

# CUTS THAT

# HURT

**The impact of legal aid cuts in England  
on access to justice**



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## **CUTS THAT HURT**

**The impact of legal aid cuts in England on access to justice**

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# EXECUTIVE SUMMARY

**‘I feel alone, like I’ve been left in the dark without anywhere to get help... I’m scared about what that will mean for my kids.’**

**Sarah**, private family law case, interview 12 May 2016

Every day, ordinary people face legal problems where they need to be able to get the right advice and support as soon as possible. Be it a parent trying to secure contact with their child, a disabled person who has had her benefits wrongly cut, or an 18-year-old born in the UK who is trying to regularise his immigration status or claim her entitlement to British citizenship. Without that advice and support the consequences can be profound: they could face being made homeless, falling deeply into debt, being prevented from seeing their children, or being separated from their families. This has a significant human cost for the individuals themselves and their families, and a wider cost to society as other services have to take the strain of supporting people whose problems have spiralled out of control.

These are some of the consequences of the severe cuts to civil legal aid that were included in the 2012 Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act. The upshot of those changes is a two-tier justice system: open to those who can afford it, but, increasingly closed to the poorest, most vulnerable and most in need of its protection.

This report examines the impact of civil legal aid cuts on access to justice in England. It focuses on the impact on a range of disadvantaged and marginalised groups, primarily in the areas of family, immigration and welfare benefits law.

Access to justice forms part of the bedrock of human rights protection in any state. It is a core element of an individual’s right to an effective remedy, the right to fair trial and the right to equality before the law. In the United Kingdom it is the provision of legal aid that has acted as a cornerstone guaranteeing the structural integrity of the broader edifice of access to justice. Without timely and accessible legal advice, people cannot effectively claim and enforce their rights and problems can escalate and have profound consequences for individuals and their families.

In human rights terms, the cuts to legal aid constitute a retrogressive measure. They were primarily motivated by a desire to reduce spending on the justice system at a time of increased fiscal pressure, but were made with insufficient regard for the potential negative and profound impacts on the protection of human rights in the UK. There is no dispute that fewer people can now access free legal help and representation in a wide range of cases; the government’s own statistics bear this out.

The first part of the report details some of the ways in which the loss of legal aid has made it substantially more difficult for people to access the legal advice and assistance that they need. It sets out how the cuts have led to a loss in early specialist legal advice and resulted in a reduced and uneven provision of free legal assistance across the country. It also challenges the government’s stated expectations that a new scheme of Exceptional Case Funding (ECF) will ensure that legal aid remains available to the most vulnerable in society. It concludes that systemic and inherent failings mean that the scheme does not in practice provide the promised safety net for vulnerable

or disadvantaged people who are struggling to navigate complex legal processes and effectively advocate for their rights.

The second part of the report sets out the ways in which the cuts to civil legal aid have had a particularly serious and disproportionate impact on disadvantaged and marginalised people in the UK, who already experience the most obstacles in accessing justice and effectively claiming their rights. People directly impacted by the changes in the legal aid regime spoke to Amnesty International about their frustration: that they felt left in the dark, isolated, under significant added stress, and in some cases as if they lacked a vital lifeline.

The report documents the impact of the cuts on a number of specific groups:

- **Children and vulnerable young people:** the cuts to legal aid have had far-reaching and negative implications for children and vulnerable young people whose capacity is restricted, their right to be heard and to have their best interests protected. Children and vulnerable young people cannot be expected to navigate complex legal processes alone, yet that is precisely what LASPO allows for. The impact has also been felt in cases where the best interests of the child are very much at stake, including in private family law cases. If parents or carers cannot access legal advice, assistance or representation, it can negatively impact the ability of decision-makers, administrative and judicial, to make decisions properly.
- **Migrants and refugees:** as a group who already experience a range of distinct problems and inequalities due to their immigration status, the removal of legal aid from immigration and family reunification cases has been profound. They are left to try and navigate complex legal processes, with ever changing immigration rules, as they face potential removal and separation of their family or being left trapped in poverty, excluded from work, education and vulnerable to exploitation. Even those who manage to get pro bono help find their cases stalled because they cannot afford the expert evidence they require.
- **People with additional vulnerabilities:** there are a large number of people who have additional vulnerabilities and/or disadvantages that make accessing, navigating and understanding the legal process harder. Amnesty International heard of cases of people with mental health illnesses, learning disabilities, low numeracy and literacy levels, language problems, medical conditions such as terminal illness, and alcohol and drug dependency who were struggling to effectively advocate for themselves and claim their rights. Many are forced to wait until crisis point before they can get help and advice, taking a significant toll on their well-being, as they fear falling into further debt, being faced with homelessness or losing access to their children.

Amnesty International is calling on the United Kingdom government to:

- Immediately review the impact of reforms introduced by the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 on access to justice and protection of human rights, particularly for vulnerable and disadvantaged groups, including children and young people, people with mental health problems, people with disabilities and migrants;
- Ensure better provision of public legal education to ensure people understand and can effectively claim their rights, and provide parallel education to practitioners.

The following set of recommendations is not exhaustive for the purpose of ensuring access to justice for disadvantaged and marginalised groups in England. It sets out specific recommendations that have emerged from the limited scope of Amnesty International's research.

- Ensure that children and vulnerable young people are entitled to legal aid, regardless of the legal issue at stake;
- Children and families without sufficient means should be able to obtain legal advice, assistance, and where litigation is contemplated, legal representation free of charge in any case where a child's best interests are engaged;
- Restore initial legal advice for private family cases;
- Restore welfare benefits advice funding;
- Restore legal aid to all immigration cases raising arguable human rights concerns;
- Facilitate the provision of meaningful legal information and effective advice for individuals detained under immigration powers;

- Ensure family reunification cases are entitled to legal aid;
- Abandon plans to introduce a residence test;
- Overhaul the Exceptional Case Funding system so as to make it fully accessible to members of the public and ensure that all those who are potentially eligible for Exceptional Case Funding have the opportunity to receive advice on their entitlement and funded assistance in making an application;
- Work with non-governmental organisations to ensure that those affected by all forms of domestic violence are able to get legal aid in private family law cases and ensure that in other areas of civil law victims of domestic violence are adequately protected;
- Ensure victims of trafficking are able to exercise their right to seek reparations and hold to account those who have exploited them.

# METHODOLOGY

This report examines the impact of civil legal aid cuts on access to justice in England. It focuses on the impact on a range of disadvantaged and marginalised groups, namely children and young people (24 years old and under), migrants and refugees, and people with specific vulnerabilities which can make accessing legal procedures more difficult, such as those with mental health problems or disabilities. This report recognises that other disadvantaged or marginalised groups may or will likely have been negatively impacted by these cuts; however, the report is limited in its scope.

This research primarily concerns immigration, family and welfare benefits law, identified as priority areas through initial scoping, although other areas of law are referenced. The absence of reference or research in relation to other areas of law, should not be interpreted as a lack of concern, but that the scope of this report is unable to address the wide-ranging nature of the impact.

The report is based on research conducted by Amnesty International between October 2015 and June 2016. Desk research was carried out throughout this period, drawing on substantial publicly available information, including court cases, legislation, policy documents, freedom of information requests, submissions to parliamentary committees, media reports and other open source materials.

In the context of the research for this report Amnesty International interviewed 30 individuals who were not eligible for legal aid following the cuts. All of the case examples in this report have been anonymised at the request of the individual in order to protect their privacy. The majority of individuals whose cases are referenced in the report did manage to get some form of legal help or advice from the not-for-profit sector. This should not be interpreted as evidencing claims that the not-for-profit sector will always, or indeed can, fill the gaps created by the legal aid cuts. It is symptomatic of a methodological challenge encountered in the research whereby introduction to cases was made predominantly through the not-for-profit sector. Behind these cases Amnesty International believes there are many more who have simply not been able to access free support. However, this silent, hidden majority is incredibly difficult to trace and access. This apparent “weakness” of the report is in fact one of the most pressing reasons there needs to be a thorough and urgent review into the impact of the legal aid cuts on particularly disadvantaged and marginalised groups.

In addition, Amnesty International spoke to 90 individuals or organisations who provide legal advice, information, representation, or other support to groups affected by the legal aid cuts. This groups includes lawyers (solicitors and barristers) carrying out pro bono work, not-for-profit law centres, advice providers such as Citizen Advice Bureaus, those working or volunteering at the Personal Support Unit, NGOs carrying out advocacy for and/or providing advice to clients impacted by the cuts, charitable organisations that provide a range of support to disadvantaged groups, statutory bodies and academics.

Whilst the majority of interviews were carried out in the London and the greater London area, Amnesty International also spoke to people based in Newcastle, Sheffield, Manchester, Bristol,



Plymouth, Oxford and Birmingham.<sup>1</sup> Amnesty International delegates spent five days shadowing volunteers at the Personal Support Unit at the Royal Courts of Justice and the Central Family Court. The Personal Support Unit provides free, independent assistance to people facing proceedings without legal representation in civil and family courts and tribunals and is located in 19 courts and tribunals across England and Wales.

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1 Amnesty International did not carry out any interviews in Wales, which is why the report focuses on the impact of legal aid in England only.

# 1. REMOVING A CORNERSTONE OF JUSTICE: CUTS TO CIVIL LEGAL AID

**‘Legal aid gives a voice to the unheard and light to those overlooked. Without legal aid the marginalised are kept in the shadows. They cannot be seen and they cannot be heard.’**

**Sarah Sadek**, Immigration and Asylum Solicitor-Advocate, Avon and Bristol Law Centre,  
Interview 8 December 2015

On 1 April 2013, the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 came into force.<sup>2</sup> With it came wholesale change to the legal aid system for family and other areas of civil law in England and Wales.<sup>3</sup> Prior to this date, legal aid was available to help people access justice with respect to almost all aspects of civil law, with narrowly prescribed exceptions.<sup>4</sup> This situation has now been completely reversed. Civil legal aid is now only available for a narrow number of prescribed topics and types of legal work, subject to an override for exceptional funding in other cases.<sup>5</sup> Areas of law that can no longer be funded through legal aid include:

- Debt (except where there is an immediate risk to the home);
- Education (except for cases of Special Educational Needs);
- Employment cases;
- Housing matters (except those where the home is at immediate risk, homelessness assistance, housing disrepair cases that pose a serious risk to life or health and anti-social behaviour cases in the County Court);
- Immigration (there are exemptions, including asylum and detention cases<sup>6</sup>);
- Private family law (other than cases where strict criteria are met regarding domestic violence or child abuse, or for child parties);
- Welfare benefits (except for appeals on a point of law in the Upper Tribunal and onward appeals to the Court of Appeal and Supreme Court).<sup>7</sup>

The reach of the legal aid cuts is laid bare in the Ministry of Justice’s own statistics. The year before the relevant provisions of LASPO came into force, legal aid was granted in 925,000 cases; the

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2 Legal Aid, Sentencing and Punishment of Offenders Act 2012, available at: <http://www.legislation.gov.uk/ukpga/2012/10/schedule/1/enacted>.

3 There are two main types of legal aid. ‘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 assessing the prospect of a case succeeding, corresponding with the other party in the case, and during negotiations. ‘Civil Representation’ is legal aid for representation in court or upper (appeal) tribunals. Both have been significantly affected by the LASPO reductions in scope.

4 The Access to Justice Act 1999 provided that work was in scope for legal aid unless specifically excluded by Schedule Two of the Act, eg boundary disputes 1(c), the making of wills 1(d), and matters of trust law 1(e). This is in contrast to LASPO that says only work explicitly included in Schedule 1 is in scope. As justice is a devolved matter, legal aid is governed by a different statutory regime in Northern Ireland and Scotland and have not been examined in this report.

5 LASPO 2012, s.10(3).

6 Other 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.

7 Schedule 1 of LASPO sets out what civil work is in scope. This summary is taken from the Bar Council, “Changes to civil legal aid: Practical guidance for the bar”, page 12-13.

year after it came in to force, assistance was given in 497,000 cases, a drop of 46 per cent.<sup>8</sup> These figures can be further broken down to demonstrate the significant impact in particular areas of law relevant to this research. For example, in the area of social welfare law, 88,378 welfare-benefits cases received legal aid funding in the year 2012-2013. Following LASPO that figure dropped to just 145 – a 99 per cent reduction. Other areas of law also saw significant falls, with housing cases falling by around 50 per cent and private family cases by 60 per cent.

Civil legal aid spending has as a result fallen dramatically: £141 million in the first year after LASPO, a figure anticipated to reach £300 million per year.<sup>9</sup> Whilst these figures suggest the government has made significant savings in the short-term to the civil legal aid budget, they ignore any knock-on financial costs that could offset these savings. Parliamentary committees 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>10</sup> For example, significant concerns have been raised about the potential costs to the National Health Service, as research has shown that early and effective welfare advice provision reduces demand on health services and has a significantly positive impact on patients' health.<sup>11</sup>

The figures also fail to tell the story of the human cost incurred as a result of such sweeping change to the civil legal aid system. Until April 2013, civil legal aid was effectively a cornerstone guaranteeing the structural integrity of the broader edifice of access to justice. Its abrupt removal has had significant impact on the fabric of the justice system, and many of those least able to bear the strain caused by the decision to do away with the existing provision have been made to do so.

### The human toll

**Sarah** is facing going to court unrepresented in a private family law case concerning child access arrangements. She told Amnesty International that she had so far been unable to access any free legal advice on her case and was worried and intimidated about the upcoming hearing, "I feel alone, like I've been left in the dark without anywhere to get help... I'm scared about what that will mean for my kids".<sup>12</sup> Sarah told Amnesty International she had wanted to avoid going to court, but without advice she did not know what her options were: "It's all taken a huge toll on me, it is incredibly stressful and that in turn has to impact on my children".

**David** is in his early forties and from the Democratic Republic of Congo. He was recognised as a refugee in 2013. He is trying to do an application for family reunification for his wife, children and niece to join him. He told Amnesty International he was worried about his case: "I could not do this on my own, my case is complicated because I have to show why my niece needs to come. But she has no other family apart from us, the rest of her family were killed so she needs to be here, she needs to be with all of us. Without help I would have nothing, I would not have the chance to be with my family. Everyone should get help you can't do this by yourself. It's important to have help to bring family here otherwise nothing is good anymore."<sup>13</sup>

8 These figures are all taken from Legal Aid Statistics in England and Wales, 2013-2014, page 63.

9 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; National Audit Office, "Implementing Reforms to Legal Aid", 17 November 2014, page 6.

10 National Audit Office, "Implementing Reforms to Legal Aid", 17 November 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.

11 Advice Services Alliance and the Low Commission, "The Role of Advice Services in Health Outcomes: Evidence review and mapping study" 2015.

12 Interview 12 May 2016.

13 Interview 2 November 2015, the Red Cross are helping him with his application.

James lives in a housing association property and had been in and out of work. He told Amnesty International that his changing situation, combined with the stress he was under, meant he did not claim the housing benefits to which he was entitled. He fell into rent arrears amounting to thousands of pounds as a result. James was not eligible for free legal help to try and resolve these initial problems. He only sought help when he was facing eviction, for which he was entitled to legal aid. He told Amnesty International “It was such a stressful time, I couldn’t sleep with the eviction hanging over me. I was facing being made homeless”.<sup>14</sup> After an initial struggle to find a solicitor to take the case at short notice, the case was adjourned giving him time to find legal representation. His solicitor was able to get the eviction halted. Had he been able to access early legal help to advise him on the underlying housing benefits problem this situation may well have been avoided altogether.

