An update to:

Cut off from Justice

The impact of excluding separated and migrant children from legal aid

Research report
August 2017

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All the legal practitioners who gave up their time to complete the survey or participate in an interview in order to help us understand the context in which unaccompanied and separated children make their immigration claims.
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Introduction

The enactment of the Legal Aid, Punishment and Sentencing of Offenders Act 2012 (LASPO) has had widespread consequences for the provision of legal aid in the UK. One key feature of the new scheme, of particular importance to The Children’s Society, were the changes made to the eligibility criteria around legal aid for immigration cases. These changes saw unaccompanied and separated children removed from scope for legal aid unless their claim is for asylum, or if they have been identified as victims of child trafficking.

Since LASPO came into force in April 2013, The Children’s Society has closely followed the impact of these changes on unaccompanied and separated children. In 2015, we published a report, ‘Cut off from justice’¹, that sought to understand the changing landscape unaccompanied and separated children faced as they seek to regularise their immigration status in the UK.

This report updates our findings, four years after the introduction of LASPO, ensuring that the needs of unaccompanied and separated children continue to be heard within a system that often renders them invisible, harming both their childhood and their future.

In our 2015 report, we focused on the children themselves. We interviewed nine young people and 24 professionals from health, social care, and the voluntary sector, all supporting unaccompanied and separated children through a variety of different issues in their lives of which their immigration status was just one constituent part. The report explored the ‘super-vulnerability’ of this group, established their rights under the United Nations Convention on the Rights of the Child², and set to put a minimum estimate on the number of unaccompanied and separated children who had been removed from the scope of legal aid since the 2012 legislative changes.

The report identified 10 different ‘categories’ of children who had fallen out of scope of legal aid and looked at a variety of key themes arising from the interviews, a survey and other data collection. These themes included the invisibility of these children, their transition to adulthood at 18, the complexity of their cases, some of the safeguarding risks their immigration status can cause and the responses of English local authorities to these children when they are either in their care, or known to them.

In this report, we will re-visit many of these themes, but we have also sought to build on some of the gaps in the first report. In our interviews for this report, we focused on engaging with immigration lawyers and advisers through a series of semi-structured interviews and a survey. We also sought to update the data behind these trends, gathering information from a range of public bodies.

This report demonstrates how the consequences of LASPO have continued to develop, four years after its enactment. We found that despite improvements in the success rates for Exceptional Case Funding that still far too few applications are being made to ensure unaccompanied and separated children are accessing justice. Local authorities still have not comprehensively and systematically responded to the new environment for immigration advice that children both in their care, and those known to them, critically require. Legal professionals are taking on increased financial risk through the system and children are particularly struggling as they turn 18, especially when it comes to exercising their Article 8 ECHR right to a private and family life or if they are victims of trafficking.

It is still the case that many unaccompanied and separated are cut off from justice, leaving them with unresolved immigration issues, their lives on hold and potentially at risk.

Executive Summary

The UK Government is a signatory to the United Nations Convention on the Rights of the Child (UNCRC). This upholds, amongst other principles, the rights of children to participate (Article 12) and places a duty on institutions that primary consideration is given to the rights of the child (Article 3). This report considers how these rights and entitlements of children may have been impeded by the removal of legal aid for some of the most marginalised and vulnerable children living in the UK.

Unaccompanied and separated children were removed from the scope of legal aid five years ago, following the introduction of the Legal Aid, Punishment and Sentencing of Offenders Act 2012, unless their claim was for asylum or they had been identified as a victim of child trafficking. These young people have a 'super-vulnerability' – their irregular immigration status coexisting alongside the trauma they have too-often experienced and being without their parent, or carer in the UK.

Many of these children arrive into the UK unaccompanied, are taken into the care of local authorities and usually awarded a temporary form of leave to remain from the Home Office, known as unaccompanied asylum seeking children leave or ‘UASC leave’. This provides only a temporary respite for children, falling short of the durable solution needed for their longer-term stability. Alongside children in care, many more hidden groups of children have been cut off from justice due to the LASPO changes. These include children in private fostering arrangements, children awaiting a decision on their trafficking status and children who are misdiagnosed as being out of scope when they are not, largely due to the complexity of the immigration rules and their personal history.

