

Guidance Note

Local authorities supporting children after the cuts to legal aid

1. From 1 April 2013 the cuts to legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into force.¹ These include heavy cuts to legal aid for immigration cases.
2. Broadly speaking, legal aid will still be available for asylum cases,² trafficking cases where the individual has been recognised as a trafficking victim, certain applications under the domestic violence rule and legal proceedings connected to immigration detention. Other immigration cases, including applications for leave to remain in the UK on the basis of Article 8 of the European Convention on Human Rights (right to respect for private and family life), will no longer be within scope for legal aid.³
3. Legal aid is still available for judicial review, subject to some specific new exclusions.

Exceptional funding

4. Section 10 of LASPO allows for legal aid funding to be granted in 'exceptional' cases in areas of law that have been taken out of scope. Exceptional funding should be granted where failure to provide funding would be a breach of human rights or enforceable EU rights, or there is a substantial risk of such a breach.⁴
5. Since April 2013 the Legal Aid Agency has consistently refused to provide exceptional funding in immigration cases, even where the case involved an otherwise unrepresented child and strong human rights issues. Between April and June 2013 there were 233 applications made for exceptional funding and it was only granted in two non-inquest cases, only one of which was an immigration case and this was only granted after the solicitor initiated judicial review proceedings against the Legal Aid Agency.⁵

¹ The changes are primarily set out in Schedule 1 LASPO:
<http://www.legislation.gov.uk/ukpga/2012/10/schedule/1/enacted>.

² This includes claims on the basis of the Refugee Convention, Articles 2 and 3 of the European Convention on Human Rights, or the Qualification Directive. See paragraph 30, Part 1, Schedule 1 LASPO.

³ For more information c.f. ILPA's recent information sheet:
<http://www.ilpa.org.uk/data/resources/16615/12.12.19-legal-aid-13-update.pdf>.

⁴ Lord Chancellor's Exceptional Funding Guidance (Non-Inquests): <http://www.justice.gov.uk/downloads/legal-aid/funding-code/chancellors-guide-exceptional-funding-non-inquests.pdf>.

⁵ For more information c.f. *Exceptional Funding: a fig leaf not a safeguard* from the Public Law Project:
http://www.publiclawproject.org.uk/documents/exceptional_funding_blog.pdf.

6. It may be difficult to find a lawyer prepared to make an application for exceptional funding. The Public Law Project is assisting some individuals to apply for exceptional funding:
http://www.publiclawproject.org.uk/exceptional_funding_project_page.html.

What if a child or care leaver supported by the local authority cannot get legal aid?

7. It is illegal for an unregulated person to give immigration law advice. In addition, there is likely to be a conflict of interest if a local authority either provides 'in-house' immigration law advice or seeks to direct the legal advice an individual receives. Any immigration legal advice that a child receives would need to be independent of the local authority and from a qualified immigration adviser.
8. S.17, s.22, s.23A, s.23B and s.23C of the Children Act 1989 give local authorities very strong safeguarding responsibilities towards children in need, looked after children, relevant children and former relevant children.
9. There is no explicit provision stating that local authorities will need to step in and underwrite the cost of a child's legal fees if they cannot access mainstream legal aid, but local authorities will need to consider whether this will be the best way to meet a child's identified needs. Where regularising their immigration status will have a major impact on a child's present and future well-being, stability and prospects, the local authority will need to take active steps to support the child in resolving their immigration case. This may include helping a child find appropriate independent legal assistance and underwriting its cost, in a similar way that this service would be arranged if the child were being cared for by their own parent.
10. For example, where a local authority is supporting a destitute family under s.17 of the Children Act 1989 they will take steps to meet the identified needs of the child by providing accommodation and/or subsistence. The local authority may consider that funding the legal fees for an immigration application is the best way to address the underlying needs of the child (since the family may primarily be destitute because their immigration status has not been regularised).
11. There are likely to be some cases where the welfare issues are so significant (for example in many cases where a care leaver faces detention and removal or deportation) that the local authority would not be acting lawfully if they refused to underwrite the cost of legal fees.
12. In a mixed case (for example involving Article 3 protection issues that are covered by legal aid as well as Article 8 immigration issues that are not covered by legal aid), it may be necessary for the local authority to underwrite only part of the legal fees.
13. Local authorities can work with local law centres and other not-for-profit providers to try and arrange free legal advice for their clients. However, this may only be initial advice rather than the provider actually taking the case on for representation and may not be enough to meet the individual's needs. They might also work hard to find a solicitor to apply for exceptional funding

for their client, so that the legal fees for a supported child can be covered by legal aid (however, as discussed above, at present this seems to be almost impossible to access in immigration cases).

