



# The case for broadening the scope of immigration legal aid

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# Introduction



The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) removed most immigration matters from the scope of legal aid.<sup>1</sup> 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. Since the Act came into force, the number of ECF applications for immigration legal aid, and the grant rate, has gone up significantly and continues to be higher than any other area of law.<sup>2</sup> There were 2,525 immigration applications made in the 2019/2020 financial year and over 80% of those applications were successful.<sup>3</sup> The ECF scheme does, however, remain an additional and complex process that advisers must go through to get legal aid for their clients, or that individuals must navigate themselves where they are unable to find a provider to make an application on their behalf. Based on these reasons and the available evidence, this research briefing considers why broadening the scope of legal aid is necessary to ensure access to justice, and in particular the need to bring back within the scope of legal aid human rights immigration cases based on the right to respect for private and family life under Article 8 of the European Convention on Human Rights.

The effects of the reduced scope of legal aid under LASPO have been well documented by academics and non-governmental organisations, with many research reports highlighting that 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.<sup>4</sup> It is also unclear whether the scheme is an efficient use of public expenditure, as government has not collected data to allow for such analysis.<sup>5</sup>

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<sup>1</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012. Schedule 1, Part 1.

<sup>2</sup> Ministry of Justice, 'Legal Aid Statistics Quarterly, England and Wales January to March 2020' (2020)

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/895088/legal-aid-statistics-bulletin-jan-mar-2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895088/legal-aid-statistics-bulletin-jan-mar-2020.pdf)>.

<sup>3</sup> Ibid. Figures reported here refer to the last complete financial year for which data is available. Figures reported so far for the financial year 2020/21 show a temporary reduction in the number of applications at the start of the Covid-19 pandemic. See Ministry of Justice, 'Legal aid statistics: October to December 2020' (2020) <<https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-october-to-december-2020>>.

<sup>4</sup> Amnesty International, 'Cuts That Hurt: The Impact of Legal Aid Cuts in England on Access to Justice' (2016) <[https://www.amnesty.org.uk/files/aiuk\\_legal\\_aid\\_report.pdf](https://www.amnesty.org.uk/files/aiuk_legal_aid_report.pdf)>; The Law Society, 'Access Denied? LASPO Four Years on: A Law Society Review' (June 2017) <<https://www.lawsociety.org.uk/support-services/research-trends/laspo-4-years-on/>>; Joint Committee on Human Rights, 'Enforcing Human Rights: Tenth Report of Session 2017-19' (2018) <<https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/669/66902.htm>>.

<sup>5</sup> National Audit Office, 'Implementing Reforms to Civil Legal Aid HC 784 SESSION 2014-15' (2014) <<https://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf>>; Ministry of Justice, 'Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)' (February 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf)>. Para 283.





Overall, legal aid expenditure has been reduced far beyond what was anticipated under the Act.<sup>6</sup> The introduction of LASPO resulted in a significant underspend in the budget of the Ministry of Justice,<sup>7</sup> and in any case immigration matters represented a small proportion of pre-LASPO legal aid expenditure.<sup>8</sup> Expenditure on legal aid by the Ministry of Justice (MOJ) in the year 2018/19 was around £1.7 billion, which was ‘29% lower in real terms than the amount spent in 2010/2011’.<sup>9</sup>

Given the potentially serious consequences for individuals who are unable to access legal aid in immigration cases, in terms of potential breaches of human rights or unlawful removal, this briefing examines the extent to which the ECF scheme creates an unnecessary and harmful barrier to justice for individuals experiencing the immigration system. The analysis is based on themes from a review of existing literature, published ECF data and supported by a recent empirical case study of an organisation that provides support to individuals who need to apply for immigration ECF. In doing so the paper brings together three key arguments that support the case for reviewing the scope of immigration legal aid and bringing further matters<sup>10</sup> back into scope: ECF creates an unnecessary and harmful barrier to justice for individuals within the immigration system; ECF contributes to making the legal aid scheme for providers unviable as a whole; and, ECF cannot be justified in economic terms when grant rates for immigration are so high.

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<sup>6</sup> National Audit Office, ‘Implementing Reforms to Civil Legal Aid HC 784 SESSION 2014-15’ (2014) <<https://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf>>. Para 5; 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’ (2015) <<https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf>>.

<sup>7</sup> 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’ (2015) <<https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf>>.

<sup>8</sup> Fabian, Society, ‘The Right to Justice. The Final Report of the Bach Commission’ (2017) <[http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission\\_Right-to-Justice-Report-WEB.pdf](http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission_Right-to-Justice-Report-WEB.pdf)>. Page 32.

<sup>9</sup> House of Commons Library, ‘The Spending of the Ministry of Justice’ (2015) <<https://commonslibrary.parliament.uk/research-briefings/cdp-2019-0217/>>.

<sup>10</sup> The Government has already made some changes, particularly in respect of legal aid for separated migrant children with immigration cases. See Ministry of Justice, ‘Legal Support: The Way Ahead’ (2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777036/legal-support-the-way-ahead.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777036/legal-support-the-way-ahead.pdf)>.



# Background: changes to the scope of legal aid for immigration under LASPO

One of the main aims of LASPO was to ensure that legal aid would be targeted at those most in need. To meet this objective, the government at the time intentionally directed in-scope legal aid toward asylum cases, deeming them to be the highest priority type of case within the broader category of immigration matters.<sup>11</sup> A number of non-governmental organisations, including human rights charities and international bodies,<sup>12</sup> as well as Parliamentary reports,<sup>13</sup> have repeatedly emphasised, however, that restrictions to legal aid for advice and representation in immigration matters can result in serious breaches of human rights. Literature on the impact of LASPO finds that the failure of the system arises from ‘structural disincentives’ for lawyers with legal aid contracts to make ECF applications,<sup>14</sup> as well as the inaccessibility of the scheme to individuals.<sup>15</sup>

Within the initial proposals for the reform of legal aid, the Coalition Government, when planning the LASPO legislation, adopted the position that immigration matters are largely a matter of personal choice, under the assumption that people can choose whether or not they wish to apply to extend their stay in the United Kingdom. The proposal for reform of the legal aid system, which was put forward by the Coalition Government in 2010, argued that although immigration cases may raise issues of family or private life these factors do not rise to a sufficient level of importance to justify

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<sup>11</sup> Ministry of Justice, ‘Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)’ (February 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf)>. Para 17.

