

Cut Off From Justice

The impact of excluding
separated migrant
children from legal aid

June 2015

A close-up portrait of a young boy with dark hair and eyes, looking slightly to the right with a neutral expression. He is wearing a dark blue t-shirt. The background is a textured, light-colored wall.

**The
Children's
Society**

Executive summary

By Ilona Pinter



Introduction

In April 2013, the Government implemented changes to the legal aid system which means that separated or unaccompanied migrant children – those without a parent or guardian in this country – are no longer able to get free support with their immigration cases.

Although some children are protected – namely those fleeing war and persecution and those identified as victims of trafficking – many others are not. This change under the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) has left many thousands of children without access to a vital lifeline to help them resolve their legal cases.

According to government data, this change has left at least 2,500¹ cases each year where children are claimants in their immigration cases and are not eligible for legal aid. But given that many more children are hidden from view by the nature of their circumstances, we believe this is just the tip of the iceberg. Separated migrant children can end up alone in many different ways. Some have been abandoned in the UK by their carers, or have been left on their own after the death of a parent. Others have been sent here to live with friends or relatives in private fostering arrangements, or they have been trafficked here for exploitation but have not yet been identified.

Many children in these circumstances will have spent their formative years in the UK and feel

that this is their home. Growing up here often means that they have no lasting connections anywhere else. In many cases, as children, it would be unsafe for them to be returned to their ‘country of origin’ where they do not have any family or support networks, and cannot speak the language. However, because they are outside of their country of origin, they need to get permission from the Home Office to stay here or if they are eligible, to become British citizens.

This means that, unlike children who have British citizenship who will generally have no contact with legal processes, especially as claimants in their own right, separated migrant children will inevitably need to have contact with the immigration system at some point in their lives. Our research focuses on how these children have been affected by no longer having access to legal aid in order to resolve their immigration issues.

Our research found that since the legal aid cuts came into effect, there has been at least a 30% reduction in regulated immigration advice services² across the country and an almost 50% decrease in the number of non-fee charging

services regulated to deal with appeals and representation³. For those children who are in local authority care, the support they receive to get specialist legal advice is limited and inconsistent, with wide variance between and within local authorities.

Our freedom of information request for this research revealed that only one local authority had a specific policy in place to decide on legal support for children’s immigration cases. The vast majority have no special arrangements and appear to be leaving it up to individual social workers to effectively make legal decisions about which child is supported and how. Practitioners and young people told us that without legal aid children’s immigration claims are being avoided, or ‘sat on’, and remain unresolved. This often leads to a transitional crisis for the child as they turn 18 and their immigration status comes to bear more heavily on their access to services, such as housing, education and employment.

Where children try to resolve their immigration issues on their own, for example as they approach adulthood or where they are not

The names throughout this report have been changed.

¹ Caseload data for the year 2009/2010 provided by the Ministry of Justice – this figure gives an indication of the number of cases involving child claimants in their own right who previously would have been in the scope of legal aid for their immigration cases but following LASPO are no longer entitled

² Services regulated by the Office of the Immigration Services Commissioner (OISC)

³ Level 3 OISC providers – Further information on the OISC levels can be found online: <https://www.gov.uk/find-an-immigration-adviser/what-advisers-can-do>

'I know a lot of people who have given up...They leave it [their legal case], no matter how hard it is. They haven't got money for that and they can't do anything.'

Abiola, young person

in local authority care, children are forced to become 'mini solicitors' struggling to prepare witness statements and gather evidence about their past. This is leaving them stressed, fearful and unable to participate properly in their education. Most worryingly, some young people told us they have had to raise thousands of pounds to pay for legal advice themselves. We heard how children are being exploited or put at risk of serious harm including being sexually exploited and groomed by criminal networks because they are desperate to resolve their immigration issues.

Key problems with LASPO for separated children

LASPO came into force in April 2013. Its aim was to radically lower the cost of public spending on legal aid by cutting £350 million through the reduction and removal of specific categories of law from the scope of legal aid⁴. Immigration is one of the areas of civil law that has been severely affected. While asylum or protection under Article 3 of the European Convention on Human Rights (ECHR) remains

within its scope, individuals with non-asylum immigration applications no longer get legal aid. This particularly affects applicants with claims made under the Convention's Article 8 - the right to family and private life⁵.

