



# Public Law Project

**To:**

(1) The Lord Chancellor  
102 Petty France,  
London,  
SW1H 9AJ

(2) The Principal Legal Adviser, Central Legal team  
Legal Aid Agency  
**By email:** [CentralLegalTeamLAA@justice.gov.uk](mailto:CentralLegalTeamLAA@justice.gov.uk)

Your Ref: Not known

Our Ref: DR/PUB2.12

Date: PUB 2.12

8 September 2023

Dear Sir or Madam

**PROPOSED CLAIM FOR JUDICIAL REVIEW**  
**Collapse of provision of immigration and asylum legal aid**  
**Breach of the Lord Chancellor's duty under s 1(1) of LASPO 2012**

1) This letter is being sent in accordance with the pre-action protocol for judicial review. The proposed deadline for response is *within 21 days, that is by 5pm on 29 September 2023.*

**The claimant**

2) Public Law Project ('PLP') is the proposed claimant. PLP is a national legal charity (registered with the Charity Commission no. 1003342). PLP operates nationally and its charitable objects are focused on public law and access to justice issues. PLP employs specialist lawyers who assist individuals experiencing personal disadvantage, or charities or organisations representing the interests of marginalised or disadvantaged groups. PLP is a provider of legal aid in the categories of

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The Public Law Project is a company limited by guarantee (registration number 2368562), and a registered charity (registration number 1003342) Registered in England, registered offices as above

public law, and immigration and asylum. PLP also employs expert academics and researchers.

- 3) PLP advances its charitable objectives through areas of strategic priority. Since the advent of the current legal aid scheme, PLP has undertaken casework, policy work and research around access to civil legal aid with a particular focus on immigration. PLP contends it has standing to bring this claim. PLP's interest in relation to this issue is long-standing and extensive. It includes litigation in its own name<sup>1</sup>, on behalf of individuals<sup>2</sup> and organisations<sup>3</sup>, extensive policy engagement with the Lord Chancellor and publication of original research. Further details of the latter two are set out at paragraph [35](#).

### **The defendant's reference details**

- 4) The proposed defendant is the Lord Chancellor. The defendant's reference details are not known.

### **The details of the applicant's legal advisers**

- 5) PLP is represented by its in house legal team in this matter. I, Daniel Rourke, am the solicitor with conduct of this matter. My contact details are .
- 6) I am content to accept service of documents by email to the address above, *provided* you also copy correspondence to my colleagues Carla Clarke at and Ed Cripwell at , and forward correspondence to any alternative contacts provided if you receive an out of office reply.

### **The details of the matter being challenged**

- 7) The Lord Chancellor's failure to discharge his duty under s. 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO' or 'the Act') to secure the availability of the immigration and asylum legal aid services listed in Part 1 Schedule 1, in particular, paragraphs 28 to 32A, and his ongoing failure to take remedial action to ensure that those services are made available to individuals who need them.
- 8) PLP submits that the Lord Chancellor's failure to fulfil his s.1(1) LASPO duty has meant that access to immigration and asylum legal aid services is delayed or cannot be accessed at all, to the extent that there is a "*real risk that persons will effectively be prevented from having access to*

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<sup>1</sup> *R (oao The Public Law Project) (Appellant) v Lord Chancellor (Respondent) [2016] UKSC 39*

<sup>2</sup> *R (oao IS) v Director of Legal Aid Casework & Lord Chancellor [2015] EWHC 1965 (Admin)*, for the same Claimant in *R (oao Gudaviciene) v Lord Chancellor & Director of Legal Aid Casework [2014] EWCA Civ 1622*.

<sup>3</sup> *R (oao Rights of Women) v Lord Chancellor [2015] EWHC 1965 (Admin)*,

*justice*" contrary to the principle in R (oao UNISON) v Lord Chancellor [2017] UKSC 51, §87 ("the **UNISON principle**").

### **The details of any Interested Parties**

- 9) The Legal Aid Agency ('LAA') is considered to be an interested party to this matter. You are invited to indicate whether you agree, or if you consider there are other interested parties who ought to be served with this correspondence.

### **The issue**

- 10) The system established and maintained by the Lord Chancellor for making legal aid available for immigration and asylum matter is in crisis. There is serious under-provision and unmet need across England and Wales, to the detriment of individuals who need legal aid, who are, or are at risk of being, effectively prevented from having access to justice.
- 11) The under-provision is particularly acute in respect of individuals within the LAA's geographic 'procurement' areas of South West and North West England. The under-provision in these areas cannot be mitigated through the provision of remote advice by providers located in other regions, as there is no surplus of provision elsewhere in the system and remote delivery of advice is unsuitable for some individuals.
- 12) The under-provision is also particularly acute in respect of individuals who require legal aid in the form of Exceptional Case Funding under s.10 LASPO to avoid a breach of their Convention rights within the meaning of the Human Rights Act 1998 (or a risk of such a breach). That is the case regardless of the geographic procurement area in which the individual is seeking assistance.

### ***Statutory, regulatory, and contractual framework***

- 13) The current legal aid scheme was established under LASPO, which came into force on 1 April 2013.
- 14) Section 1 of Part 1 of LASPO provides that the Lord Chancellor "must secure that legal aid is made available in accordance with this Part". "Legal aid" means, so far as it material to this case:

*'(a) civil legal services required to be made available under section 9 or 10 or paragraph 3 of Schedule 3 (civil legal aid),'*

- 15) Section 9 provides that *'[c]ivil legal services are to be available to an individual under this Part -if (a) they are civil legal services described in Part 1 of Schedule 1'*.
- 16) The specified list of civil legal services described in Part 1 Schedule 1 of LASPO, includes paras 24-30A e.g., immigration and asylum matters,

including asylum, detention, modern slavery, and domestic violence. These matters are described as being within the 'scope' of legal aid.

- 17) Legal aid is, in principle, available for 'in scope' matters and granted following a determination by the Director of Legal Aid Casework ('DLAC' appointed under s.4) that an applicant qualifies for the services. The DLAC must determine that the applicant satisfies the separate means and merits tests.
- 18) Section 10 LASPO concerns the funding of "exceptional cases" which do not come within the scope of s.9 and are 'out of scope'. Legal aid is in principle available following a grant of 'Exceptional Case Funding' under s. 10, but only upon application, where it is accepted that a refusal of funding would breach or risk a breach of the applicant's rights under the ECHR or retained enforceable EU law.
- 19) The Lord Chancellor is empowered by s.2 of the Act to make 'such arrangements' as he considers appropriate for carrying out his functions. The Lord Chancellor has exercised his power under s.2(2)(c) of the Act by establishing and maintaining a body to secure the provision of legal aid services: the Legal Aid Agency ('LAA'), an executive agency of the Ministry of Justice ('MoJ').
- 20) The Civil Legal Aid (Procedure) Regulations 2012, (["the procedure regulations"](#)) set out, at regulation. 3, the types of legal work that can be undertaken under a legal aid contract and, at reg. 21, which of them are 'controlled work'. The following are relevant to immigration and asylum:
  - i) 'Controlled work' includes 'legal help' (which is negatively defined to exclude everything related to conducting court proceedings) and 'legal representation' for proceedings before the *First Tier Tribunal (Immigration and Asylum Chamber)* ('FTT');
  - ii) 'Licensed work' is conducted under a legal aid certificate for other in scope proceedings such as judicial review and appeals to the Upper Tribunal (Immigration and Asylum Chamber) ('UT').
- 21) In controlled work, most of the decision making is delegated to providers who determine whether the client passes the applicable means and merits tests. However, applications are required to the LAA to extend disbursement limits (and costs limits in cases where they apply). In licensed work, decision making is delegated to LAA caseworkers on applications made by providers through the Client and Case Management System ('CCMS') (an online civil legal aid system).
- 22) Remuneration to persons who provide civil legal aid services is set by the Lord Chancellor through the Civil Legal Aid Remuneration Regulations 2013 (SI 2013/422) ("the remuneration regulations") (made under s.2(3) LASPO). The remuneration regulations, combined with the procedure regulations and the Standard Civil Contract Specification 2018 create a complicated payment structure. Essentially this sets the rates and fees which providers get paid for doing civil legal aid work.