## 1.1 Legal aid: A prerequisite for effective human rights

‘Legal aid is an essential component of a fair and efficient justice system founded on the rule of law. It is also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights, including the right to a fair trial and the right to an effective remedy. Access to legal advice and assistance is also an important safeguard that helps to ensure fairness and public trust in the administration of justice’

**Report of the UN Special Rapporteur on the Independence of Judges and Lawyers,**  
15 March 2013, UN Doc: A/HRC/23/43

To claim and enforce their rights people must have equal and effective access to justice. Without the ability to effectively request, inform or challenge decisions, rights cannot be secured. In the UK, the provision of legal aid is a significant part of how the state has ensured access to the civil justice system and has met its binding international legal obligations to ensure equality before the courts and tribunals for all (see below). The introduction of significant cuts to that system has undermined human rights protection in two significant ways: by restricting access to justice and through the discriminatory effect on socio-economic grounds.<sup>15</sup>

### Access to justice

Access to justice is a core element of an individual’s right to an effective remedy, the right to fair trial and the right to equality before the law. It is an essential prerequisite for the protection and promotion of all human rights and ensuring that victims of rights violations can secure appropriate remedies. In this respect all states have an obligation to ensure remedies which are “accessible, affordable, timely and effective”.<sup>16</sup> International human rights bodies and experts have called on governments to remove obstacles to access to justice, including those that disproportionately exclude people living in poverty and discriminate against other marginalised groups and individuals.<sup>17</sup> Yet the changes introduced by the UK government have done precisely the opposite.

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<sup>14</sup> Interview 16 June 2016

<sup>15</sup> UN treaty-based mechanisms have explicitly recognised socio-economic status can be a legitimate additional ground of discrimination. The UN Committee on Economic, Social and Cultural Rights (CESCR) has also referred to the need for states to take socio-economic status into account when monitoring their compliance with their ICESCR obligations. Similarly, the Committee on the Rights of the Child expressed its concern about the significant inequality in the enjoyment of the right to education among children in Belgium, and particularly at the impact of socioeconomic status on the education opportunities accessible to children and their school performance.

<sup>16</sup> UNCESCR, General Comment No. 9: The domestic application of the Covenant (1998), UN Doc E/C.12/1998/24

<sup>17</sup> Human Rights Committee, General Comment No. 32, Report by the Special Rapporteur on extreme poverty and human rights, 9 August 2012, UN Doc A/67/278. See also Council of Europe Commissioner for Human Rights, who has stated that “vulnerable and marginalised groups of people have been hit disproportionately hard, compounding pre-existing patterns of discrimination in the political, economic and social spheres.” “Safeguarding human rights in times of economic crisis”, November 2013; Report of the Special Rapporteur on Extreme Poverty and Human Rights, 9 August 2012, UN Doc A/67/278. Treaty Bodies have also raised the impact of legal aid cuts on access to justice in relation to a number of countries including: Concluding observations of the Committee on the Elimination of Discrimination against Women Canada, CEDAW/C/CAN/CO/7, 7 November 2008.

**The right to an effective remedy** is a key element of human rights protection, enshrined in all major human rights treaties, and serves as a procedural means to ensure that individuals can enforce their rights and obtain redress.<sup>18</sup> International law requires that remedies are available not only in law but are accessible and effective in practice.<sup>19</sup> It includes the right to equal and effective access to justice and fair, meaningful and impartial procedures in which his or her claim can be fairly adjudicated and, if established, an effective remedy granted. Legal aid is one mechanism by which states can ensure that the right to an effective remedy is not illusory, but realised in practice.

**The right to a fair trial** includes the right to a fair and public hearing and respect for the principle of equality of arms.<sup>20</sup> There is a recognised connection between the right to legal assistance and the general interest in guaranteeing the right to a fair trial. In contrast to criminal cases, an entitlement to free legal aid in civil cases is not absolute. The European Court of Human Rights has, however, found that the right to access to a court contained in Article 6 (1) 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>21</sup> 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.<sup>22</sup>

While the state's responsibility to facilitate equal and effective access to justice does not, under the European Convention on Human Rights, require the universal provision of legal aid in all civil cases, it does, at a minimum, require the state to ensure that such aid is available for those with insufficient resources for legally complex disputes concerning matters of fundamental importance.

Beyond the European regional human rights system, UN Special Rapporteurs, in accordance with the jurisprudence of existing UN human rights treaty bodies, have forcefully argued that the right to legal aid should be recognised, guaranteed and promoted in both criminal and civil cases, given its importance as an essential procedural guarantee for the right to an effective remedy, the right to equality before the courts and tribunals and the right to a fair trial.<sup>23</sup>

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- 18 See for example the following, all of which have been ratified by the UK, Article 8, Universal Declaration of Human Rights; Article 2 (3), International Covenant on Civil and Political Rights; Article 2, International Covenant on Economic, Social and Cultural Rights; Article 6, International Convention on the Elimination of All Forms of Racial Discrimination; Article 2, Convention on the Elimination of All Forms of Discrimination against Women; Article 13, European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 47, Charter of Fundamental Rights of the European Union.
- 19 See for example, UN Human Rights Committee, General Comment no 31, concerning article 2(3) of the International Covenant on Civil and Political Rights, paras 14 and 15. See also the following European Court of Human Rights cases: *McFarlane v. Ireland*, App. No. 31333/06, 10 September 2010, para 114; *Riccardi Pizzati v. Italy*, App. No. 62361/00, Grand Chamber judgment, 29 March 2006, para 38; *El-Masri v. "the former Yugoslav Republic of Macedonia"*, App. No. 39630/09, 13 December 2012, para 255; *Kudła v. Poland*, App. No. 30210/96, 26 October 2000, para 152.
- 20 See for instance article 14 ICCPR and article 6 ECHR. See also on for example equality of arms, UN Human Rights Committee, General Comment no. 32, UN Doc CCPR/C/GC/32, 23 August 2007, para 13. See also Communication No. 1347/2005, *Dudko v. Australia*, Communication No. 846/1999, *Jansen-Gielen v. The Netherlands*, para. 8.2 and No. 779/1997, *Äirelä and Näkkäläjärvi v. Finland*.
- 21 *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 4 2001; *Benham v. United Kingdom*, Grand Chamber Judgment of 10 June 10 1996.
- 22 *Airey v. Ireland P, C and S v. United Kingdom*, 16 July 2002.
- 23 Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaut 15 March 2013, UN Doc, A/HRC/23/43; Report of the Special Rapporteur on extreme poverty and human rights, 9 August 2012, UN Doc A/67/278.

The decision by the UK government to introduce significant cuts to the pre-April 2013 system governing civil legal aid was driven primarily by economic considerations with scant evidence of proper regard for the potential negative and profound impacts on the protection of human rights in the UK.<sup>24</sup> There is no dispute that fewer people can now access free legal help and representation in a wide range of cases; the government's own statistics bear this out.<sup>25</sup> In human rights terms, the cuts have amounted to a retrogressive measure which, as this report sets out, has restricted access to justice for some of the most marginalised and vulnerable people in society.

In introducing any retrogressive austerity-driven policy, the UN Committee on Economic, Social and Cultural Rights has made clear that states are under an obligation to demonstrate that firstly, the policy is a temporary measure covering only the period of crisis; secondly, that the policy must be necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to the rights at stake; thirdly, the policy must not be discriminatory in effect, and must comprise all possible measures to mitigate inequalities that can grow in times of crisis and to ensure that the rights of the disadvantaged and marginalised individuals and groups are not disproportionately affected and fourthly, the policy must identify the minimum core content of rights or a social protection floor, and ensure the protection of this core content at all times.<sup>26</sup>

As evidenced in this report, the cuts to legal aid introduced by the government have failed to meet this test. Indeed, in its concluding observations on the UK, the UN Committee on Economic, Social and Cultural Rights made clear that it was seriously concerned about the disproportionate, adverse impact that such austerity measures were having on disadvantaged and marginalised individuals and groups and the failure of the state to undertake a comprehensive assessment of the cumulative impact of such measures.<sup>27</sup> This view has been echoed by a number of other UN treaty bodies who have also raised significant concerns specifically about the impact of the legal aid cuts on access to justice in the UK, with many highlighting the potentially significant impact on disadvantaged and marginalised groups.<sup>28</sup> They have been united in calling on the UK government to:

**“ensure that changes to the legal aid system do not undermine the right of access to courts and effective remedy”.**<sup>29</sup>

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24 The first Impact Assessment carried out during the consultation process for LASPO outlined economic focus as its objective and did not expand on any other objective; “The main policy objectives and intended effects are to reduce expenditure on legal aid and in so doing to target resources at issues and proceedings for which legal aid continues to be justified.” Ministry of Justice, *Legal Aid Reform: Scope Changes*, 2010. Subsequently, in its final Impact Assessment, the Ministry of Justice outlined four objectives in introducing changes to the legal aid regime, a) to make significant savings in the cost of civil legal aid; b) to discourage unnecessary and adversarial litigation at public expense; c) to target legal aid to those who need it most; and d) to deliver better overall value for money for the taxpayer, see for example, *Equality Impact Assessment, Legal Aid Sentencing and Punishment of Offenders Bill* para. 15

25 *Legal Aid Statistics in England and Wales, 2013-2014*

26 Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights. Much of this approach reflects the general test that should be applied to any restrictive measure which impacts on rights, namely that (a) the interference is “prescribed by law” (the legality requirement); (b) it “pursues a legitimate aim” (e.g. whether it is in the public interest such as protecting national security or the economic well-being of the country); and (c) the restriction is “necessary” or “proportionate.” To satisfy part (c) the state has to show that the restriction not only fulfils “a pressing social need” but that it is “proportionate” to the aim of responding to that need, based on the fact that only minimum interferences are allowed. Thus the proportionality test requires not only that a fair balance is struck between the individual interest and the collective interest, but also that the limitation does not impose a disproportionate and excessive burden on individuals or on a particular sector of the population.

27 The Committee on Economic Social and Cultural Rights observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, UN Doc: E/C.12/GBR/CO/6, 14 July 2016.

28 The Committee on Economic Social and Cultural Rights observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, UN Doc: E/C.12/GBR/CO/6, 14 July 2016. At paragraph 20 the Committee states, “The Committee is concerned that the reforms to the legal aid system and the introduction of employment tribunal fees have restricted access to justice in areas such as employment, housing, education and social welfare benefits”. 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. At paragraph 29 the Committee states “The reforms concerning the reduction of legal aid in all four jurisdictions appear to have a negative impact on the right of children to be heard in judicial and administrative proceedings affecting them.” 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. At paragraph 22 the Committee states that it is “concerned that LASPO unduly restricts women’s access to legal aid because it removes access to legal aid for litigation concerning, among others, divorce, property disputes, housing and immigration matters”. See also 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.

29 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, paragraph 22.

## Making justice unaffordable: How legal aid cuts have a discriminatory effect on the poor

**“The provision of free and competent legal advice and assistance to those who are otherwise unable to afford it is a fundamental prerequisite for ensuring that all individuals have fair and equal access to judicial and adjudicatory mechanisms.”**

**Report of the Special Rapporteur on extreme poverty and human rights, 9 August 2012, UN Doc A/67/278**

It is no secret that people living in poverty often face the most barriers to accessing justice. Poverty is an exacerbating factor for many human rights violations and can act as a considerable structural obstacle for people seeking remedies for the violations that they have suffered. Some of those obstacles are a direct result of the lack of financial resources, but other obstacles can be social, institutional, structural or discriminatory in nature. People living in poverty are often less aware of the existence and contents of their legal rights and entitlements and of how to secure the assistance they need.<sup>30</sup>

Given the developed and often complex legal system in the UK, legal aid is one of the key mechanisms that enables those within society who are least able to afford access to justice a way of doing so. The removal of significant areas of law from the scope of legal aid necessarily most affects those living in poverty, who cannot afford to pay for legal advice and representation. This situation is further exacerbated by the fact that those living in poverty are more likely to face legal problems in those very categories of claims that have been excluded from the scope of free legal aid, such as welfare benefits, debt and immigration.

In August 2012, the Special Rapporteur on extreme poverty and human rights released a report on the significant barriers that seriously impede or discourage people in poverty from accessing justice, including inadequate provision of legal assistance.<sup>31</sup> The Special Rapporteur’s report makes clear that:

**“the provision of free and competent legal advice and assistance to those who are otherwise unable to afford it is a fundamental prerequisite for ensuring that all individuals have fair and equal access to judicial and adjudicatory mechanisms.”**

This includes in civil matters where the

**“Lack of legal aid for civil matters can seriously prejudice the rights and interests of persons living in poverty”.**

The report also notes that:

**“the legal processes which relate to such civil matters are often extremely complex and their requirements onerous, creating insurmountable obstacles for those without the assistance of a lawyer”.**

The report calls on all states to ensure that the poor have de facto enjoyment of the rights to an effective remedy, equality before the courts and a fair trial, by taking effective measures to remove any regulatory, social or economic obstacles that impede or hamper persons living in poverty from

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30 See Report of the Special Rapporteur on extreme poverty and human rights, 9 August 2012, UN Doc: A/67/278; Legal Empowerment of the poor and eradication of poverty Report of the Secretary-General June 2009

31 See Report of the Special Rapporteur on extreme poverty and human rights, 9 August 2012, UN Doc: A/67/278

accessing justice. This includes explicit recommendations that state:

- Ensure that persons living in poverty have practical and effective access to competent legal advice and assistance when needed for the protection of their human rights, including by making available sufficient resources to provide high-quality legal aid
- Ensure access to free and competent civil legal assistance for persons living in poverty where the enjoyment of human rights – civil, political, economic, social and/or cultural – is at stake

## 1.2 Cutting without full analysis: The government's lack of due diligence

“It was clear to us that the urgency attached by the Government to the programme of savings militated against having a research-based and well-structured programme of change to the provision of civil legal aid. Many of the issues which we have identified and which have been identified to us could have been avoided by research and an evidence base to work from.”

Justice Committee, Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, 12 March 2015, page 8.

When states introduce policies which are likely to have or will inevitably have an impact on human rights protections, they must ensure that both their decision making process and the outcome are compliant with their human rights obligations. Despite the likely impact from wide-sweeping cuts to the civil legal aid system the government in essence made its decisions in extreme haste, without detailed analysis of the potential human rights impact. It failed to carry out adequate research prior to the introduction of the cuts, preferring to “conduct the research on the basis of what happened to people” following the cuts.<sup>32</sup> Government statements that “the legal aid reforms do not involve any fundamental right of access to the courts” also suggest a worrying lack of understanding of what the impact of these cuts could be and the importance of legal aid in securing people’s rights.<sup>33</sup>

In evidence given to the parliamentary Public Affairs Committee, the Permanent Secretary of State at the Ministry of Justice made clear that the only decision was where in the support system the axe would fall, not how deep the cut would be. He stated:

“...it was quite explicit from the start that we would not be able to do research in advance if we were to make the savings to which the government committed ... the most critical piece of evidence that was relevant to the decision that was made was the size of the spend.”<sup>34</sup>

Likewise in evidence to the Justice Committee, the Minister for Justice stated:

“...we had to take very urgent action [...] In an ideal world, it would have been perfect to have a two-year research programme speaking to all the stakeholders and then come to a decision. Sadly, the economic situation [...] did not allow that luxury.”<sup>35</sup>

This position is fundamentally contrary to what international human rights law and standards require. A thorough assessment of the impact on people and their enjoyment of human rights

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32 Public Accounts Committee, Oral evidence: Implementing reforms to civil legal aid, HC 808, 4 December 2014. Similarly in evidence to the Justice Committee, the Minister for Justice stated: “we had to take very urgent action, and that we did do. In an ideal world, it would have been perfect to have a two-year research programme speaking to all the stakeholders and then come to a decision. Sadly, the economic situation that the Government inherited did not allow that luxury”, Justice Committee, Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, 12 March 2015 page 9.

33 Government memorandum, dated 27 September 2013, to the Joint Committee on Human Rights, for its report “The implications for access to justice of the Government’s proposals to reform legal aid”, HL Paper 100 HC 766, 13 December 2013.

34 Public Accounts Committee, Oral evidence: Implementing reforms to civil legal aid, HC 808, 4 December 2014.

35 Justice Committee, Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, 12 March 2015 page 9.



must come prior to the introduction of retrogressive austerity measures.<sup>36</sup> Without that research and basic due diligence it is difficult – if not impossible – to understand what burden the cuts will have on disadvantaged and marginalised groups, and whether that burden is likely to be disproportionate or excessive to the legitimate aim of the measure. Here, no such balancing exercise could be conducted, because the requisite research was not done.