Unlike family law proceedings, where special provision has been made for children under the age of 18 to obtain legal aid, no explicit or similar safety net has been made for migrant children⁶. During the passage of the Bill, the former Justice Secretary argued that most immigration claims "*should be relatively straightforward*" and that "*with the help of their guardian [most] would be able to complete the process without recourse to specialist legal advice*"^{7,8}. As this research demonstrates, separated children's immigration cases are far from straightforward and, by their very definition, they do not have legal guardians who can help them.

The Government further proposed that instead of accessing legal aid, unaccompanied children could get assistance from social workers with "*filling in forms and explaining terms*" or from law centres and

pro-bono legal representation⁹. This creates a number of problems, not least because immigration advice services are heavily regulated and it is a criminal offence to give advice unless you are registered to do so. Furthermore, children will only be able to access free advice from law centres and others in very limited circumstances given the significant reduction in service providers alongside growing demand. A lack of consistency in the availability of free services across the country has led instead to inequalities of access and a reliance on chance in finding legal help and representation.

Research methodology

In August 2014, The Children's Society commissioned the University of Bedfordshire to undertake research relating to the ways in which LASPO was influencing the lives and circumstances of separated migrant children. In addition to a review of existing literature, the research analysed data from: a series of Freedom of Information (FOI) requests

⁴ Cookson, G (2011) Unintended Consequences: The Cost of the Government's Legal Aid Reforms. A Report for the Law Society of England and Wales. Kings College London

⁵ Symonds, S (2012) Implications of Cuts to Legal Aid for Children and Young People in Light of the Legal Aid, Sentencing and Punishment of Offender

⁶ Refugee Children's Consortium briefing on the Legal Aid, Sentencing and Punishment of Offenders Bill - Report stage, House of Lords, March 2012

⁷ Letter from Jonathan Djanogly MP, Parliamentary Under Secretary of State for Justice, to the Refugee Children's Consortium, October 2011

⁸ Refugee Children's Consortium briefing on the Legal Aid, Sentencing and Punishment of Offenders Bill - Report stage, House of Lords, March 2012

⁹ Hansard HC Report, 31 October 2011, Columns 689-690: <http://www.publications.parliament.uk/pa/cm201011/cm-hansrd/cml11031/debtext/111031-0003.htm#11103128000181>

'She is 15 and she was brought to the UK when she was six and has no status...Nothing has been done on her case. The only reason why she was brought to the attention of the authority is because she was raped by her father who was settled.'

Julie, Solicitor

to the Ministry of Justice and the Office of the Immigration Services Commissioner (OISC); FOI responses from 107 local authorities; a survey of 40 practitioners; interviews with 28 professionals across a range of legal, care and advocacy settings; and interviews with nine children and young people about their experiences.

How many children are affected by these changes?

Through this research we found that there are significant gaps in available data and inconsistencies between local and national data sets preventing a reliable assessment of the true scale of the problem. In response to our FOI requests, local authorities identified 3,612 unaccompanied and separated migrant children¹⁰ in their care – however this was based on only 107 local authorities. The biggest gap in data concerns separated children

needing immigration advice or representation who are not in the care of a local authority. A significant number of these are likely to be children in private fostering arrangements: we have estimated that there could be between 9,300 and 12,400 migrant children living in private foster care arrangements¹¹.

A significant proportion of separated children in local authority care, private fostering arrangements, and other children who may be homeless, 'sofa surfing' or living alone will be subject to immigration control and will need varying levels of legal help and representation with their cases. None of this data accurately reflects the number of separated children who need legal advice and representation for their non-asylum immigration cases. But it is clear that **thousands of separated migrant children are likely being affected by the exclusion of immigration from legal aid support.**

During the consultation period leading up to LASPO, The Children's Society obtained information from the Ministry of Justice which revealed that almost 2,500 cases each year involving children as claimants in their own right would no longer get legal aid for their immigration cases¹². In the absence of other data, this gives **the lowest estimate of children who can no longer get legal aid.** As our report shows, given that many children are likely to be 'hidden' – such as those in private fostering arrangements – we believe this figure is likely to be just the tip of the iceberg.