<sup>12</sup> Amnesty International, ‘Cuts That Hurt: The Impact of Legal Aid Cuts in England on Access to Justice’ (2016) <[https://www.amnesty.org.uk/files/aiuk\\_legal\\_aid\\_report.pdf](https://www.amnesty.org.uk/files/aiuk_legal_aid_report.pdf)>; Equality and Human Rights Commission, ‘The Impact of LASPO on Routes to Justice’ (September 2018) <<https://www.equalityhumanrights.com/sites/default/files/the-impact-of-laspo-on-routes-to-justice-september-2018.pdf>>; Equality and Human Rights Commission, ‘Progress on Socio-Economic Rights in Great Britain: Update Report on Great Britain’s Implementation of the International Covenant on Economic, Social and Cultural Rights’ (2018) <<https://www.equalityhumanrights.com/sites/default/files/progress-on-socio-economic-rights-in-great-britain.pdf>>.

<sup>13</sup> Joint Committee on Human Rights, ‘Enforcing Human Rights: Tenth Report of Session 2017-19’ (2018) <<https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/669/66902.htm>>. Para 29.

<sup>14</sup> *I.S. v Director of Legal Aid Casework and the Lord Chancellor* [2016] EWCA Civ 464 [57]; Amnesty International, ‘Cuts That Hurt: The Impact of Legal Aid Cuts in England on Access to Justice’ (2016) <[https://www.amnesty.org.uk/files/aiuk\\_legal\\_aid\\_report.pdf](https://www.amnesty.org.uk/files/aiuk_legal_aid_report.pdf)>. Page 26.

<sup>15</sup> The Law Society, ‘Access Denied? LASPO Four Years on: A Law Society Review’ (June 2017) <<https://www.lawsociety.org.uk/support-services/research-trends/laspo-4-years-on/>>.



continued legal aid spending.<sup>16</sup> These assertions were also based on a set of assumptions: that individuals are able to navigate the immigration system effectively without legal advice; the accessibility of the tribunal system for lay persons makes representation non-essential to the fair and effective functioning of the justice system; and, non-asylum cases do not routinely involve issues complex enough or that engage individual vulnerabilities necessary to justify immigration falling within the usual scope of legal aid.<sup>17</sup>

In its 2011 response to *Reform of Legal Aid*, the Immigration Law Practitioners' Association (ILPA) challenged the grounds asserted by the Government at the time that, first, immigration matters are ones of personal choice and, second, any impediments to the ability of individuals to represent themselves in immigration cases, even those engaging an Article 8 right to private and family life, are not significantly important to warrant the provision of legal aid as a matter of course. ILPA contested these statements, which were used by the Government to justify the removal of immigration from the scope of legal aid, on the basis that where the right to family and private life is at stake 'the interests of justice' require access to legal aid.<sup>18</sup> ILPA noted that in those cases where people are able to make personal choices in relation to immigration it is unlikely that they would satisfy the means test for legal aid, and that the people most likely to be impacted by the removal of legal aid would be those whose cases engaged a human rights arguments but who are unable to afford to pay for legal assistance.<sup>19</sup>

Immigration practitioners also emphasised that the claim by the Government, that individuals should be able to represent themselves in immigration matters, is a denial of the complexity of immigration law and the British immigration rules, as well as the Government's regulation of immigration advice, which places significant restrictions on who can provide legal support in immigration cases.<sup>20</sup> In its submissions, ILPA highlighted there are many types of immigration cases that fall outside what might be deemed an application based on 'personal choice'.<sup>21</sup> This is a similar position to that presented by the Low Commission in its comprehensive report from 2015, which states

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<sup>16</sup> Ministry of Justice, 'Proposals for the Reform of Legal Aid in England and Wales' (2010) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228970/7967.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228970/7967.pdf)>. Para 4.19.


<sup>17</sup> Ibid. Para 4.201-4.203.

<sup>18</sup> Immigration Law Practitioners' Association, 'ILPA Response to the Ministry of Justice Consultation: Proposals for the Reform of Legal Aid in England and Wales' (2011) <<https://ilpa.org.uk/wp-content/uploads/resources/4121/11.02.503.pdf>>. Page 10.

<sup>19</sup> Ibid.

<sup>20</sup> Sheona York, 'The End of Legal Aid in Immigration - a Barrier to Access to Justice for Migrants and a Decline in the Rule of Law' [2013] *Journal of Immigration, Asylum and Nationality Law* 106; see also, Ministry of Justice, 'Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)' (February 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf)>. Para 283.

<sup>21</sup> Immigration Law Practitioners' Association, 'ILPA Response to the Ministry of Justice Consultation: Proposals for the Reform of Legal Aid in England and Wales' (2011) <<https://ilpa.org.uk/wp-content/uploads/resources/4121/11.02.503.pdf>>. Page 7.



that immigration matters are often very complex and not the fault of individuals.<sup>22</sup> For example, where immigration matters arise due to administrative errors or poor decision-making by the Home Office.

The potential outcomes of immigration applications for individuals are an issue of particular significance in whether legal aid should be more widely available for human rights-based immigration matters. The submission by ILPA emphasised that individuals being unable to access legal aid for many types of immigration case could lead to the ‘disintegration of the family unit through separation’.<sup>23</sup> Although immigration matters engaging Article 8 rights may not meet the same level of risk of potential harm as asylum and protection cases that engage an Article 3 right to be protected from torture, inhuman, or degrading treatment, any potential breach of Article 8 nonetheless remains a very serious matter. The significance of family in an individual’s life and the negative implications of forced separation, especially on children, are recognised by the Courts.<sup>24</sup> On this basis ILPA argued that, at a very minimum, immigration matters engaging Article 8 rights should remain within the scope of legal aid.

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<sup>22</sup> Low Commission, ‘Tackling the Advice Deficit: A Strategy for Access to Advice and Legal Support on Social Welfare Law in England and Wales’ (2015) <<https://www.lag.org.uk/about-us/policy/the-low-commission-200551>>.

<sup>23</sup> Immigration Law Practitioners’ Association, ‘ILPA Response to the Ministry of Justice Consultation: Proposals for the Reform of Legal Aid in England and Wales’ (2011) <<https://ilpa.org.uk/wp-content/uploads/resources/4121/11.02.503.pdf>>. Page 9.