The government did carry out more limited Equality Impact Assessments (EIAs), to satisfy domestic equality law, which considered whether groups with protected characteristics would be disproportionately affected by the cuts.<sup>37</sup> These assessments actually concluded that the cuts would have a disproportionate effect on women, Black, Asian and Minority Ethnic individuals and disabled people because they are overrepresented among recipients of publicly funded legal services. The EIAs, however, concluded that this would be justified as the cuts were still felt to be a proportionate means of achieving the legitimate aim of reducing public expenditure.<sup>38</sup> Yet there was nothing in the EIA which could bear the weight of that conclusion. Likewise the EIAs contain no detailed analysis on the potential impact on the range of human rights obligations arising from international human rights treaties or an assessment as to whether the cuts would further entrench inequality on the basis of socio-economic status. They simply state that the government's domestic, international and European obligations have been taken into account and that the provision of an exceptional funding mechanism would ensure those obligations were met. Yet without research it is unclear how the government could be confident that the introduction of what is a retrogressive austerity measure was proportionate and would not undermine human rights protection in the UK. Subsequent evidence of the actual impact has confirmed how misplaced this confidence was.

Parliamentary committees and NGOs raised serious concerns on several occasions about the lack of research carried out by the government before it chose to introduce such wide-sweeping cuts to legal aid.<sup>39</sup> Once the cuts had been made, these criticisms were repeated, as the human and knock-on financial costs became more apparent. A report by the National Audit Office found that:

**“In implementing the reforms, the Ministry did not think through the impact of the changes on the wider system early enough. It is only now taking steps to understand how and why people who are eligible access civil legal aid.”<sup>40</sup>**

The same report also concluded that

**“The reforms have the potential to create additional costs, both to the Ministry and wider government [...] There may also be costs to the wider public sector if people**

36 See statement by Committee on Economic, Social and Cultural Rights, “Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights”, 24 June 2016, UN Doc E/C.12/2016/1 paragraph 4. Council of Europe Commissioner for Human Rights, “Safeguarding human rights in times of economic crisis”, November 2013; United Nations General Assembly, “Report of the Special Rapporteur on Extreme Poverty and Human Rights”, 9 August 2012, UN Doc A/67/278 page 40.

37 Legal Aid Reform: Scope Changes Equalities Impact Assessment (EIA) (undated) – EIA on consultation paper Proposals for the Reform of Legal Aid in England and Wales that was published by the Ministry of Justice (MoJ) on the 15 November 2010; Reform of Legal Aid in England and Wales: Equality Impact Assessment (EIA) – This EIA accompanies Reform of Legal Aid in England and Wales: the Government Response, published by the Ministry of Justice (MoJ) on 21 June 2011. Also see s.149 Equality Act 2010 for the Public Sector Equality Duty binding public authorities. See also Amnesty International, *Dealing with Difference: A Framework to Combat Discrimination in Europe*, Index EUR 01/003/2009, page 46.

38 See Legal Aid Reform: Scope Changes Equalities Impact Assessment (EIA) (undated) – EIA on consultation paper Proposals for the Reform of Legal Aid in England and Wales that was published by the Ministry of Justice (MoJ) on the 15 November, paragraph 14.46; Legal Aid Reform: Cumulative Impact Equalities Impact Assessment (EIA) – This EIA accompanies the consultation paper Proposals for the Reform of Legal Aid in England and Wales that was published by the Ministry of Justice (MoJ) on 15 November 2010, paragraph 1.107; Reform of Legal Aid in England and Wales: Equality Impact Assessment (EIA) – This EIA accompanies Reform of Legal Aid in England and Wales: the Government Response, published by the Ministry of Justice (MoJ) on 21 June 2011, paragraph 35

39 National Audit Office, “Implementing Reforms to Legal Aid”, 17 November 2014, page 8; Justice Committee, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*; 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 Submission of evidence by the Law Society April 2014; Legal Action Group, *Review of evidence to LASPO Act impact inquiry*, June 2014.

40 National Audit Office, “Implementing Reforms to Legal Aid”, 17 November 2014, page 8.

whose problems could have been resolved by legal aid-funded advice suffer adverse consequences to their health and wellbeing as a result of no longer having access to legal aid.”<sup>41</sup>

The potential knock-on financial costs were raised across a large number of the interviews with NGOs and lawyers carried out by Amnesty International. However, they pale in comparison to the emerging picture of the human cost.

The government’s decisions in the area of cuts to civil legal aid were made without adequate analysis. The process seems to have been dictated by the imperative of reducing “the size of the spend” rather than with any meaningful engagement with proportionality, potentially discriminatory or other negative human rights impacts, and without the proper regard to costs – financial, social and human – down the line.

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41 National Audit Office, “Implementing Reforms to Legal Aid”, 17 November 2014, page 8.

## 2. OVERWHELMED BY THE OBSTACLES: THE HUMAN IMPACT OF THE LEGAL AID CUTS

**‘I don’t know where to turn to get the help that I need... It’s all been too much for me.’**

**Mary**, who has inter-connected legal problems in the areas of immigration, family and welfare benefits law, interview 9 May 2016

The legal problems people face in their everyday life are diverse: an 18-year-old born in the UK who applies to university only to discover, for the first time, that he has neither British citizenship nor a regular immigration status; a parent trying to make sure they are able to see their child on a regular basis; or a woman facing eviction after a council failed to pay her the housing benefits she was entitled to.<sup>42</sup> What they have in common is the need to be able to access information and advice, including in the form of legal help or representation. Without timely and accessible legal advice, problems can escalate and have profound consequences for individuals and their families: they can fall into debt or incur further debt, become homeless or lose contact with their children.

The loss of legal aid has made it more difficult for people to access the legal advice and assistance that they need and in so doing has damaged human rights protections in England. The government has 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. This section of the report reveals that narrative as fundamentally flawed. It sets out how the cuts have led to a loss in early specialist legal advice and resulted in a reduced and uneven provision of free legal assistance across the country. It also demonstrates how the system of Exceptional Case Funding does not, in practice, provide the promised safety net for vulnerable or disadvantaged people.

### 2.1 Loss of early intervention: Getting advice too late

The cuts to legal aid have led to a loss of specialist legal advice at an early stage of an individual’s problem, with people often only able to access the necessary help when things reach a crisis point.<sup>43</sup> Early legal advice has the potential to forestall an escalating sequence of problems. For example, Pete Moran of the Cumbrian Law Centre, whose views were echoed by other interviewees, captured succinctly the impact on people’s well-being when problems were not dealt with early:

“The pervading rhetoric in recent years has been about intervening early in the development of a person’s socio-economic problems, before things get very difficult and more expensive to rectify, but the current system does the opposite. It’s much more difficult now for people to get early advice; they have to wait until their situation becomes critical before they can access help. In our practice, this typically means that they are homeless or in imminent danger of becoming so. So problems can fester and then escalate, which

<sup>42</sup> Each of these case examples was recounted to Amnesty International whilst carrying out the research for the report.

<sup>43</sup> The Law Society, Submission of the Law Society of England and Wales to the Labour Party Review of Legal Aid, (2016) pg. 15. See also Lawworks Annual Report which states that 74% of clinics have seen an increase in the number of clients in crisis or distress.

has an abrasive effect on mood and wellbeing. Life becomes very difficult for people, their confidence diminishes and when things do reach crisis point they are not in a resilient mood to deal with it.”

Housing benefits provide an illustrative example of these challenges. Following LASPO, legal help in relation to housing benefits challenges is no longer funded by legal aid. This has made it much more difficult for people to access the early specialist help they need. Yet, early advice on housing benefits problems can resolve rent arrears, making it less likely that problems will escalate and lead to possession proceedings and evictions.<sup>44</sup>

Similar concerns are also borne out in the context of family law. Many of the organisations and lawyers working in this field raised their concerns that the loss of early free legal advice had led to more individuals having unrealistic expectations as to the merits of their case, what they were entitled to and what a reasonable settlement might look like. This had the potential to exacerbate tensions leading to more cases being heard by the courts rather than being resolved either through mediation or negotiation between lawyers.<sup>45</sup> As one family lawyer explained to Amnesty International:

“People are too often now going to court without any clue what is realistic to achieve. There is such a need for effective advice early on. If they can’t get that people either don’t do anything, staying potentially in difficult relationships or they go straight to court and it’s escalated straight away. Early legal advice means parents are more equipped to find solutions quickly, for example, we can talk through what a settlement might look like or what child arrangements look like. Without legal advice early on things become polarised, they tend to drag on longer and that in turn creates much more stress on parents, which has such a detrimental impact on children.”<sup>46</sup>

The government defended its cuts to private family law in part by arguing it would encourage parents to turn to mediation and avoid cases having to go to court. Leaving aside the fact that mediation levels actually fell – and are continuing to fall – following the introduction of LASPO, as there are fewer legally aided lawyers guiding people to mediation, it also ignores the reinforcing role legal advice can play in the provision of effective mediation.<sup>47</sup> Lawyers practising in family law, as well as organisations supporting families going through divorce and separation, emphasised that mediation is often more effective, both in terms of agreement being reached and maintained in the long term if there is legal advice for both parties so they understand the issues at stake, the rights and entitlements they have and what compromises are necessary. For cases not suitable for mediation, a negotiated solution is again more likely to be achieved with legal advice.

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44 The Law Commission, “Tackling the Advice Deficit: A strategy for access to advice and legal support on social welfare law in England and Wales”, (2015). See also the Law Society, Submission of the Law Society of England and Wales to the Labour Party Review of Legal Aid, February 2016.

45 The Law Society of England and Wales, for example, has recommended that family Legal Help should be restored under legal aid in order to help increase the number of referrals to mediation and even if couples decline to use mediation, to ensure that individuals receive the benefit of initial advice so they have a clearer understanding of how to use the courts as litigants in person. The Law Society, Submission of the Law Society of England and Wales to the Labour Party Review of Legal Aid, (2016) pg. 16. See also Cafcass report in 2014 that showed a 27% increase in applications for contact and residence suggesting an increase in contested proceedings linked to the legal aid cuts. Quoted in The Law Society Gazette 7 April 2014. Resolution, an umbrella organisation of family lawyers and other professionals, found that a fall in family Legal Help to around 1/3 of its pre-LASPO figure and the continuing fall in figures restricts the potential for people to resolve their disputes, in or out of court. They continue, that despite an increase in publicly funded mediation following an almost 50% drop in the first two years post LASPO, the government is failing to meet its objective of diverting more couples into mediation on a consistent basis. As a result, they raise concerns about an “inevitable but unfortunate evidence gap” around individuals remaining in damaging relationships, delaying the resolution of their issues or being restricted from trying everything to maintain contact with their children. Resolution, The Bach Commission on Access to Justice – Evidence from Resolution, (2016) pg. 1.

46 Claire Hunter, family law solicitor, interview 13 November 2015

47 Mediation has continued to fall according to the most recent Ministry of Justice statistics, which state that the number of mediation assessments in the latest quarter was 12% down compared to the same period in 2015 and the number of starts was down by 15% over the same period, see Ministry of Justice and Legal Aid Agency, Legal Aid Statistics in England and Wales April to June 2016. See also Bar Society The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On Final Report, September 2014; Resolution, Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 Evidence from Resolution to the Justice Select Committee; Siobhan Taylor-Ward Who carries the cost? Three years after the LASPO Legal Aid Cuts, April 2016.

## **In their own words: Practitioners assess the effect of the loss of specialist early legal help**

Practitioners providing specialist legal aid and advice, across the board, raised serious concerns about the impact of the LASPO changes on early intervention, vulnerable people's ability to access timely advice, and the lack of clear and widely available information about the availability of legal aid.

"If clients were able to access early advice that would make a huge difference across the board in all areas of law. It would help to stop things spiralling out of control and ending up in court when clients are in desperate situations and at breaking point. In the end court is good for nobody, so you need that early intervention."

**Rachel Francis, co-chair Young Legal Aid Lawyers<sup>48</sup>**

"The structure of legal aid now makes things difficult. You see the initial logic that the hard end of cases should be funded, but often once it's got to that level it's gone too far and people can't be pulled back. There has to be a way to make sure that early advice and support is also available to people."

**Advice provider<sup>49</sup>**

"It's a real problem that legal aid is only available for the very sharp end of a problem not earlier on. So in housing disrepair for example you only get help when it's really serious not when it would be easier and quicker to resolve. It's the same in welfare – funding is only there at appeal level, rather than initial help to try and resolve things quickly and effectively."

**Clare Carter, Avon and Bristol Law Centre<sup>50</sup>**

"With so many of these family cases it is early intervention that can help minimise the problems. Things don't have to reach crisis point where you end up in court. Sometimes court will be the only solution, but that should be the minority of cases. Early help and guidance can help you avoid court, which means avoiding the battle, the costs and the heartache that court brings."

**Family law advice provider<sup>51</sup>**

"People can get stuck in lengthy court proceedings which could often be avoided with early professional intervention."

**Rachel Rogers, Resolution<sup>52</sup>**

Beyond the loss of early advice, another significant factor exacerbating the impact of the LASPO cuts to civil legal aid is the geographically uneven patchwork by which provision is distributed across England, and the fact that many of those not-for-profit providers stepping into the breach have seen their capacity stripped to the bone.

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48 Interview 15 October 2015

49 Interview 30 October 2015

50 Interview 5 November 2015

51 Interview 28 October 2015

52 Interview 6 October 2015

## 2.2 Free legal advice and representation: Providers unable to meet demand

“The cases we take are just the tip of the iceberg. Demand is high and resources are low, so now we only take the people who are the most destitute, who face the most barriers. Ethically that is incredibly difficult for staff here, to think this person hasn’t quite reached rock bottom so we turn them away. We try to signpost them to others who can help, but there aren’t many places for them to go. In the last 12 months we have turned 2,000–4,000 people away. It’s getting worse and worse.”<sup>53</sup>

Clare Carter, Director, Avon and Bristol Law Centre, interview 5 November 2015

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.<sup>54</sup> While the not-for-profit sector can provide incredibly valuable – and in the circumstances extremely necessary – legal assistance or other forms of support, it cannot, nor can it be expected to, fill the gaps left by the legal aid cuts.

In fact, the cuts to legal aid have had a profound impact on not-for-profit organisations that provide a range of free legal advice, representation and other forms of support to some of the most vulnerable people in the UK. There is growing evidence that the cuts have 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. As one immigration lawyer described to Amnesty International:

“We’re stretched to capacity and we have to turn people away who need help, but that feels devastating. It feels wrong. Take young undocumented migrants, it means that they are sleeping in parks, on the streets, they are getting themselves into risky situations, relying on people they shouldn’t, they are going without food and they can’t challenge that, they can’t challenge their situation because they have no access to legal advice and in turn no access to justice.”<sup>55</sup>

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53 Clare Carter, Director, Avon and Bristol Law Centre, interview 05 November 2015.

54 See “What Does a One Nation Justice System Look Like?” a speech given by Michael Gove on Tuesday 23 June 2015. In his first public speech since being appointed Lord Chancellor and Secretary of State for Justice, 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. 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. Notably, providers for advice and legal support fall into a range of categories. In the not-for-profit sector they include: not-for-profit advice agencies, including Citizen Advice Bureaus for example, local not-for-profit Law Centres; national charities, which provide information, advice and sometimes legal support. In addition, some private law firms provide pro bono legal help and representation, alongside their paid work.

55 Interview 7 October 2015.

## Demand outstrips supply

The loss of legal aid funding has led to closures of not-for-profit legal aid providers.<sup>56</sup> These figures, however, hide a deeper impact: that 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>57</sup>

Many of the organisations interviewed by Amnesty International stated that following LASPO they had either stopped providing advice in certain areas of law or had less capacity to do so. They also reported a reduction of specialist advisors or services in both the not-for-profit and for-profit legal sector.