¹⁰ This figure includes children with both asylum and non-asylum immigration cases though only asylum cases are still funded by legal aid.

¹¹ These figures were derived from the Department for Education statistics which show that 62% of children in private foster care were born outside of the UK and the estimated 15-20,000 children in private foster care according to the British Association of Adoption and Fostering.

¹² This was based on the caseload data provided for 2009/10 by the Ministry of Justice.



Research findings

Reduction in the availability of advice services

As part of this research we analysed data, provided by the Office of the Immigration Services Commissioner (OISC), on the changes to regulated immigration advice services across the country before and after the implementation of LASPO. Our analysis shows that there was at least a 30% drop overall in both fee and non-fee charging services since LASPO was introduced (between 2012 and 2014). The biggest drop – almost 50% – was seen in non-fee charging service providers at the highest level of regulation¹³ i.e. those regulated to deal with appeals and representation. There are currently nearly twice as many fee-charging OISC services as non-fee-charging services – 1330 (64% of all provision) compared with 738 (36%). The data also revealed that there is significant variance between UK regions, with some areas having none or only one or two non-fee charging providers¹⁴ regulated to deal with appeals.

While it may be enough for a child

at an initial stage of the process to get basic advice¹⁵, the majority of circumstances highlighted in this report – such as cases where children need to make an application under Article 8 of the ECHR or those who need help with an appeal – will need an adviser registered at a higher level. Therefore, children whose claims are more complex are placed at a greater disadvantage. In addition, the significant reduction to the availability of advice providers following LASPO also has implications for children who are still entitled to legal aid (e.g. those with an asylum claim) but cannot find a service in their area.

Lack of consistent support from local authorities

The research indicates that there is a significant lack of consistency across and within local areas as to how separated migrant children are supported (or not) in accessing legal services in the absence of legal aid. The removal of legal aid in children's immigration cases has effectively resulted in the transfer of costs, and responsibilities for 'merits testing', from central

government to individual local authorities, at a time when many are experiencing funding cuts.

Out of the 107 analysed responses, only 1 local authority had developed an explicit policy on providing legal services for children in their care that they have been piloting and 4 were developing this as a priority area. The vast majority did not have any formal policy in place or plans to do this in the future. This is not to suggest that local authorities were unresponsive to the legal needs of separated and unaccompanied children. Some, whilst not having a formal policy in place, highlighted that they would involve solicitors to help them make the decision on whether or not to fund children's legal costs (8%). Others identified that they would always fund legal services as part of their corporate parenting duty (8%). The most common responses from local authorities, however, were that they did not have any criteria in place to assess children's legal needs (28%) or were working within the framework of existing legislation and policies (19%), and were making decisions about children on an ad-hoc basis (23%). These responses often went hand in hand. A number of

¹³ Level 3 OISC - Further information on the OISC levels can be found online: <https://www.gov.uk/find-an-immigration-adviser/what-advisers-can-do>

¹⁴ The East of England has no non-fee charging providers registered at level 3 OISC while the East Midlands and North East regions have one provider each.

¹⁵ From a level 1 OISC-regulated adviser

‘Some young people don’t actually realise [they don’t have status], particularly some of the ones that were born here, until they reach 16 or 18, when they are applying for university or [have] medical bills or other things that make them realise that actually they don’t have status.’

Charlotte, Service Manager

authorities also declined to answer our questions relating to the ways in which decisions around legal needs were being made.

Without concrete policies or guidance in place, the decisions about which children get legal services paid for and when, is left to the discretion of social workers and managers, who are not qualified to do this. The professionals we spoke to were very concerned that as a result children’s immigration issues are being avoided or left unresolved, particularly in more complex cases where they need to pursue an appeal or procure additional services such as an expert report.

Support for children outside of care

While some separated migrant children will be known to or supported by local authorities, many will not. Those in private fostering arrangements and those living on their own will have little or no contact with local authorities. But they will still as migrants need to make an immigration claim at some point. We found that children in these circumstances depended

more on ‘word of mouth’ advice from their peers on where they could turn to for legal support. This has serious implications for those who are or had been in abusive and hidden arrangements, with limited, if any, adults in their lives to support them with their legal claims. In such cases there are significant risks that their immigration issues will remain unresolved leaving them at risk of being forcibly removed from the UK or being made homeless and destitute when they become adults.

