

Joint Briefing on Amendment 155 to the Illegal Migration Bill for Report Stage in the House of Lords, 3 July 2023 (Duty to make legal aid available within 48 hours)

1. Clause 55 of the Bill provides for insufficient access to civil legal services.¹ Clause 55 is only concerned with free legal advice and representation in relation to removal notices. It makes access contingent upon receipt of a removal notice and it does not ensure the necessary services will be made available shortly after a person has been detained. There is no set time frame in the Bill for the Home Secretary to serve a removal notice under Clause 7(2). Therefore, an individual could be left to linger in detention for days and months, before a removal notice is served by the Home Secretary and thus before they are able to access legal aid under Clause 55. Accordingly, the Bill provides no assurance of access to free civil legal services for people trapped in its provisions before a removal notice has been served upon them.
2. Clause 55 also does nothing to address the reality that it is practically impossible for many people to access legal aid under existing entitlements. There are vast numbers of unrepresented individuals seeking asylum and in detention, due to the current unsustainability and lack of capacity within the immigration and asylum legal aid sector.
3. Amendment 155 introduces a new Clause (Duty to make legal aid available to detained persons) to address this in England and Wales by supplementing what the Government intends to achieve in Clause 55. It would place a duty on the Lord Chancellor to make civil legal aid available to detained persons in relation to already in-scope judicial review and immigration matters, and in relation to suspensive claims, within 48 hours of their detention. This is crucial given the Bill provides the Home Secretary wide powers to indefinitely detain families, children who are alone, and vulnerable people such as pregnant women, while also placing a duty upon the Home Secretary to remove them, with short timeframes to make suspensive claims with compelling evidence to prevent such removal.
4. Provision of legal aid is a key component in ensuring the constitutional right of access to justice, itself inherent in the rule of law.² The courts have repeatedly upheld the principle that a failure to provide legal aid can amount to a breach of fundamental rights.³ Legal aid is essential in ensuring that people without means can secure effective access to justice and redress.

¹ The clause was introduced at Report Stage in the House of Commons.

² Echoing the words of Lord Reed in *R (Unison) v Lord Chancellor* [2017] UKSC 51 at §66.

³ *R (Gudanaviciene & Others) v Director of Legal Aid Casework and Lord Chancellor* [2014] EWCA Civ 1622; 'Spending of the Ministry of Justice on legal aid' House of Commons Library briefing, (October 2020) <<https://researchbriefings.files.parliament.uk/documents/CDP-2020-0115/CDP-2020-0115.pdf>> accessed 20 April 2023 [1.2].

5. We urge Parliamentarians to support Amendment 155.

Amendment 155 in the names of Lord Bach, Baroness Ludford, Lord Carlile of Berriew, and Baroness Prashar

After Clause 55, insert the following new Clause—

“Duty to make legal aid available to detained persons

(1) The Lord Chancellor must secure that civil legal services in relation to—

(a) a suspensive claim within the meaning of section 37(2) of this Act, and

(b) any of the matters set out in paragraphs 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 31A, 31C, 32 or 32A of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012

are made available to any person who is detained under a relevant detention power within 48 hours of the day on which they are first detained under that power.

(2) The Lord Chancellor may make such arrangements as they consider necessary for the performance of their duty under subsection (1).

(3) The duty under subsection (1) is subject to—

(a) section 11 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (qualifying for civil legal aid) and any regulations made under that section, and

(b) section 21 of that Act (financial resources) and any regulations made under that section.

(4) In this section—

“civil legal services” has the same meaning as in section 8 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012;

“relevant detention power” means a power to detain under—

(a) paragraph 16(2) or (2C) of Schedule 2 to the Immigration Act 1971 (detention of persons liable to examination or removal),

(b) paragraph 2(1), (2) or (3) of Schedule 3 to that Act (detention pending deportation),

(c) section 62 of the Nationality, Immigration and Asylum Act 2002 (detention by Secretary of State), or

(d) section 36(1) of the UK Borders Act 2007 (detention pending deportation).”

Why is Amendment 155 necessary?