<sup>24</sup> ZH (Tanzania) v SSHD [2011] UKSC 4; Robert Thomas, ‘Immigration and Access to Justice: A Critical Analysis of Recent Restrictions’ in Ellie Palmer and others (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart Publishing 2016). Page 121.



# Developments in the ECF Scheme



Since the introduction of LASPO, the number of applications for ECF being submitted and granted has risen significantly in immigration law, signalling the necessity of legal aid in immigration cases to avoid breaches of human rights. In the first year of the legislation coming into effect there were 1,516 applications and just 70 grants of ECF across all areas of law. By comparison, as mentioned in the introduction to this briefing, in 2019/20 there were 2,525 immigration applications for ECF with 2,033 grants.<sup>25</sup> In the first quarter of 2020, 983 applications for Exceptional Case Funding were received, a 17% increase from the same period in 2019.<sup>26</sup> Further, the overall increasing number of ECF applications in the past two years is attributed to immigration applications.<sup>27</sup>

Despite the increased use of the ECF scheme for immigration cases, in general the scheme continues to be underutilised compared to the figures projected prior to the introduction of LASPO. The original Impact Assessment accompanying the reform anticipated 5,000 to 7,000 applications being made to the ECF scheme, of which ‘around 3,700 (74%—53%) would be granted’.<sup>28</sup> To date, however, applications and grants remain significantly lower than those estimates. The 2019/20 data from the Legal Aid Agency (LAA) reports a total of 3,747 applications made of which 2,564 were granted ECF.<sup>29</sup> The much lower than expected usage of the scheme in general has resulted in repeated assertions by non-governmental organisations, academics and human rights campaigners that the ECF scheme is not operating as an effective safety net to protect individuals from potential or actual human rights breaches.<sup>30</sup> The Government views the substantial increase in applications as evidence that legal aid is ‘still available and being

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<sup>25</sup> Ministry of Justice, ‘Legal Aid Statistics Quarterly, England and Wales January to March 2020’ (2020) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/895088/legal-aid-statistics-bulletin-jan-mar-2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895088/legal-aid-statistics-bulletin-jan-mar-2020.pdf)>.


<sup>26</sup> Ibid. Page 16.

<sup>27</sup> Ibid.

<sup>28</sup> 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’ (2015) <<https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf>>. Para 31.

<sup>29</sup> Ministry of Justice, ‘Legal Aid Statistics Quarterly, England and Wales January to March 2020’ (2020) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/895088/legal-aid-statistics-bulletin-jan-mar-2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895088/legal-aid-statistics-bulletin-jan-mar-2020.pdf)>.

<sup>30</sup> Amnesty International, ‘Cuts That Hurt: The Impact of Legal Aid Cuts in England on Access to Justice’ (2016) <[https://www.amnesty.org.uk/files/aiuk\\_legal\\_aid\\_report.pdf](https://www.amnesty.org.uk/files/aiuk_legal_aid_report.pdf)>; Fabian Society, ‘The Right to Justice. The Final Report of the Bach Commission’ (2017) <[http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission\\_Right-to-Justice-Report-WEB.pdf](http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission_Right-to-Justice-Report-WEB.pdf)>; Rights of Women, ‘Evidence for Joint Committee on Human Rights Inquiry into: Human Rights: Attitudes to Enforcement’ (2018) <<https://rightsofwomen.org.uk/wp-content/uploads/2018/03/Evidence-for-Joint-Committee-on-Human-Rights-Inquiry-into-Human-Rights-enforcement.pdf>>.



accessed’.<sup>31</sup>

In February 2019, the Ministry of Justice published its Post-Implementation Review (PIR) of LASPO.<sup>32</sup> The PIR measured the success of LASPO against the four objectives of the legislation originally set out in the Coalition Government’s response to the ‘Reform of Legal Aid in England and Wales Consultation’:

1. Making significant savings to the cost of the scheme;
2. Discouraging unnecessary and adversarial litigation at public expense;
3. Targeting legal aid at those who need it most;
4. Delivering better overall value for money for the taxpayer.<sup>33</sup>

The PIR maintained that LASPO had been successful in targeting legal aid at those who need it most in immigration cases, by focusing resources on asylum cases.<sup>34</sup> Another reported success was that the removal of most other areas of immigration matters from the scope of legal aid resulted in a significant reduction of spending on legal help. The PIR did, however, also acknowledge the reduction was not as great as anticipated given the larger number of non-asylum cases being granted funding under ECF on human rights grounds.<sup>35</sup> The PIR also highlights the limited evidence available on what steps individuals take to resolve their legal issue without legal aid.<sup>36</sup>

Despite the apparent success of the ECF scheme in some respects, especially the greatly increased number of immigration applications and grants of ECF, there remain serious concerns about the operation of the scheme as the effective ‘safety net’ that it was intended to provide, which will be examined further in the next sections of this briefing paper.

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<sup>31</sup> Ministry of Justice, ‘Legal Support: The Way Ahead’ (2019)

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777036/legal-support-the-way-ahead.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777036/legal-support-the-way-ahead.pdf)>. Page 13.

<sup>32</sup> Ministry of Justice, ‘Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)’ (February 2019)

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

<sup>33</sup> Ibid. Para 89.

<sup>34</sup> Ibid. Para 267.

<sup>35</sup> Ibid. Para 263.

<sup>36</sup> Ibid. Para 1148.

# The impact of LASPO on specific groups



In 2018, a legal challenge brought by the Children’s Society provided compelling grounds for why legal aid must be in scope for unaccompanied minors with immigration cases, ultimately resulting in the Government bringing legal aid for separated and unaccompanied children back within scope. The Children’s Society successfully argued that separated children with immigration cases should be able to access legal aid based on the extremely vulnerable position of children who are alone and the real risk of that vulnerability increasing as a result of their insecure immigration status. Further, the distinct circumstances that would otherwise prevent children from regularising their immigration status include ‘a highly complex immigration system that a child cannot navigate alone, the serious and life changing consequences as a result of failing to navigate that system effectively and the inadequacy of the ECF to act as a safety net for children’.<sup>37</sup> The case raises broader questions about the changes to the scope of immigration legal aid introduced by LASPO: in particular, do the same arguments apply to other groups, and if so, does LASPO continue to provide inadequate protection for access to justice in immigration cases?