The main findings from our report show that:

- Applications for non-asylum immigration legal aid have fallen by 82% between 2012/13 to 2016/17.
- In line with the findings from our 2015 report ‘Cut off from Justice’, we found that there remain ‘advice deserts’ in certain regions across the country. Services remained concentrated in London and the South East, with one third of non-fee services regulated by the Office of the Immigration Services Commissioner (OISC) based in these two regions. This geographical distribution is similarly reflected in the number of applications for Exceptional Case Funding (ECF) – the safety net put in place after LASPO.
- The number of OISC-regulated immigration advice services has reduced by 46% from 2012 to 2016. The largest cut in services for those offering free legal advice was for advice at Level Three (appeals and the most complex cases), which saw a cut of 54% between 2012 to 2016.
- Home Office fees for a variety of applications have seen an increase of at least 45% between 2013 and 2017 and an application for ‘Indefinite leave to remain’ in the UK, which often marks the end of an individual’s immigration journey, has increased by 119%.
- Even in 2015/16, after the ECF scheme had been running for three years, children and young people made up only 16% of all ECF grants for immigration claims. Based on estimates of how many children would fall out of scope of legal aid, the 12 grants for ECF in 2015/16 make up less than 1% of the expected cases under the pre-LASPO system (estimated to be 2,490 in the year before LASPO was introduced – see page 27.

Building on the picture unveiled in ‘Cut off from Justice’, local authorities were once again identified as key actors in supporting these young people to access legal support, both those in their care and living in the wider community.

Whilst over 50 local authorities told us that they supported over 1,000 children to access immigration legal advice, only 12 said they paid for the immigration advice needed. Only two local
authorities had a policy on providing access to immigration advice for children subject to immigration control, leading to a postcode lottery for many children in need of immigration advice. For many of these children their immigration status is inextricably linked to the safeguarding risks they face now and will face in the future.

Whilst the safety net of ECF does exist, our evidence is clear that this is not catching unaccompanied and separated children. Whilst legal professionals submitting ECF applications told us they were generally, knowledge of ECF is limited; the process is long and speculative and in certain types of cases, such as where there is trafficking or a protection element to the claim, it is considered to be an inappropriate mechanism for accessing legal support for children.

The children excluded from legal aid often are living complex lives and, as a result, have complex immigration cases. They may struggle to navigate the routes to legal advice, particularly where their local authority is unable to assist them and, where ECF is not readily accessible, they struggle to find other sources of funding for their legal fees or risk facing exploitation in their efforts to secure funding.

The evidence gathered for this report which, along with ‘Cut off from Justice’ (2015), provides a comprehensive source of evidence examining unaccompanied and separated children's access to legal aid, leads us to conclude that very few of these children have access to the immigration advice they so desperately need.
Methodology

For this report, we have used a range of sources and triangulated research techniques to build as complete a picture as possible of unaccompanied and separated children’s immigration and nationality claims in the UK.

We have drawn on official data from the Legal Aid Agency, UK Visas and Immigration, the Home Office, the Office of the Immigration Services Commissioner and the Law Society. We have also reviewed a range of published sources including reports and legal commentary concerning the ‘Legal Aid, Sentencing and Punishment of Offenders Act 2012’ and the experiences of unaccompanied and separated children more broadly.

To augment these published sources, we issued Freedom of Information Requests to the Legal Aid Agency, the Ministry of Justice, UK Visas and Immigration, the Office of the Immigration Services Commissioner and all English local authorities with children’s services departments.

At the time of publication, the Legal Aid Agency had failed to respond. We received non-disclosures from the Ministry of Justice and UK Visas and Immigration due to applied exemptions. The Office of the Immigration Services Commissioner responded and the raw data can be found in Appendix C. In total 111 out of 152 local authorities in England responded, giving a response rate of 73%.

