

Review of Civil Legal Aid

About Bail for Immigration Detainees

Bail for Immigration Detainees (“BiD”) is an independent charity established in 1999 that exists to challenge immigration detention. We assist those held under immigration powers in removal centres and in prisons to secure their release from detention through the provision of free legal advice, information, and representation. Alongside our general casework, we engage in research, policy advocacy and strategic litigation to secure change in detention policy and practice. In 2014 BiD set up a project dedicated to aiding people detained in prisons for immigration reasons. We also provide legal advice and representation to people for their deportation appeals. We are entirely reliant on charitable donations, and we are not in receipt of legal aid funding. We do however call for the provision of legal aid funding to everyone held in detention or facing deportation. You can find out more about BiD's work on our website: www.biduk.org

Do you have any suggestions of changes that could improve civil legal aid – both short-term and longer-term changes?

BiD have conducted 6 monthly surveys of our clients since 2010 to monitor access to legal advice & representation in a detention setting. Evidence from these surveys shows that LASPO Act has excluded people from having meaningful access to justice. We call for legal aid rates to be restored to a level that incentivises providers to undertake legal aid work and for all immigration cases to be brought back into the scope of legal aid.

Whilst immigration advice remains out of scope, we suggest that the Exceptional Case Funding (ECF) application process is simplified so that non-legally trained applicants can complete the application and have a realistic prospect of success. In addition, we propose that the number of providers in detention centres be increased to meet demand, peer reviews to monitor the quality of advice and the monitoring of clients taken on through the DDA scheme to ensure that people with meritorious cases are being taken on.

Do you have any suggestions of changes – both short-term and longer-term changes – that could improve each of the following categories of law? (Immigration & Law)

BiD recommends that all immigration cases be brought back into the scope of mainstream legal aid for sustained long-term positive change to access justice and advice.

BiD recommends the following for improvements in Immigration & Asylum:

1. The ECF process should be simplified.
2. People detained under immigration powers should be allocated a lawyer upon entering detention and they should retain that lawyer until their case is
 1. resolved.
 2. There should be automatic allocation and entitlement to legal aid at detention bail hearings every 28 days.
 3. Detained Duty Advice Scheme (DDAS) appointments should be made automatically unless individuals opt out.
 4. The LAA should review the number of legal aid providers and increase providers to meet demand.
 5. The LAA should review the quality of advice on the DDAS rota using peer reviews.



What are the civil legal aid issues that are specific to your local area?

BID assists people detained under immigration powers in IRCs and prisons throughout the UK. BID exists because the Legal Aid sector cannot meet demand. Last year we supported more than 1500 bail applications, and the majority (68%) were successful.

According to Dr Jo Wilding - No Access to Justice Report there continues to be 'A severe shortage of immigration and asylum provisions in the UK'. Data from the Legal Aid Directory (2023) and National Office of Statistics (2022) reveals that in England & Wales, 65.8% of the population do not have access to an immigration and asylum legal aid provider. In detention centres, BID's Legal Advice Survey reveals that since the implementation of LASPO, there has only been one year where the number of people with a legal representative was above 60% and this figure has regularly been below 50%.

The most recent IRC survey reveals that 43% of respondents do not have a legal representative for their case, and the most recent prison survey reveals that 75% of respondents do not have a legal representative for their case.

Research shows that UK-wide, providers do not have the capacity to open more cases and the demand exceeds supply. BID's ECF project team has succeeded with all the ECF applications it has made but has found many legal aid lawyers do not have the capacity to take on new cases. As a result, our ECF team is often required to apply for adjournments of applicant's appeals whilst attempting to find lawyers for appellants. (see BID's Hurdle after Hurdle report).

The Public Law Project's (PLP) National Legal Aid Capacity Data Collection Survey found that only 1 in 16 referral attempts to legal aid providers were successful and Migrants Organise were unable to place 41% of their service users, despite undertaking parts of the preliminary work themselves and making around 35 referrals per person (PLP: Access to Immigration Legal Aid in 2023: An Ocean of Unmet Need report).