- 23) Controlled work is, in most cases, remunerated through fixed fees, subject to standard disbursement limits which providers must apply to extend before exceeding them (2018 Standard Civil Contract Specification Category Specific Rules: Immigration and Asylum Specification Contract paras 8.110-8.112 ('Category Specific Rules')). In a case where hours recorded on a controlled work matter exceed a threshold, it can 'escape' the fixed fee scheme and become payable at hourly rates (as an 'Escape Fee Case'). Licensed work is remunerated at hourly rates, subject to standard costs and scope limits that are reviewed on application throughout the course of the case.
- 24) The LAA periodically carries out procurement processes for the delivery of civil legal aid services. Face to face services are provided under the 'Standard Civil Contract'. Tender rounds were undertaken in 2013, 2018 and 2023. The outcome of the 2023 tender has not yet been made public. Separate tenders are periodically undertaken for duty and telephone advice schemes. In immigration, these are the 'Detained Duty Advice Scheme' ('DDAS'), Detained Asylum Casework Scheme ('DACs') and Immigration Telephone Advice Services Contract ('ITASC').
- 25) Providers of face-to-face advice sign the 'Standard Civil Contract' which is made up of the 'Standard terms', 'Specification (general rules)' and 'Category specific rules (immigration and asylum)'. An individualised schedule issued annually confirms the categories of law in which the provider can act, the location they provide services from and the number of controlled work 'matter starts' they can open during the schedule period. What constitutes a separate matter start is set out at paras 8.25-8.37 of the Category Specific Rules. Para 8.25 states that an initial asylum application and a subsequent asylum appeal will generally constitute two separate 'matter starts'. The type of work that can be conducted under each category of law is set out in the separate 'Category Definitions 2018'.
- 26) Providers' schedules set out the maximum number of matter starts the provider may open each year. In immigration and asylum, the LAA allocates each provider an annual allowance of at least 150. A provider may self-grant up to a further 50% if they run out (which then becomes their allocation the following year). Although the specification allows the LAA to set a minimum number of matter starts that must be utilised in any schedule period, these are not currently set in practice for Immigration and Asylum work under the contract. In 2021/2022, there were 38 providers who opened no matter starts at all.
- 27) The current iteration of the contract documents in force is the 'Standard Civil Contract 2018' (the 'Contract'). DDAS and DACs services are also provided under the Contract – providers who were successful in the additional tender for these services are given an 'exclusive authorisation' to conduct this work in their schedule and placed on the appropriate rotas. The Immigration Telephone Advice Services Contract (ITASC) is a separate contract.

- 28) Legal aid tendering is based on 'procurement areas' and, in immigration and asylum, smaller 'access points'. A provider's schedule authorisation will state the procurement area or access point in which they are required to maintain an office presence. There is no direct bar to opening files for clients who are based outside of the procurement area. However, there are indirect barriers. Providers can only open 50% of their matter starts by post (para 3.15 of the Specification, unless justified by Equality Act reasons). This can discourage taking on out of procurement area matters at the start of the schedule period (when it isn't known how many matters will be opened overall so it is hard to calculate whether the 50% limit has been adhered to). Further, where client travel is paid for, providers risk this being recouped if it is seen by the LAA as unreasonable at a later point.
- 29) The LAA seeks to ensure compliance with the contract through compliance activity including annual contract management visits and up to 10 types of audit that providers can be subject to at short notice<sup>4</sup>. The LAA seeks to ensure quality advice is provided under the Contract through accreditation and Quality Mark requirements and a process of 'peer review'<sup>5</sup>.

***Factual background: the legal aid system in crisis with serious under provision and unmet need***

- 30) The legal aid system is in crisis with serious under-provision and unmet need, which is particularly severe in certain parts of the country, where there are very few remaining providers of immigration and asylum legal aid and those who remain are at capacity and unable to meet demand, in particular, the South West and North West Procurement Areas. This situation is demonstrated by the evidence that follows, as to (i) concerns which have been raised in several inquiries and stakeholder exercises; (ii) the national crisis of immigration and asylum legal aid provision in England and Wales; (iii) particularly acute issues in the South West and North West, including as a result of an increase in dispersals to those regions; and (iv) concerns relating to cases that require a grant of ECF.

***i) Post-implementation Review of the Act, Parliamentary Inquiries and Stakeholder engagement with the Ministry of Justice.***

- 31) Concerns about the sustainability of civil legal aid practice in general are longstanding and predate the current legal aid scheme, albeit that the concerns have increased under the current scheme as the issues have grown worse over time.

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<sup>4</sup> Legal Aid Agency: <https://www.gov.uk/guidance/legal-aid-agency-audits>

<sup>5</sup> Refugee Action/Jo Wilding: 'No access to justice: How legal advice deserts fail refugees, migrants and our communities', May 2022: <https://www.ragp.org.uk/programmes/no-access-to-justice>

32) The Lord Chancellor and the LAA have long recognised that there are concerns about the sustainability of civil legal aid practice. In February 2019, the Post-Implementation Review ('PIR') of LASPO was published alongside a document titled *Legal Support: the Way Ahead* (the 'action plan'):

- i) The LASPO PIR, concluded that 'the market is currently operating at sufficient levels to meet demand', with the caveat that there was *not* effective coverage in 'one immigration and asylum area'<sup>6</sup>(the PIR does not state which area, but follows paragraphs highlighting access issues in rural areas, specifically referring to Wales and Cornwall).
- ii) The review and the resulting action plan implicitly acknowledged<sup>7</sup> the impact of administrative burdens on providers and committed to review these by the end of 2020. This target was not met and is part of an ongoing review (see §33 below).
- iii) The review also set out plans by the Ministry of Justice to 'simplify the ECF scheme to ensure it works as effectively as possible' and committed to reviewing administrative burdens passed on to legal aid providers under the scheme.

33) In 2020, civil servants in the MoJ were sufficiently concerned about the sustainability of Immigration and Asylum legal aid that they invited stakeholders, including providers, to attend a meeting to discuss concerns (see further below). By 2021, the Lord Chancellor had committed to an internal government review of the sustainability of civil legal aid, formally announced in January 2023, but ongoing.

34) PLP has itself raised concerns and sought to inform the planned improvements by developing an evidence base, including through survey research, to address the gaps and the barriers faced in relation to access to legal aid. In doing so PLP has become increasingly aware of the unmet need for immigration and asylum legal aid, bolstered through our own attempts to refer individuals whom we cannot assist to specialist solicitors, and concerns raised by partner organisations about their increased difficulties and news of established providers withdrawing from the legal aid market altogether.

35) PLP has repeatedly raised its concerns about the sustainability of civil legal aid with the Lord Chancellor and the Ministry of Justice, including for immigration and asylum work:

- i) On 27 September 2018, PLP submitted written evidence to the Post-Implementation Review of the Act (PIR), on how the legal aid scheme

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<sup>6</sup> See paragraphs 820-822 of the 'Post-implementation Review of Part 1 of LASPO', 7 February 2019: <https://www.gov.uk/government/publications/post-implementation-review-of-part-1-of-laspo>

<sup>7</sup> See p 38 of 'Legal Support: The Way Ahead', 7 February 2019: <https://www.gov.uk/government/publications/legal-support-action-plan>

is not accessible, effective or sustainable. This highlighted our research which indicated that civil legal aid fees paid and cuts in the scope of legal aid under LASPO threaten the sustainability of legal aid practice, contributing to 'advice deserts'.