In addition to this, we also conducted a survey with legal professionals, including OISC registered professionals, supporting unaccompanied and separated children with their immigration claims. This was run on ‘Qualtrics’, a widely-used questionnaire software application, over a period of six weeks. The survey was systematically distributed to every registered provider of immigration advice regulated by OISC, and every solicitor firm listed on the Law Society’s database as providing immigration advice. We also approached several immigration barristers with the survey, sending questionnaires to those chambers we identified, following a search of the bar council’s ‘find a barrister’, by snowballing techniques, and making use of our network of extended contacts.

The survey attracted a total of 29 complete responses, enough to be included in analysis. Some questions received fewer responses and, as a result, we have clearly stated the number of respondents for each question, where appropriate, within the text and accompanying tables.

Finally, we conducted a series of 22 semi-structured interviews with legal professionals with experience of supporting unaccompanied and separated children with their immigration claims. Our analysis of the data was undertaken in the same way as in our ‘Cut off from Justice’ (2015) report. Please refer to page 31 of that report for further information. Taken together with the number of participants from our survey, we have been able, within a niche area of practice, to capture a solid sample of immigration and nationality legal practitioners working with unaccompanied and separated migrant children. Seven participants did both the survey and the interviews, which takes our total sample of legal practitioners to 44 (N= 29+22-7).

Ethics approval was given by The Children’s Society, the Institute of Applied Social Research at the University of Bedfordshire, and the University of Bedfordshire’s Research Ethics Committee. Pseudonyms are used throughout this report.

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Chapter One: Unaccompanied and Separated children in the UK

Unaccompanied and separated asylum seeking children

Cut off from Justice (2015) outlined just how difficult it is to quantify the numbers of unaccompanied and separated children in the UK. The report cited three major reasons for this:

"Firstly, the paucity of available information available on the numbers and circumstances of children in the UK who are subject to immigration control. The only 'solid' information that exists is for unaccompanied children seeking asylum where statistics are kept by the Home Office, the Department for Education (DfE) and local authorities.

Secondly, many unaccompanied and separated children are not officially registered as being in the UK and live in hidden worlds. Others lead transitional lives, moving between hidden and seen worlds as they shift between legal and illegal statuses. This means that their lives and circumstances often exist outside of formal systems.

Thirdly, it is known that many agencies working with separated and unaccompanied children interpret these legal and policy definitions in different ways and in addition to this, also engage with different methods of counting these children."

In the two years since publication, little has changed. The clearance of the Calais migrant camp, as well as transfer of children to the UK for family reunification in accordance with the Dublin III regulation, has increased awareness among a range of professionals that unaccompanied and separated children are not simply 'unaccompanied asylum seeking children; looked after by local authorities’ but can instead be in a range of different circumstances. However, it remains the case that national statistics, professionals and the public do not easily distinguish between the various groups of children that make up “unaccompanied and separated children” in the UK.

As in the 2015 report, the only way to understand the potential scale of the issue is to pull together a range of existing data and information sources as proxy measures.

How many separated and unaccompanied children are seeking asylum in the UK?

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5 Kohli, RKS, Connolly, H and Beckett, H (2014) By their Side and On their Side; Reviewing the Evidence for Guardianship for Separated Children in Northern Ireland. Northern Ireland Commissioner for Children and Young People.
Unaccompanied and separated children seeking asylum in the UK form a more certain part of the numerical evidence, given that data for this group of children and young people is the most comprehensive.

Official Home Office asylum statistics\textsuperscript{10} show the number of children applying for asylum on their own has fluctuated over time. Figure 1.1 shows that between 2009 and 2012 figures fell from 2,857 to 1,125 before increasing again to a high of 3,254 in 2015. The 2016 figure of 3,175 demonstrates a slight fall on the previous year. However, all the figures in the last eight years are lower than the average figures seen between 2006 and 2009 during which an average of 3,414 asylum applications were made by unaccompanied children each year.

