

Future of legal aid inquiry

Submission to the Justice Select Committee, 29 October 2020

Justice Together is a collaboration by independent funders in the UK which aims to ensure that people who use the UK immigration system can access justice and thrive. Launching in late 2020, it will invest in free legal advice and national policy advocacy to support the lawful and fair functioning of immigration, nationality and asylum processes. Over the next five years, more than £9 million of new funding has been committed by founding funders. Justice Together is hosted by Justice Collaborations, a registered charity and subsidiary of The Legal Education Foundation.

This evidence to the Justice Select Committee focuses on five of the areas of interest mentioned in the inquiry TOR, namely:

- a) the future of legal aid for people who use the immigration, asylum and nationality systems in the UK
- b) concerns about the ability of people to access timely, quality advice and representation on their immigration matter during the C-19 pandemic and the implications for their safety and lives in the UK, as well as other aspects of their lives.
- c) some of the pressures we understand are experienced by providers in the legal aid market
- d) challenges over the next decade
- e) some suggested areas where reforms may be needed.

a) The future of legal aid for people who use the immigration, asylum and nationality systems

We would encourage the Select Committee to consider the specific need to access legal aid for people who are seeking asylum in the UK, those who are trafficked here and those who migrate for work, study or family reasons, as well as children and young people born or raised in the UK but without permanent status to remain here. Among these groups many people can and do pay for private immigration advice. However, for those seeking asylum (who are prevented by law from working), those on lower incomes, or children, access to publicly funded legal advice is extremely restricted, and even where it remains in scope is often not accessible outside main cities. As such, although equality of arms is a fundamental principle of the justice system, while the Home Office is always represented, people applying for status or challenging refusals of their immigration and nationality applications often have to do so unrepresented.

Previously published papers detail the impact of the cuts to legal aid on accessibility and quality of asylum and immigration advice and representation, and evidence that there are significant ‘advice deserts’ around the UK. This research concludes that free specialist immigration advisers are critical to prevent large numbers of people (who have moved from within and beyond the EU) from facing destitution and deportation (see for example ‘*An overview of immigration advice services in England and Wales*, by Saira Grant, July 2020’ <https://www.phf.org.uk/publications/an-overview-of-immigration-advice-services-in-england-and-wales/>.)

It is particularly important to ensure that future models of legal aid funding include consideration of protected characteristics and vulnerabilities amongst those seeking asylum or trying to resolve their immigration status. Anybody without immigration status is subject to a suite of stringent enforcement policies, known as the ‘Hostile Environment’. This requires document checks to be conducted by employers, landlords, DVLA, banks and the NHS to ensure those without permission to be in the UK do not access housing, work or public services. However, many families and individuals fall into irregularity due to onerous immigration rules which they do not understand, because they cannot access legal assistance to navigate the rules and secure their status. Access to the law is essential to support fair outcomes and support the effective functioning of the wider immigration system, and wider society.

The impact of the hostile environment has also been felt by many people legally in the UK, as the cases of the Windrush generation show. People who have lived in the UK for decades can fall foul of immigration rules they did not understand, or thought did not apply to them, as they are unable to access advice or representation. This cohort is likely to increase after Brexit as EU citizens try to secure their status and many could inadvertently fall into undocumented status. The costs of this policy are very high for the individual and equally high for society and the public purse. The Home Secretary’s commitment to ensuring that lessons are learned from Windrush provides an important opportunity to work across departments to prevent future cohorts of people becoming outside the law for want of access to immigration advice and representation.