This reduction in provision has manifested itself in different ways across different parts of England, resulting in the provision of free legal advice and representation across the country being extremely uneven and irregular. While further research is required to fully map the distribution of provision, in some areas of the country there appears to be a particular shortage of organisations able to give free legal advice. This has created areas where very limited provision is available, described by one parliamentary committee as “advice deserts” such as the South West, parts of the Midlands and areas in the North of England.<sup>58</sup>

The reduction in providers has made accessing free legal advice and help substantially more difficult. One woman, based in Oxford, who is now no longer eligible for legal aid for her private family case following LASPO told Amnesty International:

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- 56 The exact number of closures is difficult to determine, not least because 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 (Ames, Dawes and Hitchcock, “Survey of Not for Profit Legal Advice Providers in England and Wales”, Ministry of Justice Analytical Series 2015.) There is therefore no comparable data comparing not for profit providers before the introduction of LASPO and after. However, immediately prior to the implementation of LASPO, the University of Warwick published a report, (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 in association with illegal (2013)) which found around 20% of not for profit providers believed that their service could close or was very likely to close completely in 2013. Individual organisations have begun to give examples of closures. For example, the Law Centres Network have reported that one in five of their members have closed (Interview 5 October 2015). Similarly, nine of the homelessness charity Shelter’s advice centres have now closed. The impact of cuts on specialist practitioners reliant on legal aid are also noteworthy. In particular, the closure of leading Chambers Tookes and Renaissance which focused on civil liberties and family law respectively, have been raised by the Legal Action Group. Written evidence from the Legal Action Group (LAS 06) Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, 2014. Pg 5. There are also regional studies, such as “The Impact of Legal Aid Cuts on Advice Giving Charities in Liverpool: First Results” Jennifer Sigafoos Debra Morris Charity Law & Policy Unit, University of Liverpool, 12 June 2013, which highlight closures and loss of advice. See also data on for profit and not for profit providers such as “LASPO One Year On”, Bar Council report, para 177, which highlights that the number of civil and family legal aid providers fell by almost a quarter in 2013-14 compared to 2012-13. 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, Lawworks clinics network report April 2014 – March 2015, November 2015, page 9.
- 57 In addition to the interviews carried out by Amnesty International, this conclusion is supported by the following: 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. In its submission to the Justice Select Committee, Citizens Advice Bureau reported 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 – due to being unable to provide specialist help. 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, pg 4. 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, pg 1
- 58 See 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; The Low Commission, Tackling the Advice Deficit: A strategy for access to advice and legal support on social welfare law in England and Wales, (2015), Natalie Byrom, “The State of the Sector: The impact of cuts to civil legal aid on practitioners and their clients: A report by the Centre for Human Rights in Practice, University of Warwick, April 2013 and Lawworks, a network of pro-bono clinics providing a range of legal advice, help and representation across the country also reported that 69.4% of all advice given across its network occurred in London. Annual statistics from Lawworks also indicate considerable variation in the type of advice people can access from region to region, see Lawworks clinics network report April 2014 – March 2015, November 2015, page 24-35. The National Audit Office reported that there are 14 local authority areas in which no face-to-face civil legal aid work was started and 39 in which fewer than 49 pieces of legal work per 100,000 people was started in 2013-14 (National Audit Office, Implementing reforms to civil legal aid, 20 November 2014). See also regional studies such as the study by the Law Centres Network, “Delivering Free Specialist Legal Advice in Yorkshire and the North East” 2015. See also the Law Society interactive map, accessible at <https://www.lawsociety.org.uk/policy-campaigns/campaigns/access-to-justice/end-legal-aid-deserts/>

“I’ve got nowhere to go for help now in Oxford. The organisation that used to give me advice on my case, as well as confidence that things would be OK, has gone. I’ve lost that support. I’m totally on my own and that terrifies me.”<sup>59</sup>

Similarly, a lawyer for an organisation providing free family legal advice in one region in the North of England – a geographic area that includes hundreds of thousands of people – told Amnesty International:

“I had one woman who came to see me who needed help. She had no money, but desperately needed advice on her case concerning child access arrangements, as she was worried about the father’s behaviour. We couldn’t help her due to a conflict of interest. She asked where else she could go to get help and my response had to be nowhere, there is simply nowhere for you to go. That felt just awful, to not be able to signpost her anywhere, to know that she will be left to do it all alone”.<sup>60</sup>

While provision has decreased, demand on organisations providing free legal help and advice has increased. Whilst other factors have contributed to this increased demand, for example, changes in the benefits system and immigration rules, reductions in counter services at courts and increasing pressure on housing, it is clear that the introduction of LASPO has led to more people who are no longer eligible for legal aid seeking free legal advice or help for their problems.<sup>61</sup> For example, Lawworks, a network of pro-bono clinics providing a range of legal advice, help and representation across the country, reported that 95% of its clinics had experienced an increase in demand for advice between April 2014 and March 2015 and that 74% have seen an increase in the complexity of legal matters at the clinics.<sup>62</sup> Similarly, the Child Law Advice Service told Amnesty International:

“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>63</sup>

The legal aid cuts have also impacted organisations’ ability to provide holistic advice to people.<sup>64</sup> People frequently experience legal issues in clusters reflecting the inter-connected nature of social problems. However, following the introduction of LASPO organisations reported that they were often only able to assist in relation to one or two aspects of a person’s problem. This in turn can mean they are unable to address the underlying and fundamental cause of the problem. As one advice provider explained to Amnesty International:

“Pre-LASPO cases could be looked at as a package, for example we could look at welfare, debt and housing together. Now we can often only afford to do housing, but that usually can’t be really solved without addressing debt and welfare issues and they are often the underlying cause. So you feel like you’re just sticking a plaster on it you are never healing the wound.”<sup>65</sup>

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59 Interview 19 January 2016.

60 Interview 7 January 2016.

61 Alongside interviews carried out by Amnesty International, there are a number of studies and reports documenting the increased demand since LASPO, including,

62 Lawworks clinics network report April 2014 – March 2015, November 2015,

63 Interview, 19 October 2015.

64 See, in particular, the Low Commission on this point, “Tackling the Advice Deficit: A strategy for access to advice and legal support on social welfare law in England and Wales”, 2015.

65 Interview 30 October 2015.



One individual Amnesty International spoke with, who had inter-connected immigration, family and welfare benefits legal problems, told the organisation:

“It is very difficult, I’m always being sent from one person to the next who might be able to give me advice, but no one can help me in all the areas I need. I don’t know where to turn to get the help that I need. It stresses me out too much as I don’t understand how it works. I feel like this has affected my health, it’s all been too much for me.”<sup>66</sup>

### 2.3 Exceptional Case Funding: An inadequate safety net

“We do sometimes apply for exceptional case funding, but the whole process is incredibly problematic. The risks involved, the work required, the way it’s set up. The whole system just creates an additional barrier which vulnerable people with difficult complex cases have to get through. It’s simply inadequate.”

Michael Tarnoky, Director Lambeth Law Centre, 29 February 2016

The UK government has repeatedly emphasised that the availability of Exceptional Case Funding (ECF) will ensure that legal aid is available to the most vulnerable in society, and will ensure that the government fulfils its international human rights obligations. Section 10 of LASPO provides for Exceptional Case 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.<sup>67</sup>

In practice, however, the ECF scheme is 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.

As a safety net for the most vulnerable and marginalised members of society, it is failing; the evidence strongly suggests that significant numbers have slipped or are slipping through. How many of this silent, hidden group have actually been affected is, as was outlined in the methodology section, inevitably unknown, but it is precisely for these reasons that the government should investigate further.

#### **Jane: Overwhelmed by the process of accessing Exceptional Case Funding<sup>68</sup>**

Jane is from West Africa, she has been living in the UK for over 10 years and is trying to secure her and her family’s immigration status. She has four children who were all born in the UK. Two of her sons have a diagnosis for an Autistic Spectrum Disorder, both require substantial round the clock care due to developmental delays, and one of the children is non-verbal. Her eldest child has British citizenship, having lived in the UK for the first 10 years of his life. Jane told Amnesty International she is particularly scared about the discrimination and harmful impact that her two children could face because of their disabilities if they were removed from the UK, where they have lived all their lives. Following a refusal by the Home Office of her human rights claim to stay in the United Kingdom, Jane needed to submit an appeal.

Continued over »

66 Interview 9 May 2016

67 It should be noted that these criteria for exceptional case funding does not include any UN treaty rights to which the UK is a party and could be violated through a failure to provide legal aid.

68 Interview 17 May 2016. Name has been changed.

Jane and her family have been living in severe poverty, including periods of homelessness. By 2014, the family were sleeping on night buses for shelter, while Jane was eight months pregnant with her fourth son.<sup>69</sup> Jane tried to get legal help to resolve her and her family's immigration status. Jane said she rang the legal aid telephone gateway where, after great difficulty navigating through the system, she was eventually given a list of solicitors. All of the solicitors she phoned told her she was not entitled to legal aid and so they could not take her case. Jane told Amnesty International she could not afford to pay, "How could I afford a lawyer? The little money I had was spent on bus passes and sandwiches for the children". The stress on Jane and her kids has been severe.

"One day my son had to call an ambulance for me. I totally broke down. I was really sick. From my head to my toe. It's like when someone is on the floor and they put a car on top of them. I couldn't even lift my hand. I lay on the sofa and couldn't move. My son was 10. He's able to understand. I kept trying to tell him I'm OK but he sat beside me. I fell asleep and when I woke around midnight he was still there watching me, he'd covered me with a blanket. I got up and I started trying to do things, put the shopping away that sort of thing. He said mummy you need help. The next morning the children's dad phoned and I couldn't talk properly so he told my son to phone the ambulance. When they arrived the paramedics said it was severe exhaustion. They asked me who I had, who could help. I told them I had no one."

Jane and her family's case is legally complex and the additional emotional stresses on Jane make it difficult for her to navigate and understand the legal process. She also required expert evidence, including an Independent Social Worker report, to address the best interests and needs of the children. Her only possibility of accessing legal aid was through Exceptional Case Funding. An NGO working with families in extreme poverty was able to refer Jane to a law centre to make an ECF application on her behalf. That application was refused in December 2015. Her case was referred on to another law centre which decided to resubmit an application for ECF on Jane's behalf. In July 2016 the Home Office reversed its initial decision with respect to Jane and her family.

"To get any immigration help is very, very hard. Some people when I called, would say I don't do that anymore. Others who still do were saying it would cost thousands of pounds. Even if I prostitute myself, I could not be able to get this. It's really, really tough. I can't do it without help. The only thing that keeps me going is the boys. I can't lie to you. If I think about what I'm facing, I will be in a mental hospital. But I know that my boys won't be able to cope without me. I'm keeping strong for the boys. I'm their mother. If I fall to pieces – that's it."

The first year the ECF scheme operated 1,315 applications were made, with only 16 people granted funding – a success rate of just over one per cent.<sup>70</sup> Following serious concerns about individuals being denied funding under the ECF scheme, a judicial review was brought challenging the refusal to grant legal aid in relation to six claimants. The High Court of England and Wales found that "the Guidance", which lays down the principles as to when ECF should be granted, was unlawful.<sup>71</sup> In particular, it 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 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

69 Following Judicial Review Proceedings against two local authorities for failings in their duty of care towards Jane and her family, they have now been housed and are receiving financial assistance.

70 Legal Aid Statistics in England and Wales Legal Aid Agency 2013-2014 Ministry of Justice Statistics bulletin, Published 24 June 2014. This figure refers to non-inquest applications

71 In the case of Gudanašvičienė and Ors v The Director of Legal Aid Casework and the Lord Chancellor [2014] EWCA Civ 1622, 15 December the Court states that the success rate for non-inquest ECF applications has risen from one per cent to thirteen per cent.

breach only in rare and extreme cases. The Court also found the Guidance wrongly suggested that the procedural protections contained in Article 8 (right to a family and private life) did not apply in immigration cases so that a refusal of legal aid in these cases would not breach the ECHR. These findings were upheld by the Court of Appeal in December 2014.<sup>72</sup>

Following these rulings, changes were made to the Guidance and there has been a welcome increase in successful ECF applications.<sup>73</sup> However, the number of applications for ECF being made has remained around 1,200 per year.<sup>74</sup> This is substantially lower than the Ministry of Justice's own figures that predicted 5,000 and 7,000 applications for ECF would be received each year.<sup>75</sup>

The reasons for this statistical disparity are numerous and complex, but Amnesty International considers that they reflect the reality that the ECF scheme is not protecting disadvantaged and vulnerable people's right to equal and effective access to justice.<sup>76</sup>

**"Our recent experience of the scheme suggests that there remain considerable barriers to access, particularly for unrepresented applicants who can struggle to get an application accepted as such by the LAA. We are, therefore, concerned that in practice large numbers of individuals who are prima facie eligible for ECF are still not able to obtain it."**<sup>77</sup>

### The Public Law Project

One key problem is that the way in which the scheme operates has created systemic disincentives for legal aid providers to submit ECF applications. Most organisations supporting vulnerable and disadvantaged clients who spoke to Amnesty International said that they found it difficult to find solicitors who would make ECF applications for individuals, particularly outside of London, due to the factors outlined below. These challenges are exacerbated for those trying to find help without the assistance of an NGO or similar support group, who have pre-existing relationships with organisations and lawyers willing to carry out ECF applications. The more isolated an individual is, the more difficult it is likely to be for them to find help. As a result there is real likelihood that many individuals who are entitled to legal aid are falling through the safety net.

Amnesty International spoke with lawyers who had either considered or had made ECF applications. They reported that even with improved success rates, they and others were often unwilling to do the

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

73 *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, para. 50 and 77. Recent statistics from the Ministry of Justice state that between April and June 2016, 214 (53%) of Exceptional Case Funding applications that had been determined were granted. This is the highest number of grants in a single quarter since the ECF scheme was introduced in 2013, see the Ministry of Justice and Legal Aid Agency, *Legal Aid Statistics in England and Wales April to June 2016*, accessible here [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/556216/legal-aid-statistics-bulletin-apr-to-jun-2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/556216/legal-aid-statistics-bulletin-apr-to-jun-2016.pdf)

74 *Legal Aid Statistics, September 2013-December 2015*, from the Ministry of Justice and the Legal Aid Agency. In its most recent quarterly legal aid statistics report the Ministry of Justice has stated that the number of ECF applications in that quarter had increased to 424 applications, the most received in a single quarter since July to September 2013.

75 Report by the 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).

76 Prior to *Gudanaviciene and Ors v The Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622, 15 December 2014 early evidence from a consultation by the National Audit Office found that the application process created disincentives to apply for Exceptional case funding which included low success rates as well as complex and time consuming forms. National Audit Office, "Implementing reforms to civil legal aid" 2014, Paragraph 15 and 3.7. This conclusion was supported in 2015 by the House of Commons Justice Committee which reported evidence that amongst other considerations, low application success rates had depressing effects on the number of applications made as well as practitioners no longer considering ECF applications acceptable use of charitable funds (paragraph 42). See also generally, paragraph 34 in which the Committee considers the question of why the grant for exceptional case funding was so low. 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" 4 March 2015. A report by the Children's Society highlighted similar barriers as well as finding that the poor decision making quality of the process discouraged practitioners from making ECF applications. The Children's Society, "Cut off from Justice" 2015, paragraph 59.

77 Evidence of the Public Law Project to the Labour Party Review of Legal Aid, Amnesty International has also met and interviewed staff at the Public Law Project.

work, especially when they had no prior relationship with the client, given the time it takes to do an ECF application (between six and 10 hours) and the fact that there is no payment for unsuccessful applications. The risk for firms which are often already operating on the narrowest of margins was too high.

The challenges associated with finding lawyers willing to make ECF applications due to the structural disincentives the scheme creates were outlined in a potentially landmark case of a man identified by the courts only as “I.S”. I.S is a blind 59-year-old Nigerian, who has profound cognitive impairment and is unable to care for himself. ECF was applied for by the Official Solicitor to regularise his immigration status and thereby qualify for mainstream community care and health services.<sup>78</sup> It was refused, in light of which a judicial review was brought arguing that the way in which the ECF scheme operated was inherently unfair and therefore unlawful. In particular, that availability of professional support and advice for the making of ECF applications is so exiguous that it should be condemned as inherently unfair.<sup>79</sup> This problem is all the more acute because the complexity of the ECF scheme makes it inaccessible for individuals who do not have legal support and are indeed magnified for people who do not have litigation capacity, as in the case of I.S.