Similar issues have been documented concerning the impact on access to justice in immigration cases for those who are unable to get legal advice and representation. Amnesty International found cuts to legal aid disproportionately impact vulnerable groups including those with immigration cases.<sup>38</sup> The negative impact on the lives of individuals who are unable to access legal advice can be exacerbated by the presence of additional vulnerabilities including mental health issues, literacy levels and destitution or detention, as well as other concerns.<sup>39</sup> The categories identified in the challenge brought by the Children’s Society, evidencing the extreme vulnerabilities unaccompanied children face,<sup>40</sup> are potentially relevant to many other groups who must still negotiate the ECF application process to access legal aid.

A recent report co-produced by the Unity Project<sup>41</sup> highlights the knock-on effects of the

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<sup>37</sup> Islington Law Centre, ‘Case Note: The Queen on the Application of The Children’s Society v The Lord Chancellor’ (Migrant & Refugee Children’s Legal Unit, 29 August 2018) <<https://miclu.org/blog/case-note-the-queen-on-the-application-of-the-childrens-society-v-the-lord-chancellor>>.

<sup>38</sup> Amnesty International, ‘Cuts That Hurt: The Impact of Legal Aid Cuts in England on Access to Justice’ (2016) <[https://www.amnesty.org.uk/files/aiuk\\_legal\\_aid\\_report.pdf](https://www.amnesty.org.uk/files/aiuk_legal_aid_report.pdf)>. Page 4.  
<sup>39</sup> Ibid. Page 31.

<sup>40</sup> Islington Law Centre, ‘Case Note: The Queen on the Application of The Children’s Society v The Lord Chancellor’ (Migrant & Refugee Children’s Legal Unit, 29 August 2018) <<https://miclu.org/blog/case-note-the-queen-on-the-application-of-the-childrens-society-v-the-lord-chancellor>>.

<sup>41</sup> The Unity Project, ‘Spotlight on NRPF: How No Recourse to Public Funds is harming children and families during the COVID-19 pandemic’ (2020) <<https://static1.squarespace.com/static/590060b0893fc01f949b1c8a/t/5d0bb6100099f70001faa>>.



diminishing access to immigration advice that is disproportionately impacting migrants and their families who have not yet qualified for permanent residency. The impact of COVID-19 and lockdown restrictions has meant that many people with 'No Recourse to Public Funds' (NRPF) restrictions on their immigration status are unable to access social welfare benefits that could protect them from homelessness or destitution as a consequence of the pandemic. The complexity of the NRPF policy, as well as the need for a separate application to have the conditions lifted, makes it inaccessible for most people to access without legal assistance, and the Unity Project emphasises that the immigration advice needed 'is simply unavailable. In practice this renders many unable to make an application at all'.<sup>42</sup>

A report by Bail for Immigration Detainees argues that the complexity of the immigration system can make it near impossible for individuals to navigate on their own, and for people in detention those existing challenges are significantly compounded. The prevalence of language barriers, mental health issues and trauma among detainees mean that '[d]etainees will be unable to effectively fight their immigration case or challenge their detention without access to legal representation'.<sup>43</sup> These vulnerabilities have been identified as barriers to access to justice for those not held in detention but facing similar challenges in attempting to regularise their immigration status. The Equality and Human Rights Commission notes that for groups, including migrants, seeking access to justice while experiencing multiple vulnerabilities like language barriers and mental health conditions creates real barriers to human rights being meaningfully upheld where there is no effective legal assistance.<sup>44</sup> The Commission's report *Routes to Justice* found '[i]ndividuals often cannot represent themselves effectively or provide the evidence that courts need to reach a fair decision'.<sup>45</sup>

Legal academics have also provided commentary on why, in the interests of fair and effective access to the justice system, individuals cannot be expected to represent themselves in immigration appeals. One practical issue is that without legal aid, destitute individuals have no practical means of paying for 'disbursements, including for

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+the+cost+of+the+No+Recourse+to+Public+Funds+policy.+The+Unity+Project.+June+2019.pdf>;  
see also, Agnes Woolley 'Access Denied: The cost of the 'no recourse to public funds' policy'  
(June 2019)  
<<https://static1.squarespace.com/static/590060b0893fc01f949b1c8a/t/5d0bb6100099f70001faad9c/1561048725178/Access+Denied+-+the+cost+of+the+No+Recourse+to+Public+Funds+policy.+The+Unity+Project.+June+2019.pdf>>.

<sup>42</sup> Ibid.

<sup>43</sup> Bail for Immigration Detainees, 'Research Paper: Autumn 2019 Legal Advice Survey' (2020)  
<[https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2\\_assets/files/1140/BID\\_Legal\\_Advice\\_Survey\\_.pdf](https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/1140/BID_Legal_Advice_Survey_.pdf)>.

<sup>44</sup> Equality and Human Rights Commission, 'The Impact of LASPO on Routes to Justice' (September 2018) <<https://www.equalityhumanrights.com/sites/default/files/the-impact-of-laspo-on-routes-to-justice-september-2018.pdf>>. Page 14.

<sup>45</sup> Ibid. Page 25.





translators, court fees and expertise'.<sup>46</sup> The Bach Commission reported that those most impacted by the removal of immigration from the scope of legal aid were those with minimal means of subsistence support, meaning they have no money to secure advice, representation or to cover the costs associated with presenting their appeal.<sup>47</sup>

Legal scholarship emphasises the importance of legal aid being readily available in Article 8 cases. In *Access to Justice: Beyond the Policies and Politics of Austerity*, expert in administrative law Professor Robert Thomas argues that assumptions that individuals should be able to represent themselves in the first-tier immigration and asylum tribunal due to its accessibility and 'relative absence of points of law' contradicts the reality of the adversarial and highly complex immigration system individuals face.<sup>48</sup> Thomas argues that the reduction of the scope of legal aid coincided with increasing complexity of the family immigration rules, leaving people effectively unable to enforce their Article 8 rights. He acknowledges the outcome in the case of *Gudanaviciene*<sup>49</sup> as an important step towards safeguarding access to justice for family issues in immigration cases but emphasises the necessity of legal aid in Article 8 cases to ensure individuals have fair and effective access to the tribunal.