Before 2008, people could draw on a network of advice centres, Citizens Advice Bureaus (CABs), law centres and specialist high street solicitor firms, publicly funded via local authorities and central government. Reductions in central and local funding have resulted in the number of providers of legal aid dropping by a third¹, and not for profits by half. With a shortage of lawyers across social welfare law, there has been a 30% increase year on year since 2014 of people representing themselves at an additional cost to HM Courts & Tribunals Service of £3 million per year, plus direct

¹ The number of Civil Legal Aid providers has fallen from 4,253 providers in 2011-12 to 2,824 in 2017-18. Not for profits also fallen from 500+ to c. 250

costs to the Ministry of approximately £400,000. There are several regions of the UK where there are no free immigration advisors.²

Delivery of the remaining legal aid contracts is increasingly not viable for practitioners (a situation which worsened during the pandemic – see below). Over 2014-2019 there was an estimated 70% drop in the number of new immigration cases which were publicly-funded and data from 2019 showed the number of immigration legal aid providers had dropped by more than a third (from 249 to 160).

The sector has met some of the immigration advice need through pro bono support, cross subsidisation or just doing work that is unpaid – a situation which is not sustainable and does not meet the demand.

Statistics from the Legal Aid Agency for the quarter period immediately before the pandemic highlight that overall civil legal aid expenditure continues to be relatively stable, despite overall legal aid expenditure having fallen in recent years³. The continuing upward trend for Exceptional Case Funding for immigration cases contributes to this.

² Large parts of the South West (Cornwall, Somerset, Dorset, Wiltshire), East of England (Essex, Suffolk, Norfolk), East Midlands (Lincolnshire), West Midlands, (Warwickshire, Worcester, Herefordshire, Shropshire), North West (Cheshire, Lancashire, Cumbria), Yorkshire and Wales have no providers and are complete advice deserts.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895088/legal-aid-statistics-bulletin-jan-mar-2020.pdf

b) concerns about the ability of people to access timely, quality advice and representation on their immigration matter during the C-19 pandemic and the implications for their safety and lives in the UK.

We would encourage the Select Committee to consider the particular challenges presented by C-19 to the fair functioning of the legal system for immigration and asylum cases. People subject to immigration control have been heavily impacted by C-19 because they are already disproportionately impacted by poverty, exclusion from mainstream services and more likely to be in precarious work (including those legally in the UK but without recourse to public funds)⁴. We anticipate that in the short term, demand for immigration advice is likely to rise as a consequence of societal level changes resulting from C-19. In addition, essential changes to the delivery of the immigration system and the courts has created confusion and uncertainty in many communities, and access to legal aid funded advice was extremely limited at the height of the lockdown. As such there is a backlog of cases which are likely to struggle to access representation.

During the pandemic there has been a regular survey by charities Refugee Action with NACCOM, which highlights several issues which impact on access to legal advice and representation.⁵ Firstly, there is a high prevalence of tech poverty in this group. Whilst much of society has relied on the internet and capacity for facetime/ video conferencing, many people in the asylum and migration system are unable to afford the cost of the technology and can often have more limited access to Wi-Fi. Front line organisations are concerned about on-going uncertainty about immigration status and the delays experienced in case decisions. Relatedly, organisations report being concerned about their ability to reach the most vulnerable clients who would normally access services face to face. Homelessness is a chief concern despite Government commitments to accommodate homeless people and changes to eviction rules. Organisations report increased homelessness and destitution amongst care leavers, people seeking asylum who cannot access Section 4 support and not in Home Office accommodation, and EU nationals unable to access benefits. This is a major concern now that short term housing solutions and concessions made during the height of the crisis are at an end. People who are homeless are much less likely to be able to access legal advice to resolve their immigration cases. Lack of financial support is a key issue. Confusion about immigration status and rights during and after the crisis exacerbate this. Lack of accessible information and advice on the impact of

⁴ See: COVID-19 Impact Assessment Framework

Risks and Responses for People in the UK Immigration System
Migration Exchange, May 2020. <https://global-dialogue.org/covid-19-impact-assessment-framework/>

⁵ <https://www.ragp.org.uk/data-hub>

Covid-19 on immigration status and rights is cited as a key barrier to clients accessing the services that they need.

The fourth report from Refugee Action/ NACCOM's survey provides insights on access to legal advice and representation⁶. Of the 44 respondents who answered the question 'have you experienced reduced ability to access or provide legal aid-funded advice and representation during Covid-19': 55% reported reduced ability to access or provide legal aid funded advice and representation for asylum applications and lodging fresh asylum claims; 45% for advice on rights and options; and, 41% for immigration and asylum appeals. 18% reported reduced access to legal aid funded work on lifting No Recourse to Public Funds restrictions.