Despite accepting many of the criticisms of the ECF scheme as “troubling” and the real obstacles facing people trying to access it, the Court of Appeal of England and Wales ruled by a majority that these failings did not render the system so inherently unfair as to be unlawful.<sup>80</sup> This ruling reversed an earlier decision by the High Court which found that the ECF scheme was not:

“meeting its need to ensure that an unrepresented litigant can present his or her case effectively and without obvious unfairness. [...] Those who are unable to pay for legal assistance are suffering in a way that Parliament cannot have intended.”<sup>81</sup>

Amnesty International’s own research, however, strongly supports the view of Briggs LJ, the dissenting Court of Appeal judge in the case of I.S., who found the defects in the ECF scheme to be systematic and inherent and thus that the scheme was inherently unfair:

“I have asked myself whether the fact that a significant number of deserving individuals do obtain ECF, as the result of the undertaking of the work necessary for their applications by solicitors who must do so on an assumption that their work is likely to remain unpaid, and therefore pro bono, rescues the ECF scheme from inherent unlawfulness. I do not consider that it does. It is notorious that, despite their laudable and valiant endeavours, those lawyers who offer to work pro bono for deserving clients are insufficient to meet anything approaching the demand for their services, so that there must be (however difficult to quantify) a substantial class of deserving applicants who can neither obtain ECF on their own, nor obtain the legal assistance necessary for them to do so.”<sup>82</sup>

The case is now pending before the Supreme Court.

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78 I.S lacks litigation capacity and is represented through the Official Solicitor. He was one of the parties in the case of *Gudanaviciene and Ors v Director of Legal Aid Casework* [2014] EWHC 1840 (Admin). Following that case on 18 August 2014, the Director of Legal Aid formally determined that IS qualified for legal aid to regularise his immigration status.

79 *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. Presenting evidence from legal firms responsible for 20 percent of all ECF applications and 44 percent of all successful applications lawyers argued “It is economically irrational for legal aid firms to work on ECF applications where (i) unsuccessful applications are unpaid, (ii) 87% of applications are unsuccessful, (iii) it takes many hours to make an application, which would otherwise have been spent on chargeable work, (iv) successful applications are paid at ordinary legal aid rates and (v) legal aid firms are struggling to survive. In those circumstances, it would be surprising if legal aid firms were willing to make applications. The evidence before the Judge from legal aid providers was that they were unwilling to act in an economically irrational way and would not make ECF applications for new clients. The volume and quality of that evidence was unprecedented in judicial review proceedings.”

80 *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

81 *I.S. (by his litigation friend the Official Solicitor) v Director of Legal Aid Casework and the Lord Chancellor* [2015] EWHC 1965 (Admin) §80.

82 Lord Justice Briggs, *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, §75.

Many who spoke with Amnesty International shared the view that only individuals with very serious and possibly multiple vulnerabilities would likely be eligible for ECF because of the way the system operates, particularly when considering applications for legal help, as opposed to legal representation in court. As a consequence they did not consider ECF to be a realistic option for many disadvantaged individuals, in spite of the challenges that they would have accessing, navigating and understanding the legal processes and the fact they had meritorious cases. Amnesty International was given examples of the following vulnerabilities that were encountered by organisations and lawyers supporting people who were no longer entitled to legal aid, but who they had decided would not be sufficiently likely to secure ECF to make an application worthwhile: mental health problems (a range of challenges from depression to people with diagnosed mental illnesses); learning disabilities; low numeracy and literacy; language problems; medical conditions such as terminal illness; and alcohol and drug dependency.

The systemic and inherent failings of the ECF system render it an inadequate safety net to ensure vulnerable people's rights are protected. It also cannot act as the panacea to the wider effects the cuts have had on access to justice in England.

# 3. LEFT UNHEARD: THE IMPACT ON VULNERABLE AND MARGINALISED GROUPS

**‘I don’t know the law, I don’t know what to say to make sure I’m heard. I just don’t know how to do it on my own.’**

**Alfred**, private family law case, interview 1 July 2016

The cuts to civil legal aid under LASPO have had a particularly serious and disproportionate impact on disadvantaged and marginalised people in the UK. A number of people directly impacted by the changes in the legal aid regime told Amnesty International that they felt left in the dark, isolated, under significant added stress, and in some cases as if they lacked a vital lifeline. This chapter documents the impact on a number of specific groups: migrants, children and young people and people with disabilities or other vulnerabilities that make engaging in legal processes more difficult.

## 3.1 Migrants and refugees

“There are families and children who should be able to stay, but they need legal advice to help them. 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 storing the problems up for later, a price they and society will have to pay for at a later date.”

**Rosalind Compton**, Solicitor, Migrant Children’s Project, Coram Children’s Legal Centre, interview 23 October 2015

Migrants and refugees are a diverse group and experience a range of distinct problems and inequalities due to their immigration status. They can experience discrimination on multiple grounds, including socio-economic factors. They have been significantly impacted by the legal aid cuts in a number of different areas. This report, however, focuses on two areas that have been taken out of scope for legal aid: Article 8 (right to private and family life) immigration cases and family reunification cases for refugees.

### The right to a family life in immigration cases

“It was a very difficult time for us. We had lost everything. We were left just with our children. We had no support left. I was really depressed, wondering, am I really alive? It was like I was dreaming. I never thought I could find myself in this situation.”

**Rachel**, who has three children all born in the UK, has a family Article 8 immigration case. Interview 17 May 2016

In certain circumstances people have a right to stay in the UK because of their right to a family life, which is protected by Article 8 of the European Convention on Human Rights. For example, while the domestic Immigration Rules may not say so, a child who was born or grew up in the UK, a mother or father whose children are all British citizens or a person who is married to a British citizen or someone with settled status, may have a prima facie right to remain. However the right to family life is not absolute, which means the rights of the individual and those of her or his family,

can be weighed against the government's need to, for example, maintain immigration control or prevent crime and disorder. Interference with family life is therefore acceptable as long as it meets tests of lawfulness, necessity and proportionality.<sup>83</sup>

### Procedural protections of Article 8

The right to a family life under Article 8 of the European Convention on Human Rights contains procedural protections that are similar to those under Article 6, though the Article 8 test is broader than the Article 6(1) test.<sup>84</sup> Under Article 8, the European Court of Human Rights has articulated the test as an examination as to whether those affected have been involved in the decision-making process, viewed as a whole, to a degree sufficient to provide them with the requisite protection of their interests.<sup>85</sup>

In the case of *Gudanaviciene and others v Director of Legal Aid Casework and the Lord Chancellor*, the Court of Appeal of England and Wales confirmed that in certain cases the refusal to provide legal aid would be in violation of the procedural aspects of Article 8 of the European Convention on Human Rights.<sup>86</sup> The Court stated that whether legal aid was required in an Article 8 case would “depend on the particular facts and circumstances of each case, including (a) the importance of the issues at stake; (b) the complexity of the procedural, legal and evidential issues; and (c) the ability of the individual to represent himself without legal assistance, having regard to his age and mental capacity.”<sup>87</sup>

The government has argued that Article 8 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.<sup>88</sup> Amnesty International believes this view is not tenable given the challenges people face in these cases. Firstly, immigration law is complex and immigration rules often change. Indeed, for this reason immigration advice is heavily regulated, which greatly limits what sources of advice and assistance are permitted in the absence of legal aid.<sup>89</sup> Small errors and

83 In deciding whether there exists a right to family life under article 8(1) Strasbourg and UK jurisprudence consider whether there exist close personal ties, thereby extending the right to family life beyond the typical nuclear family (*Lebbink v The Netherlands* [App. NO. 45582/99, judgment of 1 June 2004 para 36; *Singh v Entry Clearance Officer (ECO), New Delhi* [2004] EWCA Civ 1075). Thus, the right to family life takes account of modern familial relationships such as unmarried/cohabitating couples who live with their children (*Jobnston v. Ireland*, [1986] ECHR 9697/82) the relationship between adopted children and adoptive parents [*X v. France* [1982] EHRR ], and adult children dependent and their parents [*Singh & Anor v SSHD* [2015] EWCA Civ 630, [2015] All ER. However, the right to a family life under Article 8 is a qualified right. Thus, individuals must also show that the violation of their right to family life is disproportionate, as prescribed under Article 8(2). This includes considerations of whether the violation “is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.”

84 See, for example, *W v United Kingdom* (1987) 10 EHRR 29 (1998), *Airey v Ireland* [1979] ECHR 6289/73 , having decided that there was a breach of article 6(1), the ECtHR went on to hold that the applicant was denied an “effectively accessible” legal procedure to enable her to petition for a judicial separation and that this also constituted a breach of article 8. Also *AK and L v Croatia* [2013] ECHR 37956/11. See also *Gudanaviciene and others v Director of Legal Aid Casework and the Lord Chancellor*, [2014] EWCA Civ 1622, 15 December 2014, para. 70, which notes that: “The article 8 test is broader than the article 6(1) test, but in practice we doubt whether there is any real difference between the two formulations in the context with which we are concerned.”

85 See, for example, *W v UK* (1998), *Airey v Ireland* [1979] ECHR 6289/73, having decided that there was a breach of article 6(1), the ECtHR went on to hold that the applicant was denied an “effectively accessible” legal procedure to enable her to petition for a judicial separation and that this also constituted a breach of article 8. Also *AK and L v Croatia* [2013] ECHR 37956/11 *W v UK*; *Ciliz v Netherlands* [2000] ECHR 29192/95 ] and *Senigo Longue v France* [2014] ECHR 2014.

86 The Court of Appeal confirmed an early ruling from the High Court of England and Wales that the Guidance, which lays down the principles as to when ECF should be granted, was not compatible with article 8 of the Convention in immigration cases. The Guidance wrongly stated that there is nothing in the current case law that would put the UK under a legal obligation to provide legal aid in immigration proceedings in order to meet its procedural obligations under article 8.

87 *Gudanaviciene and others v Director of Legal Aid Casework and the Lord Chancellor*, [2014] EWCA Civ 1622, 15 December 2014, para. 72.

88 Ministry of Justice ‘Reform of Legal Aid in England and Wales: the Government Response June’ 2011.

89 *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

mistakes will lead to applications being returned or refused. Without advice, given the complexity of the law, people can be left without knowing what their legal rights and entitlements are or how to argue their case based on the current law and immigration rules.

Although Amnesty International acknowledges that not every individual who wishes to make an Article 8 immigration claim will necessarily be successful with their application on its merits, lawyers and early legal advice can play a role in assessing a case and deterring a person from making a claim if it is not likely to succeed. On the other hand, the challenges facing those with *prima facie* compelling Article 8 immigration cases are daunting. Those who spoke with Amnesty International emphasised that the complexity of the law in this field meant 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. Whilst a lack of substantive understanding of the law clearly inhibits effective engagement with legal proceedings, many NGOs and lawyers emphasised that a lack of knowledge of legal procedure in immigration proceedings can be just as prohibitive, be it issues such as timeliness and invalidity; holding the other party to account through disclosure; understanding and completing forms and so forth.

Furthermore, a critical issue raised across the board was the matter of evidence gathering and presentation. Expertise and specialist knowledge are required to examine a case file, identify what evidence is needed and how it can be obtained. 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 best interests and 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. 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. Legal aid is critical therefore both in order to get an expert to identify what evidence is needed and how it can be obtained, but also to get disbursements to pay for it. The Immigration Law Practitioners' Association has made clear this means that "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>90</sup> As Jo Renshaw, an immigration lawyer described to Amnesty International:

"Once a client came to me and she was totally destitute. She had baby twins who weren't British and wanted to make an application for further leave to remain on mental health grounds, but I knew it had little chance of success. There is no way though she could have navigated the system effectively on her own, so in the end I felt so bad for her that I took the case pro bono and did the best I could, but it has been an incredible burden in terms of the time it has taken, over two years we have been doing work for her. I can't represent her fully and adequately as I do in other cases. I can't pay for the reports that she needs, which may have made some difference to her case. So I just don't know what the outcome of her case will be."

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 staying with insecure immigration status in the UK, leaving them destitute and potentially open to exploitation. As Jonathan, who has four children in the UK and is fighting deportation on Article 8 family grounds told Amnesty International:

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90 Immigration Law Practitioners' Association, "ILPA evidence to the Bach Commission" available here: <http://www.ilpa.org.uk/data/resources/32109/16.04.29-ILPA-to-Bach-Commission-on-Access-to-Justice-call-for-written-evidence.pdf>



“If I could meet a Minister who was in charge of legal aid for immigration, I would say, give us a chance. We are less privileged people, give us a second chance to stay with our families, our kids. We should have a fair chance to be able to argue our case.”<sup>91</sup>

Interviews carried out by Amnesty International also indicate that this group often has additional vulnerabilities or challenges that makes accessing and navigating the legal system more difficult. Across those Amnesty International spoke with who work with migrants and refugees, examples were given of the additional challenges facing those from this community in accessing justice including, language barriers, mental health problems, problems with literacy, destitution, homelessness and isolation.

### Reliant on pro bono support

Victoria has been living in London since 2001.<sup>92</sup> Her son was born in the UK in 2002. After overstaying her permission to remain in the UK, suffering precarious living situations with no access to funds and relying on charity she sought advice and finally submitted an application for leave to remain outside the immigration rules, based on her son’s rights to private and family life under Article 8 of the European Convention of Human Rights. At the time, she was eligible for legal aid and was represented by a solicitor who lodged the application. In 2011 the Home Office granted her and her son permission to remain in the UK on a discretionary basis for three years. Before the end of that period Victoria had to apply for an extension of time. By then she was no longer eligible for legal aid and could not afford to pay for representation. She was referred to Islington Law Centre which was able to take the case on pro bono. Victoria, however, suffers from mental health problems and whilst the application was being made she became progressively mentally unstable and was placed under the care of her GP and hospital. An application was made by the law centre, including detailed evidence with regard to Victoria and her son’s current situation in the UK. In 2014, the Home Office granted further leave to remain in the UK. Without the law centre’s help she would not have been able to make the application herself. This pro bono support, however, is only available to a limited number of people. Many in a similar situation will have to face these challenges alone.

**Immigration Detention:** Many of the challenges highlighted above are exacerbated for those challenging removal on Article 8 grounds while in immigration detention.<sup>93</sup> Amnesty International is particularly concerned by the lack of access to advice, information and legal assistance for those held under immigration powers pending deportation following the completion of a criminal sentence, who remain located in an ordinary prison rather than an immigration removal centre.<sup>94</sup> As a lawyer working for a specialist legal charity, Bail for Immigration Detainees, explained to Amnesty International:

“LASPO has had a tremendous impact upon the people with whom I work and their problems are compounded by being in prison. They are being faced with huge life changing decisions and have no advice to help them through. There are no legal surgeries in prison so access to advice is very hard. Lots of people are just operating in the dark they can’t reach out or don’t know where to reach out. There is a lack of access to communication as many of those in prison that are held under immigration powers aren’t distinguished from those under prison regime so they live with the same restrictions. So a lot of work has to be done via letters, but letters take a long time and deportation often is a short time frame.”<sup>95</sup>

91 Interview 7 March 2016.

92 This is a reported case from Hackney Migrant Centre, Interview 19 October 2016.

93 See report by BiD “Rough Justice: children and families affected by the 2013 legal aid cuts” 24 September 2015

94 Since 2008, any foreign national who has served a criminal sentence of 12 months or more has been subject to automatic statutory deportation order, regardless of length of residence in the UK.

95 Interview 30 November 2016

Amnesty International heard many case examples of individuals trying to challenge a removal decision from immigration removal centres and spoke directly with three individuals who were or had been in detention. There was a repeated concern about the difficulties gaining access to advice and legal support, which led to a lack of understanding of what rights people had and made it more difficult to advocate for them. A number of the cases involved people with additional vulnerabilities, notably mental health problems and poor literacy, which made engaging with the legal process an additional challenge.

### **Billy: Challenging deportation for an offence committed as a child**

Billy is 21 and was born in the UK. He is currently in immigration detention and trying to challenge a post-conviction deportation notice.<sup>96</sup> Whilst the conviction was for a serious offence, he committed it whilst he was still a child. He told Amnesty International he only discovered he had a problem with his immigration status on the day he was due for release from prison. Instead of being released as he had expected he was served with his deportation notice and detained under immigration powers. He told Amnesty International:

“I spent the first three months in detention going around in circles as I didn’t have anyone to help. At first I didn’t realise I couldn’t get legal aid, but then I started asking around and trying to find a solicitor and realised I couldn’t get any help unless I could pay. But I don’t know anything about immigration, why would I? I was born in the UK. I’ve always lived here I’ve never been anywhere else but here. I didn’t realise I wasn’t British. There’s no way I can do my case on my own, it’s so complex, it’s got different elements, different things that have to be argued, I don’t know about those parts of the law I don’t know what it is I’m meant to say. I just know I was born here and have always lived here I can’t imagine being sent somewhere I have never been.”

