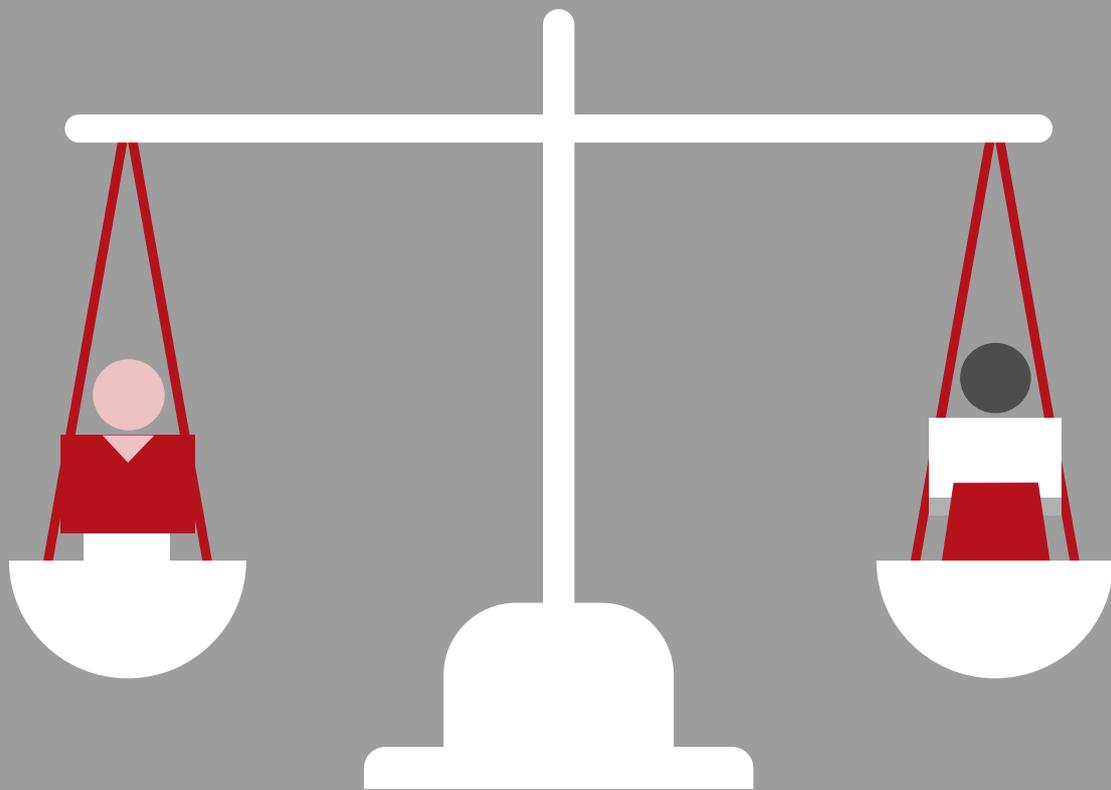


# Rights without remedies:

Legal aid and access to justice for children



February 2018

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Coram Children's Legal Centre, part of the Coram group of charities, promotes and protects the rights of children in the UK and internationally in line with the UN Convention on the Rights of the Child. For more information, visit [www.childrenslegalcentre.com](http://www.childrenslegalcentre.com).

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# Glossary

- **Child** – A child is defined by the United Nations Convention on the Rights of the Child and the UK's Children Act 1989 as a person under the age of 18 years.
- **Civil law** – Civil law exists to protect individuals against one another and the state. Civil law sets out the rights and duties of individuals – both in legislation and through common law (court rulings).
- **Judicial review** – A process for holding government authorities, including ministers, local councils and statutory tribunals, to account for unlawful actions such as the violation of an individual's rights. An individual who feels that the exercise of power by a government authority is unlawful may apply to the Administrative Court (a division of the High Court) for judicial review of the decision and have it set aside (quashed) and possibly to obtain damages. A court may also make mandatory orders or injunctions to compel the authority to do its duty or to stop it from acting illegally.
- **Legal aid** – There are generally two main types of civil legal aid given to individuals who cannot afford to pay for legal services themselves. 'Legal help' is funding for legal advice or assistance. It is often given to people in the early stages of a potential court case, including investigation (evidence-gathering) work, assessing the prospects of a case succeeding, corresponding with the other party in the case, and during negotiations. In some cases, it may cover representation at hearings. 'Legal Representation' is funding which usually covers court/tribunal based work, including representation at hearings.
- **Legal Aid Agency** – An executive agency of the Ministry of Justice, established on 1 April 2013, replacing the Legal Services Commission. The body responsible for commissioning and administering civil, family and criminal legal aid services in England and Wales
- **Litigant in person** – An individual who is conducting legal proceedings on their own behalf, i.e. they are not represented by a solicitor or a barrister.
- **Means test** – The process by which an assessment of clients' financial eligibility for legal aid is made.
- **Merits test** – The merits test aims to ensure that only cases with reasonable prospects of success receive legal aid, also taking account of factors other than the prospects of success (including for example whether it is reasonable to provide legal aid in all the circumstances of the case).
- **Young person** – In this report, a young person is defined as anyone aged between 15 and 24 years of age, in keeping with the United Nations definition of 'youth'.

## Acronyms

- CAO – child arrangements order
- CCLC – Coram Children's Legal Centre
- CLAS – Child Law Advice Service
- ECF – exceptional case funding
- ECHR – European Convention on Human Rights
- EHC – education, health and care plan
- LAA – Legal Aid Agency
- LASPO – Legal Aid, Sentencing and Punishment of Offenders Act 2012
- MCP – Migrant Children's Project
- PR – parental responsibility
- PSU – Personal Support Unit
- SEN – special educational needs
- SGO – special guardianship order
- UNCRC – United Nations Convention on the Rights of the Child

# Introduction

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*'The rule of law is rightly regarded as being the foundation of any democratic society. But the rule of law is meaningless if there is no access to justice. It is pointless to be granted rights if you have no way of enforcing them.'*<sup>1</sup>

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Rachel fled domestic violence in Nigeria and came to the UK on a visitor's visa. She fell in love with a British man and, four years later, she became pregnant with his child. Her baby's father left her during the pregnancy. She has not seen him since.

Rachel's son Sam was born with autism. He was born British because his father was British but as his father was no longer in contact this was difficult to prove. Without papers Rachel did not have permission to work. The family slept in the living room of her friend's house, which was cramped and dirty and shared with a number of strangers. As Sam got older his needs became more difficult to meet in such a chaotic environment, and Rachel and Sam were made homeless. Rachel went to the police station and was referred to children's services, who housed her and Sam on a temporary basis, on the condition that her immigration status was regularised quickly.

However, Rachel was destitute and could not afford to pay for a solicitor. Government-funded legal advice and representation for immigration cases is not available. She tried to make the application herself but found the immigration system confusing and hard to understand. Her application was refused by the Home Office because they did not accept her statement that her son's father was British.

Coram Children's Legal Centre (CCLC) met Rachel in time to lodge an appeal against this decision, by offering free advice and representation through our charitably funded pro bono project. CCLC then made a 20 page application for exceptional case funding for legal aid so that Rachel could instruct a lawyer to prepare for the appeal. The funding was granted. With the help of a solicitor, Rachel was able to gather better evidence of her son's paternity, nationality and medical needs, and the Immigration Judge agreed that she should be granted permission ('leave') to remain in the UK.

Sam is a British boy whose early years needed to be ones focused on support and nurturing. If legal aid had been available, his mother could have regularised her status easily and could then have worked and supported her young son. Instead, as a young child he was forced to live in slum-like conditions, exacerbating the challenges he already faced from his disability.

Sam's case above is an illustration of a young child who could have been let down by our legal system. It was only because CCLC intervened, using charitable funding, that he was not left living in destitution.

This country has a strong legal framework for the protection and support of children and young people, but if they are unable to actually enforce their rights then those rights are worth little more than the paper they are written on. If they, or those caring for them, are unable to enforce their rights, children can be left without homes, without status, excluded from education, and separated from their families. Key decisions about a child's future can be made without their views being put forward, or all the necessary information considered.

The legal aid system, introduced in 1949, was based on the belief that every person should have equal access to and protection under the law, regardless of financial position or status. It was designed to ensure that those who could not pay for legal advice and representation were not left without – ensuring 'equality of arms'. Legal aid provision is usually subject to means and merits tests, which examines an individual's prospects of success, the importance of the case and whether they have savings or disposable income which could fund their legal case. Those who are eligible for legal aid but whose savings or income exceed a set level pay a contribution. However, the areas of law to which legal aid applies have been progressively narrowed, threatening children's and young people's access to justice.

Prior to April 2013, legal aid was available to help people access justice in almost all aspects of civil law, with some narrow exceptions.<sup>2</sup> The Legal Aid, Sentencing and

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1 Andrew Caplen, President of the Law Society, Access to justice lecture at University of Portsmouth, December 2014 at <https://www.lawsociety.org.uk/news/speeches/access-to-justice/>

2 The Access to Justice Act 1999 provided that work was in scope for legal aid unless specifically excluded by Schedule 2 of the Act, e.g. boundary disputes 1(c), the making of wills 1(d), and matters of trust law 1(e). This is in contrast to LASPO, which says only work explicitly included in Schedule 1 is in scope.

Punishment of Offenders Act 2012 (LASPO) overhauled the legal aid system, significantly reducing the areas of law and types of legal work which legal aid can cover. Areas of law that were removed from scope included employment, education (except for cases of special educational needs), non-asylum immigration, private family law, many debt and housing cases, and most welfare benefits cases.<sup>3</sup> Where an area of law is no longer in scope, individuals must either pay privately for their own legal advice and representation or go without and deal with matters themselves (and as a litigant in person, if there are court hearings). Like Rachel above, a small number of individuals may be able to access legal aid by applying for and being granted exceptional case funding (ECF), but this relies on their being able to find a way to apply.

LASPO was intended to increase 'public confidence in the system by ensuring limited public resources are targeted at those cases which justify it and those people who need it'.<sup>4</sup> The changes introduced were decided by a four-stage test: 'first, the importance of the issue; secondly, the litigant's ability to present their own case, including and especially any vulnerability; thirdly, the availability of alternative sources of funding; and, fourthly, the availability of other routes to resolution'.<sup>5</sup>

Crucially, the changes introduced by LASPO aimed to 'protect the vast majority of funding in cases involving children' and pledged that '96% of the current spend on cases involving child claimants will continue'.<sup>6</sup> However the government rejected calls at the time to go further than this and introduce an automatic entitlement to legal aid for all children and vulnerable young people.<sup>7</sup> As a result, children and young people are falling through the gaps.

This report, drawing on evidence from CCLC's legal advice services, assesses the impact of LASPO in England and the

removal of areas of law from scope on children, focusing on family, education and immigration law.<sup>8</sup> We advise and represent vulnerable children, young people and families, many of whom quite simply lack the ability to negotiate legal processes effectively without the assistance of a lawyer. Legal processes demand that individuals, no matter how vulnerable, complete and submit forms, prepare for legal proceedings and represent themselves in court. Without a lawyer, many of these vulnerable clients would not be able to take action to enforce their rights – and if their rights are unenforceable, they are illusory.

By 2016, grants of civil legal aid had fallen to less than one-third of pre-LASPO levels,<sup>9</sup> a drop that has had a particular impact on at-risk groups, including children and those with mental health or literacy problems. Since LASPO's measures came into force in April 2013, at least 6,000 children each year have been left without access to free legal advice and representation in many areas of civil law – some estimates are as high as 15,000.<sup>10</sup> However, this figure does not include children in families and much of the impact of LASPO on children is felt in cases involving children, rather than the cases involving child claimants.

Limited alternative provision exists and any alternative free sources of information and advice that do exist are rarely able to meet the scale of demand, or are unsuitable for individuals who require more intensive or specialist services.

The Justice Select Committee, Joint Committee on Human Rights and Office of the Children's Commissioner have all criticised the removal of legal aid from children's cases.<sup>11</sup> The Justice Select Committee raised concerns that 'children were facing particular difficulties in accessing legal advice and representation' and that 'children are inevitably at a disadvantage in asserting their legal rights, even in matters

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3 Everything was removed from scope unless it was specifically listed, whereas previously, everything was in scope unless it was specifically excluded.