Circumstances where separated children lose out on legal aid

Our research revealed that legal aid cuts under LASPO are affecting separated migrant children across a wide-range of circumstances. Children who will no longer be able to access free legal support for their immigration cases include:

- children in cross-border adoption arrangements
- trafficked children who have

not been formally identified as trafficked through the National Referral Mechanism¹⁶

- children living in private fostering arrangements, including with unscrupulous and exploitative adults
- children left with unresolved immigration issues after the death of a parent or as a result of a family breakdown
- stateless children born in the UK without having had their status regularised¹⁷.

Out of scope, out of sight

Our research highlighted how cuts to legal aid are compounding the problems for separated migrant children who are already a hidden group. In some cases children are hidden when they are ‘out of the orbit’ from and unknown to public services. Often children will not know what their status is let alone how they should go about resolving it. In some cases, especially when they have been trafficked, children may fear the authorities and avoid contact.

¹⁶ Trafficked children can only get legal aid if they have received a positive ‘reasonable grounds’ decision through the National Referral Mechanism or if they have an asylum claim

¹⁷ See section 3.1 of the report for the full list

For children who are in contact with services – usually through social workers - their immigration status may also remain unseen or be ignored. Children often do not know that there is anything wrong with their status; some young people we spoke to thought they were British. This is particularly the case for those children who have lived in the UK for a long time and who 'look' and 'sound' British.

Interview respondents gave a number of examples of where local authorities were not addressing young people's immigration issues. In one case, a Vietnamese boy had arrived in the UK at the age of 11 and was later taken into care. His support worker stated that the local authority had "*sat on [his case] for years*" so his immigration status remained unresolved at the point where he was just about to leave the care system. The absence of legal aid means that children can no longer come into contact with legal professionals independently who can establish their status and advise on their options to ensure finding a permanent solution.

The risks for children whose status remains unresolved are very serious, placing them in precarious

Florence's story

Florence arrived in the UK as a very young child with her mother who left her in the care of a 'friend', living as an undocumented child for many years.

The woman she had been left with was disabled and Florence was responsible for her physical care and the housework. She was neglected, often went without food and at times was locked out of the house with nowhere else to go. An 'uncle' would regularly visit the house. He was a known criminal with a volatile personality and Florence would often witness physical arguments between the man and woman leaving her very ill as a result.

Florence sometimes went to school and her teachers, upon noticing her underweight and careworn appearance, made a referral to social services. Social services sat on the referral for a number of years, only occasionally visiting Florence and not doing anything about her undocumented status. The woman that Florence lived with was also undocumented and arranged with friends who did have status to pretend they were Florence's carers. Florence had to go to their house whenever social services visited and was forced to call them 'mum' and 'dad'. When Florence was 16, she was made homeless, but with the support of a voluntary organisation, she was taken into care. During this time, Florence had assumed that her stay in the UK was not a problem. She did not know that she was undocumented.

Without legal aid she has been unable to regularise her status because she cannot afford to pay for legal help. So far the local authority is unwilling to pay. If she cannot resolve her immigration issues before turning 18 she may be detained by immigration authorities. She could be made destitute or be forced to return to her country of origin which is a foreign place to her and somewhere where she has no support network or family.

“A lot of times in lessons I would be crying and asking ‘Sir, can I take time off?’ Or maybe lie to my teachers and say I needed to go home where really I had to go get in contact with these immigration people.”

Yemi, young person

and potentially dangerous situations. As children they are at risk of social isolation, abuse, exploitation and homelessness. In addition, as they become young adults, they are likely to be made destitute, detained and/or forcibly removed from the UK which may not be safe for them. It is also important that children make applications for extensions of leave in-time so they do not have periods without status as gaps in their immigration history that would have consequences for them later in life if and when they try to settle in the UK. In addition, there are significant administrative fees and a health surcharge to pay when making applications for extensions. This detailed information is not something that social workers would be aware of. It is vital therefore, that children have access to properly qualified specialist solicitors.