6. **Legal aid was decimated by the legal aid cuts in 2013.**⁴ In England and Wales, most non-asylum immigration matters are excluded from the scope of legal aid. This has damaged the entire immigration legal aid sector⁵ and the ability of everyone, including individuals seeking asylum and those in detention, to access reliable, quality, legal aid immigration advice.
7. **Immigration law is highly complex and extremely difficult - if not impossible - to navigate without a lawyer.** It is unrealistic to believe that individuals seeking asylum, who have just arrived in the UK, who may be traumatised and vulnerable, and who may speak no or little English, can understand our complex laws and make effective representations (including lodging suspensive claims with the compelling evidence required under this Bill) without professional legal assistance. As stated by Lord Justice Underhill in the Court of Appeal's judgment on the Rwanda scheme, handed down on Thursday, 29 June 2023, cases where decisions are fair where there has been no access to legal assistance are '*likely to be exceptional*'.⁶ Therefore, Amendment 155 would help to secure timely access to legal assistance, which is crucial to the fairness of decision-making.
8. **The Ministry of Justice has accepted 'the strict timelines implemented through the IMB and the high anticipated volume of cases' poses a 'unique challenge', particularly in light of the 'challenges posed by the existing caseload and the capacity constraints within the immigration legal aid sector'.**⁷ By introducing new "fast track" procedures, suspensive claims, appeals, and detention powers, the Bill will place further limitations on the already stretched capacity of a limited pool of providers practising in this area. In England and Wales, following a decade of austerity and cuts to legal aid services and fees,⁸ the decreasing number of legal aid providers in asylum and immigration law with capacity to take these cases impedes access to free legal advice and representation in any meaningful sense. Under the Bill, already insufficient legal aid provision is made even harder to access.

⁴ Legal Aid, Sentencing and Punishment of Offenders Act 2012.

⁵Jo Wilding, *Droughts and Deserts: A report on the immigration legal aid market* (2019) <<https://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf>> (accessed 9 August 2022).

⁶ *R (AAA and ors.) v SSHD* [2023] EWCA Civ 745 at [429].

⁷ Ministry of Justice, *Legal Aid Fees in the Illegal Migration Bill* (27 June 2023) <<https://www.gov.uk/government/consultations/legal-aid-fees-in-the-illegal-migration-bill/legal-aid-fees-in-the-illegal-migration-bill#equalities-impact-assessment>> accessed 30 June 2023. It has proposed a 15% increase, but only for work conducted under Clause 55 of the Bill.

⁸ For example, hourly rates, which were introduced on 1 October 2007 in the Community Legal Service (Funding) Order 2007 have not risen, but were further cut in 2011 by 10% in the Community Legal Service (Funding) (Amendment No.2) Order 2011.

9. **The expansion of the detention estate in advice deserts⁹ across England and Wales will erect a further barrier to access to advice and representation.** For example, in Lincolnshire, where the Home Office has proposed to create a new, large-scale asylum accommodation facility at RAF Scampton¹⁰, there is no provision for legal aid at all.¹¹ As noted in the Economic Impact Assessment, '[t]he location of any potential additional detention centres has not been defined and so cannot be assessed'.¹²

10. There are already vast numbers of unrepresented individuals:

- a. Bail for Immigration Detainees (BID) recently published a Legal Advice Survey based on 42 people¹³ being held in Immigration Removal Centres. Before the legal aid cuts came into force, 79% of people had legal representation, and the figures have remained far lower ever since.¹⁴ The survey found that after legal aid cuts, just 43% of people have a lawyer in their immigration case.¹⁵ Figures have continued to plummet.
- b. Government figures from 2022 suggest that around half the number of people seeking asylum do not have access to legal aid advice.¹⁶
- c. An October 2022 report by the Anti Trafficking and Labour Exploitation Unit (ATLEU) reveals a staggering 90% of support workers surveyed struggled to

⁹ Jo Wilding, *Droughts and Deserts: A report on the immigration legal aid market* (2019) <<https://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf>> (accessed 9 August 2022); J. Wilding, M. Mguni, T. Van Isacker, *A Huge Gulf: Demand and Supply for Immigration Legal Advice in London* (2021)

<<https://www.phf.org.uk/publications/a-huge-gulf-demand-and-supply-for-immigration-legal-advice-in-london/>> (accessed 9 August 2022); Jo Wilding, *The Legal Aid Market* (2021, Bristol University Press).