Where individuals are unable to access legal aid, it may have a significant impact on limiting their options for being able to challenge incorrect or unlawful decision-making, and arguably increases the risk of forced separation for families, the impact of which can be devastating for individuals, families and communities.<sup>50</sup> Given the possible serious consequences of individuals being unable to access legal aid, the ECF scheme has the potential to operate as a harmful barrier to justice where it does not operate as intended as a 'safety net'.

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<sup>46</sup> Fabian Society, 'The Right to Justice. The Final Report of the Bach Commission' (2017) <[http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission\\_Right-to-Justice-Report-WEB.pdf](http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission_Right-to-Justice-Report-WEB.pdf)>. Page 32.


<sup>47</sup> Ibid.

<sup>48</sup> Robert Thomas, 'Immigration and Access to Justice: A Critical Analysis of Recent Restrictions' in Ellie Palmer and others (eds), *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart Publishing 2016). Page 115.

<sup>49</sup> R (on the application of Gudanaviciene) and ors v Director of Legal Aid Casework and the Lord Chancellor [2015] WLR 2247.

<sup>50</sup> Sonja Starr and Lea Brilmayer, 'Family Separation as a Violation of International Law' (2003) 21 *Berkeley Journal of International Law* 213.

## Barriers to ECF



The difficulties that individuals face in accessing the ECF scheme without the help of a provider are an ongoing cause for concern. Based on research about how individuals access the ECF scheme directly, Rights of Women, a national legal charity, recommends that legal aid should be reinstated for all immigration cases that involve human rights.<sup>51</sup> Of the 79 referrals that Rights of Women received during the study it conducted, 18 were immigration cases and all were granted. However, in assisting individuals to make ECF applications, Rights of Women reported issues with the complexity of the application process, the delays in decision-making, and the absence of an effective urgent case procedure to ensure that individuals could access ECF in urgent cases.

Despite some improvements to the ECF scheme since its introduction, non-governmental reports have continued to highlight how it might act as a barrier to individuals in need of legal aid. In the past couple of years, the Joint Committee on Human Rights (JCHR) has recommended that the Government should consider bringing Article 8 immigration cases back within the scope of legal aid,<sup>52</sup> as well as additionally arguing for all immigration matters to be brought back into scope.<sup>53</sup> The JCHR report *Enforcing Human Rights* cites evidence submitted by Public Law Project that demonstrates the importance of bringing Article 8 claims back into the scope of immigration legal aid. Public Law Project submitted that a high percentage of immigration ECF applications are granted, and because ‘these will mainly be cases based on private and family life rights’ they reveal a strong case ‘for reinstating legal aid for Article 8 immigration cases to ensure effective participation in proceedings which determine individuals’ rights to live with their family or remain in their communities’.<sup>54</sup> In fact, since the publication of the JCHR report in July 2019, the grant rates for immigration ECF have risen from over 70% to over 80% of all applications.<sup>55</sup>

In the JCHR report *Immigration Detention* a number of additional reasons for bringing all immigration matters into the scope of legal aid are addressed. The report finds that challenges to detention decisions fall within the scope of legal aid, but it is ‘generally not

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<sup>51</sup> Rights of Women, ‘Accessible or beyond Reach? Navigating the Exceptional Case Funding Scheme without a Lawyer’ (2019) <<https://rightsofwomen.org.uk/wp-content/uploads/2019/02/Accessible-or-beyond-reach.pdf>>.


<sup>52</sup> Joint Committee on Human Rights, ‘Enforcing Human Rights: Tenth Report of Session 2017-19’ (2018) <<https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/669/669.pdf>>.

<sup>53</sup> Joint Committee on Human Rights, ‘Immigration Detention Inquiry: Sixteenth Report of Session 2017-19’ (2019) <<https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1484/1484.pdf>>.

<sup>54</sup> Joint Committee on Human Rights, ‘Enforcing Human Rights: Tenth Report of Session 2017-19’ (2018) <<https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/669/669.pdf>>. Page 18.

<sup>55</sup> Ministry of Justice, ‘Legal Aid Statistics Quarterly, England and Wales January to March 2020’ (2020) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/895088/legal-aid-statistics-bulletin-jan-mar-2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895088/legal-aid-statistics-bulletin-jan-mar-2020.pdf)>.

available for most immigration decisions.<sup>56</sup> On this basis, the report states:



"Restricting legal aid to such 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".<sup>57</sup>

Consequently, the JCHR recommends 'reinstating legal aid for all immigration cases',<sup>58</sup> in addition to its recommendation for the Government to consider bringing Article 8 immigration cases within the scope of legal aid where the usual means and merits tests are met.

It is also worth noting that the changes to the scope of legal aid under LASPO may affect whether asylum seekers (with cases that are clearly in scope) can access advice and representation.<sup>59</sup> The PIR concluded that although LASPO was broadly found to be effective at targeting those most in need, the volume of asylum cases had dropped, possibly as a result of the changes to scope and general awareness of the legal aid scheme as a result, or possibly due to other factors.<sup>60</sup> Research by Dr Jo Wilding emphasises the necessity of highly specialised expertise for different types of immigration cases, and the impact on the accessibility of good quality advice and representation where the provision of advice under legal aid is no longer financially viable for organisations.<sup>61</sup>

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<sup>56</sup> Joint Committee on Human Rights, 'Immigration Detention Inquiry: Sixteenth Report of Session 2017–19' (2019) <<https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1484/1484.pdf>> Page 18.

<sup>57</sup> Ibid. Page 19.

<sup>58</sup> Ibid.

<sup>59</sup> NACCOM and Refugee Action, 'Tipping the Scales: Access to Justice in the Asylum System' (2018) <<https://www.refugee-action.org.uk/wp-content/uploads/2018/07/Access-to-Justice-July-18-1.pdf>>.

<sup>60</sup> Ministry of Justice, 'Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)' (February 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf)>. Para 282.

<sup>61</sup> Jo Wilding, 'Droughts and Deserts: A Report on the Immigration Legal Aid Market' (University of Brighton and the Joseph Rowntree Charitable Trust, 2019) <<http://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf>>.



