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Your ref: DR/PUB2.12
Our ref: Z2309649/JBD/JD5

24 October 2023

Dear Sir

Proposed claim in respect of the Lord Chancellor's duty under section 1(1) of LASPO

1. We act for the Lord Chancellor and write further to your letter before claim dated 8 September 2023. This is our response in accordance with the Pre-Action Protocol for Judicial Review.

The proposed claimant

2. The proposed claimant is Public Law Project (“PLP”).

The proposed defendant

3. The proposed defendant is the Lord Chancellor.

Reference details

4. This matter is being dealt with by [REDACTED]. Any correspondence should be sent to me at the above address and marked with the above reference.

Matter being challenged

5. PLP contends that the matter being challenged is “*the Lord Chancellor's failure to discharge his duty*” under section 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”). With respect, PLP has failed to identify either a relevant decision of the Lord Chancellor's or any obstacle which the Lord Chancellor could even arguably be said to have placed in the way of those seeking to access legal assistance. As currently framed, the claim seeks to initiate a wide-ranging public inquiry into the ongoing operation of the entire legal aid system for immigration.

Gary Howard - Head of Division
Natalie Cohen / Emma Parker - Deputy Directors, Team Leaders MOJ, Public Law



Response to the proposed claim

Summary

6. The Lord Chancellor does not accept that there has been any unlawful failure to secure his obligations under section 1(1) of LASPO. Upon the correct application of the case law, and reading the legislation in context, the system as it operates is lawful and in particular has the flexibility to react to any issues as they arise.
7. The Lord Chancellor acknowledges that there is a large volume of immigration and asylum work and that many providers are at high capacity in certain areas, but we do not consider that this gives rise to any unsurmountable problem, let alone one which gives rise to an arguable claim of systemic illegality as suggested in your letter. The Lord Chancellor has, in exercise of his powers under LASPO, made arrangements with providers throughout England and Wales and is satisfied overall that those providers have sufficient capacity to meet the current levels of demand for publicly funded legal advice by those who are entitled to access it.
8. The Lord Chancellor also acknowledges, however, that there is currently a shortage of legal aid providers in some areas, notably the South West. The Lord Chancellor also accepts that it is necessary for him to take reasonable steps to ensure that those who are located in such parts of the country are able to access publicly funded immigration advice, where they are eligible for such advice.
9. The difficulty which arises is, from the Lord Chancellor's investigations, one of matching supply to demand in circumstances where both the supply (i.e., the number of providers in any particular area) and the demand (i.e., the number of individuals in those areas requiring immigration advice) are not static. The consequence is that at various points in time there may be over-capacity in some areas and under-capacity in others. The Lord Chancellor is, however, currently taking action to improve the match between supply and demand.
10. As an initial step, the Lord Chancellor is acting to address the current difficulties in information flow between potential clients, providers and the LAA (and between providers). In particular, and as explained below, the Lord Chancellor will be introducing a new way of managing the information about which providers have capacity by centralising the information via the Civil Legal Advice (CLA) telephone line and the LAA website which will list which immigration providers have capacity.
11. At present, this effort will be focused on the South West where we acknowledge that there are capacity issues at present. However, the Lord Chancellor will move to address any similar issues that may exist (or arise) in other areas where he becomes aware of those issues. To this end, the Lord Chancellor remains ready and willing to engage with PLP and other agencies with a view to identifying any other areas where there may be issues which require resolution. The Lord Chancellor considers that constructive engagement of this type is preferable to adversarial, backwards looking, litigation which will distract from what must be the shared objective of ensuring that legal advice is available to all of those eligible for it.
12. The above is an explanation of how the Lord Chancellor intends to address the immediate problem which you have identified. However, the Lord Chancellor is also engaged in detailed policy work with a view to identifying how the civil legal aid system can be improved in the medium and longer term. In particular, there is an ongoing Review of Civil Legal Aid ("**ROCLA**") which is considering the broader economic context of the civil legal aid market as a whole across eleven categories (not only immigration) so that it can operate sustainably in the long-term. ROCLA's final report is expected in March 2024. This timeline is necessary because civil legal aid covers a broad and complex market, and it will take time to gather relevant evidence and

develop meaningful proposals across all categories in England and Wales. The Review consists of four components, each requiring extensive evidence collection and intensive stakeholder involvement. The threatened proceedings would be a distraction to that important work which is ongoing.