¹⁰ Joe Duggan, 'Row erupts over plans for detention centre at RAF base that 'may scupper £300m revamp project' *i-News* (8 March 2023)

<<https://inews.co.uk/news/immigration-detention-centre-plans-raf-scampton-row-regeneration-2194731>> accessed 20 April 2023.

¹¹ Jo Wilding, *No access to justice: How legal advice deserts fail refugees, migrants and our communities* (2022, Refugee Action) 19.

<https://assets.website-files.com/5eb86d8dfb1f1e1609be988b/628f50a1917c740a7f1539c1_No%20access%20to%20justice-%20how%20legal%20advice%20deserts%20fail%20refugees%20migrants%20and%20our%20communities.pdf> accessed 20 April 2023.

¹² Home Office, Economic Impact Assessment: Illegal Migration Bill (HO 0438)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1165397/Illegal_Migration_Bill_IA_-_LM_Signed-final.pdf> [131].

¹³ Those individuals were all BID clients. Not all are individuals seeking asylum.

¹⁴ For more detail, see BID's 'Legal advice in immigration detention: a 10-year review' <https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/1293/10_Years_of_Legal_Advice_Survey.pdf>.

¹⁵ Bail for Immigration Detainees, 'Autumn Legal Advice Survey' (December 2022)

<https://hubble-live-assets.s3.amazonaws.com/biduk/file_asset/file/716/221205_LAS.pdf> accessed 19 April 2023.

¹⁶ Dr Jo Wilding, 'New Freedom of Information data indicates half of asylum applicants are unable to access legal aid representation' *Refugee Law Initiative* (4 November 2022)

<<https://rli.blogs.sas.ac.uk/2022/11/04/new-freedom-of-information-data-indicates-half-of-asylum-applicants-are-unable-to-access-legal-aid-representation/>> accessed 19 April 2023.

find a legal aid immigration lawyer for a survivor of trafficking and modern slavery in the past year, with devastating impacts.¹⁷

11. **Where legal aid advice is currently available in detention, there have been concerns, including those expressed by His Majesty’s Chief Inspector of Prisons, about the quality of advice.**¹⁸ Evidence gathered by Detention Action in 2021 showed that the Detained Duty Advice Scheme through which 30 minutes of free legal advice are provided to people in detention (after which the representative must undertake means and merits test) was operating with persistent fundamental defects, including people not knowing whether they had a legal representative willing to take on their case at the end of the session, being denied representation on the basis of complexity or provider capacity, not being given written advice, and providers lacking knowledge of law and practice on key issues.¹⁹ For those held in prisons under immigration powers, the barriers to accessing legal aid are even greater.²⁰
12. **For people held in Short-term Holding Facilities (such as Manston), and the soon to be opened Residential Holding Rooms, there is no access to a duty advice scheme.** Instead, individuals are meant to access a telephone on their own initiative to find a legal aid lawyer willing to represent them. Even if they did identify potential legal aid providers, the likelihood that a legal aid representative would provide a free assessment of the merits of a case given the unremunerated expense and time involved—especially over the phone—is extremely low. This particular issue has become pressing as Clause 10 of this Bill envisages the possible detention of very large numbers of people in *any place* of detention.
13. **Amendment 155 ensures a detained person will be able to access civil legal aid services, including legal aid assistance to properly prepare a human rights or asylum claim, before their claim is declared inadmissible and they are served with a removal notice.** It appears that under the Bill the first time a person will have legal advice, for example, to prove one or more of the four conditions in Clause 2 does not apply to them, will be when they receive a removal notice. This will create inefficiencies for

¹⁷ Anti Trafficking & Labour Exploitation Unit (ATLEU) “‘It has destroyed me’: A legal advice system on the brink” (2022) 4 <<https://drive.google.com/file/d/15xlzaXCpN2eyXSlw7Ubx2Au1lr6mRXRF/view>> accessed 19 April 2023.