The cuts to legal aid available to migrants in general have also been keenly felt by recognised refugees who are seeking to be reunited with their family members who are still outside the UK.

### **Family reunification for refugees**

“Family reunion cases have a huge impact. These are people who have been torn from their families through no fault of their own, through war conflict and violence. People who have been through so much already and whose families can be left in horribly dangerous and difficult positions. They need help to get through the process. Without that help it will be very hard for them to finally be reunited with families.”

Sarah Sadek, Immigration and Asylum Solicitor-Advocate, Avon and Bristol Law Centre, Interview 8 December 2015.

Following LASPO, refugees applying to have their family join them in the UK are no longer eligible for free legal advice and assistance to help them through what can be a complex process. In December 2014, the Court of Appeal of England and Wales ruled that family reunification cases should be eligible for Exceptional Case Funding, but rejected the earlier finding of the High Court that these cases were entitled to an automatic provision of legal aid.<sup>97</sup>

<sup>96</sup> Telephone Interview, 28 January 2016.

<sup>97</sup> In June 2014, the High Court of England and Wales ruled that because family reunification was an obligation arising out of the Refugee Convention – widely interpreted – it should actually remain in scope for legal aid (*Gudanaviciene and others v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWHC 1840 (Admin)). The Court of Appeal of England and Wales overturned this finding following an appeal from the government. The Court confirmed that while family reunification cases could be eligible for exceptional case funding they were not entitled to automatic provision of legal aid as the right to family reunion was not a right arising directly from the Refugee Convention narrowly interpreted. Lawyers have requested permission to appeal to the Supreme Court, which is currently pending. Amnesty International considers the right to family reunification to arise directly from the refugee Convention and place a corresponding obligation on the state. It should therefore be considered in scope for legal aid.

**International law and the right to family reunification:** The right to found the family unit and the state's duty to ensure its protection is enshrined under numerous international legal instruments which the UK has ratified, with the right to family reunification considered a corollary of these rights.<sup>98</sup> The Convention on Rights of the Child also expressly provides for a right to family reunification<sup>99</sup> The right to family reunification also arises from international refugee law, with the 'Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons' widely referenced as providing a right to family reunification arising from the 1951 Refugee Convention.<sup>100</sup>

Amnesty International believes that, given what is at stake for families, there should be an automatic provision for legal assistance in family reunification applications made by refugees.<sup>101</sup> Separation of families can have a devastating impact on peoples' lives, their rehabilitation from experiences of trauma and their ability to integrate and adapt to their country of asylum. Those applying for family reunification are often dealing with the fact that their family members are left in precarious and often unsafe conditions. Many refugees seeking family reunion also often present with additional vulnerabilities. Emotional or physiological issues for applicants are common. Many have experienced serious trauma which can be exacerbated by ongoing separation from their families.<sup>102</sup>

Furthermore, Amnesty International considers that the government's argument that family reunion is a "straightforward immigration matter" underestimates the complexities that exist in these cases.<sup>103</sup> Legal advisers play an essential role in identifying and obtaining alternative evidence that can support an application. Essential documentation may be unavailable for a variety of reasons, including the nature of flight and the environments from where people have come. Legal advisers play a critical role in helping to explain this in cover letters to applications and in identifying alternative evidence. Some documentation requires legal advisers to qualify what is sufficient and effective for an application. Furthermore, as in immigration cases obtaining evidence, such as DNA testing, which can be critical in demonstrating family links, is expensive and no longer funded through legal aid.

In addition to the above complexities present in most "standard" reunification cases there are a number of types of family reunion applications which bring additional challenges. Notably, cases involving adoption, de facto adoption, stepchildren and siblings are inherently complex. They require legal advice in determining the eligibility of the applications, support in documentation gathering,

98 Both the UDHR and ICCPR emphasise that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State". Notably, in relation to Article 23 ICCPR, Human Rights Committee General Comment 19 outlines that, "the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reason." These rights are also recognised in the ICESCR, Article 10, outlining that; "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children." The principle of family reunification has been increasingly recognised under international humanitarian law through the 4th Geneva Convention and its Additional Protocols.

99 Article 9(1); Article 10(2) The Convention also outlines the manner in which family reunification cases should be handled, outlining that family reunification applications by a child or parent should be, "...dealt with by States Parties in a positive, humane and expeditious manner". Notably, in similar language to the 4th Geneva Convention, the CRC calls on state parties to protect children seeking or holding refugee status and to co-operate in aiding such children in the tracing of family members for the purposes of obtaining information necessary for family reunification.

100 'Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons' Recommendation B

101 Legal assistance in family reunification applications by refugees was left in scope in Northern Ireland – a move that has been attributed to a combination of factors, including the complexity of the legal process, the low cost to the public purse for family reunification applications and that "...immigration and asylum is much less of an issue in Northern Ireland." Ministry of Justice 'A strategy for Access to Justice: The Report of Access to Justice (2)' 2015.

102 Red Cross, Not so straightforward the need for qualified legal support in refugee family reunion, British Red Cross

103 The Red Cross carried out a detailed piece of research on this point: British Red Cross, "Not so straightforward the need for qualified legal support in refugee family reunion, British Red Cross, 2015. Amnesty International's own research, while more limited, fully supports the findings of the Red Cross report. It is worth also noting that many of the people in this group have difficulties with the English language which makes engaging in the process effectively more challenging. The Red Cross found that 62 per cent of sponsors required English language support with their refugee family reunion applications and children.

and reference to precedent and existing policy and guidance. There are also a number of situations where family reunion is applied for outside of the immigration rules on compassionate grounds.<sup>104</sup> One lawyer described to Amnesty International such a case she was helping with pro bono:

“A father was trying to get his two daughters and wife to join him the UK. However, the two daughters had just turned 18 and so are no longer eligible to come to the UK. His wife could join him, but won’t leave her daughters alone in country where they would have been in a precarious position. His application will have to be outside of the rules, and it’s complex as he has to build an argument about why this case should be an exception, he has to provide evidence about the situation facing his daughters and wife. He has to make that convincing and understand what grounds the Home Office might deem the case compelling enough to grant it. That’s tough for a lawyer to do, let alone a person with no knowledge and experience of the system.”<sup>105</sup>

### **In their own words: Stories of family reunification<sup>106</sup>**

A number of recognised refugees in the UK (or people assisting them with their applications) dealing with or who have dealt with applications for family reunification, expressed their concerns and frustration at being unable to fully understand or negotiate the complex legal system in order to ensure their families were also able to enjoy the protection that they had managed to obtain.

**Belay** is in his early twenties and is from Eritrea. His wife is currently in Sudan in a refugee camp on her own. He came to the UK in 2012 and is a recognised refugee. “It’s been very difficult: we have been apart for three years. For her it’s very hard, there is no safety for her in Sudan: she has no family, no protection, no support. She is very scared, it’s very difficult for her. My hope for the future is that we can be together. You make an oath and you say you will be together, you say I will not leave you, that is the promise you make when you marry, but we weren’t safe and I had to leave. Now I need her here with me where we can both be safe. I just started to get help from Red Cross to do the application, it’s been good to get help I can’t do it alone, I don’t understand what I am meant to do.

**Ruth** is from central Africa. A student helping her with a family reunification application relayed her story to Amnesty International:

“The case I’m helping with at the moment is really difficult. Ruth was living with her sister and her sister’s kids. Her sister was then killed by soldiers and so she became the main carer for the children. They were at church one Sunday when soldiers came and they started to kill people. She ran, everyone ran but later she couldn’t find the kids so thought they had been killed. So she fled. When she reached the UK she found out two of the kids had survived the attack. But she has no documents to prove that relationship. She has been diagnosed with PTSD. She wants the children to join her, to care for them, they were her dependants and all the family she has left, it’s really the only hope she has. The judge in her asylum case made a positive determination and said she was credible and her story was credible. So we helped her make an application outside of the rules. That was refused by the Home Office. We’ve lodged notice of appeal of family reunification and wondering if we can get ECF for her. But there is no way she could do this alone, she wouldn’t know where to start.”

<sup>104</sup> This refers to cases where applicants do not conform to the immigration rules on refugee family reunion, but whose circumstances may be deemed compelling and compassionate enough that they still warrant consideration for the family to enter the UK.

<sup>105</sup> Interview 2 November 2015

<sup>106</sup> These interviews were all carried out on 2 November 2015

## The residence test

The UK government has put forward plans to introduce a residence test for civil legal aid.<sup>107</sup> With certain exceptions, such as for asylum-seekers and resettled refugees, the test is designed to limit all funding to people who are lawfully resident in the UK and who, at some point, have been lawfully resident for at least 12 months continuously. The result of the test will mean that any individual recently moved to this country, or who has insecure immigration status, and who is treated unlawfully (eg by the police, their landlord, the NHS or a local authority) will have no access to justice unless they are in a position to pay. Many of those who will get caught in this test are vulnerable and will not have the financial means to pay for legal representation. Such a residency test is inherently discriminatory in so far as it disproportionately affects non-nationals and is fundamentally contrary to the principle that all individuals should have equal access to justice.<sup>108</sup>

On 18 April 2016, the Supreme Court ruled that the government's plans to introduce a residence test via secondary legislation were unlawful because the Lord Chancellor did not have the legal power to introduce the test – it was *ultra vires* the enabling statute.<sup>109</sup> Amnesty International hopes that the Supreme Court's ruling will bring an end to the government's plans to introduce the residence test. However, concerns remain that the government may, in the future, seek to alter LASPO in order to grant the Lord Chancellor the necessary powers to introduce a residence test.

## Victims of trafficking

While the government included provisions in LASPO to ensure that victims of trafficking would still have access to legal aid, those working with this vulnerable group have raised concerns that there are serious practical impediments for victims to access legal aid in the context of employment law, to seek redress against their exploitative employer.

Evidence from NGOs shows that many victims are unable to access advice because of the limited number of providers able to deal with compensation claims and the limited number of such claims each one is permitted to handle under the new system.<sup>110</sup>

In March 2016, the High Court of England and Wales gave permission for a judicial review to be brought by the Anti-Trafficking and Labour Exploitation Unit challenging the review of legal aid provision for victims of trafficking and modern slavery in the context of bringing claims against their traffickers. Granting permission, Justice Blake stated “it was arguable that the arrangements amounted to a breach of the government's duty to make legal aid available to victims of trafficking.”<sup>111</sup> In response, the government announced it would carry out an urgent review of the provisions to identify whether there are barriers to advice and assistance; if so, the causes of these; and what steps should be taken as a result.

This review should result in tangible changes that will ensure victims of trafficking are able to exercise their right to seek reparations and hold to account those who have exploited them.

107 Ministry of Justice Consultation paper, *Transforming Legal Aid: Delivering a more credible and efficient system*, (2013)

108 The Special Rapporteur on the independence of judges and lawyers has also stated clearly that “access to legal aid must be available to all individuals, regardless of nationality or statelessness, including asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State party,” Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaut 15 March 2013, UN Doc, A/HRC/23/43, page 20

109 LASPO 2012 s. 9(2) imbues the Lord Chancellor with the power to add, vary or omit services under Schedule 1 of the Act.

110 Amnesty International met with ATLEU, 17 February 2016 and Kalayaan 26 January 2016, two NGOs that work closely with victims of trafficking and modern slavery.

111 Garden Court Chambers Press Release, “MoJ agrees to review legal aid in trafficking and labour exploitation cases”, 21 March 2016.

### 3.2 Impact on children and young people: An emerging two-tier system?

“Rights mean nothing without the knowledge and means to enforce them. Access to good quality information, advice, advocacy and representation is crucial if we are to understand our rights and responsibilities, deal with difficult problems in our lives and navigate our way to becoming confident and independent adults. However, many of us don’t currently receive the help and support we need. This has to change!”

**Make our rights a reality, Young People’s Manifesto**

The cuts to legal aid have had far-reaching implications for children and young people, their right to be heard and to have their best interests protected. This impact has been felt both directly, where the child or young person is party to the proceedings and indirectly in cases where the best interests of the child are very much at stake.<sup>112</sup>

#### Best interests of the child in family proceedings

“There is so much good stuff happening in family law, trying to make it less adversarial, focusing on children, and making it more pragmatic... a huge sea change that focuses on fairness and kids’ welfare. But all of this good work is for those who can afford it, for those who can pay. We have created a two-tier system where for those who can’t pay they are left without effective access, and the impact on them, and on their children can be huge and long-term. Fairness and equality should be at the heart of the system and that has now gone.”

Clare Hunter, family law solicitor, 13 November 2015

The cuts to legal aid have had far-reaching implications for children in private family law cases, where the child is not a party to the proceedings but where their best interests are very much at stake.<sup>113</sup> The UN Convention on the Rights of the Child (UNCRC) which the UK has ratified states that the best interests of children should be the primary consideration in all decisions affecting them (Article 3 (1)). This is of fundamental importance in the context of private family cases where the best interests of a child are clearly engaged, for example, in child access or contact arrangements, even though they are not party to the proceedings. Where 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 procedural guarantees of Article 8 (right to family life) and Article 6 (right to a fair trial) of the European Convention on Human Rights are also engaged in private family law cases and risk being undermined by the cuts to legal aid.

Concerns around the loss of legal help prior to a private family case going to court was highlighted in the first half of this report. This section therefore focuses on the challenges people face going through the court process without legal representation, as litigants in person, and the consequent impact on children.

It is clear that a core guiding principle of the family court system in the UK is the best interests of the child. The Children’s Act 1989 makes clear a child’s welfare must be the court’s paramount

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112 The Committee on the Rights of the Child has emphasised that relevant judicial proceedings affecting the child includes, amongst other things, separation of parents, custody, health care, social security, unaccompanied children, whilst typical administrative proceedings include decisions about children’s education health environment, living conditions and protection UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) UN Doc: CRC/C/GC/14 29 May 2013

113 It should be emphasised that other areas of law aside from private family law, where the best interest of the child is also at stake, have also been impacted by the cuts to civil legal aid. See for example Office of the Children’s Commissioner, Legal Aid changes since 2013, Child Rights Impact Assessment, September 2014 and Children’s Rights Alliance for England, UK implementation of the UN Convention on the Rights of the Child: civil society alternative report 2015 to the UN Committee - England, July 2015.

consideration when determining any question with respect to the upbringing of a child, something clearly reflected in case law. The Children's and Family Court Advisory and Support Service (Cafcass) also acts as a mechanism to safeguard and promote the welfare of children in family court cases, including by making provision for children to be represented. Nonetheless, the substantial cuts to legal aid in private family cases has made it more difficult for the courts to ensure that decisions are made in the best interest of the child.

The legal aid cuts have led to a substantial rise in the number of litigants in person in the family courts. 114 The central concern raised with Amnesty International by lawyers and NGOs is that 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.