Transitional crises: Risks of serious harm for young people without status

Our research found that the most visible impact of changes

to legal aid is on older children between the ages of 16-18. There are already significant legal, social and bureaucratic transitions that happen at these ages. In fact, this is a key point when many realise that they have an irregular immigration status in the first place. Common triggers are making applications to higher education or to work, the dissolution of informal private care arrangements and becoming homeless following a breakdown in family relationships.

Excluding them from legal aid at this key point in their lives hinders their ability to resolve their legal status and, in turn, has consequences for their future, their well-being and security. Without specialist legal support to establish the nature of their case properly and gather the evidence needed, young people in these circumstances cannot get a chance to have their claim considered fairly and are at an increased risk of removal to countries that they have little, if any, connection to, no family, home or support network there, and may even be at risk of serious harm. Enabling children to access legal aid would not mean that all of them

would be allowed to remain in the UK but would help to contribute to a fair process.

Research participants also highlighted the dangers of destitution for young people turning 18 whose immigration applications had been put on hold as a result of barriers caused by the legal aid changes. This included young people being forced to ‘sofa surf’, sleep on night buses, or in parks. We heard about one 18-year-old girl in particular who was refused after care support from the local authority. The local authority had delayed taking her into care when she was 17 and as a result they did not owe her leaving care duties. The local authority had not sought to regularise her status when she was in care and when she turned 18 she became destitute. She had severe mental health difficulties and was raped while she was homeless. With no support from a local authority and nowhere else to turn, she had no money to pay for legal support to resolve her status.

¹⁸ It is a criminal offence for a person to provide immigration advice or services in the UK unless their organisation is regulated by the Office of the Immigration Services Commission (OISC) and unless they are qualified to do so under the terms of section 84 (1) of the Immigration and Asylum Act (1999): <https://www.gov.uk/government/publications/how-to-become-a-regulated-immigration-adviser/how-to-become-a-regulated-immigration-adviser--2>

Children out of their depth

Children and young people encounter many obstacles to accessing legal support without legal aid, and often end up out of their depth in trying to overcome and avoid these.

In many immigration applications for regularisation, the expectation is that they build a solid and coherent picture of the child's life, relationships and achievements in the UK. One of the professionals that we interviewed spoke of how, within the context of the legal aid changes, this has forced children and young people into being their own "mini solicitors". She spoke of children having to make judgements about who to ask for evidence, what to include and e having to ensure the accuracy of the information submitted on immigration forms.

Children who have to address 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. As already mentioned,

Yemi's story

Yemi was nine years old when she came to the UK from Nigeria to stay with an aunt.

She has always thought that she was British and only when she turned 17 and began applying for university, did she find out that she was not. Anxious about her lack of status, she immediately set about trying to get legal support to help her regularise her status.

As she could not get legal aid, she had to do a lot of the work herself such as gathering all the evidence to prove her identity and time spent in the UK. The stakes were high and Yemi feared removal to a country that she no longer knew. She explained to us that she felt terrified all the time. She was not only fearful of her application being rejected, but also about raising the funds to pay for the lawyer - £3,000 in total. In the end her application was rejected and she was faced with the prospect of the uncertainty of further costs to appeal the refusal. She felt out of her depth. Preparing the paperwork and raising the funds for her original application had been difficult enough but now she was faced with a process that was even more complex, intimidating and unrealistic in terms of costs. Throughout this process, her college attendance and work were severely affected and she could find no escape from her situation.

'They all have complex cases...we have got a child with 8 or more years residence in the UK under 18 but no family to help them get evidence and a chaotic upbringing because they have been abandoned. They have been sofa surfing.'

Angela, Solicitor

it is a criminal offence to give immigration advice if you are not registered with the OISC¹⁸ and therefore it seems paradoxical that vulnerable migrant children are being cut off from vital legal services to support them.

Many of the non-legal professionals interviewed for this research, including those with considerable experience of the immigration system, said that many of the laws, rules and processes involved are so specialised that they are challenging enough for professionals to access, let alone children. Even legal practitioners who are qualified and registered to give immigration advice find the area of children's claims to be difficult to get a handle on.

