

National Audit Office consultation on legal aid

About BID

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 providing assistance for 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

1. **What impacts, if any, have the changes in types of cases covered by legal aid since LASPO had on individuals with legal issues? Where possible please provide specific examples, without giving personal information.**

The removal of non-asylum immigration work since LASPO has had a devastating impact on the immigration legal aid market, as well as being disastrous for people subject to immigration control (Jo Wilding, Droughts and Deserts, 2019). The government's own review of LASPO showed an 85% reduction in legal help for non-asylum immigration matters, and a 62% reduction in full representation (LASPO Post-Implementation Review 2019). LASPO reduced the rates paid for legal work and led to a reduction in the number of legal aid providers.

Bail for Immigration Detainees (BID) has conducted 6th monthly surveys into the availability of legal advice in immigration detention since 2010. In 2021, we published a 10-Year Review which found that levels of legal representation had declined since LASPO. In November 2012, before the legal aid cuts came into force, 79% of respondents had legal representation, of which 75% were legally aided. In May 2013, the proportion fell to 43% with only 29% having a legal aid solicitor. Since then, there have only been two surveys where the number of people with a legal representative was above 60% and the figure has frequently fallen below 50%.

The percentage of people detained under the immigration acts who had a Detention Duty Advice (DDA) appointment and were subsequently taken on by the lawyer has not risen above 50% since Autumn 2012, the last survey before LASPO came into force. These figures are worryingly low given that people's liberty is at stake and duty solicitors should be seeking to provide advice and/or representation in the individual's detention or bail matter, regardless of the merits of the substantive immigration case. Even people with poor prospects of being granted bail should receive legal advice regarding the merits of their detention case, including the steps they need to take to be able to get out of detention.

Additionally, whilst BID does not have the resources or access to systematically monitor the quality of advice delivered under the DDA, survey respondents raised concerns with us about the poor quality of advice which includes short appointments some lasting less than a few minutes, solicitors asking for a fee without offering to make ECF applications, delivering advice that was not useful, refusing to take a cases without giving reasons, including where they lack of capacity and being difficult to contact after the appointment. We have been told that people are not bothering to use the DDA because the reputation of the duty solicitors is so bad.

A significant number of BID's client are people with children who are facing deportation and who are relying on their private or family life rights under Article 8 of the ECHR. For example, BID represented a client with a wife and two children who had lived in the UK lawfully and uneventfully for 15 years when he was subjected to a violent assault and suffered a traumatic brain injury. Following the assault his behaviour changed resulting in him receiving a 20-month custodial sentence for theft which triggered automatic deportation under the UK Border's Act. He did not qualify for automatic legal aid post LASPO and had no choice but to instruct private solicitors to represent him. Inevitably his article 8 application was refused and his appeal dismissed. A determining factor was that no expert evidence was put in front of the judge including the impact of his deportation on his children and the impact of the traumatic brain injury on his offending. He was detained and on the brink of removal when BID was instructed. We were able to refer him to solicitors to challenge the removal which was subsequently stopped by the courts. Had legal aid been available during the early stages of his case it is very likely he would have succeeded because legal aid would paid for the expert reports which typically cost around £1500 each.

BID represents a significant number of long-term British residents who were either born in the UK, arrived as children and/or have British partners and minor children and who were in the UK lawfully prior to being convicted of a criminal offence. People facing deportation are usually detained under immigration powers in prison. They are initially issued with a Stage 1 Notice of Liability to Deportation

which must be responded to within 14 days. If they fail to respond within the 14 days they lose their right to appeal the actual decision to deport them. We have come across a number of clients with meritorious cases who failed to respond to their Stage 1 Decision because they did not have access to advice and representation through legal aid. The long-term detrimental impact of this especially on children and families cannot be overstated ([Deportation Report Final.pdf \(hubble-live-assets.s3.amazonaws.com\)](#)) and many people are deported without having had meaningful access to justice.

2. What additional costs or savings to other public services or wider society, if any, have these examples had?

The Tribunal Service and the Home Office will have faced additional costs due to people not have been able to access meaningful legal advice at the earliest opportunity. This will have resulted in ineffective appeals resulting in adjournments, dismissals of appeals and onward appeals in circumstances where had the cases been front-loaded via meaningful representation the cases would have been disposed of and concluded at a far earlier stage. The existence of our Revocation project and our ECF project is evidence of people having been unable to access legal representation at an early stage as the work involves making detailed and complex applications for ECF during the course of appeals or in order to make fresh claims or to apply for the revocation of deportation orders after they have been issued. The distress caused to appellants, their families, including children also results in people requiring medical care and assistance arising from the deterioration of medical conditions that are a direct result of the prolongation of uncertainty due to ongoing legal cases. It is difficult, if not impossible to quantify the public funds that are wasted where this occurs. The Government has also often complained about late claims being made when removal is in process or being attempted, and this in turn arises from cancelled removal directions. The reason for such cancellation is nearly always due to the absence of legal aid advice at an early stage of a case as evidenced by our case study where legal aid would have amounted to at most £5000 including the expert reports whilst the final bill to prevent his removal amounted to nearer 16k.