4 Ministry of Justice, 'Transforming Legal Aid: Next Steps', September 2013, Annex F para 6.3, at [https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/supporting\\_documents/transforminglegalaidnextsteps.pdf](https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/supporting_documents/transforminglegalaidnextsteps.pdf)

5 As stated by the then Government spokesperson in the House of Lords, Baroness Northover. HL Deb 23 April 2012, vol 736, col 1664

6 Ibid.

7 Legal Aid, Sentencing and Punishment of Offenders Bill, 'Marshaled List of Motions and Amendments to be Moved on Consideration of Commons Reasons and Amendments as at 20 April 2012', paragraph 171, Motion J, Amendment 171 sought to provide legal aid to children under 18 but was rejected by the House of Commons with reasons provided at paragraph 171A; See also, Legal Aid, Sentencing and Punishment of Offenders Bill, 'Second Marshalled List of Amendments to be moved on Report as at 5 March 2012', paragraph 21 relates to providing civil legal services for vulnerable young people. During the passage of LASPO the government argued that there was no need to ensure children had an automatic entitlement to legal aid, expect for private family law cases, because ordinarily they should have a parent, carer or guardian to act on their behalf

8 The report does not look into legal aid eligibility or the operation of legal aid rules.

9 Legal Aid Statistics quarterly, England and Wales, April to June 2017. In the year before LASPO came into force, civil legal aid was granted in 925,000 cases; the year after it came in to force, assistance was given in 497,000 cases, a drop of 46%. Legal Aid Statistics in England and Wales, 2013-2014, page 63.

10 Figures supplied to JustRights by Ministry of Justice on 10/10/11 in response to a Freedom of Information request. See The Children's Society, 'Cut off from Justice: The impact of excluding separated and migrant children from legal aid', 2017

11 Joint Committee on Human Rights, 'Human rights of unaccompanied migrant children and young people in the UK First Report of Session 2013-14', June 2013, <https://publications.parliament.uk/pa/jt201314/jtselect/jtrights/9/9.pdf>

which can have serious long-term consequences for them.<sup>12</sup> UN treaty bodies have echoed these concerns about changes, stressing in particular the impact on marginalised groups.<sup>13</sup> The Committee on the Rights of the Child highlighted the ‘negative impact on the right of children to be heard in judicial and administrative proceedings affecting them’.<sup>14</sup>

LASPO’s changes were broad, and fundamentally altered the UK’s justice system. As such, the government committed to review the Act within five years of its implementation. Now that this review is underway, we urge the government to examine in particular the impact on children’s rights of the legal aid changes, and to take steps to address this impact through implementing the recommendations in this report. No child should be left without access to justice.

## Legal aid and access to justice

Although there is not the same recognised connection between the right to free legal advice, assistance and representation and guaranteeing the right to a fair trial as there is in criminal cases, the provision of legal aid – to assist those people otherwise unable to afford legal representation and access to the courts – is a significant part of how a state can ensure access to the civil justice system.

The European Court of Human Rights has found that the right to access to a court contained in Article 6 (1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR) encompasses the right to free legal assistance in civil matters when such assistance proved indispensable for effective access to the courts and a fair hearing (in particular for ensuring the equality of arms).<sup>15</sup> Human rights protections under Article 6 have been further elaborated on in the Court of Appeal in this country in the context of legal aid for civil litigation. The court specified that these include practical and effective rights of access to the courts, the ability to ‘present the case properly and satisfactorily’ before the court of tribunal, and equality of arms such that each side can present their case ‘under conditions that do not place them at a substantial disadvantage vis-a-vis their opponent’.<sup>16</sup>

For children who are not in detention there is no express provision in the UN Convention on the Rights of the Child (UNCRC) for access to free legal representation. However, Article 12 provides that they should have ‘the opportunity to be heard in any judicial and administrative proceedings affecting [them], either directly or through a representative’. The UNCRC also states that the best interests of children should be the primary consideration in all decisions affecting them (Article 3 (1)). Access to justice is important in cases where the best interests of a child are clearly engaged, for example, in child access or contact arrangements, even if they are not party to the proceedings. Where children, parents or carers struggle to access legal advice, assistance or representation, it can impact the ability of decision-makers (administrative and judicial) to make decisions properly, in possession of all relevant evidence and information. The UN Committee on the Rights of the Child has stated that a child ‘will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies’.<sup>17</sup>

12 House of Commons Justice Committee, ‘Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 Eighth Report of Session 2014–15’, at <https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf>

13 See, for example, the Committee on the Elimination of Discrimination against Women, Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, UN Doc: CEDAW/C/GBR/CO/7, 30 July 2013, para. 22; the Human Rights Committee, Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, UN Doc CCPR/C/GBR/CO/7, 7 August 2015, para. 22.

14 The Committee on the Rights of the Child, Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, UN Doc: CRC/C/GBR/CO/5 3 June 2016, para 29.

15 *Airey v. Ireland P, C and S v. United Kingdom*, Judgment of July 16 2002; *McVicar v. United Kingdom*, 7 May 2002; *Bertuzzi v. France A. B. v. Slovakia*, 4 March 2003; *Steel and Morris v. United Kingdom*, 15 February 2005; *Munro v. United Kingdom*, Application No. 10594/83, 14 July 1987; *Inadmissible Thaw v. United Kingdom*, Application No. 27435/95, 26 June 1996; *Stewart-Brady v. United Kingdom*, Application Nos. 27436/95 and 28406/95, 2 July 1997; *Golder v. United Kingdom*, 21 February 1975; *Artico v. Italy*, 13 May 1980; *Jordan v. United Kingdom*, 4 May 2001; *Benham v. United Kingdom*, Grand Chamber Judgment of 10 June 1996. In deciding whether free legal assistance is indispensable for effective access to the courts or fair hearing in a particular case, the European Court of Human Rights has stated it will consider the particular facts and circumstances of each case, taking into account several factors: (1) the importance of what is at stake for the applicant; (2) the complexity of the case or the procedure, particularly when legal representation is mandatory by law; (3) the capacity of the applicant to effectively exercise his or her right of access to court

16 *R (Gudanaviciene) v The Director of Legal Aid Casework* [2014] EWCA Civ 162

17 The UN Committee on the Rights of the Child ‘General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)’, para. 96, at [http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)

## Coram Children’s Legal Centre’s work

Coram Children’s Legal Centre (CCLC) currently holds Legal Aid Agency (LAA) contracts in education law through Civil Legal Advice (the LAA’s mandatory telephone gateway); family law; immigration and asylum law; community care law; and public law. The Legal Practice Unit represents children, or their parents depending on the area of law, in almost 1,000 new cases per year where the subject at the heart of the legal case is a child. The vast majority of these (904 cases in 2016-17) are education law matters, as they often involve one-off or short pieces of advice, with much lower numbers across other areas of law: 24 child law cases, 30 asylum and trafficking cases, and 38 community care cases were taken on in 2016-17.

As well as being a legal aid provider, CCLC has experience of the effects of the legal aid cuts through grant-funded work providing free advice line and outreach advice services to thousands of children, young people and families each year through the Child Law Advice Service (CLAS) and the Migrant Children’s Project (MCP) advice line and outreach work.

CLAS is a Department for Education-funded service providing free legal advice and information to members of the public on family, child and education law. It is one of the very few alternative sources of free advice on out of scope family and education law issues. In the 2016-17 financial year, CLAS received 90,132 calls (from 82,770 callers), of which it was able to answer 18,948.

The volume of calls to CLAS almost doubled in the year following changes to legal aid coming into effect. The total volume of callers to the line rose from 23,017 in 2012/13 to 40,192 in 2013/14.<sup>18</sup> The changes in call volumes happened virtually overnight and were stark: in April 2013, the month following the LASPO cuts coming into effect, the number of unique callers rose to 2,839, up from 1,492 in April 2012. This number has continued to rise: between April 2016 and March 2017 the service was contacted by an average of 6,897 unique callers per month. Although CLAS has increased its capacity by 240% since 2012, through the use of volunteers, the scale of provision has not been able to keep with such increased demand.

Year (January)	Total number of unique callers	Total number of advice calls
2012	1,414	1,473
2013	2,216	1,475
2014	3,868	1,316
2015	4,067	1,863
2016	4,890	1,739
2017	7,587	1,640



Free advice is also provided through the MCP, which helps migrant and refugee children, young people, families, and the professionals who support them. In 2016-17 it provided advice in 1,297 cases through its phone and email advice line, and to 482 young people and families through face-to-face outreach advice in London.

<sup>18</sup> Figures relates to unique callers and are the number of unique phone numbers logged by CLAS over a period, regardless of whether or not these calls were answered, or the number of times an individual number was logged.

# Private family law

Private family law cases are conducted between individuals, generally in connection to or following parental separation.<sup>19</sup> Such cases are of clear importance to the children involved: they determine who children will live with, who will have parental responsibility (PR) for them, whether and how they will have contact with other family members, their standard of living and any financial support they should get.

Private family law cases have been removed from the scope of legal aid, except where there is evidence of domestic abuse or child abuse. Children can be the applicants themselves in these cases, but more usually their parents are.<sup>20</sup> This area of law has seen a significant increase in litigants in person – people who represent themselves in court – as people are unable to pay for legal representation. However, litigants in person often struggle to understand court procedures, with cases subsequently taking longer to resolve.<sup>21</sup>

Private family cases make up a huge area of law, and the removal of legal aid has left many thousands of people in need of advice and help. In the 2016-17 financial year CLAS dealt with 15,500 calls relating to private family law matters.<sup>22</sup> In only 15% of these calls was the caller's matter believed to be in scope for legal aid, and in many of these eligibility was related to experience of domestic violence which (as explored below) can be extremely difficult to evidence. Analysis based on a small sample of the calls CLAS receives suggested that around 65% of callers had an income that was low enough to pass the current financial eligibility tests (means tests) for legal aid,<sup>23</sup> and an additional 8% may have passed the slightly lower means tests in 2012.<sup>24</sup> Extrapolated, this would suggest that CLAS advised over 9,500 callers last year whose legal problem was now out of scope of legal aid but who would have secured legal aid in 2012 (before the cuts) as they were financially eligible.

## Case study 1: The need for face-to-face advice

CLAS advised a mother seeking advice on contact with her six year old daughter who lived with her grandmother under a Special Guardianship Order (SGO). There was a history of domestic violence between the father and mother, although this had never been evidenced. There were 26 telephone communications logged between the caller and CLAS in relation to this one matter – it was clear that the caller did not understand the legal process, and was confused, requiring advisers to repeat advice continuously. The caller required intensive one-to-one legal assistance in preparing court forms and understanding the application of the law, but was unable to pay privately for legal assistance. Because the local authority had not started care proceedings, the mother was not entitled to advice or representation through legal aid. CLAS talked her through making an application and the relevant forms but as a phone advice service could not offer further support or follow up.

For those who *are* still eligible, there is a lack of awareness of eligibility for legal aid and not enough providers to turn to. This is shown by the general decline of grants of legal aid for private family cases where the subject is still in scope: there were 30,580 grants in 2014-15, but only 13,889 grants in 2016-17. The same decline has happened to children's cases: the number of children granted legal aid in private family law cases fell by 69% from 2013 to 2015.<sup>25</sup> These statistics suggest that the reduction in capacity in the legal sector has had an impact on the take-up of the limited legal aid which remains, and that knowledge about eligibility for legal aid in general is limited,<sup>26</sup> an issue observed by CLAS advisers and other legal charities.<sup>27</sup>

19 Public family law matters are those which relate to state intervention in a family's life, such as a care proceedings brought by a local authority.

20 A child might be granted legal aid to bring a family law case against, or independent of, their parent(s) - such as forced marriage protection orders, female genital mutilation protection orders, non-molestation orders, and declarations of parentage. A child may receive legal aid to be made party to family law proceedings that were initiated by adults – for example, where a child has specific issues relating to parenting, or seeks contact with a sibling. It is generally considered inequitable to aggregate the parents' means when considering the child's financial eligibility in these situations. See: Legal Action Group, 'Use it or Lose it: Children and Legal Aid', October 2016.