The quality of legal aid advice given in the Detained Duty Advice Scheme (DDAS) is highly variable. BID's most recent findings revealed that 32.5% of respondents said DDAS appointments lasted less than the time allocated. 7.5% said their lawyer was in a rush and 32.5% said the lawyer did not give sufficient advice. BID has conducted bi-annual reviews of legal advice in IRCs since 2010 and has observed a decline in the quality of advice since the expansion of the legal aid contracts for the DDAS in 2018. Whilst provider numbers increased (although some 30% subsequently left the market) they included many inexperienced advisors who did not have the skills, knowledge, and experience to assist clients in detention who typically have very complex cases. (BID - 10 Years of Legal Advice in Immigration Detention).

What do you think are the changes in the administration of civil legal aid that would be most beneficial to providers?

We recommend:

- 1) guaranteeing payment for ECF applications even if the application is ultimately refused
- 2) an uplift in fees for all legal aid providers to address years of underinvestment and;
- 3) introducing a rota for lawyers who will guarantee to take on a minimum number of cases that have been granted ECF for advice and representation relating to Article 8 (family life and private life) human rights claims.

As previously noted, people in detention typically have complex cases which will include fresh applications for asylum & human rights claims. In BID's experience, ECF applications that had been thoroughly prepared by suitably qualified practitioners assisted in securing ECF and results in successful referrals to legal aid



providers Assistance for ECF applications is often pro-bono and we found that the complex and time-consuming bureaucratic demands of the ECF system means that many firms will not make applications for ECF. (see BID's Hurdle after Hurdle report - Part Two)

We recommend that all immigration work be brought back into scope of legal aid but whilst it is out of scope, we recommend paying providers for the ECF application would ensure time-pressed lawyers with billing targets would be remunerated benefitting providers and clients

What potential risks and opportunities do you foresee in the future for civil legal aid: i) in general; and ii) if no changes are made to the current system?

In general, structural problems caused by years of underinvestment since LASPO have meant that the system is collapsing.

BID believes that there is a risk that the unrealistic demands put upon providers risk providers relinquishing their legal aid contracts. More than 30% of immigration and asylum legal aid providers who were given contracts in September 2019 had stopped delivering legal aid work by March 2023. Unless there is a structural change within the sector, this trend is likely to increase. (Source: The Conversation: The legal aid sector is collapsing and millions more may soon be without access to justice –new data. June 2023)

If there are no changes to the current system, there is also a risk of a further shortage of legal aid practitioners. Findings from PA Consulting reveal two-thirds of private practices and 37% of nonprofits stopped doing legal aid work in the past because it was no longer financially viable. It also revealed that 4 in 10 civil legal aid providers plan to exit the sector within 5 years, with 42% considering a departure or reduced workload in the next 12 months.

There is an opportunity to significantly reinvest in legal aid to recruit more good quality providers. We welcome the statement from the House of Commons Justice Committee that "Civil legal aid, like criminal legal aid, needs the Government to take decisive action to change the approach set by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 at the start of the last decade. Without such a step, the sector will continue to struggle to attract new recruits." (see The Future of Legal Aid - Third Report of Session 2021–22)

What do you think are the possible downstream benefits of civil legal aid? The term 'downstream benefits' is used to describe the cost savings, other benefits to government and wider societal benefits when eligible individuals have access to legally aided advice and representation.

Access to legally aided advice and representation at an early stage would have significantly wider societal benefits for individuals and the government. The government frequently claims that removals are prevented by vexatious late claims however the reality is that people often do not get to access a lawyer who is willing to take up their case until they are detained pending removal. The system as it is pays viable rates for public law challenges including PL challenges to removal. The failures in the legal aid system and the absence of legal aid at an early stage means that often it is only at this late stage that providers will pick up a case, resulting in late asylum, human rights and immigration claims and late appeals.

In addition, early advice would enable individuals to spend the least time necessary in detention. According to the Migration Observatory it costs £38,520 annually to detain someone, thus reducing the amount of time a person is in detention will save the state money.