14. Local authorities should not refuse to consider underwriting the cost of legal fees for a child or former relevant child, since a blanket refusal is unlikely to be lawful.
15. Local authorities may need to develop policies on this issue, which might, for example, include a mechanism to prevent the local authority having to fund legal services for repeat applications that might have a poor chance of success. The local authority itself is not permitted to pre-judge the merits of an immigration case; it would need to be considered by an independent immigration lawyer.
16. A local authority which does not consider this issue will leave itself open to threats of judicial review.
17. The NRPF Network recommends that the senior managers of local authority Children's Services departments work with the local authority's legal team to develop a policy on this issue.

What if the family or care leaver is caught by Schedule 3 NIAA?

18. Schedule 3 of the Nationality, Immigration and Asylum Act 2002 restricts support under the Children Act 1989 to adults if they are:
 - A refugee of another EEA state (and dependents)
 - An EEA national (and dependents)
 - A refused asylum-seeker who has failed to comply with removal directions
 - In the UK in breach of immigration laws/unlawfully.⁶
19. Support should not be refused under Schedule 3 if to do so would breach human rights or European treaty rights.
20. Schedule 3 does not apply to children or to British nationals. Where Schedule 3 applies to the parent of a child supported under s.17 of the Children Act or a care leaver then the adult could initially be assisted to seek exceptional funding from the Legal Aid Agency for their case.
21. However, in light of the extreme difficulties that have been noted around accessing exceptional legal aid funding, local authorities should still consider whether providing financial support for immigration legal services may be necessary to prevent a breach of human rights or European treaty rights, for example where delay might prejudice the person's case.

What about adults?

22. When the local authority provides services to a child in need under s.17 of the Children Act, they can also provide those services to the child's parent.

⁶ Available online at: <http://www.legislation.gov.uk/ukpga/2002/41/schedule/3>

23. Where a single adult is supported by the local authority under s.21 of the National Assistance Act 1948 because they have a need for care and attention that is not otherwise available, the local authority should provide accommodation and services in connection to this accommodation. Underwriting the cost of legal fees would not usually be seen as a service 'in connection' with accommodation.
24. In a compelling case the local authority could consider using its discretion under s.1 of the Localism Act 2011 to underwrite the cost of legal services, but any cases should be checked carefully with the local authority's legal team.

Key considerations

- Is all or part of the case likely to be eligible for legal aid (e.g. because there is a protection claim) and has legal advice been sought to ascertain this, if necessary from a number of different legal aid providers?
- Is free immigration legal advice and representation available, e.g. from a law centre or other voluntary sector initiative? Is it sufficient?
- Does the case involve human rights issues (such as Article 8 ECHR right to respect for private and family life) that the client is unlikely to be able to adequately present on their own?
- Local authority decisions should not be arbitrary – have a clear and fair policy worked out.
- Immigration legal services are independent – the lawyer will work in the best interests of the client and it will be the client who is instructing them, not the local authority; communication between the lawyer and client is confidential. Although the local authority can write to the solicitor, they should beware any conflict of interest.
- The local authority should act in accordance with its legal duties to children, including under the Children Act 1989, the Children Act 2004 and the UN Convention on the Rights of the Child. A child's best interests must be a primary consideration in all actions concerning them.
- The local authority will need to base any assessment of the merits of an immigration case on an informed legal opinion.

Further information

- Coram Children's Legal Centre:
http://www.childrenslegalcentre.com/index.php?page=migrant_children
- The NRP Network: <http://www.nrpfnetwork.org.uk/enquiries/Pages/default.aspx>