- ii) On 12 September 2019 PLP attended a roundtable organised by the Ministry of Justice regarding ECF. The meeting focused on the barriers faced by direct applicants attempting to access the ECF scheme, the delays in processing of ECF applications and the poor administration of the scheme generally. The underuse of the scheme by legal aid providers was also highlighted.
- iii) On 16 April 2020 and 15 March 2021, PLP wrote to the Lord Chancellor setting out our concerns about the impact of the pandemic on immigration legal aid providers and their ability to provide ECF on immigration matters.<sup>8</sup> This followed PLP's publication, in October 2020, of original research on providers' experience of the ECF scheme<sup>9</sup> in light of the Ministry of Justice's stated plans to improve the scheme<sup>10</sup>. Just under half of providers surveyed reported they had not used the scheme in the preceding twelve month period, citing financial concerns around remuneration and uncertainty over the LAA's eligibility criteria for ECF.
- iv) On 7 July 2020, PLP and other stakeholders attended a stakeholder engagement meeting with the Ministry of Justice around the sustainability of asylum and immigration legal aid provision. Stakeholders urged that the Lord Chancellor exercise the powers under s. 2 of LASPO to provide financial support to providers and warned of difficulties around recruitment and retention of staff. The difficulties highlighted included (a) that individuals could not be placed with solicitors even when they had been granted ECF; (b) the inadequacy of the fixed fee system along with concerns about the low level of hourly rates; (c) the poor functioning of the peer review function and how this was not succeeding in identifying poor quality providers working under the fixed fee regime; (d) recruitment and retention issues and (e) concerns over excessive LAA administration requirements and how this had led to firms leaving the legal aid sector altogether.

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<sup>8</sup> PLP's letter to the Lord Chancellor calling for urgent changes to the ECF scheme 15 March 2021: <https://publiclawproject.org.uk/uncategorized/update-plps-work-on-civil-legal-aid-policy/>, following up on letter of 16 April 2020: <https://publiclawproject.org.uk/latest/plps-letter-to-the-lord-chancellor-on-ecf-changes-during-covid/>

<sup>9</sup> PLP Research Paper 'Improving Exceptional Case Funding: Providers Perspectives', Joe Tomlinson and Emma Marshall, January 2020: <https://publiclawproject.org.uk/content/uploads/2020/01/Improving-Exceptional-Case-Funding-Website-Publication-Version-docx.docx.pdf>

<sup>10</sup>Ministry of Justice, 'Legal Support: The Way Ahead' February 2019, <https://www.gov.uk/government/publications/legal-support-action-plan>



- v) In 2021, PLP took part in a Ministry of Justice engagement exercise around legal aid provision in relation to the ‘New Plan for Immigration’ consultation. Stakeholders emphasised that proposals to extend non-means tested legal aid under the *Nationality and Borders Act 2022* could not be effective without addressing the existing sustainability issues in the legal aid scheme.
  - vi) In addition, on 16 February 2023, PLP endorsed a joint letter from stakeholders highlighting concerns about the Review of Civil Legal Aid (‘RoCLA’) – its lack of terms of reference, insufficiently urgent timescale, and absence of interim measures. PLP wrote separately on 16 February 2023 to highlight its specific concerns relating to the ECF scheme. PLP has continued to attend stakeholder meetings. The MoJ responded by clarifying the timetable and publishing full terms of reference. PLP remains concerned that no interim measures are contemplated and that the timetable for any reform extends well beyond March 2024 (as any resulting proposals will be put to consultation before implementation).
- 36) In addition, PLP raised concerns indirectly in research papers and by giving evidence to parliamentary processes, in particular:
- i) In June 2018, PLP published a Research Briefing Paper on the effects of LASPO on civil legal aid in Wales<sup>11</sup>. We highlighted how the 29% decline in Welsh providers between 2012 and 2018 was creating advice deserts. We noted that the cut to legal aid rates in 2011 and significant hurdles of legal aid administration could disproportionately impact Welsh firms due to smaller average staffing levels.
  - ii) On 14 October 2020, PLP called for the Lord Chancellor to exercise his powers under s. 2 of the Act, in its written evidence<sup>12</sup> to the Justice Select Committee inquiry into the ‘Future of Legal Aid, We highlighted the poor functioning of the ECF scheme, and the limited extent of changes considered by *The Way Ahead Plan* which required expansive reimagining. We also raised concerns about the LAA’s inability to address legal aid advice deserts and their lack of a mandate or resources to properly assess the need for legal aid throughout the country. It said that urgent action was needed to assist those who cannot access justice ‘now’ (i.e. 3 years ago).
  - iii) In 2020 and 2021, then PLP Director Jo Hickman gave written and oral evidence to the Westminster Commission on Legal Aid’s inquiry into the Sustainability and Recovery of the Legal Aid Sector. She said

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<sup>11</sup> PLP Research Briefing, ‘The effects of LASPO on civil legal aid in Wales’, Sue Harper, June 2018:

[https://publiclawproject.org.uk/content/uploads/2018/07/LASPOA\\_briefing\\_Wales.pdf](https://publiclawproject.org.uk/content/uploads/2018/07/LASPOA_briefing_Wales.pdf)

<sup>12</sup> PLP Submission to the Justice Committee inquiry on the access to justice impacts of court and tribunal reforms: <https://publiclawproject.org.uk/resources/plp-submission-to-the-justice-committee-inquiry-on-the-access-to-justice-impacts-of-court-and-tribunal-reforms/>

that the legal aid scheme was not fit for purpose as it was not accessible, effective, or sustainable. In particular she highlighted 'advice deserts', low rates of pay and that for profit providers were finding their practices economically unviable<sup>13</sup>.

- iv) In PLP's 15 December 2022 submission<sup>14</sup> to the Joint Committee on Human Rights 'Human Rights of Asylum Seekers in the UK' consultation we stressed that the asylum legal aid market was collapsing. We highlighted the falling number of matter starts, notwithstanding an increasing number of asylum applications. We identified that Home Office policies of dispersing asylum seekers away from London to areas with no local provision would exacerbate the existing advice desert crisis.

### ***(ii) Serious under provision and unmet need in England & Wales***

- 37) The LAA lacks a mandate or resources to effectively monitor the levels of unmet need for legal aid in England and Wales. Remedying this was a recommendation of two parliamentary enquiries in 2021: [Westminster Commission \(Recommendation H, p 29\)](#) and [Justice Select Committee \(§155\)](#).
- 38) PLP is only aware of one attempt to monitor provider capacity under the 'Immigration and Asylum capacity exercise' undertaken in September 2021. We refer to email correspondence with our contract manager dated 16 September 2021. That exercise involved asking providers to respond to questions about their short, medium, and long term capacity within 5 working days. The outcome is unknown. It was said to be intended to *'provide a data baseline so that Service Development (SD) can ascertain what the capacity in the national system is, and is likely to be, over the next 5-6 months'*.
- 39) There is a wealth of cogent recent evidence, to demonstrate the paucity of provision and the vast extent of unmet need across England and Wales, for example:
  - i) Research commissioned by Refugee Action in May 2022<sup>15</sup> (the 'Mapping report') to review and map provision and demand for free and low-cost immigration legal advice throughout the whole UK, by region nation and sub-region, including legal aid and all levels of non-legal aid provision. It considered 'primary legal aid need' by comparing the estimated need for legal aid for each of the 'in scope' immigration and asylum categories with the estimated available provision across England and Wales. It found that there was a deficit

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<sup>13</sup> See p 12 and 17 of the transcript of the proceedings available at <http://www.apg-legalaid.org/sites/default/files/2020%233%20-%20Transcript%20Civil%20Law.pdf>

<sup>14</sup> PLP Submission: <https://committees.parliament.uk/writtenevidence/122198/pdf/>

<sup>15</sup> Refugee Action: 'No access to justice: How legal advice deserts fail refugees, migrants and our communities', Dr Jo Wilding, June 2022: <https://www.refugee-action.org.uk/no-access-to-justice-how-legal-advice-deserts-fail-refugees-migrants-and-our-communities/>

between the need for immigration and asylum legal advice and the provision available in every area of England and Wales. The only exception was London as part of a larger procurement area including the South East, where the surplus at that time (+154) was insufficient to cover the deficit in the South East procurement area (-988), even if it could be re-allocated. It said, “The South West is widely recognised as an area of severe advice desert for asylum and immigration, and there is a “persistent deficit between need and provision” in the North West (where Greater Manchester is the epicentre)’.