3. In your view, how is the government performing against its objective to target legal aid to those who need it most?

The existence of BID, as a charity that provides free legal advice for people held under immigration powers in IRCs and prisons, reflects the lack of access to legal aid and the lack of lawyers to whom we

can refer cases. Legal Aid is available for immigration bail cases but despite this in 2022 alone, BID responded to 7,445 calls through its telephone advice line, and a further 1000 queries through the enquires email. We provided legal advice & assistance to 1,536 people in preparing their bail applications through our DIY scheme (where we prepare the bail application but the client represents themselves at the hearing) & provided full legal representation (where we prepare the case & instruct a pro bono barrister to represent the client at the hearing) to a further 366 people of which 313 people cases were either granted bail or bail in principle - an astonishing success rate of 85%. This represents a large gap in the government's objective to target legal aid to those who need it the most. Rather this demonstrates that the current legal aid system, which does not consider non-asylum claims, excludes a large demographic of people from accessing legal advice.

In 2022, BID also provided deportation legal advice to 78 people, assisted 38 people on making ECF applications and securing legal representatives and provided free legal advice to 128 parents or carers separated from 284 children. BID also made 43 referrals for unlawful detention.

4. Have you seen examples of eligible individuals who are unable to access legal aid in the past three years? We define eligible individuals as individuals who meet the means test requirements and whose case is in scope. Answer options: Yes, frequently. Yes, sometimes. Yes, rarely. Or, No.

Yes, frequently. At BID, we tend to see a mix of clients many who have protection claims and are appeals rights exhausted and others who detained pending deportation and are facing breaches of their article 8 right to a private and family life which is out of scope of legal aid. When we are first instructed we investigate the client substantive claim in order to ascertain whether they have a protection element and/or are the victims of trafficking. We see many clients where there are indicators of human trafficking however legal aid is not available until there has been a reasonable grounds decision. We refer these clients to the appropriate agency who will refer them into the NRM after which if they do get a positive reasonable grounds decision we provide them with a list of legal aid lawyers whom they can contact. They often come back to us for further help as the legal aid lawyers have not been able to take their case primarily for capacity reasons. We do the same with people with asylum claims and again find that many of our clients complain that they are not able to secure a legal aid lawyer even when they have an asylum claim.

5. The 'exceptional case funding' scheme is intended to fund cases outside the scope of legal aid, where a failure to do so would result in a breach of the applicant's rights under international

law. How effective do you feel the exceptional case funding scheme is in its current form? Please include how, if at all, you feel the scheme could be made more effective.

Post LASPOA, BID set up an Exceptional Case Funding Project (ECF Project) which won the Law Works Pro Bono Awards for the Best New Pro Bono Activity. Working with 4 commercial law firms a BID lawyer trains and supervises pro bono lawyers in the commercial firms to make ECF applications on behalf of our clients. Once ECF is granted we then refer our clients to a legal aid lawyer. In 2022, BID secured legal aid for 38 people. In addition, we also represented 7 clients in their deportation matter through our Article 8 Deportation Advice Project (ADAP) also set up in the aftermath of LASPOA. Clients were at all stages of the deportation process and out of the seven five had young children where deportation would result in potentially permanent separation.

BID has undertaken research and is in the process of producing a report into the process of applying for Exceptional Case Funding (ECF), through the perspectives of the pro-bono lawyers making the applications. Initial results reveal the complexity of the application process and explores the difficulties in referring cases once legal aid is granted. The preliminary findings show that the application is time-consuming, taking pro-bono lawyers 37 hours on average to complete the application. The lawyers who responded to the survey said that given the complexity of immigration law the applicant would not have been able to complete the application without legal assistance. The findings also highlight the difficulties they had in communicating with applicants especially those that were detained in prison where they have to mostly rely on postal correspondence causing significant delays.

As well as communication difficulties for applicants and the complexity of the law, respondents cited other barriers which include:

- Procedural complexity of the application / knowing what information is relevant.
- Difficulty applicants would have in understanding the legal arguments.
- The complexity of the case including issues such as long history of immigration applications and appeals, medical problems and family life issues that require evidence & their relevance.
- Logistical difficulties including access fax, emails, phones.
- Vulnerability / mental state of the applicants such as PTSD, lack of English literacy skills.

As already noted once ECF is granted, applicants are then faced with the additional hurdle of finding a legal aid lawyer to represent them resulting in further long delays and leading to requests to the courts for adjournments. In one case, 46 solicitors' firms were contacted for a client without success.

