droughts and Deserts’ (2019) <http://www.iowilding.org/assets/files/Droughts and Deserts final report.pdf>. P. 42.

³² Dr Anna Lindley, ‘Injustice in Immigration Detention : Perspectives from legal professionals’ (The Bar Council, November 2017) <http://www.aviddetention.org.uk/sites/default/files/images/171130_injustice_in_immigration_detention_dr_anna_lindley.pdf>