- ii) Analysis of the published list of legal aid providers by the Law Society in March 2023<sup>16</sup>, reveals that 39 million people (66% of the population) do not have access to an immigration and asylum provider within their local authority area. Travelling to another area is precluded by the lack of a significant surplus of provision in any area of England and Wales, and in some cases, the need for face to face provision as a reasonable adjustment for a protected characteristic under the Equality Act 2010.

40) In addition, PLP’s enclosed report ‘Access to immigration legal aid in 2023: An ocean of unmet need’ (the ‘PLP report’) collates information gathered from partners across several LAA procurement areas around April 2023. The evidence gathered indicates that the situation has worsened since the mapping exercise undertaken by Refugee Action and the analysis of the number of providers in each local authority area undertaken by the Law Society.

41) The PLP report demonstrates that the mapping analysis undertaken by Refugee Action is borne out by the experience of organisations on the ground in London and their service users. London accounts for around 40% of total legal aid provider offices<sup>17</sup>, yet provision is plainly inadequate to meet the need in that area:

- i) Even the largest providers of immigration legal aid, who benefit from the greatest economies of scale, consider their immigration legal aid practice is operating at a loss (Wilson Solicitors LLP and Duncan Lewis Solicitors Ltd., PLP Report, p 12-13).
- ii) One support organisation based in London, was unable to secure a legal aid lawyer for the majority of their service users (58%) over a 6 month period (Haringey Migrant Support Centre [‘HMSC’], PLP Report, p 13-14). Another support organisation was unable to secure a legal aid lawyer for 41% of its service users, with many of those service users waiting over a year unsuccessfully (Migrants Organise, PLP Report, p14-15).

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<sup>16</sup>Law Society: <https://www.lawsociety.org.uk/campaigns/legal-aid-deserts>

<sup>17</sup> See analysis in Justice Together initiative ‘A Huge Gulf: Demand and Supply for Immigration Legal Advice in London’, June 2021, p 4: <https://justice-together.org.uk/wp-content/uploads/2021/06/A-Huge-Gulf-FINAL-report.pdf>

- iii) Collated survey data from nine support organisations (the majority based in London) indicates that only 1 in 16 referral attempts by support organisations to legal aid providers is successful. The majority of cases (57%) were still awaiting a successful referral. Some individuals had been waiting for advice for as long as 18 months (National Survey, PLP report, p36-37).
- iv) This excess need cannot be met, and is not being met by the voluntary sector, who are often unable to recruit suitably accredited advisors (HMSC, PLP report, p13-14). Even where they are able to recruit, they can only provide assistance to a minority of their service users and cannot fund disbursements needed to progress service users' matters (such as expert reports: Migrants Organise, PLP Report, p12).
- v) Many providers will not take on ECF cases at all, even where a referral organisation has obtained a grant of ECF (such grant meaning that the LAA recognises that there is a risk of a breach of the individual's Convention rights if they do not receive legal aid, HMSC: p 16 of PLP Report).

42) There is therefore no surplus of legal aid provision that can be reallocated (whether remotely or through travelling to provide advice) to meet the unmet need in other procurement areas.

***(iii) Serious under-provision and unmet need in the South West Procurement Area***

43) The acute lack of provision in the South West has been known to the Legal Aid Agency since at least January 2020, when it held a meeting with the Plymouth legal aid network, Plymouth City Council, and Dr Jo Wilding. We refer to a note of interim findings, shared by Dr Wilding with the LAA for that meeting, which highlighted:

- i) That since the resignation of a senior supervising caseworker at the Plymouth office of Migrant Legal Project ('MLP') in summer 2019, there was only a single remotely supervised caseworker in the South West outside of Bristol undertaking immigration & asylum legal aid work (this remains the case).
- ii) There are serious difficulties in recruiting appropriately qualified staff at all levels for existing providers in the South West (including Bristol), which had prevented some providers from carrying out work – e.g., while Wiltshire Law Centre had a contract, it was unable to recruit.
- iii) The depth of the capacity crisis in Plymouth and Devon means that it is unlikely to be sustainably addressed without exercise of the Lord Chancellor's powers in section 2 of LASPO.

44) Throughout 2020, MLP sought financial assistance from both the LAA and Lord Chancellor, highlighting the challenges it was facing due to recruitment and retention issues, and cash flow issues caused by delays in Home Office decision making:

- i) In September 2020, MLP wrote to its LAA Contract Manager, seeking financial relief under Public Procurement Notes (PPNs) No. 2 and 4 of 2020<sup>18</sup>.
  - ii) On 6 October 2020, MLP wrote formally to the Lord Chancellor, requesting a grant under the Lord Chancellor's s. 2 powers. In the application, MLP set out efforts to engage with the LAA (see further below) and explained its own difficulties, which broadly mirror those set out at p 22-30 of the PLP Report (chiefly recruitment, retention, and cash flow issues due to Home Office decision making delays).
  - iii) The LAA responded on 21 October 2020, stating that the PPNs had been taken into account in contract variations announced to all providers. The LAA requested detailed information about MLP's detailed financial situation and ongoing caseload. However, the request was framed in terms of understanding MLP's position for contract management purposes/helping them to understand general support available, rather than indicating the LAA was considering targeted support or recommending the LC exercise his s. 2 powers.
  - iv) MLP provided the information requested but did not receive any targeted support beyond that available to all providers under contract variations. MLP instead accessed a covid 'bounce back' loan (available to businesses during the pandemic). MLP ultimately exhausted its reserves, returned one of its legal aid schedules and closed one of its offices in Cardiff, Wales.
  - v) The Lord Chancellor did not substantively respond to the request for support under s.2 LAPSO, instead treating the request as having been dealt with by MLP's LAA Contract Manager when MLP followed up by email on 11 November 2020.
- 45) The Refugee Action Mapping report (para [39 \(i\)](#) above) estimated the primary legal aid need in the South West to be 1,712 and the provision to be 547, meaning there was estimated to be a deficit of 1,165 unmet 'matter starts' for in scope immigration and asylum legal aid services. Recent developments have exacerbated that deficit dramatically.
- 46) The authors of the Mapping report explain their methodology in calculating available provision as follows: *'Primary Legal Aid Provision is calculated as the average number of legal aid matter starts opened in the area per year, over the past three years'* (p 62). Primary Legal Aid Need is calculated as:

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<sup>18</sup> 'Supplier relief due to COVID-19', March 2020:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/874178/PPN\\_02\\_20\\_Supplier\\_Relief\\_due\\_to\\_Covid19.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874178/PPN_02_20_Supplier_Relief_due_to_Covid19.pdf) and 'Recovery and Transition from COVID-19', June 2020:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/891154/PPN\\_04\\_20- Recovery\\_and\\_Transition\\_from\\_COVID-19.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/891154/PPN_04_20- Recovery_and_Transition_from_COVID-19.pdf)

- *Four fifths of the number of people in s95 support (representing the approximate number of main applicants, excluding dependants).*
- *An additional 10% of the total number in s95 support, as an indicative figure for other forms of asylum support.*
- *Three quarters of the number of unaccompanied children in the care of the local authorities (indicative of the number of children in the authority's care who are new applicants in a year, but not counting care leavers).*
- *Four fifths of the number of people granted asylum in the area five years earlier, and eligible for settlement within the calendar year (again reflecting main applicants and excluding dependants).*
- *Two thirds of the number of people referred into the National Referral Mechanism for a decision on whether they are victims of trafficking (reflecting the fact that approximately one third are UK nationals).*
- *The number of Domestic Violence Indefinite Leave to Remain (DVILR) applications attributed to the area.'*

47) However, that situation has grown very significantly worse in the past two years, as several of the largest providers of immigration and asylum legal aid services have withdrawn from the market: South West Law, Hoole & Co, Albany and NLS Solicitors. In total, six providers have ceased providing legal aid services since 2022. A further provider has paused taking on new asylum matters until at least January 2024. At the same time, Home Office dispersal patterns have dramatically increased demand. For the reasons that follow, it is evident that provision of immigration and asylum legal aid has collapsed in the South West.