Of the 51 organisations that responded to the question 'what non-legal-aid sources of free legal advice are currently accessible to the clients you are working with': 61% reported that their clients had access to one-off immigration advice; 59% complex immigration advice; 57% one-off welfare, benefits or housing advice; and, 49% complex casework on welfare, benefits or housing. Access to pro-bono representation by private immigration solicitors and community care, housing or benefits solicitors were reported at 20% and 12% respectively.

The report points to the implications of the backlog created as a result of lockdown and distancing measures and the demand now on the sector to deal with that demand. It notes that:

"The responses to the questions on access to legal advice and representation point to significant gaps in casework capacity. This is compounded by a backlog resulting from repeatedly delayed decisions - delays that are difficult to challenge when they are related to COVID-19. One respondent, working as a solicitor, pointed out that should the Home Office and courts temporarily increase staffing to manage this case decision backlog, the sector would struggle to employ enough adequately trained staff, quickly enough, to meet the demand".

Discussion amongst sector actors and legal practitioners, points to an increased demand for advice in the near future (whilst at the same time having ever more limited resources to meet these). The Refugee Action survey (mentioned above) finds that insufficient staff to meet demand is a key future operational concern for the sector. Research from our partner The Legal Education Foundation finds that the economic climate created by the pandemic is causing legal need to rise.

⁶ <https://www.ragp.org.uk/blog/new-insights-into-legal-advice-and-representation-operational-needs-and-sector-coordination>

<https://research.thelegaleducationfoundation.org/wp-content/uploads/2020/06/FINAL-REPORT-CJC-4-June-2020-v2.pdf>

C-19 is expected to produce increased demand for legal work relating to the following:

- Surge in destitution needs (directly related to immigration status), especially when people temporarily housed by statutory services are evicted after lockdown. In March 2020, the UK Government and devolved governments took sensible decisions that protected people seeking asylum, people at risk of homelessness with No Recourse to Public Funds (NRPF) and wider public health. These measures included the suspension of evictions from asylum accommodation and the provision of accommodation to everyone experiencing homelessness, regardless of their immigration status, through the 'Everyone In' directive and equivalent initiatives by devolved governments. This protected many people when they needed it most and was a welcome, life-saving measure to individual and public safety. However, since the 15th September, people who have been refused asylum in England have begun to receive notices to leave their accommodation, with plans to restart evictions in Scotland, Wales and Northern Ireland at a later date. As these temporary initiatives come to an end, charities have highlighted the likelihood of increased destitution and homelessness amongst those who are most vulnerable is heightened.⁷ Thousands of people seeking asylum who now face eviction typically have no source of alternative income or savings. They will rely on charities or local people in the communities for support. Charities supporting people who are experiencing homelessness have had to radically rethink how they provide safe accommodation, and local conditions mean that accommodation providers have significantly less capacity and serious concerns about their ability to support those most in need. Moreover, the independent legal advice that people who have been refused asylum need to consider their options to challenge the decision and/or access assisted voluntary return is either unavailable or acutely oversubscribed.
- EU nationals with pre-settled status and/ or complex settled status claims are increasingly facing poverty as they cannot claim benefits and have suffered job losses/ drop in income because of Covid-19.
- Domestic violence related cases (given the surge in domestic abuse during lockdown) <https://www.bbc.co.uk/news/uk-52433520>
- Family reunion work (effectively on hold given border closures, lack of flights and court changes)

⁷ See for example: <https://naccom.org.uk/open-letter-to-the-prime-minister-reverse-the-decision-to-evict-people-with-no-recourse-to-public-funds-nrpf-into-homelessness/>

Demand is also expected to increase with regards to the following:

- Complex Settled Status claims and especially legal work concerning EU national children. On 1st July, Coram Children's Legal Centre published research that highlights that there have been fewer applications to the Settled Status scheme for children than there ought to be and that many vulnerable stand to lose status in the UK after the June 2021 deadline for applications. https://www.childrenslegalcentre.com/wp-content/uploads/2020/06/CCLC-Children-left-out_July-2020_final.pdf
- Undocumented people, again because of fewer legal routes but also because of general confusion about immigration system changes, and the impact this will have on access to everyday life and services
- Increase in need for advice services for people in immigration detention (for example, as settled status applications are rejected and immigration routes closed down).
- Trafficking and employment related abuses linked to immigration status. This is expected as there will be fewer legal migration options following new Immigration legislation. <https://www.politics.co.uk/comment-analysis/2020/05/19/government-immigration-plans-risk-increase-in-modern-slavery> Other countries who have suddenly introduced such restrictions have seen a considerable rise in undocumented work.

It is worth noting that the above list reflects a rise in *complex* legal work and work that will likely require a holistic approach, with input of experienced solicitors or level 3 caseworkers and is likely to be above the time possible under fixed fee arrangements. It also reflects the intersection of immigration with other issues, particularly employment, benefits and homelessness.

It is also worth noting the impact of a pause in free assistance and awareness raising work that lawyers and others in the migration sector have been able to undertake, which is particularly concerning given the impending deadline for the EU Settlement Scheme. Although this is not advice or casework, it makes an unknown but likely significant impact on people's awareness about their rights, forthcoming legal changes and the steps they need to take. For example, steps to raise the awareness of the Settled Status scheme with so-called 'hard-to-reach' groups, like Roma. Ongoing restrictions in many areas of the country mean that face-to-face outreach is still extremely limited in scope.

Finally, we note and share the concerns raised by the Joint Council for the Welfare of Immigrants (JCWI) concerning the access to justice implications on litigants in person of the Practice Direction and Guidance Note introduced by the Upper Tribunal in response to the Covid-19 pandemic. Statutory appeals against determinations of the First-tier Tribunal have as a matter of consistent practice been considered by the

Upper Tribunal at oral hearings. This long-standing practice reflects the gravity of the issues at stake in asylum and human rights appeals. JCWI have become aware of a number of cases which have been refused on the papers under the new procedure and are particularly concerned that unrepresented litigants will have been affected. The chief concern is that they may be unaware of their right to appeal and may become liable to detention and removal. JCWI sought interim relief, namely that the offending section of the guidance note⁸ be withdrawn. This was refused on 2nd July 2020. JCWI made an application for Judicial Review in July. On 6th August, the High Court granted JCWI permission to judicially review Covid-19 related UT(IAC) guidance which creates 'a strong presumption that error of law appeals in UTIAC will be determined without a hearing'. The Court held that the challenge raised 'an important issue warranting consideration at a substantive hearing'. We hope that the Select Committee will consider this issue and the issues raised at the substantive hearing.

c) some of the pressures we understand are experienced by providers in the legal aid market

Independent trusts and foundations have a good overview of some of the pressures experienced by providers in the legal aid market. We will not go into detail here as we know that submissions will be made by practitioner bodies and associations. However, we would like to highlight the following key points from our understanding of the specific challenges for those supporting immigration, nationality and citizenship cases:

- The migration and social welfare advice sectors are made up of organisations who rely on face to face contact. This reflects to a large extent that much of the migration sector is concerned with service delivery and advice work and the nature of the client group, who are often vulnerable and do not speak English as a first language. Recent research (pre Covid-19) for Migration Exchange found that 85% of migration organisations provide direct services and for many, this accounts for the greatest proportion of their budget allocation⁹. When social distancing came into effect on 16th March and a full lockdown followed on 23rd March, migrant rights organisations and the legal sector was forced to quickly close offices and therefore face to face work stopped suddenly, impacting existing case work and ability to take on new case work. Given the impact of social distancing rules on the running of the courts and on Home Office

⁸ Presidential Guidance Note No.1 2020 § 9-17 and the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and Upper Tribunal §4.