Detention is frequently used in a way that is inconsistent with its statutory purpose or the limitations set out in common law, and usually detention is not used to effect removal. In the year ending September 2023, 16,363 entered and 16,674 people left the detention estate. Only 27% were removed at the end of their period of detention. In addition, people are often held for long periods of time purportedly to facilitate removal. Data from September 2022 reveals that 1,122 out of 2,077 people (54%) were in detention for between 28 days to 48 months or more. (Home Office statistics, Sep 2023). Detention is always detrimental to people and many years of credible research shows it causes considerable harm to people's physical and mental health. BID's "Voices from Detention" report contains first hand testimonies of the cruelty of daily life in immigration detention & its harmful impact on them, their families and communities.

BID's "Excessively Cruel" study has highlighted how families are placed in extreme practical, financial and emotional hardship by detention & the extended periods of uncertainty whilst under the constant threat that family life will be brought to a permanent end. The mental health consequences of the ordeal were severe, particularly for children. Qualitative data from the study reveals the children who face separation from a parent have developed anxiety; crying constantly; were unable to let their parent out of their sight; withdrawing from everything; loss of appetite; difficulty sleeping; having nightmares; and in one particularly serious case self-harm and attempted suicide.

Early access to legal advice and representation would also reduce the costs to the government for wrongful detention with compensation for unlawful detention increasing year on year. In 2022-23, the Home Office paid out £16.1 million in 736 cases of wrongful detention (Home Office Annual Report 2022-23) This compares to £12.7 million in 572 cases the previous year (The Migration Observatory – Immigration Detention in the UK Nov 2022)

Unfortunately, cuts to legal aid under LASPO have had a devastating impact on access to immigration advice and representation. The number of legal aid cases to help people get early advice dropped from nearly one million in 2009/10 to 130,000 in 2021/22. The number of advice agencies and law centres conducting legal aid has fallen by 59% (<https://www.lawsociety.org.uk/contact-or-visit-us/pressoffice/press-releases/a-decade-of-cuts-legal-aid-in-tatters>) Eligible individuals are currently struggling to access legally aided advice and representation (see answer 9) and in BID's view, the legal aid sector needs reinvestment in order to address structural barriers to justice.

Fees

What are your views on the incentives created by the structure of the current fee system?

BID does agree with the introduction of a 15% uplift for work under the Illegal Migration Act 2023 however, we do not believe that 15% is sufficient to ensure that everyone who is issued with an inadmissibility decision is able to secure legal representation especially within the truncated timeframes of the Act. In 2022 45,755 people arrived on a small boat and in 2023, 29,437 entered irregularly (<https://www.bbc.co.uk/news/uk-53699511>.) The legal aid sector cannot meet the demand and the incentive is inadequate to address the structural issues, high caseloads and demands.

The hourly rate for Immigration and Asylum legal aid providers is £59.36 per hour for London providers and £54.40 per hour for non-London providers. This is the first rise in fees since 1996 and the last change to fees was a reduction in 2011.

We echo the concerns and support the recommendations by Duncan Lewis in their open letter to the Lord Chancellor and the Director of Legal Aid Casework, which highlighted that nothing less than an uplift of



50% for work under the Illegal Migration Act will enable providers to undertake the work at the scale required.

Additionally, we remain concerned that this uplift will incentivise providers to abandon non-uplifted work leading to a substantial number of people no longer having access to a legal aid lawyer.

Do you think these support the effective resolution of problems at the earliest point?

BID welcomes the use of incentives but does not think that they will be sufficient to ensure effective early resolution of problems. The Illegal Migration Act has created a situation where people cannot have their claims processed in the UK unless they can show they will suffer serious and irreversible harm. In the absence of returns agreements these people will not be removable, creating backlogs and bottlenecks that a 15% uplift in legal aid will not be able to resolve. To illustrate, assuming that around 40k people arrive year on year within 3 years there will be 120k people stuck in a legal limbo and it is difficult to see how early access to legal advice will assist them.

We agree with the findings of Jo Wilding that in immigration law, people are unable to find a lawyer to take on the case because of the fee levels and capacity shortages and this uplift in very limited circumstances will not remedy this. (Written evidence from Dr Jo Wilding - <https://committees.parliament.uk/writtenevidence/12571/html/>)

How could the system be structured better?