48) The author of the Mapping report has shared data obtained under the Freedom of Information Act 2000 confirming the number of matter starts opened by each provider office in England and Wales in the financial year 2021-22 the 'FOIA data'. The FOIA data shows that, aside from a single provider office in Plymouth, provision was already confined to the City of Bristol.

49) Following the withdrawal of the six providers, who were responsible for just over half of the matter starts opened in 2021-22, the FOIA data indicates that the bulk of the provision in the South West is now undertaken by a single provider, Migrant Legal Project ('MLP'):

**Table 1: Extracted FOIA data – Matter starts opened in 2021-2022**

<b>Provider</b>	<b>Matter starts</b>	<b>Current status<sup>19</sup></b>
HOOLE & CO SOLICITORS	68	Withdrawn from legal aid.

<sup>19</sup> Based on information from partners and the LAA's directory of providers, updated 27 July 2023: <https://www.gov.uk/government/publications/directory-of-legal-aid-providers>.

BRISTOL LAW CENTRE	32	Active.
SOUTH WEST LAW (LEGAL SERVICES IN THE COMMUNITY)LTD	1	Withdrawn from legal aid.
ALBANY SOLICITORS	145	Withdrawn from legal aid.
MIGRANT LEGAL PROJECT (BRISTOL OFFICE)	138	Reduced capacity.
ELISABETH DEAN SOLICITORS	43	Reduced capacity – not taking on asylum cases before January 2024.
FOUNTAIN SOLICITORS LTD	30	Withdrawn from legal aid.
NLS SOLICITORS	85	Withdrawn from legal aid.
IMMIGRATION ADVICE SERVICE	4	Active.
MIGRANT LEGAL PROJECT (PLYMOUTH OFFICE)	72	Reduced capacity.
WILTSHIRE LAW CENTRE	0	Withdrawn from legal aid
<b>Total matter starts opened</b>		<b>618</b>
<b>Total matter starts opened (Providers that have withdrawn)</b>		<b>329</b>
<b>Total matter starts opened (Providers that are active)</b>		<b>289</b>
<b>Total matter starts opened (MLP offices)</b>		<b>210</b>

50) PLP has undertaken research to establish the impact of these developments by speaking to legal aid providers and organisations attempting to refer to them. The PLP report (enclosed) focuses in particular on the South West and North West of England.

51) The PLP report explores the impact of the under provision identified in June 2022 by the Mapping report when combined with developments since. Namely the closure of the 6 firms and changes in Home Office dispersal practices which have resulted in large numbers of individuals who have a need for in scope immigration and asylum legal aid being accommodated within the dispersal area. This appears highly likely to increase demand compared to the previous years. For example:

- i) Devon and Cornwall Refugee Support ('DCRS') advise that they were (as of March 2023) supporting 943 asylum seekers accommodated in hotels across Devon and Cornwall (whereas previously they had supported 360) (p 23 of the PLP report).
- ii) The 'Bibby Stockholm' accommodation barge, located in Portland Harbour, Dorset, which will accommodate around 500 asylum seeking adults. The vessel alone has the capacity to overwhelm immigration and asylum legal aid provision in the South West. It may

generate significantly more than 500 matter starts (as more than 500 individuals may be accommodated over the course of a year<sup>20</sup>).

- 52) This is highly concerning, given that support organisations in the area already report that they are unable to identify suitable representatives for all, or even a substantial majority of the people that they support (see PLP report p 22-23).
- 53) Further, local authorities in the South West have recognised the paucity of provision by funding their own provision for resettlement scheme refugees for matters that are within the scope of legal aid (applications for Indefinite Leave to Remain on the Settlement (Protection) route)<sup>21</sup>.
- 54) As set out [above](#), the LAA has been aware of the lack of provision in the South West Procurement Area for several years. MLP informed the LAA on 9 May 2023 of further recruitment and retention issues and indicated it may need to close further offices this year. It is therefore operating at severely reduced capacity and is unable to meet the demand from former clients of Albany and Hoole & Co. We refer to the enclosed email of May 2023, where MLP also highlighted the closure of Albany and Hoole & Co and its inability to meet demand from the former clients of those firms.
- 55) The contract manager replied on 11 May 2023, indicating that the LAA was aware of the situation and was *‘working to fully understand the implications of this on remaining providers, stakeholders but also ultimately, and most importantly the clients who now may need to find alternative representation.’* The contract manager also referred to LAA efforts to maintain and circulate a list of out of area providers who have indicated some capacity to advise clients who reside outside of the region. PLP is aware of two requests by the LAA to providers asking that they volunteer to be placed on a list of providers willing to take on matters from the South West Procurement Area:
- i) By a letter dated 27 April 2022, Ms Daniels of the LAA wrote to PLP (in its role as an immigration provider), *‘to offer you the opportunity to be part of a list of Providers who will be signposted to Clients in South West England who have been unable to instruct a Provider in the Immigration Procurement Area, South West, (“List for South West Clients”)*. However, when referrers contact providers that the LAA has indicated have capacity, they discover that this list is inaccurate or out of date. DCRS report that when they attempted to use the List for South West Clients, only 4 of 20 firms on the list responded. One firm, Albany Solicitors, initially offered to take 30 or so cases, but then no longer had capacity for any more. The firm has since withdrawn from legal aid. Another firm also took on cases but has since informed

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<sup>20</sup> Home Office, ‘Factsheet: Asylum accommodation on a vessel in Portland port’, 4 September 2023: <https://www.gov.uk/government/publications/asylum-accommodation-factsheets/factsheet-asylum-accommodation-on-a-vessel-in-portland-port>

<sup>21</sup> Ibid (15), p 191 and p 200.



DCRS it is at capacity. The other two did not take on cases (p 23 of the PLP Report).

- ii) By an email dated 3 July 2023, which advised that the LAA had been contacted by the Home Office to confirm 'three large asylum seeker accommodation sites' (one of which was the 'Portland Vessel') and made the following request:

*'We have been asked to collate a list of Legal Aid Providers who would be able and willing to take cases on from individuals that are accommodated at these three locations. I will collate your responses and then these will be passed to Migrant Help who will be assisting individuals in finding legal advice. Should a client's matter be taken on, and a meeting face to face on-site be required, Providers will need to make an appointment. Each site will have their own system and details will be provided by the site service provider.'*

*We do understand that you may want, or need to conduct these matters remotely, given the locations of the sites in relation to your office(s). Under contract paragraph 3.17 you may accept 50% of your matter applications remotely. Should you need this to be increased you will need to contact your Contract Manager who will provide written confirmation that this has been increased to cover the matters started for clients at one of these locations. Similarly, should you need to increase your New Matter Start allowance please follow the usual process.'*

Ms Alison Pickup of Asylum Aid has provided us with email correspondence between 4-6 July 2023 in which she requested clarification about the arrangements and received a reply. In summary, the LAA was unable to confirm whether individuals at the sites would be supported to travel to providers, was only able to provide limited information about practical arrangements for remote advice and confirmed that there would be no special contractual concessions or remuneration. The extent of the LAA's current plans to monitor capacity of the firms on any resulting list is unclear. The Defendant will be aware that the barge is not currently operational, but the responsible minister has indicated it could be operational again 'within weeks'<sup>22</sup>.