⁹ <https://global-dialogue.org/wp-content/uploads/2020/04/Migration-Exchange-Taking-Stock-and-Facing-the-Future-Executive-Summary-Final-WEB-1.pdf>

immigration decision making, a great deal of existing work has been stopped in its tracks, with huge implications for funding given legal aid contract rules.

- The need to undertake legal work remotely in order to continue to operate has been a big challenge, and expensive. Often neither the organisations in question nor their service users have good access to and understanding of digital solutions to stay connected. This has meant reduction to services and some difficulties catching up to new ways of working (for example, as more Home Office and legal processes move to a digital approach). The charitable sector generally was already in a weak position to switch to remote working and digital services at scale. NPC research, just before the crisis hit, found that charities' confidence on their ability to use digital technology had dropped by 11 percentage points to 59% from 70% since 2017.
<https://www.thinknpc.org/resource-hub/state-of-the-sector-2020/>.
- The legal sector overall is dealing with a huge backlog. As courts have gradually got up to speed with new arrangements and courts have re-opened (though tribunals remain almost entirely remote), the sector is trying to deal with cases that should have been closed or progressed months ago.
- The already stressed social welfare legal sector after years of austerity and has now suffered a huge financial blow and there are real fears for the survival of many organisations. NCVO estimated (20th March) that charities stand to lose around £4bn in 12 weeks as a result of the crisis (based largely on charity shop closures and cancelled fundraising). <https://www.ncvo.org.uk/about-us/media-centre/press-releases/2748-every-day-counts-as-charities-still-wait-for-government-support> With respect to the social welfare advice sector, 420 legal aid providers are not for profits, and 43 of these provide immigration advice¹⁰. The Law Centres Network estimated that one in two law centres may close unless rescue measures are put in place. The legal sector generally however, taking in commercial practitioners, has suffered a sudden income shock. We are aware that these issues are well-covered in Select Committee reports from summer 2020 so will not further elaborate here.

Despite commitment from the Legal Aid Agency to support the legal aid sector, in actuality the sector has faced a dramatic drop in income. This has been two-fold. Firstly, business interruption and the changes to the courts above have halted the progression of many cases and stopped face to face advice. Secondly, changes made to legal aid fee structures, apparently made to bring legal aid in line with the current operation of the courts (as above), would have reduced what can be claimed

¹⁰ As of 20th May 2020 <https://www.gov.uk/government/publications/directory-of-legal-aid-providers>

via legal aid for complex cases. This was a huge concern for the sector and would have had hugely damaging implications for how those in the immigration system were able to access justice. However, following litigation, this new fee structure has been removed – though the policy remains under review and further changes to the structure of legal aid fees are possible later this year. ***There is now a temporary fee regime which will allow providers to undertake work under the Online Procedure and be remunerated at hourly rates.*** ILPA, Law Centres Network, the Bar Council, the Law Society, together with Duncan Lewis Solicitors worked together to deliver this legal action. This example highlights the how litigation had to be used to raise the legitimate concerns of legal aid lawyers, when instead proper consultation and dialogue could have resolved this without recourse to the courts.

d) Upcoming challenges over the next decade

We would like to highlight the following three upcoming challenges:

- **The new immigration system:** It is now vital that a strategy for fair and effective functioning of legal aid is developed, in light of the fact that the UK is fundamentally changing its immigration system to end freedom of movement and introduce new laws and policies to govern migration. This amounts to the biggest set of changes to UK immigration law in the past four decades and will inevitably create a need for advice as people navigate this new system. Immigration decisions raise some of the highest stakes of any legal process in the UK, and the process can be confusing and complex. Immigration advice is one of the few areas of law where provision of advice is regulated and it is a criminal offence to offer it without appropriate registration. Without representation there is a high risk of immigration decisions going wrong, and as a result people who migrate and settle in the UK risk losing their jobs, homes, health care, access to the welfare state, being detained indefinitely and ultimately removed from the country they have made their home. Experts are predicting that EU citizens who fail to secure status under the new EU Settlement Scheme will join the many people from outside the EU already struggling to regularise their status and may become undocumented in the UK. (see for example <https://migrationobservatory.ox.ac.uk/resources/reports/unsettled-status-2020/> 24 September 2020)
- **The pandemic and increased demand:** We would also highlight that the economic and social consequences of the pandemic, with rising unemployment will likely have a major impact on the ability of people to afford to pay for legal advice and representation. This is highly likely to result in increased pressure on charities as more people become eligible for legal aid and/or seek support from overstretched charities offering a free service. Yet despite this increased demand, our recent extensive consultation with this sector has raised the issue of recruitment of legal advisors and in particular of supervisors – this points to