21 Family Court Statistics Quarterly, England and Wales, January to March 2017, table 8.

22 Figure relates to unique callers. The majority of the calls to the Child Law Advice Service relate to residence and child arrangement orders (formerly 'contact orders'). Most of the rest of the calls related to an education law matter.

23 An estimation of financial eligibility was determined using three indicators based on legal aid eligibility requirements: income, assets (property); and cash assets (money in bank account/s).

24 A sample of 141 calls were analysed over a two week period, of which 91 passed the current means test and an additional 11 were estimated to have been likely to pass the means test which existed in 2012.

25 Joint Commission on Human Rights, 'The UK's compliance with the UN Convention on the Rights of the Child', March 2015, section 105, at <https://publications.parliament.uk/pa/jt201415/jtselect/jtrights/144/144.pdf>

26 As noted by the National Audit Office, 'the Ministry [of Justice] does not know whether or not all those eligible for legal aid are able to access it.' National Audit Office, 'Implementing reforms to civil legal aid' HC 784 Session 2014-15, November 2014, at <https://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf>

27 Rights of Women found that 71.4% of the women they surveyed said it was difficult or very difficult to find a legal aid solicitor in their area for private law family advice. (See: <http://rightsofwomen.org.uk/wp-content/uploads/2014/09/Evidencing-domestic-violence-V.pdf>)

For the majority of the callers not eligible for legal aid, the key issue is the fundamental lack of understanding of their own rights and the processes they must navigate. It is important that legal advice and assistance is made available in a spectrum that meets the needs of those who try to access it. On one end of the scale is public legal education, needed to a much greater extent than that currently provided. A previous Lord Chancellor, Elizabeth Truss MP, highlighted the 'need to improve legal education and people's understanding of the law' and that the government 'can spend the current budget better by making sure that we are providing people with early legal help'.<sup>28</sup> There is evidence that improving legal education would ease the burden on the courts, which are at present struggling to meet the needs of the rising numbers of litigants in person involved in family proceedings.<sup>29</sup> By late 2014, the increase in litigants in person had led to an estimated £3.4 million in additional costs for the Ministry of Justice in the family court alone.<sup>30</sup>

### Case study 2: The benefits of understanding private family law and processes

CLAS was contacted by the father of a seven year old child who had had inconsistent contact with his child. The caller was due to meet with the child's mother but wanted to know his legal position in advance. The CLAS adviser explained that contact is seen as the right of the child, rather than of either parent, but that there is a duty on the parent with whom the child lives to facilitate a reasonable amount of contact. It was explained that if an arrangement could be made without going to court, that would be best. If the matter did go to court, because of the limited role the father has played in the child's life so far, the court would be reluctant to grant him a significant amount of contact. Instead they would like recommend a form of indirect contact or supervised contact at a contact centre at first and then progress it from there. The father finished the call with a much clearer understanding of his and his child's rights, and of the benefits of reaching a mutually accepted arrangement with the child's mother rather than going to court.

On the other end of the spectrum is face-to-face advice from a legal professional for those who need early and specialist legal intervention to prevent their case from cascading up and into the court system where it falls upon the judge to prevent

the justice system from failing the children involved. Adults with learning disabilities, language barriers and/or mental health issues will all struggle to engage with the legal system without specialist support. If a parent cannot understand the evidence requirements in a case, cannot effectively navigate the procedures and processes required, and cannot represent themselves effectively in a hearing by presenting their argument and advocating their position, judges are more likely to lack the necessary information to ensure that the outcome of a case is in the best interests of the child.

Where a legal case has got as far as the family court, services do exist to assist individuals to navigate complex systems and processes. Where an individual who calls CLAS lives within reach of a Personal Support Unit (PSU), for example, they can receive both general legal advice about their case and hands-on support at court. One of the PSU's main features is to help litigants in person with filling in forms, writing statements, accompanying someone to court and providing emotional and practical support. However, volunteer-staffed PSUs are not available everywhere. Although the need for them exists at every court, they are currently based in only 20 locations.<sup>31</sup>

At the time of the 2012 legal aid reforms the Ministry of Justice anticipated that the need created by taking most of private family law out of scope would be met through the preservation of legal aid for family mediation, which would offer an alternative to lengthy adversarial proceedings in cases of family breakdown. The government predicted that the number of family mediations would increase as other avenues for resolution were closed off, with 9,000 more mediation assessments expected in 2013-14. In reality, there were 17,275 (56%) *fewer* assessments. Solicitors providing early family legal advice were a significant source of referrals to family mediation, and the government had failed to take account of that fact.<sup>32</sup> The take-up of this service has continued to fall from a peak of 31,336 assessments in 2011 to 11,927 in 2016.<sup>33</sup>

LASPO followed the general principle that public law family cases such as those involving child protection should remain within scope of legal aid but private law family cases such as divorce should be outside scope. However, this public/private law boundary does not stand up to scrutiny when looking at the impact on children. Private law child contact disputes in acrimonious divorces, for example, can involve contested court hearings and longer delays in resolving cases, especially when parties are representing themselves and perhaps

28 House of Lords Select Committee on the Constitution, 'Corrected oral evidence: Oral evidence session with the Lord Chancellor and Secretary of State for Justice', 1 March 2017

29 See for example: House of Commons Library, 'Litigants in person: the rise of the self-represented litigant in civil and family cases in England and Wales', January 2016; Citizens Advice, 'Standing alone: going to the family court without a lawyer', March 2016; The Low Commission, 'Tackling the advice deficit: a strategy for access to advice and legal support on social welfare law in England and Wales', January 2014

30 National Audit Office, Ministry of Justice and Legal Aid Agency: Implementing reforms to civil legal aid, 2014, §1.19

31 Personal Support Unit, 'Report and financial statements for the year ended 31 March 2017', at <https://www.thepsu.org/>

32 The Law Society of England and Wales, 'Access denied? LASPO four years on: a Law Society Review', June 2017, at <http://www.lawsociety.org.uk/support-services/research-trends/laspo-4-years-on/>

33 Ministry of Justice, 'Report of the Family Mediation Task Force', June 2017

putting the psychological wellbeing of children involved at risk.<sup>34</sup> While legal advice cannot address all elements of adult behaviour, an early understanding of how the law can help resolve problems can help prevent significant distress downstream.

#### RECOMMENDATION:

**Funded early legal advice, with the offer of follow-up in writing, should be provided in private family law cases, and widely advertised. This would help ensure that individuals are aware of the system, and of their rights and options. It would enable parents to understand that the interests of their children are of paramount importance following a breakdown in their relationship.<sup>35</sup> It would go some way towards reversing the trends of declining uptake of what is still in scope for legal aid, including mediation.<sup>36</sup> It could also help reverse the trend of the rising number of litigants in person by preventing cases from going as far as the family court unnecessarily.**

## Special guardianship and child arrangements orders

The government defended its legal aid reforms, in part, by stating that legal aid had been retained 'where children may be taken into care.'<sup>37</sup> If a local authority starts proceedings for a care order or a supervision order then all parties qualify for non-means and non-merits tested legal aid to cover advice and representation. The child can be independently legally represented and supported by a children's guardian. However, care proceedings are not always used, especially in cases where a child can remain within the friends and family network (e.g. with a close family member, such as a grandparent), in the long-term. In such cases alternatives such as a child arrangements order (CAO) obtained by the friends and family carer or a special guardianship order (SGO)<sup>38</sup> may be used instead.

SGOs are private family law orders and are often used to confirm the child's placement with a friends and family carer and confer parental responsibility (PR) on the special guardian. Where a special guardianship arrangement is proposed because the child's birth parents are not able to care for the child, the legal connection to the birth parent is not severed. However, the child is able to benefit from

### Case study 3: Special guardianship

CLAS advised a man who was caring for his niece's ten year old daughter. The child's mother passed away the previous year. Following this, children's services sought to involve the child's father. The father had no previous involvement in the child's upbringing, no desire to be involved, and there was some conflict between the child's father and the caller. Children's services agreed that it was not advisable that the child live with the father due to the fact that they had no pre-existing relationship. Children's services proposed that the caller enter into a private fostering arrangement with the father; this was then the status quo for the next seven months. The caller was receiving benefits such as child tax credit and housing benefit but was not receiving any support from children's services (financial or otherwise).

The caller contacted CLAS to find out how to apply for a special guardianship order (SGO) as he wanted parental responsibility for the child and any additional support that might be available. It was argued that children's services should support the application for an SGO by funding legal advice, assistance and representation. However, the social worker refused to provide any financial support for the court application fee or legal assistance. The caller was faced with having to make the application as a litigant in person, which includes the requirement to attend a mediation information and assessment meeting before lodging an application to the court. This requirement inflamed the already heightened tensions with the child's father, which was distressing to the child.

stability and permanence and the special guardian is able to exercise PR for the child. The form of PR given to a special guardian allows (except in certain circumstances) the special guardian to exercise that PR to the exclusion of others with PR (e.g. the child's birth parents).

A CAO is a court order which states with whom a child will live and/or with whom the child will spend time and have contact. An application for a CAO can be made by a parent, step-parent, guardian or certain other categories of people. Other people can ask the court for permission to apply for a CAO. Like an SGO, a 'live with' CAO grants the applicant PR. However, in the case of a CAO this PR is equivalent to the PR that others (e.g. the child's birth parents) may continue to hold. This means that many decisions must be made jointly by those who hold PR or at least with consultation.

34 Legal aid cut for family courts 'damaging' for children, BBC News, September 2014, at: <http://www.bbc.co.uk/news/uk-wales-29021702>

35 Bach Commission, 'The Right to Justice: final report of the Bach Commission', September 2017, at [http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission\\_Right-to-Justice-Report-WEB.pdf](http://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission_Right-to-Justice-Report-WEB.pdf)

36 In 'Access denied?', The Law Society estimates that the cost of such a measure would be £14 million, at the pre-LASPO rate of £86 per case.

37 HL Deb 23 April 2012, vol 736, col 1664

38 Made law by the Adoption and Children Act 2002

In 2016-17, CLAS received 273 calls regarding SGOs and 296 calls relating to CAOs from non-parents, including wider family members, step-parents, and siblings.

Although alternatives to care proceedings can be a pragmatic solution for the child in question, they are often not straightforward. For example, there are instances where use of a 'live with' CAO would be inappropriate, such as in cases where there is conflict among family members or an unresolved dispute between the parent and the proposed friends and family carer.<sup>39</sup> If a decision is to be made that is in the best interests of the child affected, it is essential that the child's birth parents are able to understand the process and put forward their views on the suitability of the placements. On these occasions it is essential that parents receive legal support.

Friends and family carers can also be at risk in this process and are in need of support. There is no legal aid funding available for proposed special guardians (unless the SGO is applied for following the initiation of care proceedings; or if there is evidence of domestic or child abuse) and so applicants are often unable to get the necessary legal advice before applying for an SGO. Concerns have been raised that local authorities may encourage wider family – often grandparents – to make an application to the court for an SGO or a CAO but in many instances are refusing to fund the legal advice and representation necessary to obtain these orders. The Department for Education has noted the lack of adequate support services for special guardians, including information and advice.<sup>40</sup> Where individuals are taking on responsibility for a child, it is critical that they fully understand the legal implications of this undertaking. Proposed special guardians must also be able to fight for adequate support from social services.

There is strong consensus among legal specialists that the lack of legal aid in this area of law is of particular concern, with the Law Society calling for legal aid to be reinstated in June 2017.<sup>41</sup> Following compelling evidence from the Association of Lawyers for Children, the Justice Committee recommended that 'further consideration be given to the provision of legal aid in private law applications for SGOs where applicants are members of the extended family'.<sup>42</sup> It is essential that all carers and prospective special guardians are able to access comprehensive legal advice promptly where a child may be placed away from their parents on a long-term basis, and not just when a child may be taken into local authority care.