#### **(iv) Serious under-provision and unmet need in the North West Procurement Area**

- 56) The Mapping report estimated the primary legal aid need in the North West to be 11,704 and the provision to be 5,234 for in scope immigration

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<sup>22</sup> BBC, 'Bibby Stockholm: Migrants could be back in weeks, says minister', 6 September 2023: <https://www.bbc.co.uk/news/uk-england-dorset-66711607>

and asylum legal aid<sup>23</sup>. There was therefore a deficit, with demand for providers to open a further 6,470 'matter starts' but no provider capacity to actually do so. This is numerically the largest deficit for any procurement area, despite the North West procurement area having the second-highest amount of legal aid provision.

57) This unmet need has been confirmed by 3 local NGO referral organisations and one of the largest providers in the area, which is unable to meet demand for its services or to make appropriate external referrals:

- i) Greater Manchester Immigration Aid Unit (GMIAU) is a legal aid provider with offices in Crumpsall, South Manchester and in Liverpool:
  - (a) GMIAU did not use all of its allocated matters starts at any of its offices in 2020-21 or 2022-23 and does not expect to do so in 2023-24. Its capacity to take on cases is saturated, and (as is the case more generally across the legal aid system) the number of its available matter starts is not indicative of its ability in practice to take on new cases (p 20, PLP Report).
  - (b) Demand for GMIAU's services now exceeds its capacity and appears to be increasing. Referrals increased by 137% last year (p 21, PLP Report).
  - (c) GMIAU prioritises unaccompanied asylum-seeking children ('UASC') cases over other work, but due to a marked increase in referrals it now prioritises this cohort based on age (17.5-18year-olds). GMIAU secured grant funding for a position just to manage the UASC waiting list - dealing with initial administration related to the legal aid scheme so cases can be taken up quickly (p 21, PLP Report).
  - (d) GMIAU keeps waiting lists for referrals it cannot take on. As of March 2023, there were 274 children waiting on the UASC list and over 100 people waiting on non-UASC lists. Previous practice was to remove people from waiting lists after 2 months and signpost them to other organisations. However, GMIAU changed its practice when it became clear that those people were not able to find help elsewhere. GMIAU is now turning away new referrals and has closed these waiting lists.
  - (e) GMIAU, like many other not for profit organisations in the sector, has only been able to continue its legally aided work because it is heavily subsidised by other funding streams. It has calculated the loss which it makes on its immigration and asylum legal aid work to be £285,000 in real terms. This includes allocation of

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<sup>23</sup> Ibid (15) p97.

both direct salary costs and a proportion of indirect costs (e.g. management, finance, building and insurance costs etc).

- (f) GMIAU announced on 27 July 2023 that it had secured grant funding from local authorities to subsidise UASC cases<sup>24</sup>, which it considers loss-making under legal aid. These local authorities, through The North West Association of Directors of Children's Services (NWADCS), has provided funding for two years for GMIAU to recruit new caseworkers and expand its capacity (but for UASC cases only).
- ii) Refugee Action in Manchester has indicated that since October 2022 the ten usual legal aid providers they refer clients to have no capacity for the foreseeable future (p 20, PLP Report).
- iii) British Red Cross in Liverpool indicated on 4 May 2023 that they refer to providers they are confident are able to carry out work to a satisfactory standard and they report that these providers' waiting lists are up to a year long (p 20, PLP Report).
- iv) Penrith and Eden Refugee Network operate in Cumbria where there are 400 places for asylum seekers in five contingency hotels but no immigration providers nor any registered advisers. They assist people to prepare their own asylum cases using a 'Right to Remain Toolkit'. At a recent drop-in session there were 17 attendees and only around a quarter had a lawyer (p 20, PLP Report).

#### **(iv) Exceptional Case Funding**

58) The Mapping report highlights that the unmet need for in scope advice and assistance is dwarfed by that outside of it:

*'Numerically, by far the greatest need is outside the scope of legal aid: every region has at least twice as many people undocumented (ie with no leave to remain) as in asylum support. The South East of England (excluding London) has an estimated 62,500 undocumented people, compared with 900 people in asylum support'.*

59) s.10(3) of LASPO provides for ECF determinations which provide for an exception to the general rule that legal aid is only available for in scope matters listed in Schedule 1 LASPO. ECF represents a vital safeguard, intended to ensure that legal aid is granted where there would otherwise be a risk of fundamental rights. Immigration and asylum matters make up the bulk of applications for ECF and grant rates are over 80%<sup>25</sup>.

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<sup>24</sup> GMIAU, 'A new North West fighting fund for unaccompanied children seeking asylum' – 27 July 2023: <https://gmiau.org/north-west-fighting-fund-unaccompanied-children/>

<sup>25</sup> Ministry of Justice, Legal Aid Statistics (Q4 Jan-Mar 2023) show 459 grants from 521 applications (88%): <https://www.gov.uk/government/collections/legal-aid-statistics>

- 60) ECF work is less viable for providers as there are higher administrative burdens and greater risks to undertaking such work<sup>26</sup>. There is evidence that providers have often been reluctant to incur the additional administrative burdens of preparing and submitting applications for ECF<sup>27</sup>. The application forms have been updated since the PIR in consultation with PLP and other stakeholders in an attempt to make them accessible for individuals.
- 61) However, irrespective of any improvements made to application processes, where individuals are able to obtain ECF with the help of a third party or as a direct applicant, they struggle to identify a provider who is willing to assist<sup>28</sup>. Providers indicate they do not take on ECF work (MLP, PLP report p 27) or only take it on for existing clients when it arises in parallel to a matter they are assisting on (Wilson, PLP report, p 16).
- 62) The experiences of NGO referrers in London (the only region in which the Mapping report identified a small surplus of legal aid capacity in 2022) is that they overwhelmingly struggle to find providers to take on ECF matters, even where the individual already has a grant of ECF and that issues have been deteriorating dramatically over time:
- i) Research by Coram Children’s Legal Centre<sup>29</sup> in 2017, cited in the LASPO PIR<sup>30</sup>, was that where it had been able to secure ECF in 25% of cases it has taken over a month to find a solicitor to take on the case because there is such a shortage of legal providers.
  - ii) Research by Hackney Migrant Centre in 2020 analysed 30 cases over a 12 month period. There was an average delay of 197 days securing a solicitor<sup>31</sup>.
  - iii) Research by HMSC based on referral efforts between December 2021 and May 2022 found (Annex A, PLP Report):
    - (a) The average waiting time for a solicitor (for all types of cases, including in scope matters) was over 20 weeks. 38% of cases were not placed within 6 months.
    - (b) The majority of cases (62%) not successfully placed were Art. 8 ECHR cases (requiring a grant of ECF).

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<sup>26</sup> PLP ‘Improving Exceptional Case Funding: Provider perspectives’: <https://publiclawproject.org.uk/content/uploads/2020/01/Improving-Exceptional-Case-Funding-Website-Publication-Version-docx.docx.pdf>, p15

<sup>27</sup> Ibid (26), p13 (38.75% of providers reported they do not make ECF applications on behalf of their clients).

<sup>28</sup> Ibid (26), p 16 (53.75% do not take on clients who have applied for ECF directly from the Legal Aid Agency and have had their eligibility confirmed).