13. Finally, and for the avoidance of doubt, the Lord Chancellor does not have powers in respect of current immigration rules or policy decisions and must be responsive to immigration advice needs as and when they arise. For example, the Nationality and Borders Act 2022 and the Illegal Migration Act 2023 have introduced new features in the immigration system which require changes to the provision of civil legal aid, some of which have been very recently introduced. Again, the Lord Chancellor accepts that the legal aid system must be responsive to increases in demand, and he has taken and will take appropriate steps to ensure that where there are increases in demand they are met (for example in respect of changes under the Illegal Migration Act).

Legal framework

14. As you will be aware, LASPO considerably reduced the scope of civil legal aid (covering both advice and assistance as well as representation). Unlike the predecessor provisions in the Access to Justice Act 1999, LASPO exhaustively specifies the categories of case for which legal aid is available. The Lord Chancellor cannot expand the scope of civil legal aid beyond those identified in LASPO.

15. Section 1 of LASPO provides as follows:

Lord Chancellor's functions

(1) The Lord Chancellor must secure that legal aid is made available in accordance with this Part.

(2) In this Part "legal aid" means—

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

(b) services consisting of advice, assistance and representation required to be made available under section 13, 15 or 16 or paragraph 4 or 5 of Schedule 3 (criminal legal aid).

(3) The Lord Chancellor may secure the provision of—

(a) general information about the law and the legal system, and

(b) information about the availability of advice about, and assistance in connection with, the law and the legal system.

(4) The Lord Chancellor may do anything which is calculated to facilitate, or is incidental or conducive to, the carrying out of the Lord Chancellor's functions under this Part.

(5) Nothing in this Part affects the powers that the Lord Chancellor has otherwise than under this Part.

16. The starting point is that under section 1(1), the Lord Chancellor has a broad discretion to determine how that aim ("*secure that legal aid is made available*") is to be achieved. In order to do so, the Lord Chancellor has incidental powers as made clear by section 1(4). For the avoidance of doubt, there is no duty of result established by section 1 of LASPO; rather, read with the applicable case law, the Lord Chancellor is under a duty to operate a lawful scheme which ensures legal aid is available for those in scope.

17. Section 2 (“Arrangements”) and section 3 (“Standards of service”) provide that the Lord Chancellor can make such arrangements as he considers appropriate and may set and monitor standards in relation to services made available.
18. The statutory scheme imposes a broad obligation to “secure” a state of affairs. It specifically recognises, unsurprisingly, that there are myriad ways in which that might be done; that decisions about those matters will be for the judgement of the Lord Chancellor, controlled by public law principles including specifically rationality; and that he should be accorded a very broad margin in making those judgements (“*such arrangements as he considers appropriate*”). Decision-making under s.2(1) LASPO “*quintessentially, involves the making of discretionary judgments*” and is reviewable on rationality grounds: *R (Law Society) v Lord Chancellor* [2015] EWHC 295 (Admin) at §§32-33 per Laws LJ; [2015] EWCA Civ 230 at §18 per Lord Dyson MR.

UNISON and R(A)

19. In *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2020] AC 869, the Supreme Court confirmed the existence of a constitutional right of access to the courts and to legal advice. The Court found at §78 that the Executive is under a legal obligation not to introduce legal impediments in the way of such access save on the basis of clear legal authority.
20. In certain circumstances, the right of access to a court or tribunal may be breached by placing a practical obstacle in the way of someone entitled to legal aid. In *UNISON*, the impugned executive action was the imposition of fees for employment tribunal cases. In that context, it was possible for a judicial review challenge to be brought in respect of executive action which imposed hindrances on access to justice such that there is a “real risk” that the hindrance amounts to a denial of access to justice (at §87).
21. In *R(A) v SSHD* [2021] UKSC 37, [2021] 1 WLR 3931, the Supreme Court conducted a detailed review of “systemic challenges” in judicial review. As part of its analysis, Lord Sales and Lord Burnett considered there was a distinct *UNISON* principle which was that the executive could not impose legal impediments which result in a “real risk of prevention of access to justice” (§§66, 80).
22. What the Supreme Court patently was not doing in *R(A)* was suggesting that the *UNISON* principle could be invoked to ground a broad challenge to the overall operation of the legal aid scheme based on an unspecified omission, as you have alleged. Rather, as was the case in *UNISON*, challenges of this kind must concern some positive action or impediment that prevents access to justice.
23. Such an impediment does not arise simply because a practical issue becomes apparent with the operation of the legal aid system (that is, a system which itself facilitates access to justice), still less where (as here) the Lord Chancellor is taking prompt and reasonable steps to address that issue. It is unsurprising, therefore, that there is no case in which the manner of legal aid provision, or the operation of the legal aid scheme, still less the level of funding for a legal aid scheme, has been held to constitute an impediment to access to the courts, see for example *Detention Action v Lord Chancellor* [2022] EWHC 18 (Admin) and *R (SPM) v Secretary of State for the Home Department* [2023] EWCA Civ 764. We note that in *R (Detention Action) v Lord Chancellor* [2022] EWHC 18 (Admin), Calver J considered that it was “possible” that a monitoring scheme under section 3 of LASPO could be set up in a way that is “sufficiently inadequate or unreasonable” that the scheme itself gives rise to the impediment to access to justice under *UNISON* (§§91-92). This establishes a very high threshold because it amounts to an allegation that the entire monitoring scheme is in fact operated so unreasonably or irrationally that there is a real risk that it impedes access to justice.