In fact a number of examples were given where children's legal needs and potential solutions had been misdiagnosed. A number of respondents gave examples of how legal practitioners, who had perhaps not specialised in children's law, had failed to appraise children's circumstances correctly and channelled them through the wrong immigration pathway, such as excluding trafficked children from the international protection route. Our evidence

challenges the assumption that children's immigration cases are "straightforward".

Children raising funds to pay for solicitors

The complexity of children's cases arises not just from the nature of their immigration circumstances, but also from the problems that can arise for children from having to pay for legal advisers or representatives. The overall costs of paying for solicitors can be high, uncertain and prolonged, particularly where children have to pursue an appeal. Where they are unable to pay, they avoid resolving their case altogether or are limited in who they can afford to advise and represent them. Some children and young people we spoke to or heard about faced an array of costs ranging from the legal advice and or representation itself, application fees, disbursements and, at times, the costs of instructing expert witnesses. In addition, unlike legal aid solicitors, private solicitors are not required to have a DBS check, which is an additional safeguard to protect children. Furthermore, where legal aid solicitors must assess a case on its merits to grant legal aid, this is not the case for private solicitors who are free to take on cases which will be paid

for by the child, no matter the likelihood of success.

Risks and exploitation

The absence of legal aid means that children without other support are expected to source funds to pay for legal fees and other costs of immigration applications on their own. This has very serious implications for their safety. The practitioners and children we spoke to highlighted the ways in which this renders them vulnerable to exploitation and harm at the hands of powerful adults who are more than willing to take advantage of their situation. These risks existed for children prior to LASPO; however, the professionals we interviewed reported a marked increase in risks following the cuts. Children desperate to resolve their legal issues are faced with the intense risk of being exploited through unregulated labour, sexually exploited, and are being groomed by criminal networks, in order to raise funds to cover legal fees. In one case we heard about two brothers who were living in private rented accommodation and one had to work in a dangerous and unregulated construction job in order to pay for their rent, food and legal fees.



Conclusion and recommendations

Through the stories of children and young people and the professionals who support them, this report demonstrates the wide-ranging and severe consequences brought about by the exclusion of separated children from legal aid in their immigration cases under LASPO.

While this is a diverse group of children and circumstances, our report shows how their common multiple and compounding vulnerabilities are not considered with their exclusion from legal aid support. It shows that some trafficked children, children in abusive private fostering arrangements, children who have been abandoned by their carers, and those with many other exceptional circumstances, are being placed at substantial risk by a justice system that does not consider their circumstances serious enough to warrant legal aid support.

The report has highlighted how the significantly reduced availability of immigration advice services across the country and the inconsistent support from local authorities is leaving children without a vital lifeline previously provided by legal aid. Instead, children are having to shoulder serious legal responsibilities themselves by acting as their own solicitors or going to extreme lengths to raise funds and pay for legal services.

Placing more of the burden to regularise their status on the children themselves increases the chances, at best, for them to

go down the wrong regularisation pathway, prolonging their precarious status and, at worst, not obtaining the international protection which they would otherwise be eligible, putting them at risk of destitution and forced removals. The report brings into focus the various ways in which this legislation has effectively stacked the odds against separated children, undermining their chances of finding a permanent and safe solution to their immigration issues.

'The significantly reduced availability of immigration advice services across the country and the inconsistent support from local authorities is leaving children without a vital lifeline previously provided by legal aid.'

Key recommendations from the report include:

- 1 The Government should reinstate legal aid for all separated children for their immigration cases.**
- 2 Local authorities should ensure the systematic collection of data for separated children with non-asylum immigration claims.**
- 3 Until legal aid is reinstated, local authorities should train social workers and Independent Reviewing Officers in the identification of children who are out of scope of legal aid and in how to best support their legal needs within this new and complex territory.**
- 4 Until legal aid is reinstated, local authorities should develop written policies that offer clarity on the nature and scope of their responsibilities in relation to legal aid for separated children.**
- 5 Outreach work should be undertaken in schools and colleges to inform children and young people about immigration and the law, routes to regularisation and their importance.**

The full list of recommendations can be found in the main report.



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