the need for a proper recruitment and retention strategy to be developed in partnership with the Ministry of Justice.

- **Court and tribunal reform and the shift to digitisation and automation:** In 2016, the Courts and Tribunal Service (HMCTS) launched an ambitious portfolio of reforms that aimed to modernise the justice system, reduce complexity and provide new ways for people to engage¹¹. HMCTS intends to achieve its aims by introducing new technology and working practices to modernise the administration of justice, moving activity out of the courtroom (the result being more cases decided by the papers and remote hearings), streamlining processes and introducing digital channels for people to access services. The vast £1 billion reforms are ultimately expected to reduce costs as a consequence of modernisation¹². The reform programme is expected to be completed by late 2023, following a one-year extension to the timetable.

There have been concerns voiced over the extent to which these reforms might compromise access to justice, rather than maintain or improve it, as was promised¹³. Immigration cases heard in tribunals are a cause for particular concern given the vulnerability of the client group and the limited access to publicly funded and quality representation. In particular, there are concerns that the move to digitisation and automation will entrench existing flaws and inefficiency in determinations and appeals, rather than ameliorate them¹⁴.

The shift to reliance on artificial intelligence to expediate public service resource allocation and delivery is occurring across local and national Government, and immigration is, like everything else, impacted by this. There are concerns that these algorithms systematise poor decision making and even racism¹⁵. For example, the exclusion of data from child tax credit in the EUSS has been identified as disadvantaging women seeking to resolve their status.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf

¹² In September last year, the National Audit Office published its analysis of the progress of the reform programme <https://www.nao.org.uk/wp-content/uploads/2019/09/Transforming-Courts-and-Tribunals.pdf>

¹³ <https://research.thelegaleducationfoundation.org/author/natalie-byrom>

¹⁴ <https://justice.org.uk/our-work/administrative-justice-system/immigration-asylum-determination-reform/>

¹⁵ <https://www.opendemocracy.net/en/openjustice/unlawful-state/price-and-prejudice-automated-decision-making-and-uk-government/>

e) Recommendations:

Based on our understanding of the issues, need for advice and representation, and our experience of working with charities and not for profit providers, we encourage the Select Committee to encourage:

- a) Better long-term planning for legal aid and a culture of engagement and dialogue across government and with civil society and practitioners. This will help to prevent need arising for advice and complex casework in the immigration system. A 'demand-reduction' strategy underpinned by principles of access to justice, equitable treatment and a shared analysis of likely demand would contribute greatly to a more sustainable and cost-effective system of legal aid in the long term.
- b) The involvement of people who use the justice system to shape the provision of funding and good value services. This should include organisations who can represent the views and experiences of people and communities who have experienced the administration of immigration cases, and the intersection between this and wider aspects of their lives, including any protected characteristics. The views and experiences of those directly affected, alongside the expertise and perspective of practitioners, are crucial building blocks of a future legal aid system that is fit for purpose, represents good value for the public and fair outcomes.
- c) A strategy to improve the administration and operation of legal aid including the fixed fees regime and the approach to bills and claims by the Legal Aid Agency
- d) A review of the wider cost and social benefits of inclusion in public funding for other areas of immigration law and/or particular populations.

We are very happy to support further engagement with independent trusts and foundations who support non-profit provision of immigration advice and representation.