This concern has been articulated clearly by Sir James Munby, the President of the Family Division, in the case of *Q v Q*, a child contact case where legal aid had been denied to one of the parties:

“[I]t seems to me that these are matters which required to be investigated in justice not merely to the father but I emphasise equally importantly to the son, as well as in the wider public interest of other litigants in a similar situation to that of the father here. I emphasise the interests of the son because, under our procedure in private law case like this where the child is not independently represented, fairness to the child can only be achieved if there is fairness to those who are litigating. There is the risk that, if one has a process which is not fair to one of the parents, that unfairness may in the final analysis rebound to the disadvantage of the child.”<sup>115</sup>

Litigants in person often lack the skills to represent themselves and present their cases effectively; it is the benefit of hearing the legal arguments on both sides that is important for the judge in making a determination in a case. In particular, litigants in person often struggle in the examining and cross-examining of witnesses and in making their own submissions. These processes require individuals to understand what is legally relevant to their case, and how to articulate and support their arguments. That is difficult for many people to do effectively without support, particularly in the context of cases that are emotionally charged. Indeed a number of lawyers recounted to Amnesty International scenarios they had witnessed when unrepresented individuals had focussed only on issues of personal significance that were not legally relevant, or had become agitated and frustrated during the hearing and as a result were not able to advocate for their case. As one unrepresented father in a child contact case said about himself:

“I'm not a very good talker. I'm not a big talker. I'm not confident. I get excited, it might come across as aggressive and I'm worried about that”.<sup>116</sup>

Some of these challenges are reflected in a case recounted by one lawyer, who provided free legal advice, but could not represent people in hearings:

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114 See the most recent Legal Aid Statistics in England and Wales April to June 2016 from the Legal Aid Agency and the Ministry of Justice which highlights an increase in litigants in person. National Audit Office, 'Implementing reforms to civil legal aid' 2014. The report examines the implementation of changes to civil legal aid as well as the value for money provided by the reforms, as stated in the Ministry of Justice's objectives. The report finds that the reforms resulted in a significant increase in the number of litigants in person in family courts, costing the MOJ an estimated £3.4 million in 2013-2014 (paragraph 1.19). The same report also suggests that there has been an increase in the number of litigants in person in civil law courts, but the available data makes this conclusion more difficult to determine (paragraph 1.24); The Family Court Unions Parliamentary Group conducted a survey of NAPO members, which is the largest trade union for staff in Cafcass. In addition to members reporting a dramatic increase in the number of litigants in person, they also outlined that prior to the introduction of LASPO, it was more likely that both parents would be represented in court than neither, but post LASPO figures show that it is 10 times more likely that two parents will begin proceedings without any legal representation than both begin proceedings with a solicitor. The Family Court Unions Parliamentary Group, 'The impact of legal aid cuts on Family Justice' April 2014, page 4.

115 *Q v Q* [2014] EWFC 7 para. 19

116 Interview, 19 May 2016.

“This woman had come for advice. She had real concerns about the father’s behaviour around the kids, but did want him to be part of children’s lives. She didn’t want to deny access completely. But when the judge asked if she was OK that he had access she just said, ‘Yes.’ She didn’t realise it was at that point where she needed to request supervised access. She just didn’t understand the process, and the judge couldn’t have known she had concerns without her saying so, so how could he have made the right decision about what was best for the kids. So we’ve given her advice now about what she needs to do next, but she will have to do that alone, she’ll have to go back to court to change the terms of access, which is more time, money and stress for everyone.”<sup>117</sup>

Amnesty International spoke with people who were litigants in person at the family court; many spoke about the fact that they felt intimidated, that they found it difficult to explain their case and that they struggled to understand the process and what the judge was telling them. When the other side was properly represented in court, either because they had financial means to pay or were eligible for legal aid, people often said that they felt the process wasn’t fair or equal. As one woman with an ongoing private family law case explained:

“I have to go to court on my own and I am so worried about them misinterpreting me. That I won’t be able to explain the situation properly. It’s so scary the idea that I have to go to court and face a barrister, face a judge, knowing what to say and when I should say it. The first time I went to court I had a barrister. He did it for free for me, but he can’t do it again. He was really great. The judge thanked him for his help and said it was good he was there because I wouldn’t have coped without it. But this time I don’t have anyone. When I go to court I have to cross-examine my ex. That terrifies me. I have so many sleepless nights. If I lose I know I will blame myself, it’s because I wasn’t good enough, but then I think how can I be good enough when I’m up against a barrister. I just don’t know if I can do it on my own and I have looked and asked everywhere for help but everything needs money and I don’t have it. So what am I meant to do?”<sup>118</sup>

The absence of legal advice before the hearing can also be challenging. For example, many litigants in person struggle with handling paperwork, understanding disclosure requirements, how to prepare bundles and what evidence to file. Whilst carrying out the research for this report, Amnesty International witnessed many of these challenges first hand, including individuals who struggled to understand deadlines set by the court to file evidence, how to draft and what to include in a position statement, how to prepare a Scott’s schedule (a table that sets out information about the claim), understanding what legal terms meant, what a legal bundle was and how to fill in the appropriate forms for their case. As one man, who is seeking child access, told Amnesty International:

“I find the court papers hard to understand, I don’t know what I’m meant to do and when. I find it so hard to go into court on my own. I don’t know what I’m meant to say. I feel like if I had a solicitor they could have helped me explain my case properly, made sure I saw my kids from the beginning. But with being on my own the whole thing is so difficult and takes so long.”<sup>119</sup>

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117 Interview, 13 November 2015

118 Interview 19 January 2016.

119 Interview 12 May 2016



**“Like a bird in a cage”**

**Salmah**<sup>120</sup> is a recognised refugee from Iran, who has one young daughter. She is separated from her husband and is seeking a divorce and a child arrangement order as she wants her daughter to live with her. Salmah’s English is limited and she struggles to understand the forms she is required to complete and the court processes. An NGO referred her to a student law clinic, which is giving her some help and advice about her case, but cannot represent her. One of the students helping Salmah explained to Amnesty International the challenges she faced:

“I didn’t realise the impact of the cuts to legal aid until I started helping in the law clinic, supporting people in private family cases. That is when you realise how much people like Salmah need advice and representation. She can’t get through the process on her own, she struggles to understand the forms she needs to complete, we’ve helped her apply for fee remission which she didn’t know about, she didn’t know what evidence she needed and how to put it together. It’s difficult for me, I want to help her more, but we have limits. I am just a student so I’m not able to represent her, which is what she really needs. If this goes to court she won’t be able to do it alone. She’s vulnerable, her English is limited, she feels intimidated by the father and she doesn’t understand the court process, so articulating her case, explaining why she believes her daughter should stay with her is going to be very difficult if not impossible for her.”

Salmah spoke to Amnesty International through an interpreter:

“Since I have no idea about law in the UK I had no idea how to get a divorce and how to keep my daughter with me. I was very upset and distressed about the situation. I was overthinking everything, scared I would lose my daughter; this made me more and more upset. I am so happy I came here; they gave me some help. Without help I could not have taken this divorce forward. In that case I think my life would have been ruined. I would have been like a bird in a cage, I wouldn’t have been able to do anything at all. Now I am hopeful, now I have the chance to be free.”

Amnesty International recognises and supports the effort being made by the court service and judiciary to make the court process for litigants in person in private family cases more responsive and supportive to help ensure that outcomes are in the best interests of the child. However, the concern remains that when the absence of legal help and representation means that a parent is unable to effectively represent themselves, rendering the process unfair, this unfairness risks being at the cost of the child’s best interests.

### Children and vulnerable young people as parties to proceedings

“I feel the system is a loop – a vicious cycle. We want to help ourselves, but are not allowed to help ourselves because we can’t get advice. Young people especially need to be given that help. It’s like being trapped. Literally in a system that doesn’t allow you to help yourself. A lot of young people suffer. Young people with lots of potential.”<sup>121</sup>

Effective access to justice is critical for children and young people to claim and enforce their rights. Article 12 of the UNCRC guarantees the right of the child to be heard and for his or her views

120 Interviews were carried out 2 November 2015.

121 Interview 10 May 2016

to be taken seriously in all judicial and administrative proceedings affecting them.<sup>122</sup> For this group, understanding and effectively navigating legal systems without support and advice can be an insurmountable challenge. Despite this, the government rejected calls to ensure children and vulnerable young people received an automatic entitlement to free legal aid.<sup>123</sup> This has left as many as 6,000 children each year, and countless more vulnerable young people, without access to free legal advice and representation in many areas of civil law.<sup>124</sup>

NGOs working with children have raised particular concerns in the context of immigration proceedings, where children are having to make applications alone, because for example they are unaccompanied or separated migrants, or with limited support because of family circumstances.<sup>125</sup> The data from the Ministry of Justice confirms that there are almost 2,500 cases each year involving children as claimants in their own right who would no longer get legal aid for their immigration case.<sup>126</sup> Children addressing their immigration claims on their own are at an automatic disadvantage in so far as the laws, processes and systems governing their circumstances are profoundly complex. They require specialist advisors that are experienced not just in immigration law, but also with working with children. As one lawyer explained:

“The idea that children and young people can represent themselves just does not work. This is such a vulnerable group. It’s not just that they don’t understand legal processes and legal concepts, which they don’t, but it’s also that they have no idea how to fill forms out properly, what to write, where to send paperwork, where to get advice and who to speak to. Without professional support they simply can’t access justice and they can’t engage with the legal process.”<sup>127</sup>

### **Damian: difficulties assembling legal evidence as a child**

**Damian** has been in the UK since he was three years old. When he tried to enrol into sixth form at the age of 16 he realised that his immigration status had not been regularised. He applied for indefinite leave to remain in 2013, which was turned down by the Home Office. Living in a hostel with his father, Damian was referred to the Project for the Registration of Children as British Citizens (PRCBC) who advised him to make a citizenship application. His father was unable to do this for Damian, and so PRCBC provided legal advice and support to do the application and successfully challenged the initial refusal. Damian now has British citizenship.

122 The UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) UN Doc: CRC/C/GC/14 29 May 2013, page 11. See also Joint Committee on Human Rights: The UK’s compliance with the UN Convention on the Rights of the Child – Human Rights Joint Committee Contents

123 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, except for private family law cases, because ordinarily they should have a parent, carer or guardian to act on their behalf

124 Figures supplied to JustRights by Ministry of Justice on 10/10/11 in response to a Freedom of Information request

125 Office of the Children’s Commissioner, Legal Aid changes since 2013, Child Rights Impact Assessment, September 2014; 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.

126 Children’s Society, *Cut Off From Justice The impact of excluding separated migrant children from legal aid* June 2015

127 Senior Solicitor, specialising in children’s rights, Interview 25 November 2015.

Damian told Amnesty International:

“I was totally unaware I could apply to register as British, until I was introduced to PRCBC, I could never have done that on my own. Getting the evidence for the application was actually very stressful. I had to leave school to go and seek evidence to prove I had been living in the UK all this time. People were asking me where I was going and what I was doing; that was hard. There is a lot of stigma behind being an immigrant. It’s hard. Especially for young people that don’t know they are undocumented and their parents also don’t understand immigration law and how the system works.”<sup>128</sup>

Unaccompanied or separated children are one of the most vulnerable groups in our society, yet there is no automatic entitlement to legal aid for them. Although Amnesty International was not able to directly interview an unaccompanied or separated child who is currently a party in their immigration proceeding, it did speak with several organisations supporting children in these cases. The case of Jill, who came to the UK at the age of five to live with an aunt, is typical of the kind of examples given to Amnesty International by those working with children and young people.<sup>129</sup> Following a difficult relationship with her aunt, including allegations of exploitation and abuse, Jill left home at the age of 15 and was looked after by social services. She is now 17 years old and remains without either British citizenship or a regular immigration status. She wants to apply for indefinite leave to remain and citizenship, given the time she has been in the UK, but needs immigration advice and help with the applications. This needs to be completed before she turns 18, when less favourable immigration rules will apply to her case. She is not entitled to legal aid and the local authority whose care she is under has refused to pay for legal assistance to help her. Jill recently was able to access pro bono support; the lawyer now helping her with her applications told Amnesty International:

“There is no way she could do these applications on her own, to understand the process, get the relevant evidence together, yet she has no access to legal aid. Social services wouldn’t pay, even though it should be part of their duty to look after children. She’s lucky, she lives in a part of London where there is access to some pro bono help, but that’s few and far between. She’s also lucky she was referred to us in time, she’s about to turn 18 when it would have been much more difficult to make an application for ILR and she would have lost her right to apply to citizenship.”<sup>130</sup>

The provision of pro bono support for cases such as this is not always accessible, particularly outside of London. There also appears to be an inconsistency across local authorities as to the role they should play in assisting these children. NGOs and lawyers who spoke with Amnesty International reported that some local authorities were willing to pay either for legal advice or for a solicitor to make an ECF application. Others, in contrast, were not willing to help, particularly in complex cases that may incur higher legal costs.<sup>131</sup>

These accounts are supported by detailed research from the Children’s Society report *Cut off from Justice* which raises significant concerns about the impact of legal aid cuts on unaccompanied children, which has left “Children without a vital lifeline [...] undermining their chances of finding a permanent and safe solution to their immigration issues”.<sup>132</sup>

128 Interview 10 May 2016.

129 Name has been changed to protect her anonymity. The case is based on details given to Amnesty International by a lawyer representing her pro bono. Amnesty International heard several other case examples from NGOs and lawyers working with children and young people.

130 Interview 16 February 2016.

131 Concerns around inconsistency of local authorities was expressed by four NGOs who spoke with Amnesty International and five other not-for-profit legal advice providers.

132 Children’s Society, *Cut Off From Justice The impact of excluding separated migrant children from legal aid* June 2015

The report found that there is significant variability in local authority practice, impacting on the experiences of children.<sup>133</sup> The effect of these decisions can sometimes have stark and arbitrary consequences. Indeed, a particularly illustrative example found in the report by the Children's Society involved twins, aged 17, from Sierra Leone.<sup>134</sup> Both were in the care of a local authority after being abandoned by their father, who subsequently died. Both were seeking an extension of their leave. The local authority had instructed a lawyer for one of the twins, but the other twin had a criminal record and the local authority made the decision not to fund the case for him but to go ahead and fund the other twin. He was therefore left without legal support until his case was referred by an advocacy organisation to a voluntary sector solicitor.

**Youth worker**<sup>135</sup>: "I had one young person I was working with who had to self-represent at the lower asylum and immigration tribunal. He had a good case, but no access to legal aid. We couldn't get him pro bono help in time, so I just accompanied him to the court, explaining to him that I wouldn't be able to help him as I'm not qualified but could give him moral support. He was vulnerable, he didn't know what to expect. I had to explain everything, what the court looks like, what the environment will be, he didn't know, he hadn't seen any of it before. All he could do was tell his story to the judge, he couldn't argue the case law, or argue his case in relation to the immigration rules or run the Article 8 arguments. We asked for an adjournment but the court said no. In the end his appeal was refused."

The inclusion of young people (aged 24 and under) in this report is because children's legal problems are often only evident following changes in life circumstances or a key life event, the most common triggers being leaving home or care, leaving education, and trying to enter employment. These changes occur most often during the transition to adulthood. For many disadvantaged and vulnerable young people these processes can be fraught with difficulties, particularly for those where independence and responsibility are thrust upon them at an early age, for example through becoming a young parent, an early school leaver or a young carer. Because of this, youth workers and NGOs specialising in children's rights, emphasised to Amnesty International the adverse impact of the legal aid cuts on young people, particularly those who were disadvantaged or vulnerable. This is a group that often faces a range of challenges and problems and without early intervention can develop serious multiple problems. Statistical evidence supports the view that young people are disproportionately and increasingly prone to a range of social welfare problems including homelessness, unemployment and mental health issues which frequently give rise to the need for advice.<sup>136</sup>

For example, young people have been found to increasingly account for a disproportionate number of all people with problems in areas of social welfare law; since LASPO there has been a 56 per cent drop in cases of 18 to 24 year old applicants in social welfare law.<sup>137</sup> Many have led chaotic lives, they do not carry with them requisite paper work, they are sceptical of legal processes and do not know how to engage with them properly and they lack trust in traditional centres of advice and may not have confidence in adult authority figures.<sup>138</sup>

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133 Children's Society, *Cut Off From Justice The impact of excluding separated migrant children from legal aid* June 2015, page 50-59.

134 Children's Society, *Cut Off From Justice The impact of excluding separated migrant children from legal aid* June 2015, page 57.

135 Interview 9 December 2016

136 Youth Access, "More of the same? The Advice needs of young people, January 2016; James Kenrick, The outcomes & impact of youth advice – the evidence: key research evidence on the difference made to young people's lives by social welfare advice services, Youth Access, 2011, available at: [www.baringfoundation.org.uk/YouthAccessValue.p](http://www.baringfoundation.org.uk/YouthAccessValue.p)

137 Just Rights "Justice for the young: A briefing for anyone concerned about children and young people's access to legal aid", February 2015;

138 See also Office of the Children's Commissioner, *Legal Aid changes since 2013, Child Rights Impact Assessment*, September 2014; *Not Seen and Not Heard – how children and young people will lose out from cuts to civil legal aid*, a report by Sound off for Justice and JustRights on the impact of the proposed Legal Aid, Sentencing and Punishment of Offenders Bill on children and young people.