### RECOMMENDATION:

**The government should reinstate legal aid in all cases where there is local authority involvement in private law children proceedings, including in relation to special guardianship orders. Legal advice, assistance and representation should be available for both prospective carers/guardians and parents who are respondents or prospective respondents to proceedings for special guardianship orders.**



## Child abuse cases

Virtually all private family law issues were removed from the scope of legal aid by LASPO, save for those:

1. Where the person seeking legal aid has evidence that they are, or are at risk of being, a victim of domestic violence and the alleged perpetrator of that violence is the person who would be the 'other party' if proceedings were commenced in family court (but only if there is a prescribed form of evidence).
2. Where the person seeking legal aid has evidence that the child who would be the subject of proceedings is at risk from the other party to proceedings (but only if there is a prescribed form of evidence). For example, a mother involved in child arrangements proceedings with her ex-partner, who has been convicted of abuse, would be able to get legal aid to resolve the issue of the ex-partner's contact with the child.<sup>43</sup>

Until late 2017 these conditions were subject to the victim being able to produce evidence of their abuse from within tight timescales – 24 months for child victims. Following a successful legal challenge by the charity Rights of Women these time limits were abolished for all cases after 8 January 2018. The range of documents accepted as evidence of abuse has also widened substantially in domestic violence cases. In child protection cases, the accepted evidence has broadened to include an arrest for a child abuse offence, even if that arrest has not yet led to a conviction or a caution. However, legal aid can be withdrawn (or in some cases revoked) if legal aid is granted solely on evidence that is subsequently proven to be false, such as police bail that did not result in any subsequent caution or charge. Although these amendments to the operation of legal aid in this area of

39 Association of Lawyers for Children, 'Response to the Department for Education Special Guardianship Review', August 2015

40 Department for Education, Special guardianship: a call for views, 2015, at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/446131/Special\\_guardianship\\_review\\_consultation\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/446131/Special_guardianship_review_consultation_.pdf)

41 The Law Society, 'Access denied?', 2017

42 Justice Committee, 'Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 Eighth Report of Session 2014–15', HC 311, 12 March 2015, p. 25

43 Legal Aid Agency, The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 - Evidence Requirements for Private Family Law Matters, Regulation 34, §3.3

### Case study 4: Child protection

CLAS advised a father of three children aged between five and ten. The children lived with their mother and the mother's partner. The eldest daughter disclosed to the police that the mother's partner had sexually assaulted her. The mother's partner was bailed for two months. One of the bail conditions stipulated that he was not allowed into the family home. Children's services told the mother that she could not have contact with him and he was not to have any contact with the children or the children would be made the subject of child protection plans. However, the children's father was extremely worried that the mother would allow her partner contact even though she had been warned by children's services. The children's father wanted the children to live with him, but the mother would not agree. To resolve this situation, the father wanted to apply for an emergency live-with child arrangements order – a move he expected the mother to fight. However, because the other party to proceedings would be the children's mother, and not her partner, the allegations of abuse would not bring the father into scope for legal aid. As a result, he had to proceed through a complex legal process, as quickly as possible, as a litigant in person.

### RECOMMENDATION:

**Legal aid should be available in *all* cases in which a child is at risk of abuse.**



law are welcome, some child victims of abuse still fall outside the scope of legal aid.

Although it was made clear by the government in 2012 that family cases where a child is at risk of abuse would fall into scope of legal aid,<sup>44</sup> CLAS advisors continue to give advice in cases where a child is at risk of abuse but the case is not within scope of legal aid. Anyone with the care of a child may seek to protect them: for example, a grandmother may seek prevent the father of a child in her care from having contact. Not all will be eligible for legal aid, however, because it will only be granted where the abuser is the other party to proceedings and if there is a prescribed form of evidence. Therefore if proceedings are brought by a father against his ex-wife because her new partner has been abusing the child, the person seeking to protect the child through the courts is not eligible for legal aid. This is a serious omission and clearly not in keeping with the stated intentions of LASPO. In reviewing the changes made in 2012 the government has the opportunity to remedy this omission and bring back into scope of legal aid all cases in which a child is at risk of abuse.

44 HL Deb 23 April 2012, vol 736, col 1664

# Education law

CLAS dealt with 3,448 calls on education issues in 2016-17. In the same period, the CLAS website pages on education had more than 45,000 unique users. However, only 175 of the calls taken on an education matter were considered likely to be in scope for legal aid and could be referred to the Civil Legal Advice telephone gateway: 5% of the total.

Following LASPO, the only area of education law that remains in scope for legal aid is special educational needs (SEN).<sup>45</sup> All other legal matters, including school exclusions, admissions, bullying and negligence issues, were removed from scope by LASPO. Since April 2013, the number of children granted legal aid for education has fallen by 84%.<sup>46</sup>

Legal aid is available in SEN cases if an individual wants to appeal to the First-tier Tribunal for Special Educational Needs and Disability against the decision of the local authority to, for example, refuse to conduct an education, health and care (EHC) needs assessment of a child or to issue an EHC plan.<sup>47</sup> Legal aid funding will cover a solicitor helping to prepare a legal challenge and seek independent expert advice, but not representation at the tribunal. Legal aid may also be available to appeal a decision of the First-tier Tribunal to the Upper Tribunal. For example, legal aid is available to challenge the decision of a school or education provider, the local authority or a review/appeal panel by judicial review, which is a way of challenging a public body's decision if this is unlawful, unreasonable, perverse or has procedural issues. However, before a judicial review can be commenced, all other available remedies must have been attempted first. So before a family struggling to ensure their child is in appropriate education can access legal aid in the circumstances listed above, they will have had to have dealt with the issue either without legal assistance, with pro bono help, or having paid privately.

Furthermore, legal aid does not cover representation or expert attendance at a SEN hearing unless very exceptional circumstances apply. There is little guidance on this. SEN appeals are very complex because each child is different, and local authorities often have multiple witnesses and experts in attendance. This expert testimony is hard for parents to challenge, and already stretched families are often faced with serious inequalities of arms.

## Case study 5: Representation at SEN tribunal

CCLC represented Anna, a young woman with expressive and receptive language impairments who was enrolled at a local further education college for post-16 education. The local authority wanted Anna to remain at the local college she had been attending for a year, but her father argued that she had not made any progress and in order to ever achieve some independence she needed to attend a specialist private residential school with a 'waking day' curriculum designed to meet Anna's specific needs. The case was taken to the tribunal.

All aspects of Anna's learning required repetition and 'over-learning' to enable her to acquire the skills to live and work independently. For example, Anna could not prepare any food or wash up independently despite having been on a catering course for a full academic year. At the tribunal, the local authority had an educational psychologist as an expert witness, who argued that Anna's needs could be met by her college as long as her father continued the work at home. There was no legal aid to support Anna's family at the tribunal, and her father did not have the expertise to disprove the claims of the local authority's expert witnesses.

CCLC has a small amount of charitable funding to help in about 20 of these types of cases a year and so, using this, was able to pay for a barrister to represent Anna's family and an educational psychologist. As well as providing expert testimony, Anna's psychologist supported her to provide her own compelling evidence to the tribunal. The tribunal ruled that Anna should be able to attend the specialist residential college, where she is now thriving.

### RECOMMENDATION:

**The cost of experts attending SEN hearings should be covered by legal aid.**



45 Legal Aid Sentencing and Punishment of Offenders Act 2012, Sch 1 para 2(1)

46 Joint Committee on Human Rights, 'The UK's compliance with the UN Convention on the Rights of the Child', March 2015, §105

47 Explanatory Notes to LASPO – §824-6

## School exclusions

Before 2013, legal aid was available for legal advice and assistance (but not for representation) in relation to school exclusion matters. This is no longer the case, and CCLC deals with many queries relating to school exclusions where there is a clear need for legal advice. Exclusion from school has been found to have a significant negative effect on children. It has been found to cause mental health problems,<sup>48</sup> excluded young people are far more likely than others to experience long-term unemployment and 42% of prisoners had been permanently excluded from school.<sup>49</sup> The cost of exclusion is around £370,000 per young person in lifetime education, benefits, healthcare and criminal justice costs.<sup>50</sup>

In 2015-16 there were 6,675 permanent exclusions, 0.07% of the school population, and this rate has stayed roughly the same since 2010.<sup>51</sup> However, Department for Education data<sup>52</sup> and evidence from CLAS suggests that these figures are just the tip of the iceberg,<sup>53</sup> as unofficial or unlawful exclusions by schools are not recorded in that data. In the last 20 months, CLAS advised about schools exclusions in 1,704 calls. In a quarter of the calls relating to primary schools, the adviser concluded that the school may have acted unlawfully, either by not complying with procedures or because it did not adequately consider the child's special educational needs. An exclusion may be necessary, if regrettable, but it must always be undertaken in a fair and transparent manner.

There is evidence that a significant number of excluded children have SEN. The School Exclusion Project estimates that 75-80% of its cases involve children with SEN.<sup>54</sup> Similarly, the Institute for Public Policy Research estimated in 2017 that the number was as high as 77% of children in schools for excluded children, and found that 'those with a recognised need are seven times more likely to be excluded than their peers... suggesting that their needs may be a causal factor in exclusion.'<sup>55</sup>

The decision to exclude a pupil may be subject to independent review<sup>56</sup> but other than guidance for parents and carers in the Department for Education Exclusions statutory guidance, and phone lines such as CLAS, there is no state provided

### Case study 6: Unlawful exclusion of a child with undiagnosed special educational needs

The mother of Alex, a 12 year old child at a mainstream state school, called CLAS for advice. Alex had concentration problems from an early age and he was thought by Child and Adolescent Mental Health Services to have borderline deficiency disorder/ADHD, although this had not been formally diagnosed. Alex's new secondary school, which had not made any attempt to assess or identify Alex's special educational needs, had excluded him several times in six months. Alex was temporarily excluded while his school tried to negotiate a managed move to another school, but when this fell through, Alex was trapped at home. Rather than permanently excluding Alex on a formal basis, which would at least have come under the scrutiny of an Independent Review Panel, his school had tried to force him out informally. By the time Alex's mother called CLAS, he had been out of school for nearly three months, during which time she had not been able to work.

Legal aid was available for a judicial review of the unlawful exclusion, but Alex's mum did not know how long her son had to be out of school before his exclusion became 'unlawful' and had no idea that her son's case was within scope of legal aid. Independent legal advice and information was vital to ensure she fully understood her son's rights and the action that could be taken.

face-to-face advice and support for parents navigating the process. The School Exclusion Project provides pro bono representatives who appear on behalf of the parent before the appropriate decision-making body – the governing body of the school – before the Independent Review Panel. Since the Project started in September 2011, it has provided assistance to over 250 parents whose children face exclusion. CLAS signposted to the project 140 times in the year 2016 to 2017.

The only legal remedy for a permanent exclusion is judicial review. However, applications for judicial review fell 23% in

48 University of Exeter, 'Exclusion from school can trigger long-term psychiatric illness' August 2017 at [http://www.exeter.ac.uk/news/featurednews/title\\_595920\\_en.html](http://www.exeter.ac.uk/news/featurednews/title_595920_en.html)

49 Institute for Public Policy Research, 'Making the Difference: Breaking the link between school exclusion and social exclusion', October 2017, at <https://www.ippr.org/publications/making-the-difference>

50 ibid

51 The numbers of permanent exclusions in England in recent years have been as follows: 2012/13 - 4,630; 2013/14 - 4,950; 2014/15 - 5,790; 2015/16 - 6,675. See Department for Education, 'Permanent and fixed period exclusions in England: 2015 to 2016', July 2017.

52 Department for Education data shows that around 48,000 pupils are in alternative provision

53 See <http://www.childrenslegalcentre.com/lawful-and-unlawful-exclusions/>

54 See the School Exclusions Project at <https://schoolexclusionproject.com/how-we-help/>

55 Institute for Public Policy Research, 'Making the difference breaking the link between school exclusion and social exclusion', October 2017

56 Parents or carers of pupils who have been excluded can appeal the exclusion decision first to a Governors' Disciplinary Committee and then to an Independent Review Panel. The decision to exclude a pupil can only be overturned by the governing body; the Panel can only recommend that a child be readmitted, or at most direct that the governing body reconsider its decision. In the period since 2011/12, the percentage of Independent Review Panel determinations finding in favour of the parent has hovered around 30%, meaning that for nearly one in three cases decision-making by governing bodies is found to be illegal, irrational or procedurally incorrect.

the eighteen months between April 2015 and October 2016,<sup>57</sup> a fall which has been attributed to changes to funding and payments arrangements.<sup>58</sup> Access to judicial review is also impeded by the non-legal hurdles that must be overcome in education matters before a judicial review can be considered, and the lack of public knowledge of these hurdles and processes.