<sup>29</sup> Coram Children’s Legal Centre, ‘“This is my home”: Securing permanent status for long-term resident children and young people in the UK’ June 2017: [https://www.childrenslegalcentre.com/wp-content/uploads/2017/06/Thisismyhome\\_FullReport.pdf](https://www.childrenslegalcentre.com/wp-content/uploads/2017/06/Thisismyhome_FullReport.pdf)

<sup>30</sup> Ibid (6) at §287.

<sup>31</sup> Public Law Project, ‘The case for broadening the scope of immigration legal aid’, April 2021: <https://publiclawproject.org.uk/content/uploads/2021/04/Legal-aid-briefing.pdf>, p 17

- (c) This was the case despite HMSC applying for and receiving a grant ECF in the vast majority of cases (HMSC, PLP Report, p 48).
- iv) Research by Migrants Organise analysing referral efforts between April and October 2022 for cases including ECF cases, found that they were unable to place a substantial minority (41%) of cases. On average, it took 35 referral attempts to place a case and the organisation undertook a great deal of preparatory work on cases that would have been chargeable by a provider under legal aid, in order to make referrals more attractive (p 14, PLP Report).
- v) Research by HMSC based on referral efforts between August 2022 and January 2023 found that they were unable to place the majority (58%) of their visitors within 6 months. Again, the majority (57%) were Art. 8 ECHR cases requiring a grant of ECF. Again, HMSC applied for and obtained ECF in most cases to reduce the administrative burden for providers.

## **Submissions**

### ***The statutory duty to make legal aid available in accordance with the constitutional right of access to justice***

- 63) It is, or should be, uncontroversial, that the Lord Chancellor is required to discharge his duties under LASPO to make immigration and asylum legal aid services available in a manner which is consistent with the *UNISON* principle, and therefore so as to ensure that there is effective access to justice. The Lord Chancellor will act unlawfully if he purports to discharge his duties under LASPO in a manner such that there is a real risk that individuals will not have effective access to justice. Hence, in *R (oao Detention Action) v Lord Chancellor [2022] EWHC 18 (Admin)*, the High Court held that the Defendant's operation of the DDAS scheme could *in principle* amount to an impediment to access to justice and therefore fell to be assessed on the *UNISON* principle as well as on *Wednesbury* grounds (though on the facts the evidence did not satisfy the relevant threshold) (§86-93).
- 64) In the present case, the direct impediment to effective access to justice by individuals seeking immigration and asylum legal aid arises from the Lord Chancellor's failure to exercise his powers under s. 2 of the Act to address inadequate levels of provision, particularly in the South West, North West and for individuals who have been granted ECF by the LAA.
- 65) The applicable test is the "real risk" test, not the "unacceptable risk" or "inherently unfair" tests that apply in other public law contexts: see *R (A) v SSHD [2021] 1 WLR 3931*. In *A* the Supreme Court considered *R (Howard League for Penal Reform v Lord Chancellor [2017] 4 WLR 92* and other cases where the Courts had applied a different test of whether the system was inherently unfair. It held that the substance of the analysis in these previous cases was whether there had been an

unlawful infringement of the constitutional right of access to a court of tribunal, which was now to be determined according to the UNISON principle.

- 66) Whether an individual can have effective access to justice in immigration proceedings without legal representation will depend on ‘the particular facts and circumstances of each case, including (a) the importance of the issues at stake; (b) the complexity of the procedural, legal and evidential issues; and (c) the ability of the individual to represent himself without legal assistance, having regard to his age and mental capacity: R (Gudanaviciene and others) v Director of Legal Aid Casework and Lord Chancellor [2014] EWCA Civ 1622. It is, however, clear from the ruling of the Court of Appeal in that case that legal representation will be required to secure effective access to justice in, at least, a very substantial proportion of immigration and asylum cases.

### **Analysis**

- 67) The Lord Chancellor is failing to comply with the s.1(1) LASPO duty to make immigration and asylum legal aid available, to the extent that there is a “real risk that persons will effectively be prevented from having access to justice” (UNISON, §87). The Lord Chancellor and Interested Party have been aware of both the issues set out in this pre-action letter (including the acute issues in the South West) for over 3 years.
- 68) The evidence above shows that there are large cohorts of people who are presently unable to access immigration and asylum legal aid services under the legal aid scheme at all or suffer substantial delay in doing so. There is a real risk of a denial of effective access to justice for a significant proportion of the following cohorts:
- i) Asylum seekers who require advice, assistance, or representation in relation to the substance of their initial applications, admissibility, appeals, or fresh claims. The need for the highest standards of procedural fairness and the increasing complexity of immigration law have been repeatedly affirmed by the Courts (see for example, SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284 at [8], per Moses LJ and Robinson v Secretary of State for the Home Department [2019] UKSC 11, [66]). Asylum seekers require legal advice, assistance, or representation to effectively advance their case, at all stages of the asylum and asylum appeals process.
  - ii) Unaccompanied asylum-seeking children, and other separated children seeking services under paragraph 31A Schedule 1 of LASPO (Immigration, citizenship and nationality) who are vulnerable by definition by reason of their young age and experiences and plainly require advice, assistance, and/or representation to effectively advance their cases.

- iii) Victims of domestic violence who, in an immigration context, are likely to be highly dependent upon their abuser (who is likely to be their Sponsor) and isolated from community and other forms of support (given the nature of coercive controlling relationships).
  - iv) Victims of modern slavery, including human trafficking, who require advice, assistance, or representation in relation to the National Referral Mechanism or an application for leave to remain. Provision of support and legal aid for this cohort - who are recognised in statutory guidance as often unlikely to self-identify<sup>32</sup> - is required under the UK's international obligations (Art. 15 of the European Convention Against Trafficking 2005).
  - v) Individuals whom the DLAC has expressly recognised require a grant of ECF in order to avoid the risk of a breach of their Convention rights. The Lord Chancellor has, through the delegated decision taken by the DLAC, effectively conceded that the Gudanaviciene criteria are met in respect of these individuals.
- 69) These groups suffer serious detriment as a result of inability to access legal aid provision at all, or substantial delays in being able to access such provision. Such detriment includes but is not limited to:
- i) Refusal of asylum or applications for leave to remain because the person did not raise matters at the first opportunity which is then held against them (e.g s.92 NIAA 2002, s.8 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004; failing to meet Home Office deadlines or appeal deadlines as required.
  - ii) Grant of a lesser status or period of leave.
  - iii) Delayed or no referral to the National Referral Mechanism (NRM)
  - iv) Delayed or ineffective challenge to age assessments.
  - v) Prolonged destitution.
  - vi) Being held in limbo or the subject of the Secretary of State's "hostile environment" created by provisions of the *Immigration Act 2014*, which are designed to make life as uncomfortable as possible for immigrants who lack leave to remain in the UK. The features of the hostile environment were described by Underhill LJ in *R (Balajigari) v SSHD* [2019] 1 WLR 4647 at §81.<sup>33</sup>

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<sup>32</sup> 'Modern Slavery: Statutory guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland', p113 Version 3.4: <https://www.gov.uk/government/publications/modern-slavery-how-to-identify-and-support-victims>.

<sup>33</sup> "It is, in the first place, a criminal offence to be in the UK without leave to remain: see section 24 of the *Immigration Act 1971*. As regards practical consequences, a person without leave faces severe restrictions on their right to work (see section 24B of the 1971 Act), to rent accommodation (section 22 of the 2014 Act), to have a bank account (section 40 of the 2014 Act) and to hold a driving licence (sections 97, 97A and 99 of the *Road Traffic Act 1988*); nor will they be entitled to free treatment from the NHS: section 175 of the *National Health Service Act 2006*". (That statement needs to be qualified in one respect.