The system needs proper funding if it is to work for the reasons given. This includes early availability of legal aid; ensuring rotas and structures to guarantee take-up of cases; ensuring access to legal aid whenever the Home Office or a court is considering a person's immigration or asylum claim; either replacing the ECF process by allowing legal aid lawyers to take on cases that meet the threshold for legal aid or making the process work so that people can be represented; increasing the legal aid capacity by incentivising lawyers to undertake this work; ensuring legal aid advice is available whenever a person is detained and until they are either granted permission to be in the UK or when they are removed from or leave the UK.

Career development and diversity

Is there anything in particular in civil legal aid that prevents practitioners with protected characteristics from starting and continuing their careers?

Yes. Deeply rooted and intersectional structural barriers prevent potential practitioners with protected characteristics from starting and continuing their careers in legal aid. For example, research from the Runnymede Trust reveals Black and minority ethnic people are 2.5 times more likely to be in relative poverty, and 2.2 times more likely to be in deep poverty (see Runnymede's Falling Faster report) and, according to the latest statistics, lawyers from lower socio-economic backgrounds has reduced from 21% in 2015 to 18% in 2023 (SRA - Diversity in law firms' workforce.)

This could be addressed with greater accessibility to qualifying as a practitioner including pathways for people who have lived experience of detention to qualify as a legal representative. Volunteering (unpaid) is an accepted route into a legal career and for many people with protected characteristics they cannot afford to work unpaid. This could be addressed with paid internships funded by the government.

How can the diversity of the profession be increased in legal aid practice, including ethnicity, disability, sex, age and socio-economic background?



Diversity in the legal profession can be achieved by identifying and removing long-term structural barriers and addressing personal bias, prejudice, and discrimination in the workplace. This works needs to start whilst people are still in education and should include paid internships.

User needs

What barriers/obstacles do you think individuals encounter when attempting to access civil legal aid?

A significant barrier for BID's clients when attempting to access civil legal aid is the location of their detention which is a barrier to legal visits and communications. BID's Prison Legal Advice Surveys and ECF report reveal that the lack of representation for people detained in prisons continues to be high. 75% of respondents do not have a legal representative for their immigration case. Unsurprisingly, 75% reported that they had not received 30 minutes of advice under the legal aid telephone advice scheme & 88% of those who responded had not been provided with any information on how to obtain legal aid for help with their immigration case.

People detained in prison continue to face practical problems in utilising the telephone advice scheme. BID's 2023 Prison Legal Advice Survey report reveals that 50% of respondents said they did not have numbers for legal advice automatically added to their PIN. The time taken to get a legal representative's number added to a PIN varied and, in some cases, it had taken weeks to be approved. Additionally, many people are served with the notice of intention to deport which requires they respond with reasons for why they should not be deported whilst serving their criminal sentence. Despite the active consideration and investigation of their legal case by the Home Office they are unable to access the telephone legal advice service that is only available when they are detained under immigration powers. At that point their cases may have been decided by the Home Office and appeals may have concluded (thus resulting in fresh claims needing to be made if and when legal advice is accessed)

For people detained in IRCs, BID's most recent Legal Advice Survey (2023) revealed a common reason why respondents did not have a lawyer was financial. As already noted, the research we have conducted shows that people applying for ECF struggle to complete the complicated application forms or are unaware that legal aid may be available through this scheme.

The simplification of the financial merits test combined with the allocation of a legal aid lawyer at the point when a person is either served with a notice of intention to deport or to detain them under immigration powers would mitigate these risks, minimise delays, reduce late submissions and appeals and ensure that important deadlines are not missed.

What could be done to improve client choice such that it is easier for clients to find civil legal aid providers and make informed decisions about which one best meets their needs?

BID calls for the end of administrative immigration detention altogether and that people are not detained post sentence in prisons. The low rates of absconding for people on immigration bail is evidence that detention is not necessary and contact management can and should take place in a community setting. While at liberty individuals can seek legal representation and maintain contact with their lawyers more readily, encouraging engagement in legal processes and a better understanding of their legal position.

The solution to finding legal aid providers is also to increase the number of providers, pay them sustainable rates, ensure they are delivering a quality service, bring immigration work back into the scope of legal aid and allocate a lawyer at the point that critical paperwork is served.