One significant issue for immigration cases that fall outside the scope of legal aid is the potential impact of delays in accessing legal advice. Evidence submitted to the PIR suggests that the uneven geographic availability of legal aid providers and difficulties referring on immigration cases, even where ECF has been granted, can generate delays.<sup>62</sup> The evidence suggests that the absence of immigration providers in some areas of the country has also had a knock-on effect on asylum cases that are within the scope of legal aid, where individuals are unable to access legal advice.<sup>63</sup> The case study in the next section of this briefing paper provides details of the assistance that Hackney Migrant Centre (HMC) offers to individuals who need to apply for ECF and who would otherwise be unable to access legal aid. The example demonstrates how the ECF process can create significant delays in practice for those who require legal aid to protect their human rights. It is also significant to note that HMC is based in London, a metropolitan area with a significant number of legal aid contracts.<sup>64</sup> Other areas of the country have much lower levels of provision.


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<sup>62</sup> Ministry of Justice, 'Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)' (February 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf)>. Para 287.

<sup>63</sup> NACCOM and Refugee Action, 'Tipping the Scales: Access to Justice in the Asylum System' (2018) <<https://www.refugee-action.org.uk/wp-content/uploads/2018/07/Access-to-Justice-July-18-1.pdf>>; Ministry of Justice, 'Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)' (February 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf)>. Para 288.

<sup>64</sup> In February 2021, the directory of legal aid providers published by government showed that there were 266 holders of immigration and asylum contracts across England and Wales, of which 74 were recorded as London (excluding outer boroughs of London, such as Croydon, where there are additional contracts recorded). Data from: Legal Aid Agency, 'Directory of legal aid providers' (9 December 2014, last updated 22 February 2021) <<https://www.gov.uk/government/publications/directory-of-legal-aid-providers>>. See also, Jo Wilding, 'Droughts and Deserts: A Report on the Immigration Legal Aid Market' (University of Brighton and the Joseph Rowntree Charitable Trust, 2019) <<http://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf>>, which reports that at the time of publication of that report, Greater London had 130 immigration and asylum legal aid lawyers.





# Case Study – Hackney Migrant Centre (HMC)

Most applications that HMC provides assistance with are for people without immigration status who need to make an application for leave to remain on human rights grounds.

## Referral data collected August 2019 to August 2020

No. of referrals received	81
No. of applications submitted	30
No. of applications granted	30
No. of applications pending	34

HMC reports that for a total of 64 cases, including 30 cases that have been granted ECF and 34 either pending submission or decision at the time the data was collated, the applications that they have assisted with fall within the following types of case:

## Case type

Long Residence Private Life	25
Appendix FM applications	13
Article 8 private life (outside the rules)	20
Non-refugee family reunion	5
Limited Leave to Remain renewal	1

HMC established its ECF project to address the needs of individuals who require assistance where legal aid providers are unable to assist with ECF applications. However, the time that it takes for HMC to complete ECF applications, combined with the fact that demand for this type of assistance is extremely high, contributes to the waiting times that individuals face.

Based on 30 applications granted ECF during the twelve-month period reported in the figures above, the time spent on the HMC waiting list, from referral to the ECF project to a first ECF appointment, was on average 124 days. The total time on average from



referral to the ECF project to securing a solicitor was 197 days. This represents a significant additional delay to the process of individuals regularising their immigration status, for cases eligible for ECF where there is a potential risk or actual breach of an individual's human rights. HMC reports that these delays are because the applications are time consuming to complete and the evidential requirements are burdensome for clients because a high level of detail is required for an application to succeed. An individual must include details on the nature of the immigration application that they need to make and have an understanding of what is involved in that process. A lay person without a legal background is unlikely to have this kind of knowledge.

HMC also reports that virtually none of their clients are aware of the availability of ECF or the possibility of fee waivers (for the Home Office application fee and the NHS surcharge) prior to accessing help from the Centre, meaning many of their clients have previously paid high fees to private solicitors and in some cases received poor quality advice in their applications.

HMC highlights that the lack of capacity within the immigration legal aid sector contributes to the difficulties that its clients experience, alongside the barriers to ECF that individuals face. As HMC's project on ECF has developed, the speed at which HMC volunteers are able to assist with ECF applications has increased, meaning that the waiting times for a grant of ECF have reduced. This has not, however, resolved the issue of the delays that individuals face, as HMC continues to find it difficult to refer cases on due to local Law Centres and legal aid firms already operating at capacity: an issue that it reports has been exacerbated by the Covid-19 pandemic.

The data from HMC suggests there is a need for additional research into how the ECF scheme creates delays for people who need to access legal aid for human rights immigration applications, with greater scrutiny of whether the scheme serves the needs of people who apply directly without the assistance of a lawyer, as well as whether those who obtain a grant of ECF as an individual applicant are then able to secure the assistance of a legal aid provider.

# The economic cost of the ECF scheme



The ECF scheme may not only be a potentially harmful barrier to justice for individuals, but also one that is economically unjustified for immigration matters. The PIR concluded that the change to the scope of immigration legal aid met its objective of making significant savings to the cost of the scheme.<sup>65</sup> The PIR also, however, found that rather than generating value for money, some stakeholder feedback suggests that implementing the £15 million reduction in spending on immigration legal aid<sup>66</sup> has been at the expense of efficiency and equity in allocating public resources. The PIR reports that ‘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’.<sup>67</sup> The PIR also acknowledges that limitations in data collected by government prevent any robust assessment of whether the reforms have shifted costs rather than reducing them and thus whether ‘the saving represent savings to the government as a whole or the LAA alone’.<sup>68</sup> Similar issues have been raised elsewhere, which will be outlined below.

Expenditure on immigration legal aid was significantly, and arguably disproportionately, affected by LASPO. Pre-LASPO, the overall spend on civil (non-family) legal aid was £140 million for Legal Help and £80 million for Civil Representation, which reduced to £80 million and £50 million respectively by 2017/18, representing an overall saving of approximately £90 million per year.<sup>69</sup> In comparison, Legal Help for non-asylum immigration matters was just £10 million (7.1% of the total expenditure for civil Legal Help, excluding family matters) and Civil Representation for all immigration and asylum work was £10 million. These figures have reduced to £2 million and £4 million respectively since LASPO, with an overall reduction in spending on non-asylum immigration matters of £15 million.<sup>70</sup> As the overall saving to civil legal aid reported by the PIR has been £90 million per year, the reduction in expenditure on immigration matters per year represents 16.7% of the overall amount, despite making up a much smaller proportion of the pre-LASPO budget. Legal Help spending for non-asylum immigration matters is now £2 million, which is just 2.5% of total expenditure on civil Legal Help.