70) These outcomes carry serious and irreversible consequences, such as refoulement, re-trafficking, repatriation and prolonged, separation from family members. They represent denial of effective access to justice in very many immigration and asylum cases.

71) PLP is not aware of any steps taken by the Lord Chancellor to monitor need for immigration and asylum legal aid services in different geographical areas. As to the capacity of legal aid providers to meet that need, it appears that the Lord Chancellor may have been proceeding on the basis of a complacent and wholly erroneous assumption that the availability of immigration and asylum legal aid services can be equated with the number of immigration and asylum matter starts allocated to providers with legal aid contracts. The number of available matter starts does not equate to provider capacity, for the reasons set out in the Mapping report, p 68:

*'In England and Wales, the allocation of matter starts creates illusory provision. Each firm is allocated a number of matter starts, which adds up to a total matter start allocation for the access point, the procurement area, or England and Wales as a whole. At every administrative level, the tables in the Provision Overviews show that far more matter starts are allocated each year than are actually used. Local authorities and Strategic Migration Partnerships report being told by the LAA that there is unused capacity in their area because only one third or half of the matter starts have been used, yet they are unable to find providers to take on cases within their area.*

*Some providers with contracts are not in fact doing any legal aid work, sometimes because they cannot recruit anyone to do the work, or have lost (permanently or temporarily) a supervisor. Others undertake fewer than ten legal aid cases in a year, either because of staffing shortages or because they cannot afford the losses they incur on legal aid work and have deliberately minimised their legal aid work.'*

72) It is no answer to the crisis of availability of legal aid services in the South West and North West procurement areas for the Lord Chancellor or the LAA to compile a list of providers outside the geographical area who are willing to take on work remotely. The Lord Chancellor and LAA have both been on notice of the issue since 2019 at the latest and extensive efforts have been made by providers and stakeholders to bring the issues to their attention (above, [32-36](#) and [43-44, 54](#)). Remote provision will not be suitable for some individuals due to their vulnerability, trauma, age, or their Equality Act characteristics or needs. In any event, there is inadequate provision in other areas to meet the excess demand; and any capacity used by an out-of-area provider becomes unavailable for use in

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Regulation 17(1) of the *National Health Service (Charges to Overseas Visitors) Regulations 2015* provides that victims of trafficking are exempted from the NHS charging regime. However, the other aspects of the hostile environment apply”



their own geographical area, leading to denial of access to justice in those areas instead. Where the LAA is able to draw up lists of providers in principle willing to work on a remote access basis, these are either ineffective or quickly become obsolete, as demonstrated by the experiences of DCRS set out above.

73) There are obvious reasons, connected to remuneration rates and contract and audit requirements, as to why there is insufficient provision of immigration and asylum legal aid services. However, it is not for the Claimant to specify how the Lord Chancellor ought to remedy the absence of sufficient provision, so as to ensure effective access to justice. The Claimant merely observes that the Lord Chancellor has a broad discretion in this regard. In addition to setting rates of remuneration, he is empowered to make 'such arrangements' as he considers appropriate for carrying out his functions (s. 2.2(a)-(c) of the Act). Those arrangements can include making grants or loans to persons to provide services (s. 2.2(a)) or to individuals to enable them to obtain services (2.2(b)). Despite the longstanding and systemic nature of the under provision of immigration legal aid documented above, the Lord Chancellor's powers under s. 2(a)-(b) have not, to the Claimant's knowledge, ever been exercised.

### **ADR proposals**

74) We note that a range of Stakeholders, including PLP, have attempted to engage with the Lord Chancellor on these issues over the last decade. Many of those efforts are detailed above.

75) In the absence of an immediate commitment to implement suitable interim measures whilst the Review of Civil Legal Aid is ongoing, it is not considered that ADR is appropriate in this case.

### **The details of any information sought**

76) The Lord Chancellor and the LAA are requested to provide details of any mechanisms they consider they have in place to monitor (a) the extent of need for immigration and asylum legal aid services in different geographical areas, in particular (but not limited to) the South West and North West, and (b) the capacity of providers to meet such need.

77) The Lord Chancellor and the LAA are requested to set out details of any steps that they consider they have taken to address the lack of provision in the South West and North West, and for Exceptional Case Funding nationally.

78) The Lord Chancellor and the LAA are requested to clarify the role of the following in monitoring provider capacity:

- i) The Home Office asylum support contractor, Migrant Help.
- ii) The LAA's 'Service Development team'.

**The details of any documents that are considered relevant and necessary**

79) We note the following paragraph in the [LAA Annual report](#) for 2022-23, published 18 July 2023 at page 53:

*'Market sustainability SO1 Gaps in the provision of legal aid due to insufficient provider volumes The capacity of the provider-base has continued to be managed actively by the LAA and the risks posed by existing or potential gaps in provision have received corporate-level oversight throughout the year. Engaging with MOJ Policy colleagues and ministers to outline challenges, agree options, and operational approaches to service provision issues has been a priority over the last year and will continue to be so into 2023-24. As a result of our regular market capacity reviews, we have run several additional tender exercises during the year to address gaps in provision.'*

80) We request copies of communications, records of meetings and any other records of the above 'engagement' between employees of the Lord Chancellor and the LAA in relation to the above matters as they relate to the South West, North West and in respect of Exceptional Case Funding.

81) We note the following paragraph of the Government response to its 'Immigration Legal Aid: A consultation on new fees for new services' (20 December 2022):

*'The LAA and Home Office discuss dispersal patterns and legal aid capacity and take action when gaps appear.'*

82) The Lord Chancellor and the LAA are requested to clarify what 'action' this statement refers to. The Lord Chancellor and the LAA are requested to provide copies of communications, records of meetings and any other records of the above 'discussions' that relate to the provision of legal aid in the North West, South West or for Exceptional Case Funding.

83) The Lord Chancellor and the LAA are requested to provide records of any communications with Migrant Help concerning provision of immigration and asylum legal aid in the South West or North West.

84) The Lord Chancellor and the LAA are requested to provide a copy of any documents relating to the outcome of the 'Immigration and Asylum capacity exercise' undertaken by the LAA around September 2021, and any subsequent similar exercise.

**The address for reply and service of court documents**

85) The address for the Public Law Project is at the first page of this letter. Please ensure that the reply and court documents are served by email to

## **Funding**

86) We put you on notice that should the matter proceed, PLP will seek a Costs Capping Order under the Criminal Justice and Courts Act 2015. It is contended that the proposed proceedings meet the definition of public interest proceedings and other relevant criteria are met in view of the nature of the claim.

## **Enclosures**

87) Please find enclosed the following:

- i) Note of interim findings, Dr Jo Wilding, January 2020.
- ii) Correspondence between MLP, the LAA and Lord Chancellor between September and November 2020.
- iii) FOIA data: Immigration and asylum matter starts 2021-22.
- iv) Correspondence between PLP and its LAA Contract Manager concerning a 'capacity monitoring exercise' in September 2021.
- v) Correspondence between the LAA and PLP concerning the 'List for South West Clients' dated 27 April 2022.
- vi) Correspondence between PLP, Ministry of Justice and other Stakeholders concerning RoCLA, February to April 2023.
- vii) Correspondence between MLP and LAA, 9-11 May 2023.
- viii) Correspondence between the LAA, PLP and Asylum Aid concerning 'asylum seeker accommodation sites' dated 3-6 July 2023.
- ix) PLP's report 'Access to immigration legal aid in 2023: An ocean of unmet need', September 2023.

## **Proposed reply date**

88) In view of the nature of the proposed claim, the disclosure/information requested, and the volume of material enclosed with this pre-action letter, we are prepared to extend the normal response time to 21 days, A response is therefore requested by 5pm on 29 September 2023.

Yours faithfully



Daniel Rourke  
Solicitor  
Lead Lawyer  
**Public Law Project**

Direct line:  
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