¹⁸ For instance, see BID’s *Spring 2019 Legal Advice Survey* https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/890/190523_legal_advice_survey_spring_2019.pdf; HMIP’s inspection of Colnbrook IRC, (2019), S14, page 16: “*some of the new representatives providing this service had been seeing a large number of detainees for less than the allotted time, potentially affecting the quality of provision*” <https://www.justiceinspectorates.gov.uk/hmiprison/inspections/colnbrook-immigration-removal-centre-4/>.

¹⁹ *R (Detention Action) v Lord Chancellor* [2022] EWHC 18 (Admin).

²⁰ For more information, see BID’s report: *Catch 2022 – accessing immigration legal advice from prison* (2022) https://hubble-live-assets.s3.amazonaws.com/biduk/file_asset/file/635/BiD_Prison_Report_page_1_1_.pdf; HM Chief Inspector of Prisons, ‘The experience of immigration detainees in prisons’ (September 2022) 4 <https://www.justiceinspectorates.gov.uk/hmiprison/wp-content/uploads/sites/4/2022/10/The-experience-of-immigration-detainees-in-prisons-web-2022.pdf>.

representatives, applicants, the Legal Aid Agency, and the Home Office who may have to engage with the suspensive claim process, when it could have been avoided. Without early access to in-scope legal assistance, before an inadmissibility decision is made, an individual may be unable to:

- a. prepare a case to explain that they did not use deception to obtain entry to the UK (if that is alleged);
- b. make representations as to the exceptional circumstances referenced in Clause 5(4)-(5), which would mean they cannot be removed to certain countries or territories; and
- c. prove that they did not pass through or stop in a country where their life or liberty was not threatened by reason of their race, religion, nationality, membership of a particular social group or political opinion, which will require significant gathering of evidence of local country conditions, through which they passed, to evidence the threat they faced.

14. This Bill provides an extremely short timeframe of seven days for an individual to seek and find legal advice and representation and provide sufficient instructions for a representative to submit a suspensive claim with compelling evidence against removal.

As a result, the vast number of inadmissible applicants, which the Home Secretary will have a duty to remove, will simply not be able to find a legal representative to challenge their detention, make a human rights and/or suspensive claim, or plead any circumstances as to why they should be excluded from the draconian provisions of this Bill. It is foreseeable that many people will struggle to express themselves in English let alone to make ‘compelling’ written representations, meeting the form and content yet to be prescribed, while detained and without access to a lawyer within seven days of being served a notice of removal. As stated by the Court of Appeal in the Rwanda judgment:

‘The evidence clearly establishes, and it is in any event obvious as a matter of common sense and experience, that in many cases it will indeed be impossible for claimants to submit effective representations within seven days of receipt of a Notice of Intent, even if they have ready access to legal assistance and only wish to make representations on matters specific to their particular circumstances.’²¹

15. Access to high quality legal advice, within 48 hours, would increase the effectiveness and efficiency of the immigration and asylum system. With adequate legal aid, people would be better able to make timely claims increasing efficiency within the Home Office and the justice system. They would know what evidence they needed to produce and understand their prospects of success, to enable them to make an informed decision regarding whether and how to proceed with their claim.

²¹ *R (AAA and ors.) v SSHD* [2023] EWCA Civ 745 at [441].

16. **Amendment 155 will build upon current legal aid arrangements.** We understand that a good precedent for this is the facility for people detained at police stations. When a person is taken to a police station and it is decided there is no criminal element to the case, they are allowed to access an immigration lawyer to obtain immigration advice. The police call the duty solicitor call centre, and there are lawyers on a duty rota to take up the case and provide immigration advice and decide on the merits of the case. A new 48-hour system would involve allocating a solicitor to an individual upon them entering detention.
17. For the above reasons, as a necessary measure to ensure access to justice for those in immigration detention, we urge Parliamentarians to support Amendment 155.
18. This joint briefing is supported by Bail for Immigration Detainees (BID), the Immigration Law Practitioners' Association (ILPA), and the Public Law Project (PLP).

If you have further questions, please contact:

Bail for Immigration Detainees - Pierre Makhoulouf, Legal Director - pierre@biduk.org

Immigration Law Practitioners' Association (ILPA) - Zoe Bantleman, Legal Director - zoe.bantleman@ilpa.org.uk