BID's casework has found many people are notified that there is an intention to deport them whilst they are still serving their criminal sentence. In this event we recommend that they are given immediate access to the 30 minutes legal aid telephone advice and/or are allocated a lawyer when served with their paperwork.

Whilst BID recommends the prioritisation of client choice, data from BID's IRC Legal Advice Surveys reveals that 43% of respondents still do not have legal representation (see answer 18). BID recommends that individuals who cannot find a legal aid lawyer should have a legal aid lawyer allocated to them by the Legal Aid Agency.

Do you think that some people who are eligible for civil legal aid may not know that it is available and/or how to access it? If so, how do you suggest that this is addressed?

BID's research has demonstrated that people facing deportation require specialist legal advice & representation to have a fair opportunity to present their case against deportation, but they were often unaware of the existence of ECF and/or were simply unable to make an application directly to the LAA unassisted.

BID's award winning ECF project was created because of this. As well as assisting clients by preparing applications for ECF and referring successful applicants to legal aid lawyers we also offer training on the ECF process and on related human rights and deportation issues. This way we can improve the skill set of legal aid lawyers and create a culture of high-quality legal advice within the profession.

However, the ECF process is itself a complicating and an unnecessary process. It would be simpler, cheaper and it would increase access to justice if people were able to approach legal aid lawyers knowing that if their cases were assessed as being within the scope of legal aid entitlement they would be immediately provided with legal aid advice and representation on their substantive legal aid matter. However, the ECF process introduces an unnecessary obstacle that must be overcome, complicating understanding of entitlements on the part of people seeking advice and discouraging advice providers from engaging with the process; and resulting in increased costs and delays with decision-making at the Home Office and the courts.

How do you think that people receiving civil legal aid can be supported in cases where they have multiple or 'clustered' legal issues and some of these are outside of the scope of civil legal aid?

Many of our clients are in this cohort of people with a cluster of legal issues. Typically, our clients will be relying on their article 8 right to a family life claim and will need legal advice in respect of their family matter. Like Immigration, many family matters are not in scope of legal aid & so we also have to make applications & find lawyers for ECF given that the two issues are inexorably interlinked.

How do you think that the Exceptional Case Funding scheme is currently working, and are there any ways in which it could be improved?

BID's research has found that the Exceptional Case Funding application process is complex and represents hurdles for applicants (see BID's report: Hurdle after Hurdle: The struggle for advice and representation through ECF).

Through working with people facing deportation who were relying on their article 8 right to a private and family life it is clear to us that the ECF scheme is not an adequate safety net because of the complexities of



both the application process as well as law, policy & practice in this area. In 2019, we set up a project to supervise pro-bono lawyers from 4 commercial firms to prepare ECF applications. BID has found that paradoxically, many people struggle to apply for legal aid without legal assistance. BID received 28 survey responses from pro-bono lawyers assisting people with ECF applications and found that 100% of respondents doubted whether their ECF applicants could complete an ECF application without legal assistance because of the complexity inherent in Immigration Law. But the problems do not end at the granting of legal aid. Many clients face the additional hurdle of finding a legal aid lawyer available to take their case. BID's ECF report 'Hurdle after Hurdle' provides numerous case studies demonstrating referral attempts (see Part 2 & Annex A) Since the publication of the report, BID's Legal Manager has had cases where the number of attempts for referrals has been as high as 130 i.e. 130 legal aid firms declined to take on a case due to their lack of capacity to do so, despite ECF having been granted.

BID has five recommendations to improve the ECF scheme.

1. Scrap the scheme and bring all immigration cases back into scope of legal aid.
2. Whilst the LASPO Act remains in force, the ECF application process should be simplified so that non-legally qualified people are able to complete the application forms and have a realistic prospect of being granted ECF.
3. We recommend that lawyers are paid for the work involved in preparing an ECF application, even if ultimately funding is not granted.
4. We recommend that the number of immigration lawyers with a legal aid contract is significantly increased and that legal aid rates are restored to their 1998 levels to make it more viable to hold an immigration legal aid contract.
5. Anyone in receipt of Schedule 10 support or who is detained should also be passported through the financial means tests, and automatically allocated legal aid, for greater access to justice.