Easy access to legal aid is critical in view of the 'unduly harsh' test and the demands of the Home Office and the courts to consider expert evidence in cases involving children or where appellants claim deportation will have an 'unduly harsh' impact upon applicants, partners or their children. This is interpreted by the Home Office as 'excessively cruel' and as the Home Office interprets the law strictly, this sanctions cruelty to children as long as it is not proven to be excessive.

People appealing deportation decisions face multiple barriers to justice. Meeting the legislative tests for successfully appealing deportation is exceptionally demanding and requires substantial expert evidence. As we have shown the ECF scheme is beset with problems and inaccessible to many. For those that are held in prison there are additional practical hurdles that make accessing legal advice very difficult if not impossible & as we have shown this generates additional costs further down the line. (BID Research Report, Excessively cruel: Detention, deportation & separated families)

We recommend that immigration cases (and deportation cases in particular) be brought back into the scope of mainstream legal aid as a matter of urgency. This would omit the bureaucratic hurdles that the ECF scheme has created and would guarantee that Legal Aid lawyers are paid for the work they undertake and ensure that necessary expert reports are available. In the alternative, we recommend a simplification of the ECF application so that a person without a legal background is able to successfully complete the application.

6. Have you or your organisation changed the way you work in response to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) or subsequent changes? For example, changes to: types of legal aid work provided, amount of legal aid work provided, staffing, organisational structures or other efficiencies.

We do not have a legal aid contract however demand for our services increased after the introduction of LASPOA in April 2013. In 2014, we established an Article 8 Deportation Advice Project (ADAP) due to demand arising directly from the lack of access to advice for people in prisons after the introduction of LASPOA. The project prioritises long-term UK residents with British families and those with particularly compelling circumstances. It also prepares and disseminates a range of self-help leaflets about deportation. This is a small project which comprises a Legal Manager with occasional volunteer support. Last year 78 people were provided with advice or representation and we took on 36 cases and also provided one off advice in 48 cases. We currently have a total of 38 active cases at ADAP.

In 2022, BID made 6 referrals for judicial review. These were for a wide range of issues, including cancellation of removal directions, both of which were successful, a challenge to very prolonged delays

in decision-making, a challenge to the type of status granted to a client, challenges to regulation 33 certifications, (which would have allowed the Home Office to remove an individual before their appeal was heard), and a challenge to a refusal to accept further human rights submissions as amounting to a fresh claim.

We have established a Revocation Project in 2022, which works with those unjustly deported (primarily because they were not able to access legal aid and were deported without ever having their cases properly considered) to return them to the UK where they can reunite with their families and communities. This is a new project and we currently have 5 clients all who have children in the UK & one application has strong compassionate circumstances including significant health issues.

BID's capacity is limited. We are funded by grant making trusts and foundations and struggle to access funding as many funders will not fund work that they believe should be funded by the government. We have a small legal team and rely heavily on volunteers to support our work. We simply do not have the capacity to meet the demand and it is apparent that systemic & structural change is required to enable people to get meaningful access to justice.

7. Do you or your organisation intend to make any changes to the amount or type of legal aid work that you provide in the next three years? Answer options: Yes, No, I don't know, or N/A.

Yes, BID is not a receipt of legal aid funding but we will continue to try and fill the gaps.

8. What do you think are the key challenges and opportunities for providers of legal aid in the next five years? (5000 characters)

In the next five years, the key challenges for legal aid providers will be meeting demand coupled with reduced capacity given that an analysis by the Law Society found there has been a 5% drop in providers since April 2022. (<https://www.lawsociety.org.uk/campaigns/legal-aid-deserts/immigration-and-asylum>). At the end of 2022 there was a backlog of 166,261 asylum claims still waiting to be processed which when coupled with the implementation of the Illegal Migration Act will completely clog the system up.

The Illegal Migration Act puts a duty on the Home Secretary to remove individuals who enter or arrive in the UK illegally. In 2022, 45,755 people arrived in the UK on small boats all of whom would, under this Act, be detained and issued with removal notices either to their own country or, if they are making

an asylum claim to a 'safe third country'. (<https://consult.justice.gov.uk/digital-communications/legal-aid-fees-in-the-illegal-migration-bill/>) The Act reduces a person's ability to challenge removal to a so called safe third country and requires that they do so within 8 days of being issued with a notice. This is a very tall order given the evidential requirements and whilst legal aid is in scope, with no means or merits test and a proposed 15% uplift for these cases, there is unlikely to be sufficient providers to meet the demand. Furthermore, it will also incentivise providers to take on clients served with removal notices under the Act which in turn will mean that the outstanding asylum or family and private life claims under article 8 of the ECHR are likely to find it even harder to find a legal representative.

With regards to key opportunities in the next five years, this is also an opportunity to call for systematic change in the scope and type of cases of allocated legal aid, including the restoration of legal aid for deportation matters, the automatic allocation of legal aid lawyers to people in detention facing deportation, a thorough review of legal aid fees with a view to setting fees that will provide an incentive for legal aid providers to continue working the sector.