Whilst this research has focused on the impact of legal aid cuts on children and young people, this is a group that faces a much wider set of obstacles that make it more difficult for them to access justice. For example, this is a group that is often not given the knowledge they need to ensure they know what their rights are and how to claim them. Research carried out by the Office of the Children’s Commissioner and by NGOs working with children have found that many children and young people are not recognising when they have a legal problem and often do not know where to turn to get help when they do.<sup>139</sup> Traditional sources of advice such as Citizens Advice Bureaus are often not being accessed by this group, leaving many children and young people adrift without adequate support. Restoration of legal aid to children and young people should therefore be viewed as a necessary, but not sufficient, measure to ensure access to justice for this group of vulnerable people. For example more effective public legal education is required to raise young people’s awareness of their rights and responsibilities; to build their life skills and resilience; and to help young people avoid problems and cope with them when they do arise.

### 3.3 Vulnerable people left without support

“I feel alone and I am scared about what will happen.”

Robert, private family law case, Interview 25 January 2016

Engaging effectively in legal processes without adequate support is difficult for the majority of people, but there are a large number of people who have additional vulnerabilities and/or disadvantages that make this process harder. Amnesty International was given examples of the following vulnerabilities that lawyers, NGOs and advice centres were often encountering when supporting people who were no longer entitled to legal aid: mental health (a range of challenges from depression to people with diagnosed mental illnesses); learning disabilities; low numeracy and literacy levels; language problems; medical conditions such as terminal illness; and alcohol and drug dependency. These vulnerabilities can make accessing, navigating and understanding the legal process more difficult. As Rachel Francis, a barrister explained:

“I have seen people in court attempting to represent themselves when they lack capacity, have very significant learning disabilities or are otherwise incapable of representing themselves effectively. These clients are in an impossible situation and the court is ill-equipped to deal with their needs. For example, I was representing a father in a contact case where the mother had capacity issues and no representatives. It was incredibly difficult, the mother didn’t understand what was happening and what she was meant to do. It took four adjournments to resolve the matter, which caused significant stress and financial hardship for these parents, and an unacceptably long delay for the child. Vulnerable litigants in person are often not being supported properly, they don’t know where to go to get support.”

For example, Amnesty International spoke with a number of homelessness charities who all spoke of the particular vulnerabilities and challenges those facing homelessness or who already are homeless face in accessing justice generally, which have been exacerbated by the loss of legal aid. This is a group that disproportionately suffers from mental health problems, and where there is a problem with substance abuse. They often do not have the paperwork or identification documents that are required in social welfare cases, either because they have been stolen or lost during moves in and out of accommodation, or because they have simply had no contact with the authorities. This makes cases inherently more complex, be it challenging a benefit decision or trying to regularise a person’s immigration status. Yet this is a group that often has less resilience and capacity to navigate these issues alone.

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<sup>139</sup> Office of the Children’s Commissioner, Legal Aid changes since 2013, Child Rights Impact Assessment, September 2014; Not Seen and Not Heard – how children and young people will lose out from cuts to civil legal aid, a report by Sound off for Justice and JustRights on the impact of the proposed Legal Aid, Sentencing and Punishment of Offenders Bill on children and young people.

“Whilst our statistics show that only 10% of PSU clients consider themselves to have a health issue, in my experience it is much higher, especially people who have mental health problems. For these clients it’s very difficult to represent themselves, they find it hard to express themselves and get frustrated which exacerbates those challenges. We can’t speak for them in court, it’s not our role, so they have to be able to express themselves and for many of them that is too hard a task”<sup>140</sup>

Amnesty International acknowledges that individuals with extreme vulnerabilities have the possibility of securing legal aid via the ECF scheme. However, as outlined above the scheme does not guarantee an effective safety net for vulnerable groups. This leaves vulnerable individuals at risk of having their Article 6 or Article 8 procedural rights violated because they are unable to effectively advocate for their rights, rendering the process unfair. There are for example parents with learning disabilities, mental health problems or other communication difficulties in the family justice system which render them vulnerable and unable to conduct their own case.<sup>141</sup> For example, Robert, who has learning difficulties and is a litigant in person in a private family law case, told Amnesty International that he struggled to complete the forms needed to make an application to arrange contact with his child and raise his concerns about his child not getting prompt medical attention. He was given some initial assistance from an advice provider, which has since had to close down following a lack of funding. There were initial orders from the court for him to, amongst other things, provide a Scott’s Schedule, which he said he was unable to do because he did not understand what was required. He has secured some initial contact with his child but will be returning to court for a final hearing, without representation, later this year. Robert told Amnesty International:

“I don’t understand what is going on. It is difficult for me to do the forms as I can’t write very well and it is hard for me to speak, to explain what it is I want to say. I don’t know where to get help from anymore. I feel alone and I am scared about what will happen.”<sup>142</sup>

Cases such as these reflect concerns raised by the President of the Family Division, Sir James Munby, who has stated in evidence to a parliamentary committee:

“Previously we had a lot of litigants in person who were there through choice. They tended to be people who had a particular point of view, but who understood the case, were articulate and had the confidence to appear in court. We now have a lot of litigants in person who are there not through choice and who lack all these characteristics.”<sup>143</sup>

## Survivors of domestic violence

Throughout the consultation preceding the legal aid cuts and during the passage of LASPO, the government emphasised its intention to ensure that survivors of domestic violence would remain eligible for legal aid. However, the rules on the evidence of domestic violence that someone was required to provide under LASPO in order to be eligible were narrow and restrictive, both in relation to the type of evidence that could be provided and the fact the evidence was subject to a 24-month time limit. The consequence was that victims of domestic violence were not being given the protection they needed and were not able to effectively access justice.

In February 2016, the Court of Appeal of England and Wales found that these evidence requirements were operating to prevent survivors of domestic violence from getting legal

140 Katrina Rolinson, PSU Coordinator, Royal Courts of Justice.

141 Access to Justice in the Family Court Family law bar association April 2015

142 Interview 25 January 2016.

143 Evidence given to the Justice Committee, for its report, “Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012”.

aid for family cases and were therefore unlawful.<sup>144</sup> Considering the evidence submitted by Rights of Women, who brought the case, as to circumstances in which the regulations operated as a bar to legal aid, the Court described a “...formidable catalogue of areas of domestic violence not reached by a statute whose purpose is to reach just such cases”.<sup>145</sup> In response, in April 2016 new regulations were introduced that extended the 24-month time limit to 60 months and introduced new forms of evidence for financial abuse.<sup>146</sup>

Disadvantaged and vulnerable groups are also overrepresented users of civil legal aid. They are more likely to encounter legal problems in the context of social welfare law, yet are often less equipped to navigate those legal problems effectively to claim their rights. As a result the legal aid cuts have placed a disproportionate burden on this segment of society. Amnesty International believes that LASPO has had a disproportionate impact on vulnerable groups and disadvantaged groups, who are overrepresented users of civil legal aid.

The context of welfare benefits law provides an example. The government accepted in its initial legal aid consultation that withdrawing legal aid for legal advice about welfare benefits would have a disproportionate impact on disabled people, recognising that the class of individuals bringing these cases is more likely to report being ill or disabled, in comparison with the population as a whole.<sup>147</sup> The government argued, however, that this disproportionate impact was justified given the legitimate aim to reduce spending. In the context of welfare benefits it emphasised that applications are straightforward, especially given the advice services that exist, and that welfare benefits case tribunals are inquisitorial and therefore people can present their case without assistance.

Amnesty International disagrees.<sup>148</sup> Statistics support the argument that receiving legal help and advice in welfare benefits cases improves the prospects of accurate outcome of appeals.<sup>149</sup> Welfare benefits cases can be complex, particularly in the context of ongoing reforms, and when a claimant is vulnerable, for example due to being ill, disabled or having mental health problems, it can be more difficult to understand the legal process and what is required to advocate for their rights. Preceding that, people struggle to articulate what their problem is and what they need. As Lambeth Law Centre explained:

**“Usually people seek advice from us because their benefits have been stopped and they don’t understand the reasons why. They need help to understand what the causes might be and help understanding the system before they can even start to challenge a decision. For example, people don’t self-identify with mental health issues, they might say they are a bit down, but the stigma means they won’t admit to behaviour that stops them doing certain jobs. That means that they lose certain entitlements and then get into all sorts of problems as they struggle to manage finances.”<sup>150</sup>**

144 *Rights of Women v The Lord Chancellor and Secretary of State for Justice*, [2016] EWCA Civ 91, 18 February 2016.

145 *Rights of Women v The Lord Chancellor and Secretary of State for Justice*, [2016] EWCA Civ 91, 18 February 2016, para. 44.

146 Amnesty International notes that the restrictive 24 month time-limit for evidence for children at risk of child abuse appears to still be in place, see Kelly Reeve “Legal aid for children at risk” in Legal Update 3-26 September 2016

147 These benefits include: Disability Living Allowance (DLA) or Attendance Allowance, Incapacity Benefit, Income Support and Housing Benefit.

148 See also Committee on Economic Social and Cultural Rights, General Comment 19 Paragraph 78 “Before any action is carried out by the State party, or by any other third party, that interferes with the right of an individual to social security the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and include: (a) an opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies” (emphasis added) and paragraph 81 “States parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil society, with a view to assisting disadvantaged and marginalised individuals and groups in the realisation of their right to social security.”

149 Cristina Sarb and Marc Bush, *Legal aid in welfare: the tool we can’t afford to lose*, Scope, 2011, *The business case for social welfare advice services An evidence review – lay summary* Professor Graham Cookson and Dr Freda Mold1 University of Surrey; Citizen Advice Bureau, *The impact of welfare benefits advice*

150 Michael Tarnoky, Director Lambeth Law Centre, 29 February 2016.

## Accessing legal aid with serious health problems or disabilities

**Ms S.** has had a lifetime of mental health problems, including a diagnosis of schizophrenia and has suffered from delusions. She had been hospitalised for the past six months, but had received a notice that she had been found “Fit to Work”, which put her Employment and Support Allowance at risk. She was not eligible for free legal aid that could advise her how to challenge the assessment. Her lawyer, who is representing her before the Mental Health Tribunal, told Amnesty International: “She will get no legal aid for advice as to how to deal with that and she can’t manage it on her own. I can’t help, I’m her representative for the mental health tribunal and that’s legally aided. The other problems she might have to face alone. That’s the key issue that people with serious mental health issues struggle to navigate the system. They often have a cluster of problems, debt, housing, relationship problems, and they struggle to access the advice they need.”<sup>151</sup>

**Anne** has long term serious health issues. English is not her first language. After the birth of her fourth child a health visitor identified her as a victim of domestic violence and she and her children were placed in temporary accommodation. Anne applied for Personal Independence Payments which helps with some of the extra costs caused by long-term ill-health or a disability. She was refused. She was referred to an organisation that gives advice on welfare benefits who sent a mandatory reconsideration request and when that was turned down supported her at tribunal stage. Anne subsequently got the enhanced care and mobility support she was entitled to. Her support worker told Amnesty International: “There is no way she could have navigated the process alone. Getting through the system is a minefield and she needed support, she was vulnerable and I think she would have given up after the first refusal without help to show her she was entitled to support and should fight the refusal.”

Though welfare tribunals are inquisitorial in nature (not adversarial as with family proceedings for example), legal help and advice equips people with the knowledge and information to understand and effectively claim their rights.<sup>152</sup> The removal of welfare benefits from scope means that vulnerable people could miss out on this crucial support. This view has been echoed by those providing free advice and support in welfare benefit cases.

“The government argues that because the process is inquisitorial you don’t need help, you have nothing to fear, but if the person has no legal knowledge when they answer then the question goes begging. The failure to provide legal support means that the process is actually not inquisitorial but is interpretative. The Judge has to guess what the client means and what their concerns are.” – a lawyer’s comment

“Even when it’s better for a client to present their case in person at the tribunal, they will always need legal advice and support to do the preparatory work. These aren’t simple cases and people with these claims are generally more vulnerable, often we see poor literacy, or people with learning disabilities. They need help to understand their claim, what they can ask for, what they can’t ask for, people often don’t know why benefits have stopped and how to argue their case based on their circumstances and the law. They don’t know what evidence they need or if they do they don’t know how to ask for that evidence and how to make sure it’s in the correct form.”<sup>153</sup> – an advice provider’s comment

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151 Interview, Mental Health Solicitor, 5 November 2016.

152 That there is legal aid for appeals to the Upper Tribunal is in reality of little use. Solicitors who did Upper Tribunal work on legal aid contracts highlighted to Amnesty they are getting very few cases, because there is no one helping individuals at the first stage cases aren’t coming to the upper tribunal because appeals there only happen on a point of law which people aren’t able to recognise themselves without legal help

153 Interview 20 February 2016



## 4. RECOMMENDATIONS

Access to justice in England has been undermined and fundamentally weakened by the cuts to civil legal aid in breach of the UK's international human rights obligations. Under international human rights law the introduction of retrogressive austerity driven measures should also not impose a disproportionate and excessive burden on individuals or on a particular sector of the population. Yet that is exactly what they have done. It is the vulnerable and marginalised who already experience the most obstacles in accessing justice and effectively claiming their rights. They are also the most likely to experience the legal problems that are no longer eligible for legal aid. The result is that the cuts have further entrenched socioeconomic inequalities in the justice system and left vulnerable people struggling to access the advice and representation they need.

Amnesty International is therefore calling on the UK government to urgently fulfil its promise to review the impact of the cuts and take steps to ensure the right of the most disadvantaged sectors of society to access justice is adequately protected.

To the UK government:

- Immediately review the impact of reforms introduced by the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 on access to justice and protection of human rights, particularly for vulnerable and disadvantaged groups, including children and young people, people with mental health problems, people with disabilities and migrants;
- Ensure better provision of public legal education to ensure people understand and can effectively claim their rights, and provide parallel education to practitioners;

The following set of recommendations is not exhaustive for the purpose of ensuring access to justice for disadvantaged and marginalised groups in England. It sets out specific recommendations to be prioritised and that have emerged from this research which is necessarily limited in scope.

- Ensure that children and young people have an entitlement to legal aid, regardless of the legal issue at stake;
- Children and families without sufficient means should be able to obtain legal advice, assistance, and where litigation is contemplated, legal representation free of charge in any case where a child's best interests are engaged;
- Restore initial legal advice for private family law cases;
- Restore welfare benefits advice funding;

- Restore legal aid to all immigration cases raising arguable human rights concerns;
- Facilitate the provision of meaningful legal information and effective advice for individuals detained under immigration powers;
- Ensure family reunification cases are entitled to legal aid;
- Abandon plans to introduce a residence test;
- Overhaul the Exceptional Case Funding system so as to make it fully accessible to members of the public and ensure that all those who are potentially eligible for Exceptional Case Funding have the opportunity to receive advice on their entitlement and funded assistance in making an application;
- Work with non-governmental organisations to ensure that those affected by all forms of domestic violence are able to get legal aid in private family law cases and ensure that in other areas of civil law victims of domestic violence are adequately protected;
- Ensure victims of trafficking are able to exercise their right to seek reparations and hold to account those who have exploited them.



# CUTS THAT HURT

## The impact of legal aid cuts in England on access to justice

The UK government has dramatically reduced access to legal aid for tens of thousands of people in civil cases. In doing so it has stripped away a vital element of support for a fair and just legal system.

Those hardest hit by the cuts are some of the most disadvantaged and marginalised people in our society: children and young people, and people with additional vulnerabilities, including those with mental health problems or disabilities.

Access to justice in areas of law such as immigration, family and welfare has been severely curtailed.

This report turns the spotlight on the damage to human rights – and the lives of thousands of people – brought about by these rushed reforms. In its preparation Amnesty International researchers interviewed more than 100 people: individuals denied access to justice by the cuts, lawyers, volunteers, charity workers and academics.

It is a case study in the folly – and cost – of making policy without fully considering the consequences for human beings.

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