Use of technology

What are the ways in which technology could be used to improve the delivery of civil legal aid and the sustainability of civil legal aid providers? We are interested in hearing about potential improvements from the perspective of legal aid providers and people that access civil legal aid.

Technology, as a supplement to in-person appointments, could be beneficial for locations where it is difficult for practitioners to regularly attend. Jo Wilding's No Access to Justice report reveals that because of poor transport links, most of Wales is without any immigration and asylum advice above OISC Level 1.

Given the increasing use of remote accommodation centres for people seeking asylum, technology may be useful for regular conversations with clients however, in BID's view, this should supplement rather than replace in-person appointments. In-person appointments are essential to enable the building of trust and indeed participation by a client in the client-lawyer relationship. In-person appointments also allow more meaningful assessments of vulnerability.

Remote legal advice, for example advice given over the telephone or video call, can be beneficial for delivering civil legal aid advice. Please provide any specific evidence and thoughts on how the system could make the most effective use of remote advice services and the implications for services of this.

We agree with the statement from Jo Wilding that 'remote advice is not a viable solution to the severe shortage of advice' (No Access to Justice report) however remote appointments and video attendance could act as a supplement to in-person meetings. BID's view is that in-person appointments remain superior in meaningfully assessing a client's demeanour whilst taking instructions.

For example, clients may vocalise that they are mentally and emotionally well but may present physical signs of stress and anxiety which cannot be easily identified via video, such as hand wringing, leg shaking etc. This may have a significant impact on their case, particularly if clients are vulnerable or survivors of torture, trafficking, or modern slavery.

In addition, in immigration cases credibility is often the point on which a case will turn. In an ideal world the credibility of a witness will come down to their evidence and whether it is internally & externally consistent, however in reality an appellant's demeanour is also being assessed. Where credibility is an issue an in-person hearing allows the judge not only to see the physical demeanour of the appellant & their witnesses, but it also humanises them and enables the appellant and witnesses so that they present more naturally that would otherwise be the case. Similarly, participation in legal processes, whether in a court room setting or a client-lawyer relationship is more meaningful if it is in person and not served by the barrier of a camera and a screen.

What do you think are the barriers with regards to using technology, for both providers and users of civil legal aid?

BID's 2023 Legal Advice Survey report in IRCs found internet access has been a practical struggle. 55% of respondents said they could not use the internet to research their case. For those who did use the internet, 25% of responses said that many websites were blocked, including websites that would potentially have been helpful with preparing their immigration case.

BID's data found practical obstacles in using the internet services, such as long queues to use the internet room, feeling claustrophobic due to the size of the space and difficulty using the internet in different languages.

In October 2023, BID was sent a joint letter from people held under immigration powers in Yarl's Wood IRC highlighting various issues with the IT rooms & which impeded access to justice for the people detained. They complained of:

- Blocked websites,
- Lack of telephone signal,
- Private messages being read,
- Officers listening to conversations,
- Bad internet signal,
- Broken equipment,
- Insufficient amounts of equipment,
- Simple functions such as copy & paste not working.

In contrast to their counterparts in IRCs, people detained under immigration powers in prisons do not have access to the internet. BID's 2023 Prison Legal Advice Survey report found practical problems with utilising technology. People have only limited access to the telephone. They rely on the prison postal system which is slow and risks documents being lost in the post. To make calls, people are given a Personal Identification Number (PIN) that they enter before dialling the number they want to call. However, before making a call, individuals must make an application to have a number added to their PIN.

They cannot make a call until this application has been approved. There are also different limits set by the prisons to how many numbers can be added to a PIN, the length of a phone call and the charges applied to calls.



Digital exclusion is also a real issue and one that the government is failing to address. A Parliamentary report published by the Communications and Digital Committee in June 2023 found that the cost-of-living crisis has led to poorer households cutting back or cancelling internet packages whilst those that are detained are dependent upon their captors ensuring that the technology is freely available which the anecdotal evidence seems to suggest is not.

Early resolution

What do you think could be done to encourage early resolution of and/or prevention of disputes through the civil legal aid system?

The allocation of a legal aid lawyer at the point that decisions are served & bringing immigration work back into scope.