There is no 'bright line' between vulnerable children with a diagnosed SEN and a child with undiagnosed SEN issues facing permanent exclusion. As with family law, access to early advice through a continuum of provision encompassing both public legal education and early legal advice would allow for better solutions for children. Early advice on a child's unlawful exclusion could ensure that families push for appropriate assessment of their child and SEN issues can be diagnosed.

### RECOMMENDATIONS:

**Continued government funding for public legal advice on education law issues.**

**In the event of permanent exclusion, funded representation before the governing body and/or Independent Reviewing Panel should be provided.**

### Operation of the telephone gateway and need for face-to-face advice

As with debt and discrimination cases, access to legal aid for SEN issues has been restricted to a mandatory telephone gateway via Civil Legal Advice. That gateway is staffed by an operator service, which triages the calls, determining whether a client is within scope for assistance and eligible for legal aid. If a client is eligible, they are passed through to one of two specialist providers, of which CCLC is one. If they are not eligible, the client is referred to alternative advice organisations such as Citizen's Advice or CLAS.

Casework assistance is provided on a remote basis. While it will usually be parents seeking advice, the government acknowledged concerns that the telephone gateway 'would not be suitable for some clients such as those with hearing

### Case study 7: Face-to-face education advice

CCLC represented a 14 year old asylum seeker in local authority care who had an undiagnosed learning disability and diagnosed PTSD. The young person was struggling to make progress in his education and an SEN assessment was requested from the local authority. This was assumed to have been refused on the basis that his learning needs were due to a lack of formal education in his home country and having English as a second language, rather than his underlying learning disability which needed special educational provision. The young person's trauma coupled with his underlying SEN issues meant telephone advice, which was attempted, was not appropriate as he was not able to provide instructions over the phone and needed face-to-face advice in a supported environment.

CCLC lodged an appeal against a refusal to assess, and the local authority then accepted the need to assess the child. However, it was concluded that there were no special educational needs requiring specialist provision. CCLC lodged a further appeal, with an independent expert report, at which point the local authority accepted the need for therapeutic support and a differentiated curriculum. Without face-to-face advice, the young person was unlikely to have fully understood the complexity of his own needs and his rights, and proceedings may not have ever taken place. If the young person had not lived in London, however, we would probably not have been able to access face-to-face advice.

problems, older clients, younger clients, children, those with learning difficulties and clients at risk of abuse',<sup>59</sup> and created an exemption for children. It is therefore in theory possible to refer children calling alone for face-to-face advice,<sup>60</sup> although there were no referrals for SEN cases before March 2015, rather than the 10% of cases estimated by the Legal Aid Agency, as was acknowledged in the government review of the telephone gateway.<sup>61</sup> For clients for whom telephone advice is difficult, workarounds such as video conferences and text phones are available.

Face-to-face referrals are still not functioning as anticipated, in part because the threshold to be met before a case is referred for face-to-face advice is very high,<sup>62</sup> and because

57 *Ben Hoare Bell Solicitors & Ors, R (On the Application Of) v The Lord Chancellor* [2015] EWHC 523 (Admin), paragraph 69; JustRights, 'Children's rights and access to justice', October 2016. This High Court judgment found that changes relating to funding judicial review cases were unlawful and expressed 'great concern' that there had been a 23% decline in applications for legal aid in judicial review claims since the changes came into force.

58 The Civil Legal Aid (Remuneration) (Amendment) Regulations 2015

59 Ministry of Justice, 'Reform of Legal Aid in England and Wales: the Government Response', 2011 – §63 annex D

60 Civil Legal Aid (Procedure) Regulations 2012, SI 2012/3098 – reg. 2

61 Ministry of Justice, 'Review of the Civil Legal Advice Mandatory Gateway', December 2014

62 The threshold is as follows: 'whether, taking into account all Service Adaptations and Reasonable Adjustments that are reasonable available to be implemented in respect of the relevant Client, the provision of the Remote Advice can reasonably be expected to enable: (a) you to understand and act on the Client's instructions; and (b) the client to understand and act on your advice.' Civil Legal Advice Contract Standard Terms 2013 - §1.9 annex 1 (Specification)

the system that was set up is flawed. In order to facilitate face-to-face advice for children, CCLC sought to establish agency agreements across the country whereby a vulnerable client could be referred to a local provider to meet with a solicitor and give instructions in person, but this proved difficult to work. There are very few specialist education law providers, and only two legal contracts for education law. When a vulnerable child client requires ‘face to face’ advice the case remains with the provider who holds the legal aid contract. They are then responsible for finding a non-specialist provider, such as a solicitor at a law centre with some knowledge of education law, who can take instructions from the client on behalf of the solicitor: the non-specialist cannot advise directly themselves. The acts of giving advice and taking instructions are symbiotic, and this is particularly true when the client is very young or very vulnerable and struggles to communicate. In the arrangement above, the solicitor giving face-to-face advice is doing so as the agent of, and on instructions from, the specialist provider. This adds an intermediary between the education specialist and the client, slows the process, and can make it harder and more confusing for the client.<sup>63</sup> As a result, the exemption for children contained within LASPO is operationally very difficult, and in practice has helped very few – only 15 people since 1 April 2013, with fewer children each year being referred for face to face advice.<sup>64</sup>

**RECOMMENDATION:**

**The government should review the effectiveness of the current policy for accessing to face-to-face advice for SEN and whether the exemptions serve their stated purpose of safeguarding access to justice for the most vulnerable.**



63 Public Law Project, ‘Keys to the Gateway: an Independent Review of the Mandatory Civil Legal Advice Gateway’, March 2015, §6.25

64 HC Deb 7 November 2017 c111873

# Immigration law

Very few non-asylum immigration cases now fall within scope for legal aid<sup>65</sup> and few alternative sources of provision exist for those who cannot pay privately. As such, there is very heavy demand for those few free advice services which do exist, such as the advice line run by the MCP.

The MCP telephone advice line is for children, young people, parents and carers as well as voluntary and statutory sector professionals with questions relating to the legal needs of migrant and refugee children, young people and families. As well as the advice line, the MCP delivers outreach advice involving one-off, face-to-face appointments in organisations across London such as children's centres, homelessness services and community groups.

In the year from 1 July 2016 to 30 June 2017, the MCP advice line dealt with 1,153 cases, over half of which were from individuals calling about their case. Based on the information available to us, we estimate that 612 (53%) of those calls related to an immigration issue out of scope for legal aid, of which 234 related to a separated child or care leaver.

In 279 cases, the need for legal representation was a primary issue, though many more of the calls were made by or on behalf of unrepresented families, young people or children. Although it is not possible for us to accurately determine financial eligibility over the phone, 320 calls related to a child in care, a young person leaving care, or a family supported or accommodated under section 17 Children Act 1989 – itself a proxy measure for destitution.

Although the financial eligibility test is not whether or not the applicant is destitute, nearly all of the families advised through our outreach programme far exceed that financial eligibility measure and are at risk of destitution. At two community centres in north London in 2016-17, MCP solicitors advised 313 families, of whom it was estimated that 65% (based on their current homelessness or destitution) would have been in scope for legal aid prior to April 2013.

## Case study 8: Immigration

Having been abandoned by her British partner, Sarah was evicted from her home and on the streets with her two children (aged 7 and 2). Despite having to beg for food she was refused support from children's services because she had been unable to establish either the children's nationalities or her own immigration status in the UK. Without papers she couldn't work and support herself. After coming to an outreach session in north London, she was helped to get emergency accommodation and to access food and clothes banks. One of CCLC's solicitors supported the family to resolve their immigration status issues, securing exceptional case funding and legal representation for them.

During the passage of LASPO, the government argued that if an individual fell within the Immigration Rules they would be able to make an application unrepresented; that immigration cases do not require legal aid because the process of making applications is straightforward and if an individual is required to go to tribunal, this is an accessible process. This does not match the evidence gathered through pro bono advice provision at CCLC, or through subsequent case law.<sup>66</sup>

Many of the children and families we work with have cases to remain in the UK on grounds of long residence and the right to respect for private and family life under Article 8 of the ECHR. When making an immigration application that relies on family or private life, an individual must demonstrate that they reach the criteria within the Immigration Rules and/or outside of the rules (if relying on Article 8). The jurisprudence on Article 8 and on best interests of children more broadly requires an in-depth legal knowledge and understanding in order to be effectively applied. To support a claim that it would be in the best interests of a child to remain in the UK, it is necessary gather extensive evidence demonstrating the extent to which a child has developed a personal life and connections within the UK, as well as information on the family circumstances in both the UK and the country of origin. Expert evidence,

65 Exemptions include applications for indefinite leave to remain for victims of domestic violence and applications for residence cards under EEA regulations for victims of domestic violence; applications for leave to enter or remain for victims of trafficking if the individual has received a conclusive determination that they are a victim or have 'reasonable grounds' to believe that the person is a victim, applications to leave to enter and remain for victims of slavery, servitude or forced compulsory labour and for appeals before the Special Immigration Appeals Commission

66 *Gudanaviciene and others v Director of Legal Aid Casework and the Lord Chancellor*, [2014] EWCA Civ 1622, 15 December 2014, at para. 72, the Court noted that the following features of immigration proceedings are relevant in determining eligibility for legal aid: (i) there are statutory restrictions on the supply of advice and assistance (see section 84 of the Immigration and Asylum Act 1999); (ii) individuals may well have language difficulties; and (iii) the law is complex and rapidly evolving.

for example from child psychologists, is often required, as might be evidence from a child's carer, teachers, therapists or medical professionals, mentors and friends. It is vital not only to understand and obtain evidence but also to present this appropriately, and this requires guidance from legal professionals to ensure that all relevant matters informing a best interests assessment are addressed. Small errors will lead to applications being returned or refused.

Expertise and specialist knowledge are required to examine a case file, identify what evidence is needed and how it can be obtained and applied to the law. In addition, evidence gathering often costs money. The loss of legal aid encompasses a loss of assistance with fees for disbursements, including translators and expert reports, such as an independent social worker report to examine the needs of a child or a country expert report, that are frequently a key part of the evidence in an immigration case raising human rights concerns.

The complexity of the law in this field means that people frequently do not have an adequate understanding of the substance of the law, how it applies to their case and how to articulate their arguments in writing or before a tribunal or court. This can be exacerbated by language barriers and difficulties with literacy and comprehension. The procedures, as well as the law, are complex. For example, there are four different forms used for Article 8 applications, each fulfilling a range of different purposes that are not obvious unless the applicant understands from the Immigration Rules which route to settlement they would be applying under. The forms are all over 40 pages long. An application on the incorrect form is likely to be rejected and there is no right of appeal from an invalid form.

Many cases advised through outreach or the advice line are children, young people or families effectively blocked from accessing a legal route to regularisation and settlement.<sup>67</sup> As cited by Amnesty UK,

*It's an underclass that is trapped in limbo, who aren't going anywhere. They are desperate to regularise their stay, but can't. They want to work, but can't. For the kids they are growing up in abject poverty, they are struggling to get a proper education. It's just stinging*

*the problems up for later, a price they and society will have to pay for at a later date.*<sup>68</sup>

In immigration cases a tribunal or court judge is not generally empowered to repair absence of evidence or lack of capacity to seek, sift and present evidence. So while a judge may (but might not) address an individual's incapacity to deal with legal complexity in their case, they cannot plug evidential gaps.

Without access to legal help and representation people struggle to advocate effectively for their rights and as a result risk having their right to a family life violated. The reality of this means either deportation to another country, which might for example involve the separation of a parent from their child, or people remaining with insecure immigration status in the UK, leaving them destitute and potentially open to exploitation.