24. In any system-wide challenge, one has to look at the “full run” of cases and consider whether the system has the capacity to react appropriately to ensure fairness: *R (Detention Action) v FtT IAC and others* [2015] 1 WLR 5341 (CA) at §27 (Lord Dyson MR), which the Supreme Court indicated was consistent with the approach it prescribed: *R(A)* at §68.
25. Further, the alleged inherent unfairness has to be considered by reference to the statutory framework: *R(S) v Director of Legal Aid Casework and Anor* [2016] 1 WLR 4733 (CA) at §17 (Laws LJ). The sorts of objections you have raised do not go to the minimum of what the statute requires, particularly where section 1 of LASPO gives considerable latitude to the Lord Chancellor in securing the provision of legal aid services.
26. In particular, the Lord Chancellor is to be afforded a particularly broad margin in deciding whether and how to secure that legal aid is available in immigration and asylum work because these are high-level macro spending decisions concerning future allocation of public funds. In *R (Law Society) v Lord Chancellor* [2015] EWHC 295 (Admin) at §32, Laws LJ noted that, in a challenge concerning macroeconomic policy, “*an especially “light-touch” approach would be appropriate*”. These are not matters on which the Court has institutional competence; it is the Lord Chancellor who has the oversight of the market as a whole and who is considering how to operate it in a sustainable way into the future.

The Lord Chancellor’s approach to securing legal aid

27. In practice, the Lord Chancellor secures the provision of legal aid by entering into contracts with private providers following a tendering process. The terms of these agreements including as to remuneration are in the Standard Civil Contract. The Lord Chancellor has recently re-tendered for September 2024 onwards. The operation of legal aid is complex because it requires managing limited resources, ensuring the quality of legal advice, and supporting providers through changes in the market.
28. The Lord Chancellor has also taken steps to monitor the scheme as a whole under section 3(1) of LASPO, principally through information provided by contract managers and regular capacity reviews which look at the number of contracted legal aid providers and the geographical distribution, provider performance (used to evaluate the effectiveness of legal aid providers in delivering services), funding allocations, workload and case data, and access points.
29. The LAA (as the representative of the Lord Chancellor in this context) is also able to respond to ad hoc issues and feedback as it arises. The LAA meets stakeholders including representative bodies and individual providers regularly. In particular, the Process Efficiency Team (PET) meets on a regular basis with Providers, and the Civil Contracts Consultative Group meet quarterly. More informal engagements are held regularly with key bodies, such as Immigration Law Practitioners' Association (ILPA).
30. The LAA has engaged constructively in response to surges in demand due to particular developments. By way of example:
 - a. Making adjustments to ease administrative burdens during the Covid-19 pandemic and to speed up payments in immigration cases.
 - b. Enabling the greater use of remote advice.
 - c. Giving firms greater powers to self-grant matters starts and granting further matter starts to firms when requested.