Other available sources of data document how the changes to the scope of legal aid are

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<sup>65</sup> Ministry of Justice, ‘Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)’ (February 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf)>. Para 265.

<sup>66</sup> Ibid. Para 280.

<sup>67</sup> Ibid. Para 283.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid. Page 32, Figure 5.

<sup>70</sup> Based on the estimated figures for 2017/18 provided in the PIR. Ibid. Page 280.



having a detrimental impact on the sustainability of the immigration legal aid sector, which is particularly worrying given the relatively low economic cost of the immigration legal aid budget prior to LASPO. At the time of LASPO, and in the years following its implementation, the Law Centres Network,<sup>71</sup> and other representative bodies,<sup>72</sup> have emphasised that LASPO has placed significant financial pressures on practitioners creating ‘mounting unmet need’.<sup>73</sup> More recently, immigration barrister and academic Dr Jo Wilding has documented continuing issues with the immigration legal aid market, partly caused by the removal of most immigration matters from scope.<sup>74</sup> In this context, the ECF scheme may be seen to provide an additional burden to organisations with legal aid contracts where stringent auditing requirements already exist to ensure that legal aid is only granted to those who qualify.<sup>75</sup>

Previous research by Public Law Project shows low levels of confidence in the ECF scheme among legal aid providers due to the time-consuming nature of applications, the risk of not being paid and experiences of previous applications being refused.<sup>76</sup> These findings suggest that ECF is not financially viable for providers, potentially contributing to broader issues around the sustainability of the current system of legal aid contracts, which is currently under investigation by the All-Party Parliamentary Group on Legal Aid.<sup>77</sup> During follow-up research on provider experiences by Public Law Project into the effects of the Covid-19 pandemic on ECF, the issue of fixed fees being lower for immigration work than asylum matters was again emphasised. The lower fees mean that even where ECF is granted, providers are paid a lower rate of work for cases that are often more complex and have a high workload.<sup>78</sup> The standard fee for Stage 1 (legal help) asylum matters is £413, whilst the standard fee for immigration work at the legal

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<sup>71</sup> Law Centres Network, ‘LCN Response to the “Transforming Legal Aid” Consultation’ (2013) <<https://www.lawcentres.org.uk/policy-and-media/papers-and-publications/briefings-and-submissions>>.

<sup>72</sup> The Law Society, ‘Access Denied? LASPO Four Years on: A Law Society Review’ (June 2017) <<https://www.lawsociety.org.uk/support-services/research-trends/laspo-4-years-on/>>; Bar Council, ‘LASPO Five Years On’ (2018) <<https://www.barcouncil.org.uk/uploads/assets/e89215f4-6588-491d-820390e1809f5905/laspopirsubmissionbarcouncilfinal.pdf>>.

<sup>73</sup> Law Centres Network, ‘LCN Response to the “Transforming Legal Aid” Consultation’ (2013) <<https://www.lawcentres.org.uk/policy-and-media/papers-and-publications/briefings-and-submissions>>. Page 7.

<sup>74</sup> Jo Wilding, ‘Droughts and Deserts: A Report on the Immigration Legal Aid Market’ (University of Brighton and the Joseph Rowntree Charitable Trust, 2019) <<http://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf>>.

<sup>75</sup> Legal Aid Agency, ‘Guidance for Reporting Controlled Work & Controlled Work Matters’ (2020) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/899847/Guidance\\_for\\_Reporting\\_Controlled\\_Work\\_July2020\\_v23\\_removal\\_of\\_MTG.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/899847/Guidance_for_Reporting_Controlled_Work_July2020_v23_removal_of_MTG.pdf)>.

<sup>76</sup> Joe Tomlinson and Emma Marshall, ‘Improving Exceptional Case Funding: Providers’ Perspectives’ (Public Law Project, 2020) <<https://publiclawproject.org.uk/wp-content/uploads/2020/01/Improving-Exceptional-Case-Funding-Website-Publication-Version-docx.docx.pdf>>.

<sup>77</sup> APPG on Legal Aid, ‘Inquiry into Sustainability’ (2021) <<https://www.apg-legalaid.org/node/706>>.

<sup>78</sup> Emma Marshall, ‘Improving Exceptional Case Funding: Responding to Covid-19’ (Public Law Project, 2020) <<https://publiclawproject.org.uk/resources/improving-exceptional-case-funding-covid/>>.





help stage is £234.<sup>79</sup> The PIR was also unable to conclude on whether the ECF scheme represents overall value for money.<sup>80</sup>

Statistics published by the Ministry of Justice and Legal Aid Agency show that successful ECF immigration applications are increasing (See Figure 1 below), and immigration cases make up the bulk of ECF applications.<sup>81</sup> The figures below show that in the last financial year for which full data is available at the time of writing, only 151 immigration applications for ECF were refused due to the ECF criteria not being met, which is just under 6% of the total number of applications. From the accounts published by the LAA it is not possible to determine the exact operational costs of processing these applications.<sup>82</sup> We consider that, given the inconclusive findings of the PIR in respect of the economy, efficiency, effectiveness and equity of the ECF scheme,<sup>83</sup> it is important for the Government to account for the cost of the LAA processing a significant number of applications per year in order to determine the small percentage of applications submitted that do not meet the criteria for the ECF scheme.

**Figure 1 – data on the number of refused/rejected immigration cases for 2019/20**

<b>Total number of ECF applications made in 2019/20</b>	<b>2525</b>
<i>No. of applications granted and part-grant</i>	2035
<i>No. of applications refused*</i>	151
<i>No. of applications rejected**</i>	305
<i>No. of applications withdrawn</i>	29

<sup>79</sup> The Civil Legal Aid (Remuneration) Regulations 2013.

<sup>80</sup> Ministry of Justice, 'Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)' (February 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf)>. Para 595.

<sup>81</sup> Ministry of Justice, 'Legal Aid Statistics Quarterly, England and Wales January to March 2020' (2020) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/895088/legal-aid-statistics-bulletin-jan-mar-2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895088/legal-aid-statistics-bulletin-jan-mar-2020.pdf)>.