## Separated children

The case for legal aid for separated children with immigration issues is particularly strong and has been repeatedly raised by legal groups, non-departmental public bodies, select committees, and coalitions of non-governmental organisations.<sup>69</sup> Separated children are in the care of children's services (meaning that they are either looked after under section 20 of the Children Act 1989 or are formally in care) and are living in the UK with a variety of statuses. The laws, processes and systems governing their circumstances are complex. To realise their rights, they require specialist advisors that are experienced not just in immigration law, but also with working with children. Social workers have a duty to plan for the long-term future of a child in their care, but are rightly prohibited from assisting children in making immigration applications because immigration advice is heavily regulated.<sup>70</sup>

During the passage of LASPO, the government sought to reassure the House of Lords that most migrant children in care would not be left without legal representation because

*'The vast majority of unaccompanied children are asylum seekers and will receive legal aid. Victims of trafficking also receive legal aid... Children or young*

67 Coram Children's Legal Centre, 'This is my Home: Securing permanent status for long-term resident children and young people in the UK', June 2017

68 Rosalind Compton, Solicitor, Migrant Children's Project, interview 23 October 2015 (from Amnesty International, 'Cuts that hurt: the impact of aid cuts in England on access to justice', 2016, p. 28, at [https://www.amnesty.org.uk/files/aiuk\\_legal\\_aid\\_report.pdf](https://www.amnesty.org.uk/files/aiuk_legal_aid_report.pdf))

69 Office of the Children's Commissioner, 'Legal Aid changes since 2013, Child Rights Impact Assessment', September 2014; Joint Committee on Human Rights, 'Human Rights of unaccompanied migrant children and young people in the UK first report of the session 2013-14', §234; Justice Committee, 'Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 Eighth Report of Session 2014-15', HC 311, 12 March 2015; Children's Society, 'Cut Off From Justice: The impact of excluding separated migrant children from legal aid' June 2015; Coram Children's Legal Centre, 'Submission to the Bach Commission 2016', at [www.childrenslegalcentre.com](http://www.childrenslegalcentre.com); The Law Society, 'Access denied?', 2017.

70 In the past the government has suggested that social workers could provide the advice themselves, without being appropriately qualified, but this proposal was subsequently abandoned. See Letter from Damian Green, Minister for Immigration, to Sophie Barrett Brown; Immigration Law Practitioners Association, October 2011

*adults who are not unaccompanied will have the support of their family in the UK.*<sup>71</sup>

This, however, is not the case. As a conservative estimate, there are several thousand children in local authority care where immigration is the primary issue, not asylum or trafficking.<sup>72</sup> The Ministry of Justice estimated that there would be almost 2,500 immigration cases each year involving children as claimants in their own right, which would no longer be within scope for legal aid.<sup>73</sup> CCLC research suggests that this number is likely to be an underestimate.<sup>74</sup> The MCP alone advised 234 separated children and young people with an out-of-scope immigration issue over the past year.

There are over 100,000 undocumented children in the UK, many of whom were born here,<sup>75</sup> but they are a hidden population. Many professionals working with these children in care assume that because they may have lived in the UK or been in care for a long time, they must be British. There are routes open to an undocumented child to regularise their status that become closed to them once they have turned 18.<sup>76</sup> It is also possible for a child in care to make applications that recognise their unique vulnerabilities and that their futures lie in the UK, such as an early application for indefinite leave to remain. However, such applications cannot be made if a child cannot access immigration advice and representation, and avenues available to them are closed off.

### Case study 9: Care-leaver needing immigration advice and representation

The MCP advised a 19-year old care leaver from Jamaica, who came to the UK when he was seven with his parents. After a relationship breakdown, he was taken into care aged 15, and his leave to remain expired a year later. His social worker was aware of his immigration status, but did not do anything to resolve it before he turned 18. Aged 19 the young person's personal advisor called the MCP advice line to ask for help. At this point he was undocumented and had no right to work or claim benefits, and had no contact with his birth family. The local authority recognised their mistake and agreed to retrospectively pay for his legal representation. As he was no longer a looked after child and therefore no longer exempt, they also had to pay for his immigration fees, totalling £5,000.

Even those unaccompanied children who do claim asylum may not be eligible for legal aid for the duration of their legal case. There were 2,944 applications for asylum for children in the UK in the year ending 30 June 2017, but more than 50% of all grants were of a temporary form of protection known as 'leave as an unaccompanied asylum seeking child (UASC leave)',<sup>77</sup> which lasts for 30 months or until the child reaches 17.5 – whichever is shorter. At the end of this period a child can apply to renew or vary their leave to remain, but their case will not fall fully within the scope of legal aid.

In 'mixed' cases, common for separated children who have claimed asylum in the UK and subsequently been granted limited leave to remain, both asylum and human rights arguments under Article 8 ECHR are made in tandem. The case is 'split' because only the legal advice, assistance and representation in respect of the asylum aspect may be covered by legal aid. CCLC has advised social workers that if the local authority is not able to cover the costs of legal services for the Article 8 aspects of separated children's immigration cases (stand alone or part of a mixed case), then the social worker should assist the young person to apply for exceptional case funding (ECF) so that legal aid will be in place allowing the young person to then find a solicitor to assist (with the benefit of funding having already been obtained). However, it is our experience that many social workers do not follow this approach and ensure that the children and young people they are working with are assisted to make ECF applications. Nor do they cover the costs of legal services for the immigration part of the case from their budgets. Evidence from our advice provision is that very often arguments for these young peoples' rights to remain in the UK are simply not made.

Even in cases where a young person's immigration solicitor is willing to work pro bono to cover parts of a case for which, under legal aid, they will not be paid, costs can prove an insurmountable barrier. If, as is commonly the case, the expert evidence of a specialist such as an independent social worker is required to support the Article 8 arguments of a young person's case, the cost of obtaining this cannot be covered under legal aid (unless ECF was secured). The solicitor then has little choice but to not obtain such evidence unless the young person is in the unlikely position of being able to pay privately, or the local authority is able to meet the cost.

For those children accommodated under section 20 of the Children Act 1989, Department for Education statutory

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71 HL Deb 7 April 2014 vol 753 c1211

72 Based on Freedom of Information request responses, Coram Children's Legal Centre estimated a figure of around 2,300 children with non-asylum immigration cases in local authority care in England. Coram Children's Legal Centre, Op cit.

73 Figure obtained through FOI response from Ministry of Justice to JustRights and The Children's Society. See The Children's Society, op cit, p. 14

74 Coram Children's Legal Centre, op cit, pp. 11-12

75 N. Sigona and V. Hughes, 'No way out, no way in: Irregular migrant children and families in the UK', University of Oxford, 2012, at [https://www.compas.ox.ac.uk/media/PR-2012-Undocumented\\_Migrant\\_Children.pdf](https://www.compas.ox.ac.uk/media/PR-2012-Undocumented_Migrant_Children.pdf)

76 For example, under the age of 18 years, meeting the 'long residence' criteria in the Immigration Rules means residence of at least seven years. Once a young person turns 18, this number jumps to half their life (and then jumps again to 20 years' residence once they turn 25).

77 Home Office, Table as\_09: Initial decisions on asylum applications from Unaccompanied Asylum Seeking Children, excluding dependants, by sex and age at initial decision

guidance sets out that local authorities' obligations extend to considering their need to have their immigration status issues resolved as well as their need for legal services. However, it is silent on how these services are to be funded.<sup>78</sup> Usually this will be at private rates which are likely to be significantly more expensive than legal aid rates.

It has been estimated that, assuming a local authority only dealt with five children's cases a year (likely to be an underestimate, as highlighted above) the cost shift onto local authorities from LASPO amounts to £10 million a year.<sup>79</sup> This is significantly more than the Ministry of Justice expenditure for *all* children's immigration and asylum cases prior to the changes to legal aid (£5,751,842 in 2012-13).<sup>80</sup> Allowing for inflation, the restoration of legal aid for all migrant children in care would still result in at least an estimated £4 million annual saving.<sup>81</sup>

There are now additional concerns about the status of European national children in care after Brexit, many of whom may not be eligible for settled status under the Government's current proposals and may need to rely on their Article 8 rights under the immigration system that exists for non-EU nationals. Is it essential that these children receive legal advice at the earliest opportunity, but not all will be able to afford to pay for it.

Overall civil legal aid spending has fallen dramatically, and is now £291 million lower than in the financial year 2012-13.<sup>82</sup> However, these figures ignore any knock-on financial costs that could offset savings. Parliamentary committees, commissions, the National Audit Office and other organisations have highlighted concerns about the wider financial costs to local authorities and other essential services that have been caused by the cuts to legal aid.<sup>83</sup>

A review of costs in relation to the provision of legal aid should consider all government spend, and individual departments should be subject to similar considerations as applicants, including only pursuing appeals where they meet the merits test and the prospects of success can be considered good, very good or excellent. Home Office decision-making in

initial asylum decisions, for example, is strikingly poor, with the courts overturning Home Office decisions in 41% of asylum appeals in 2017.<sup>84</sup> The House of Commons Justice Select Committee recommended a 'polluter pays' principle be applied to the impact poor decision-making by particular government department has on HM Courts and Tribunals Service in 2011, and again in 2015.<sup>85</sup>

**RECOMMENDATIONS**

**The Government should reinstate legal aid for all unaccompanied and separated migrant children in matters of immigration by bringing it back within 'scope' under the Legal Aid, Sentencing and Punishment of Offenders Act 2012.**

**Until legal aid is fully reinstated for children in immigration cases, local authorities should develop written policies that offer clarity to their social workers, and the children they support, on their decision making process in relation to securing immigration advice for children, identifying specific timetables and eligibility for advice and representation.**



78 Department for Education, 'Care of unaccompanied migrant children and child victims of modern slavery: Statutory guidance for local authorities', November 2017

79 No Recourse to Public Funds Network, 'A 'Residence Test' and the Cost Shift to Local Authorities', 2013, at <http://www.nrpfnetwork.org.uk/SiteCollectionDocuments/Appendix%201%20Costs%20to%20local%20authorities%20from%20NRPf%20Network.pdf>

80 Figures taken from Ministry of Justice Freedom of Information Request responses to CCLC

81 Allowing for inflation averaged at 1.7% a year. In fact, the possible savings could be far higher. Statistics broken down by type of case are not available, but the average yearly expenditure on civil legal aid for under 18s on Immigration and Asylum between 2014 and 2017 was £5,998,858. In 2010-13 (prior to the introduction of LASPO) the average yearly expenditure was £8,155,015, suggesting an average of £2 million a year funding children's immigration cases.

82 Legal Aid Agency, Legal Aid Statistics January to March 2017, Table 1.0: Overall annual legal aid expenditure since 2005-06 (£m)

83 National Audit Office, Implementing Reforms to Legal Aid, 2014; Report of the Low Commission on the future of advice and legal support, 'Tackling the advice deficit: A strategy for access to advice and legal support on social welfare law in England and Wales', January 2014; House of Commons Justice Committee, op cit

84 Home Office, Immigration statistical release October to December 2016, Table as\_14: Asylum appeal applications and determinations, by country of nationality and sex

85 House of Commons Justice Committee, op cit., §169

# Alternative provision

During the passage of LASPO it was argued that those most in need can still access free legal representation through the not-for-profit sector, which can give free legal advice and representation, and via a scheme of exceptional case funding (ECF). However, CCLC's experience suggests that there are limits to the extent to which the voluntary sector, or pro bono provision, can fill the gap and that protecting children's rights should be seen as a duty of the state, not of charity. In addition, the ECF system does not, in practice, provide the promised safety net for vulnerable or disadvantaged people, as outlined below.

## Exceptional case funding

As a safeguard to protect those without access to legal aid, LASPO does provide for the LAA to grant legal aid funding for so-called 'exceptional cases', where legal aid is deemed necessary to prevent a breach of human rights or an EU law right.<sup>86</sup> During the passage of LASPO, the UK government repeatedly emphasised that the availability of ECF would ensure that legal aid is available to the most vulnerable in society.