- d. Expanding the self-grant scheme from April 2023 which allows providers to extend cost and disbursement limitations without the need to apply to the LAA.
 - e. Retendering for additional civil contracts in March 2023, which started on 1 September
31. In early 2022, using LAA data on provider numbers, and feedback from provider firms and other interested organisations, the LAA recognised a potential risk to provision of legal aid in the South West area. At this time there were nine active providers in the area, and most were concentrated in Bristol, despite an increasing number of asylum seekers being housed in Plymouth and Swindon. The LAA Service Development and Contract Management and Assurance teams collated and managed a list of national providers who had confirmed they had the willingness and ability to assist with the situation. This list was provided to firms in the South West and third sector organisations to signpost SW clients to out-of-area providers able to take on their case. In June 2023 the LAA discontinued the list.
32. At the same time, COVID-19 changes to the contract in relation to remote advice, which increased from 25% to 50% (with the possibility to surpassing the 50% with prior authorisation from the LAA), meant that more individuals could now access legal aid remotely, and the geographical location of providers was no longer a limiting factor in the provision of legal aid to clients in the area.
33. Finally, the Civil Legal Aid advice line helps clients find immigration providers. The CLA consistently receives between approximately 100 to 200 calls a month in relation to immigration.
34. As noted above, we acknowledge that there is a need to match supply and demand (which are dynamic) in different areas at different times. While the longer term ROCLA review is ongoing, we have introduced the following arrangements (at present focussed on the South West) and which we are happy to discuss further with you:
- a. Where an individual located in the South West requires immigration advice they should in the first instance contact immigration providers listed in Find Legal Adviser <https://find-legal-advice.justice.gov.uk/> and if there are no providers who can assist then the individual should call the LCLA telephone line on 0345 345 4 345.
 - b. CLA will maintain a list of immigration providers in England and Wales who are currently willing and able to provide remote immigration advice to individuals from the South West. This list is provided to the caller, and they are asked to phone a contracted immigration provider from that list to obtain immigration advice.
 - c. The list will be compiled by the LAA from information collected from immigration providers in England and Wales. This information may be supplemented by phone calls between contacted immigration providers and the LAA contract management team during the starting phase of this process. This list will be updated when the LAA are notified that there have been changes with providers' willingness and ability to help.
 - d. The list will be provided to immigration providers in Southwest England who are under a contractual duty (Civil Contract General specification clause 2.41) to signpost individuals requiring advice to other providers if they are not able to help. The list will also be provided to South West Asylum Forum which includes local authorities and refugee support organisations in the South West as it is these groups which ordinarily assist clients finding legal advice.

e. The current list will also be maintained on the LAA’s website so those requiring assistance will be able to access the list 24 hours a day.

35. This approach represents a refinement of a process which has been followed in the recent past, with refinements introduced to address practical issues which were encountered in that process. As explained above, the Lord Chancellor’s immediate efforts are focused on the South West where the issue appears to be the most acute. As always, the LAA and MOJ would be happy to explore this further with PLP and other agencies with a view to identifying where else there is a need to match demand and supply and expand the proposal as appropriate.

Immigration work

36. With the exception of 2020-2021 at the height of the COVID-19 pandemic, the number of immigration legal aid cases opened has remained steady, with an increase in the last year in particular:

Table 1: Number of new cases opened (LAA data)

Year	No. of new cases
2018-19	29,139
2019-20 (r)	33,532
2020-21 (r)	25,801
2021-22 (r)	32,087
2022-23 (p)	37,361

37. Correspondingly, spending has remained high. In 2022-23 of the £1 billion spent on civil and family legal aid, £44m was spent on immigration legal aid, of which around £35m was spent on asylum cases.

38. Despite this, the overall number of provider firms has declined in the last 5 years. This means that fewer providers are taking on an increasing volume of work.

Table 2: Number of immigration legal aid providers and offices (Legal Aid Contract Statistics report)

Year	No. of providers	No. of offices
Sep-18	196	300
Aug-19	197	294
Aug-20	186	277
Aug-21	174	259
Aug-22	164	245
Aug-23	147	209

39. However, there have been new entrants into the market, as well as existing providers expanding their capacity. For example, the number of providers has increased from 149 to 180 between August and October 2023. The number of offices has also increased from 212 to 253. These figures are on a “net” basis, taking account of withdrawals. This indicates that the legal aid market is dynamic and that providers are still responding to market incentives. The LAA is currently tendering for new civil contracts to commence on 1 September 2024. The tender closed on 17 October 2023 and, while the review of applications is ongoing, an increased number of firms applied in immigration.

Exceptional Case Funding

40. Due to the nature of ECF, which is targeted at issues which out of scope of legal aid and applications for which are considered by the LAA on a case-by-case merits basis, it is more

difficult to monitor demand for this scheme. However, regular engagement with providers and key stakeholders help the LAA monitor capacity and enables them to take remedial action where it is required (e.g. following concerns about the complexity of the process, the LAA have taken action to simplify the forms used and provide additional guidance to providers).