<sup>82</sup> Legal Aid Agency, 'Legal Aid Agency annual report and accounts 2019 to 2020' (21 July 2020) <<https://www.gov.uk/government/publications/legal-aid-agency-annual-report-and-accounts-2019-to-2020>>.

<sup>83</sup> These are the four measures of value for money adopted by the PIR and based on the National Auditing Office framework. See Ministry of Justice, 'Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)' (February 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf)>. Para 108.

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The following definitions are taken from page 55 of the Legal Aid Agency *User guide to legal aid statistics in England and Wales*:

**\*ECF refusal:** The application was assessed by the LAA ECF team and at least one of the ECF criteria were not met, so the application was refused with details for refusal provided.

**\*\*ECF rejected:** The application was assessed by the LAA ECF team and the determination was to reject. Either the application was in scope for non-exceptional legal aid, or not enough information was provided in the application to make a determination. Details for the rejection are provided.

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The statistics provided by the LAA along with the findings of the PIR suggest that there could be unknown costs as a result of excluding immigration cases from the scope of legal aid. The charity Rights of Women argued:


" With only 6% of all immigration applications failing to meet the threshold for ECF [in 2017/18], the economic case for operating an ECF scheme for immigration cases engaging human rights or EU rights must be proven by the Government taking into account the operational costs of processing the applications".<sup>84</sup>

We concur with the findings by Rights of Women and reiterate the need for the Government to provide and review data on whether operating the ECF scheme for immigration cases that engage human rights represents overall value for money for the taxpayer. Reviewing the economic value of the ECF scheme is particularly important given that, although the changes to the scope of immigration legal aid clearly reduced legal expenditure, the PIR was unable to conclude on whether these costs had been shifted elsewhere in government nor whether the ECF scheme itself represents overall value for money.

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<sup>84</sup> Rights of Women, 'Accessible or beyond Reach? Navigating the Exceptional Case Funding Scheme without a Lawyer' (2019) <<https://rightsofwomen.org.uk/wp-content/uploads/2019/02/Accessible-or-beyond-reach.pdf>>. Page 65.

# Can the ECF scheme be improved?



As acknowledged above, there have been noticeable improvements to the ECF scheme since it was introduced under LASPO. Since the cases of *Gudanaviciene* and *I.S.*<sup>85</sup> the number of applications for immigration ECF and the grant rate have significantly increased. Following the PIR, the Ministry of Justice conceded that some further improvements would be necessary. A separate document titled *Legal Support: The Way Ahead*<sup>86</sup> was published at the same time as the PIR, to provide details of how changes would be implemented as a result of the PIR findings. *The Way Ahead* document included three main proposals by the Ministry of Justice in relation to the ECF scheme:

1. We will work with legal practitioners to consider whether the process for applying for Exceptional Case Funding can be simplified, and ensure that the forms and guidance are as accessible as possible – by the end of 2019.
2. We will work to improve timeliness of the Exceptional Case Funding process, to ensure that people can access funding when they need it – by the end of 2019.
3. We will consider whether it is necessary to introduce a new emergency procedure for urgent matters to access Exceptional Case Funding – by the end of 2019.<sup>87</sup>

Public Law Project published research in January 2020 on the impact of the ECF scheme on organisations with legal aid contracts, which detailed the continuing barriers for providers, and how some specific changes could be implemented, including the need to review whether Article 8 immigration cases should be brought back into the scope of legal aid.<sup>88</sup>

At the time of writing, some aspects of the ECF scheme have been modified, for example, the forms have been updated with some minor changes, the guidance for providers (the ‘Provider Pack’) has been amended, and guidance for members of the public on the Government website has been corrected to include clear instructions on how individuals can submit an ECF application. It is unclear from publicly available information whether there are any further amendments to come, or what they might be. Taking into consideration the evidence presented in this briefing paper, however, it

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<sup>85</sup> Katy Watts, ‘Exceptional Case Funding’ (Public Law Project, 2018) <<https://publiclawproject.org.uk/wp-content/uploads/2018/05/Exceptional-Case-Funding-Briefing.pdf>>.

<sup>86</sup> Ministry of Justice, ‘Legal Support: The Way Ahead’ (2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/777036/legal-support-the-way-ahead.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777036/legal-support-the-way-ahead.pdf)>.

<sup>87</sup> *Ibid.* Page 14.


<sup>88</sup> Joe Tomlinson and Emma Marshall, ‘Improving Exceptional Case Funding: Providers’ Perspectives’ (Public Law Project, 2020) <<https://publiclawproject.org.uk/wp-content/uploads/2020/01/Improving-Exceptional-Case-Funding-Website-Publication-Version-docx.docx.pdf>>.

seems unlikely that minor changes to the administrative operation of the ECF scheme will make any significant difference to the systemic barriers that individuals face in accessing immigration legal aid.





## Conclusion



This research briefing has argued that the removal of most immigration matters from the scope of legal aid creates unnecessary additional barriers for those who need legal aid, in an area of law where it is almost always required to ensure effective access to the justice system. Several themes have emerged throughout academic writing, reports and submissions made to government in the years since LASPO's introduction. These highlight the inaccessibility and complexity of the ECF scheme and the impact on specific groups. Recent literature indicates that there are still significant barriers to legal aid for a number of reasons. These include the limited availability of advice in some geographic areas, and continuing barriers to the ECF scheme for some individuals.

Although the requirement to apply for ECF does not entirely prevent access to justice in all cases, it can create a harmful barrier to justice and has a disproportionate effect on preventing access for some groups, for example those in detention, and can cause significant delays for others. Cuts to legal aid funding have raised serious concerns about value for money and prioritising spending for those who need it most.<sup>89</sup> 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 and that there is a need for the government to carry out a full audit of the costs. Finally, the risks that individuals face as a result of having the additional hurdle of obtaining ECF should in any case outweigh economic concerns, given the serious human rights issues at stake where legal aid is inaccessible.

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<sup>89</sup> Equality and Human Rights Commission, 'The Impact of LASPO on Routes to Justice' (September 2018) <<https://www.equalityhumanrights.com/sites/default/files/the-impact-of-laspo-on-routes-to-justice-september-2018.pdf>>. Page 14.



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