In practice, the ECF scheme is woefully inadequate and does not provide the promised safety net for vulnerable or disadvantaged people who are struggling to navigate complex legal processes and effectively advocate for their rights. ECF can be applied for by individuals or by legal aid providers. However, because providers are not paid for making an application if ECF is not subsequently granted, there is a disincentive for them to complete the applications.<sup>87</sup>

In its first year of operation, only 1,315 ECF applications were made, with just over 1% granted.<sup>88</sup> Litigation in the following years found that the ECF process was not compatible with article 6(1) (right to a fair trial) of the ECHR and Article 47 of the EU Charter of Fundamental Rights, because

## Case study 10: Immigration and trafficking ECF

CCLC applied for legal aid exceptional case funding for a mother of twins who both have severe special educational needs. One of her sons attends a school that meets his SEN requirements, and the other is currently undergoing paediatric assessment. The mother frequently finds it difficult to cope with her children's additional needs, and suffers from depression. In 2007 she was trafficked from Nigeria to Poland, and then to the UK, by a man who sexually abused her. She has recently been referred into the National Referral Mechanism as a victim of human trafficking, and has made a claim for asylum with legal aid. However, without legal aid for the preparation of evidence for the immigration elements to her case (in particular her private life in the UK and the private lives of her children), and representations at Tribunal, the Home Office would not consider these elements of her case. Her asylum solicitor could not deal with these areas of law without funding. ECF was granted, and the solicitor representing her for her asylum case was able to take on her family's private life case as well.

it wrongly indicated that the discretion to grant ECF was severely circumscribed and that the refusal of legal aid would amount to a human rights breach only in rare and extreme cases.<sup>89</sup> Changes were made to the guidance and there was a welcome increase in successful ECF applications.<sup>90</sup> However, the number of applications for ECF being made has remained well under 2,000 per year,<sup>91</sup> far lower than the Ministry of Justice's own prediction of between 5,000 and 7,000 applications each year.<sup>92</sup> The grant rate is also low: in 2016-17, 51% of applications for ECF were granted. This is the highest number of grants since the ECF scheme was introduced.<sup>93</sup>

86 Section 10 of LASPO provides for exceptional funding where a matter is otherwise out of scope, but where failure to provide funding would breach the individual's rights under the Human Rights Act 1998 (which incorporates the European Convention on Human Rights) or enforceable rights based on EU law, or where the Director of Legal Aid Casework determines that it is appropriate to do so because of a risk of such a breach

87 Amnesty International, op cit

88 Legal Aid Agency, Legal Aid Statistics in England and Wales 2013-2014, June 2014. This figure refers to non-inquest applications.

89 *Gudanaviciene and Ors v The Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622, 15 December 2014.

90 *The Director of Legal Aid Casework & The Lord Chancellor v IS (a protected party, by his litigation friend the Official Solicitor)* [2016] EWCA Civ 464, §50 and §77

91 Legal Aid Agency, Legal Aid Statistics, January to March 2017. In its most recent quarterly legal aid statistics report, April to June 2017, the Ministry of Justice stated that the number of ECF applications in that quarter had increased to 527 applications, the most received in a single quarter since 2013

92 National Audit Office, Implementing Reforms to Civil Legal Aid, 20 November 2014, page 7, outlines expected figures from the Ministry of Justice. See also Ministry of Justice, 'Legal Aid Reform: Excluded Cases Funding Process Equality Impact Assessment', 2012

93 Ministry of Justice and Legal Aid Agency, Legal Aid Statistics in England and Wales, January to March 2017

### Case study 11: Learning difficulties and family law ECF

CLAS advised a father seeking advice on the care arrangements for his two children (aged seven and five), following their mother leaving the family home. The mother had initially taken the children to stay with the maternal grandparents. The father claimed that the children did not want to do this, and that they were afraid of the grandmother. He had previously intervened to stop her smacking the children and had returned them to his home. He then applied for and was granted an emergency residence order. A further hearing was scheduled for eight weeks' time and the caller sought advice on his legal position and what process would follow. The caller could not read or write and was dyslexic, and was unable to complete court forms on his own. With an exceptional case funding application made on the basis of the father's learning difficulties and the children's rights, the caller could have representation in the family court. However, the form was too long and daunting, and the caller stated that he could not apply. Without ECF he had no access to assistance from a family lawyer as he could not pay privately.

In total, 54% of ECF applications made in the last year related to an immigration law matter. 1,007 applications were made for immigration ECF in 2016-17, of which 68% were granted. In this period, 348 individuals were recorded as making applications for ECF directly (the remaining 1,522 (81%) being made by legal aid providers). The increased volume of direct client applications was attributed to simplifications brought in to the ECF application form.<sup>94</sup> However, a fifth of those cases were actually made by CCLC.<sup>95</sup> CCLC runs an ECF pro bono project, making ECF applications on behalf of families with immigration issues. Each application takes around three to six hours to complete, with the supervision of qualified solicitor, and typically runs to 20 pages of representations.

Since the Migrant Children's Project started undertaking exceptional case funding applications in December 2015, the project has submitted 100 applications for ECF. Of those, 56 were successful and three were withdrawn. Of the 31 applications refused, we successfully challenged 10 of the refusals, and referred seven cases for judicial review. Five of these judicial reviews were successful.

CCLC is not the only charitable or pro bono project making such applications on behalf of the very vulnerable. It would therefore be wrong to assess the ECF application process as

having been sufficiently simplified so as to enable individuals to apply alone – very few people are doing so.

An application for ECF requires detailed information and evidence regarding the case to be put, and children may find this a particular challenge. Even practitioners making an application on a child's behalf may face difficulties in obtaining sufficient instructions and evidence. In addition, it is very difficult to explain the process to a child client. This has resulted in a low number of applications made by or on behalf of children and young people in the first place. Between October 2013 and December 2016 only 80 applications for ECF for immigration cases were made on behalf of applicants aged under-18; 56, or 70%, of these were granted. This is around two applications a month, across all areas of law. For young people aged 18-21, there were 104 applications and 63 grants (60%) in the same

### Case study 12: ECF for a vulnerable young person

CCLC applied for exceptional case funding for an undocumented young man, Joel, who was brought to the UK aged 12 by his mother. Joel was now 19 years old and needed to make an immigration application to stay in the UK based on the life he had built here and his mental health needs.

When growing up, Joel's mother had entered into a relationship with a British man but the relationship was both physically and verbally abusive. The abusive partner used the immigration status of the mother and her children as a tool with which to prevent her from disclosing the abuse, even to staff at the hospital. The mother finally ended the abusive relationship after several years, but was then unable to support her children alone and the family was on the brink of becoming homeless.

CCLC first encountered the family at a drop-in for destitute families. Joel had been seriously affected by his traumatic home life, ceasing to sleep or interact with others. He had attempted suicide and his mental health concerns made it implausible that he would be able to prepare and submit an application for leave without legal support. CCLC applied for ECF for Joel's immigration case, outlining the complexity of his case, and his extreme vulnerabilities. ECF was granted, and the young man's case was taken on by a solicitor who had experience of working with young people with additional support needs. Thanks to this pro bono assistance, Joel was eventually granted leave to remain.

94 The Legal Aid Agency, 'Legal Aid Statistics in England and Wales April to June 2016: Ministry of Justice Statistics bulletin', September 2016. The Judicial Review mentioned is *The Director of Legal Aid Casework & The Lord Chancellor v IS (a protected party, by his litigation friend the Official Solicitor)* [2016] EWCA Civ 464

95 Because CCLC is not making the application with the intention of subsequently representing the client, such applications are listed as 'made directly by the individual'. Applications prepared by CCLC on behalf of a direct applicant number 71 of 347 direct applications submitted in the 2016-17 financial year (20%). CCLC's assisted direct applications between April and September 2016 also represent 25% (49 of 199) of direct applications, and 11% (49 of 471) of all ECF applications submitted for an immigration case..

period.<sup>96</sup> An academic analysis of unmet need for legal advice indicated that there are as many as 48,800 cases involving young people aged 18-24 which had the potential to be considered exceptional on grounds of mental ill-health of the young person alone.<sup>97</sup>

The current ECF guidance states that if a case is considered urgent, it will be decided within five working days.<sup>98</sup> For the ECF system to function as an adequate safety net, applicants must be able to flag urgent cases; this could include cases where there is a court hearing scheduled or where delay could cause risk of harm. In practice however, this element of the safety net is simply not working. For the 83 applications for ECF made by CCLC's ECF project since 1 April 2016, the average wait for a decision has been 21 working days. This has increased from an average of 20 in 2016 to an average of 22 in 2017. Only seven of these applications have been marked as urgent since the beginning of 2017, but for those seven the average waiting time for a decision has been 17 working days. The single fastest decision for any application in that time has been 11 working days – more than twice the time stated in the LAA guidance. On more than one occasion, a decision marked as urgent has come in too late to assist a person with a tribunal hearing.

### RECOMMENDATIONS:

**The Legal Aid Agency must reform the Exceptional Case Funding system. In the immediate term, a question should be added to the CIV ECF1 form to ask about the rights and interests of any affected children. Where the applicant is a child, a presumption should operate so that a child or young person could expect to have their case for civil legal aid funding granted, in line with children's rights standards. The LAA should accordingly publish guidance for its casework staff deciding ECF applications on how to handle applications affecting children.**

**Further work should be done to promote the use of the ECF to those working with children and young people, in an effort to counter the low proportion of applications from them.**

**The Legal Aid Agency should ensure that sufficient resources are allocated to allow for urgent cases to be decided within an appropriately quick time-frame.**

## Pro Bono

The government has suggested that the not-for-profit sector will step in to help ensure that vulnerable people can access the legal advice and support that they need. In his first public speech after being appointed Lord Chancellor and Secretary of State for Justice, Michael Gove acknowledged how controversial changes to civil legal aid had been but called on the most successful in the legal profession to contribute a little more in pro bono work.<sup>99</sup> However, it is not the 'wealthy lawyers' who are at the front line of defence of access to justice.

Providers of advice and legal support fall into a range of categories. In the not-for-profit sector they include: not-for-profit advice agencies, including, for example, Citizen Advice Bureaux; local law centres; and national charities, which provide information, advice and sometimes legal representation.

In addition, some private law firms provide pro bono legal help and representation, alongside their paid work. Pro bono projects have come into existence to meet an immediate need in a certain area of law, such as the School Exclusion Project, Independent Parental Special Education Advice (IPSEA) and Personal Support Units (PSUs) located in family courts across the country. Such projects and organisations are often largely, if not wholly, operated by volunteers.

In cases where preparation of cases in the family court is too complex for a volunteer in the Central Family Court, the individual in need is referred to the local citizens' advice bureau which provides detailed advice and then refers them back – an ecosystem of pro bono provision to meet different levels of need. However, as well as relying heavily on the time, energy and sometimes also the expertise of volunteers, such organisations also rely on grant funding from private and charitable trusts – funding which cannot be guaranteed long term. There is also a risk that those in desperate need enter a cycle of referrals rather than access to the specialist support they need.

CCLC has explored a number of ways of filling the legal aid gap and breaking this cycle through pro bono advice and representation. The MCP provides free advice and representation and an ECF project, and is funded independently through trusts and foundations. A pro bono project run by CCLC working with private law firms giving their time on a pro bono basis was the first of its kind in the UK

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96 Legal aid statistics England and Wales tables, October to December 2016; Coram Children's Legal Centre, 'This is my home: Securing permanent status for long-term resident children and young people in the UK', June 2017, p. 10

97 N. Balmer and P Pleasence, Youth Access, 'The Legal Problems and Mental Health Needs of Youth Advice Service Users: The Case for Advice', 2012, cited in JustRights, 'Justice for the young: a snapshot', February 2015

98 Legal Aid Agency, 'Exceptional Cases Funding – Provider Pack', November 2015, p. 5.

99 See 'What Does a One Nation Justice System Look Like?' a speech given by Michael Gove on Tuesday, 23 June 2015. See also The Law Society Gazette, 'Can Wealthy Lawyers Really Plug the Justice Gap?', John Hyde, 23 June 2015; Keep Calm Talk Law, 'Legal aid: Pro Bono Picking Up the Slack?', 14 July 2015; *The Guardian*, 'Lawyers Can't be Expected to Plug the Gap in Legal Aid Provision', Catherine McKinnell, 6 November 2015.

and has allowed us to realise the entitlement to citizenship of 51 children, but such support requires huge amounts of time even though the volunteers (in this case solicitors) are highly skilled. These cases have taken an estimated 20 hours in pro bono lawyers' time, resulting in costs exceeding £5,000 per case.<sup>100</sup> These initiatives, and the not-for-profit sector in general, can provide valuable and necessary legal assistance or other forms of support.<sup>101</sup> They cannot, nor can they be expected to, fill the gaps left by the removal of a statutory service.