41. In 2021-22, there were 2,612 applications for ECF in immigration, of which 2,279 were granted (87%). In 2023 so far, there have been 2,264 applications, out of which 1,966 (87%) have been granted. Over the last 5 years the grant rate for ECF applications in relation to immigration has been above 80%.
42. In January 2022 the LAA conducted extensive engagement with key stakeholders, including pro-bono services and The Law Society to discuss difficulties experienced by individuals in finding a provider to take on their ECF case. It was agreed that simplification of the process and improved guidance would help in increasing uptake of ECF providers. The LAA made the following changes:
 - a. The ECF1 form was simplified and improved in June 2022, as was the ECF Provider Pack.
 - b. A number of ECF “easy read guides” were produced, and subsequently converted into web pages for easier access.
43. The Lord Chancellor is aware that ECF is an area that requires careful monitoring, and to this end the LAA is undertaking a two-year Process Improvement Review which will consider further improvements that can be made to the existing ECF system and processes.

Interested parties

44. The Legal Aid Agency (“**LAA**”) is an executive agency of the Ministry of Justice. It carries out functions on behalf of both the Lord Chancellor and the Director of Legal Aid Casework (a statutory officer appointed by the Lord Chancellor under section 4 of LASPO).
45. As noted in our earlier correspondence, for present purposes the LAA has no separate legal identity and therefore need not be treated as a distinct interested party.

ADR proposals

46. As noted above, we have set out above the steps which the Lord Chancellor is taking to address the immediate issue which has arisen with respect to matching demand and supply in the South West and would be happy to discuss this and related issues with PLP further.

Response to requests

47. Our responses to your requests are as follows.
 - i) In relation to the request at paragraph 76 of your letter we explain above in paragraphs 27 to 33 how we monitor need and respond to ad hoc issues and surges in demand.
 - ii) In relation to the request at paragraph 77:
 - we have documentary evidence of steps previously taken in the South West [**pages 35 - 39**].
 - in relation to the North West, our current view is that there is no such lack of provision and therefore no such steps are required. However, we intend to investigate your allegations and to update you once those investigations are complete.
 - for Exceptional Case Funding, there may be a myriad of reasons why direct applications with a positive decision might find it difficult to then secure a provider, which are not related solely

to capacity or geographic location. As such, we would require more detail of the issues you consider are taking place to provide any further information.

- iii) In relation to the request in paragraph 78, Migrant Help have no formal role in monitoring provider capacity and only contact the LAA on an ad-hoc basis. We only have two emails between the LAA and Migrant Help **[pages 59 - 62]**. In relation to the Service Development Team, amongst other things, they produce regular reviews of work undertaken by providers, together with the LAA's Central Commissioning team. We attach capacity reviews carried out by the Service Development Team **[pages 1 – 34]**.
- iv) In relation to the request in paragraph 80, as noted above, we have attached capacity reviews carried out by the Service Development Team **[pages 1 - 34]**, together with:
 - documents showing why the South West provider list was set up **[pages 35 - 39]**; and
 - the findings of a capacity survey **[pages 40 - 51]**.
- v) In relation to the request in paragraph 82, the LAA meet regularly with the Home Office about their plans in relation to housing people in different locations, for example. However, no discussion has taken place with the Home Office in relation to how legal aid will be provided. Meetings with the Home Office have resulted in action such as running an additional tender in March 2023 and setting up the South West provider list.
- vi) In relation to the request for information in paragraph 83 in relation to communications with Migrant Help, they are addressed in para 3 above.
- vii) In relation to paragraph 84, copies of relevant capacity reviews are attached:
 - Oct 21 – Dec 21
 - Jan 22 – Mar 22
 - Apr 22 – Sept 22
 - Feb 23 – Jun 23

Costs

47. We note your position as to an application for a Costs Capping Order. We reserve our position until we have seen your application, but we note that PLP is required to satisfy the detailed financial requirements in sections 88 and 89 of the Criminal Justice and Courts Act 2015 and CPR 46.17.

48. We intend to seek a reciprocal Costs Capping Order if matters reach that stage.

Address for further correspondence

49. This is set out at the head of this letter. If, notwithstanding the contents of this open letter, you decide to issue proceedings then they should be served on this office at newproceedings@governmentlegal.gov.uk and marked for my attention.

Yours faithfully



(Treasury Solicitor)

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