In immigration, for example, legal aid is critical not just to get a legal adviser to identify what evidence is needed and how it can be obtained, but also to get evidence from other practitioners – such as independent social workers, psychiatrists or other specialists, without funding to pay for their work. This means that, as highlighted by the Immigration Law Practitioners' Association, 'even where pro bono assistance is available, and it is very limited, a case cannot proceed because the costs of disbursements cannot be met.'<sup>102</sup>

In addition, there is growing evidence that the narrowing of the scope of legal aid has led to a reduction in the provision of services, as well as a loss in specialist and holistic advice. This, along with the increase in demand on providers, has made it more difficult for people to gain access to the legal advice and support that they need. This has had knock-on and sometimes profound consequences for individuals as they struggle to resolve their legal problems quickly and effectively.

While there is no comparable data comparing not-for-profit providers before the introduction of LASPO and after,<sup>103</sup> immediately prior to the implementation of LASPO, the University of Warwick published a report<sup>104</sup> which found around 20% of not for profit providers believed that their service could close or was very likely to close completely in 2013. Since then, the Law Centres Network reported in 2015 that one in six of their members had closed and the Citizens' Advice Bureau described the loss of 350 specialist advisors, despite its varied funding streams making it less vulnerable to

the loss of legal aid contracts than others, resulting in an 8% drop (approximately 85,500 people) in the number of clients receiving support with complex legal cases within the first three quarters of 2013/2014.<sup>105</sup>

For many of the organisations that remain the loss of funding from legal aid contracts has led to a reduction in the services that they are able to provide.<sup>106</sup> As noted by an CLAS advisor in 'Cuts that Hurt',

*LASPO has had a huge impact on our services. We have seen demand massively increase, as well as the complexities of problems people come to us with. Rather than being an initial advice point, we are now often involved in each stage of case explaining the process throughout and giving support where we can. That has huge knock on effects: we have done all we can to respond to this massive uplift in calls by making more of our advice and information available to download, but call lengths have gone up meaning we can hear from fewer number of people even though demand has increased. Furthermore the support groups we try to refer to have closed or are stretched to capacity.<sup>107</sup>*

100 Based on internal CCLC data.

101 It should be noted that in the years following LASPO there appears to have been an increase in pro bono clinics (as opposed to legal aid providers) which have opened in recognition of the increasing need for free legal help and advice services, see, for example, Law Works clinics network report April 2014 – March 2015, November 2015, page 9.

102 Immigration Law Practitioners' Association, 'ILPA evidence to the Bach Commission', April 2016

103 It was only in 2015 that an extensive survey of not-for-profit agencies providing legal help, advice and representation was carried out by the government – see Ames, Dawes and Hitchcock, 'Survey of Not for Profit Legal Advice Providers in England and Wales', Ministry of Justice Analytical Series 2015

104 Byrom, 'The State of the Sector: The impact of cuts to civil legal aid on practitioners' Centre for Human Rights in Practice, University of Warwick (2013)

105 Citizens Advice Bureau, 'Citizens Advice Submission to the Justice Select Committee inquiry into the impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012', April 2014

106 The Justice Committee, 'Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012', HC311, March 2015, Section five. Further, the Mary Ward Legal Centre which mainly provides legal advice within the areas of debt, housing and welfare benefits reports a 25% reduction in staff, withdrawing welfare benefits services from across the whole of London to one borough only, and having to turn away 25% of those seeking help. Mary Ward Legal Centre, Written Evidence from the Mary Ward Legal Centre (LAS 28) 2014, p. 1

107 Amnesty International, 'Cuts that hurt: the impact of aid cuts in England on access to justice', 2016, p. 22

# Sustainability of the sector

Even if an individual is able to successfully apply for ECF for themselves, they must then find a representative to take on their case. Where CCLC solicitors have successfully applied on behalf of clients, and made use of their well-established legal networks to find a solicitor with capacity to take on a new client, most cases still take around three weeks to refer, with some taking several months depending on the time of year and the complexity of the case. This is a serious issue which the ECF system does not address: legal firms and not-for-profit organisations with legal aid contracts are working within extremely tight margins<sup>108</sup> and at maximum capacity, and sometimes struggle to take on available work even where that work is funded. ECF cases tend to be complex, as this is one of the characteristics that the Legal Aid Agency accepts makes a case unsuitable for an individual to make without legal representation. However, this same characteristic makes such cases more difficult to refer.

The education law sector is an advanced case study of the impact of changes under LASPO to the remaining legal aid

## Case study 13: ECF referrals taking a long time

CCLC applied for exceptional case funding for a 19 year old young man with serious mental health issues. He came to the UK aged 13 and claimed asylum. His asylum claim was rejected, but he was given leave to remain in the UK until he was 17 and a half as an unaccompanied child. When that leave ran out he applied for further leave to remain in the UK, but this was refused. He has severe depression and anxiety and was receiving one-on-one support through his supported accommodation provider. He was been in the UK for more than five years and has no family to return to. An application for leave to remain outside the Immigration Rules needed to be made; this was not a straightforward application. ECF was granted, but it nevertheless took more than four months to find a solicitor to take on the case.

## Case study 14: Persons eligible for legal aid but unable to locate a legal aid solicitor

CLAS advised the father of a ten year old child with special educational needs and numerous neurological disorders. Children's services had previously stated that the child is not disabled and is therefore not eligible to additional support from the local authority as a child in need. The father was advised that the only remedy was judicial review. The father was eligible for legal aid but was unable to locate a solicitor even through going out of county. All solicitors the father had contacted stated that they are at capacity and that the case is too complex.

provision. In 2012 there were 49 provider offices completing work in the field of legally-aided education law. In March 2015, the date on which the Justice Committee reviewed the government's legal aid reforms, there were 24.<sup>109</sup> There are now just two legal aid providers of education advice, assistance and representation.

These two examples raise questions about the sustainability of the sector as a whole. In addition to the effects of removing areas of law from scope, the National Audit Office has highlighted that the Ministry of Justice had reduced the fees it pays for legal aid, but 'does not know if the market is sustainable at the current level of fees'.<sup>110</sup> As made clear by the Justice Committee, once capacity and expertise are lost, they will be extremely difficult to restore.<sup>111</sup> Legal aid rates of pay, suppressed as they are without reference to inflation,<sup>112</sup> have made relatively small areas of law such as education law financially unviable unless legally-aided work is heavily supplemented by private practice or charitable funding. There are no guarantees that such a business model is sustainable.

This drastic reduction in numbers may be precisely in line with the Ministry of Justice's policy agenda to reduce

108 Rounds of cuts in 2004, 2007 and 2010 introduced fixed fees for certain types of cases. Then, at the same time as LASPO took many areas of law out of scope in 2013, the Civil Legal Aid (Remuneration) (Amendment) Regulations 2013 lowered the fees for civil legal aid by 10%, while criminal practitioners have had their fees cut by 8.75%.

109 Legal Aid Agency, Legal Aid Statistics January to March 2017, Table 9.3 Number of provider offices completing work in each period for Legal Help and Controlled Legal Representation

110 National Audit Office, 'Implementing Reforms to Civil Legal Aid', 20 November 2014, p. 8

111 House of Commons Justice Committee, 'Impact of changes to civil legal aid under Part 1 of the Legal Aid Sentencing and Punishment of Offenders Act 2012', (Eighth Report of Session 2014-15) §89

112 The Law Society of England and Wales, 'Access denied? LASPO four years on: a Law Society Review', June 2017, p. 11

costs, but has long-term implications for the sector. If a future review of legal aid recommends, for example, the reintroduction of mainstream face-to-face provision in an area of law currently administered through the mandatory telephone gateway, it is unlikely that this would be possible, without further investment as the infrastructure (including the human resource of a stream of new trainees in this field) is quite simply no longer there. If change is deemed necessary, urgent positive action by the Ministry of Justice is required to ensure that it is possible.

**RECOMMENDATION**

**The government should examine the impact of LASPO on the education legal aid sector more widely, as part of a wider review into the sustainability of the civil legal aid system.**



# Conclusion

Legal aid, the provision of help to people otherwise unable to afford legal advice, assistance and representation and access to the court system, is a key part of any system that protects and promotes the rights of children. Publicly funded legal advice and representation for children, young people and families is vital to ensuring that decisions can be made in the best interests of children, that their voices are heard in all administrative and legal proceedings, and that they receive fair and equal treatment before the law. Expert advocacy and legal representation are of critical importance for children where central and local government agencies and institutions are making decisions about their future and where effective redress is required in the event of these bodies acting unlawfully.

In each of the areas of law for which CCLC provides free legal advice we have examined the impact on children based on the government's recognised principles:

- the importance of the issue;
- the litigant's ability to present their own case, including and especially any vulnerability;
- the availability of alternative sources of funding; and
- the availability of other routes to resolution.<sup>113</sup>

We have found that removing whole areas of law from scope has meant that children, young people and families who cannot afford to pay for legal advice, assistance or representation are, in many cases, unable to use the justice system to take action to secure their rights or access services to which they are entitled. It is not the job of this report to detail or quantify the human cost but to highlight that effective access to justice should be available to *all* children, and this is not the case at present.

As important as legal advice and representation is the provision of public legal education. If individuals are able to identify issues in their lives as legal problems, they cannot set about resolving them using the law. As the Law Commission outlined:

*There is a continuum including public legal education, informal and formal information, general advice, specialist advice, legal help and legal representation. Legal aid should be viewed as part of this continuum, rather than as a stand-alone funding mechanism; the more we can do at the beginning of this spectrum, the less we should have to do at the end.<sup>114</sup>*

CCLC works on all parts of this continuum, offering training and public legal education, legal guidance and information, advice by phone and email, outreach legal services, and end to end legal representation. But CCLC is a small charity and can only help a tiny proportion of the children and families that need support. If we are to ensure access to justice for all children, especially the marginalised, socially excluded and most at-risk, the government must include a detailed assessment of the impact of LASPO on children and young people in its review of legal aid, and commit to amending the system as a matter of urgency so that children's rights are protected.

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113 As stated by the then Government Spokesperson in the House of Lords, Baroness Northover. HL Deb 23 April 2012, vol 736, col 1664

114 The Law Commission, *op cit*, p. ix

# Recommendations

- The government's review of civil legal aid must include a detailed assessment of the impact on children and young people.

## Private family law

- Funded early legal advice, with the offer of follow-up in writing, should be provided in private family law cases, and widely advertised.
- The government should reinstate legal aid in all cases where there is local authority involvement in private law children proceedings, including in relation to special guardianship orders.
- Legal aid should be available in all cases in which a child is at risk of abuse.

## Education

- The cost of experts attending SEN hearings should be covered by legal aid.
- Continued funding should be provided for public legal advice on education law issues.
- In the event of permanent exclusion, funded representation before the governing body and/or Independent Reviewing Panel should be available.
- The government should review the effectiveness of the current policy for accessing to face-to-face advice for SEN and whether the exemptions serve their stated purpose of safeguarding access to justice for the most vulnerable.
- The government should examine the impact of LASPO on the education legal aid sector more widely, as part of a wider review into the sustainability of the civil legal aid system.

## Immigration

- The government should reinstate legal aid for all unaccompanied and separated migrant children in matters of immigration by bringing it back within 'scope' under the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
- Until legal aid is fully reinstated for children in immigration cases, local authorities should develop written policies that offer clarity to their social workers, and the children they support, on their decision making process in relation to securing immigration advice for children, identifying specific timetables and eligibility for advice and representation.

## Exceptional case funding

- The Legal Aid Agency must reform the exceptional case funding system. In the immediate term, a question should be added to the CIV ECF1 form to ask about the rights and interests of any affected children. Where the applicant is a child, a presumption would operate so that a child or young person could expect to have their case for civil legal aid funding granted, in line with children's rights standards. The LAA should accordingly publish guidance for its casework staff deciding ECF applications on how to handle applications affecting children.
- Further work should be done to promote the use of the ECF to those working with children and young people, in an effort to counter the low proportion of applications from them.
- The Legal Aid Agency should ensure that sufficient resources are allocated to allow for urgent cases to be decided within an appropriately quick time-frame.

# Coram Children's Legal Centre

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