It is difficult to know what caused the decrease in numbers from 2010 to 2014 and the research does not address why this might be. One of the only identifiable factors highlighted in the research and statistics as a possible, although not an exclusive contributing factor, is the change in methodology used by the Home Office to record the data on unaccompanied children claiming asylum\textsuperscript{11}.

The number of asylum seeking children in the care of local authorities has also decreased across the same period from 3,480 in 2010 to 1,970 in 2014\textsuperscript{12}. This number is higher than the number of child asylum applicants because it is a cumulative number, rather than a year-on-year count. The increase in 2015 to 2016, to a level that is more in keeping with figures from 2008 and earlier, may reflect efforts to better identify claims for asylum among children. Department for Education figures for 31 March 2016 show that the number of unaccompanied asylum seeking children in the care of local authorities across England was 4,210, a 54\% increase compared to the previous year when it was 2,740\textsuperscript{13}.

The graph below tracks the number of unaccompanied children making applications to the Home Office and the numbers living in local authority care, for ease of comparison.

**Figure 1.1: Number of unaccompanied children making applications for asylum to the Home Office and number of unaccompanied children in local authority care**


It is important to have a good overview of the numbers of unaccompanied and separated asylum seeking children because, while they have recourse to legal aid for their first asylum application, they may not do so for subsequent applications. There are five different outcomes from an asylum application made by an unaccompanied child. Of these, two outcomes (asylum and humanitarian protection) would likely place a child in scope for legal aid for future applications, whilst three (UASC-leave, discretionary leave and family and private life leave) would likely put a child at risk of being out of scope in future applications.

Children can make these future applications because, during their stay in the UK, they often accrue reasons outside of asylum or protection-based reasons for remaining here that are recognised within immigration rules. However, these routes to settlement are usually cases for which legal aid is no longer available, such as claims that engage Article 8 of the European Convention on Human Rights. As such, the unaccompanied and separated asylum-seeking children in this situation are an important piece of the jigsaw when trying to understand how many children are out of scope of legal aid.

### Grants of leave to remain from the Home Office that put asylum-seeking children at risk of being out of scope for legal aid

The Home Office keeps figures of the decisions it makes on the initial applications of unaccompanied asylum seeking children which help us to better understand the number of children who, after an initial asylum decision may find themselves at risk of being out of scope for legal aid for their immigration claim. The table below provides a breakdown those decisions based on the possible outcomes for unaccompanied children receiving their first decision as children and for those over the age of 18, if their 18th birthday passes whilst they are awaiting a decision.

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Table 1.1: Outcomes of initial decisions on the claims of unaccompanied asylum seeking children

<table>
<thead>
<tr>
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<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
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<tr>
<td>Total initial decisions</td>
<td>1112</td>
<td>1270</td>
<td>1930</td>
<td>1959</td>
</tr>
<tr>
<td>Total grants</td>
<td>813</td>
<td>906</td>
<td>1289</td>
<td>1528</td>
</tr>
<tr>
<td>Total refusals</td>
<td>299</td>
<td>364</td>
<td>641</td>
<td>431</td>
</tr>
<tr>
<td>Refusals as a % of all initial decisions</td>
<td>27</td>
<td>29</td>
<td>33</td>
<td>22</td>
</tr>
<tr>
<td>Grants of Asylum</td>
<td>287</td>
<td>487</td>
<td>420</td>
<td>614</td>
</tr>
<tr>
<td>Asylum as % of all grants</td>
<td>35</td>
<td>54</td>
<td>33</td>
<td>40</td>
</tr>
<tr>
<td>Grants of Humanitarian Protection</td>
<td>4</td>
<td>10</td>
<td>19</td>
<td>57</td>
</tr>
<tr>
<td>HP as a % of all grants</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Grants of Discretionary Leave</td>
<td>383</td>
<td>23</td>
<td>41</td>
<td>15</td>
</tr>
<tr>
<td>DL as a % of all grants</td>
<td>47</td>
<td>3</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Grants of UASC Leave</td>
<td>119</td>
<td>380</td>
<td>809</td>
<td>837</td>
</tr>
<tr>
<td>UASC Leave as a % of all grants</td>
<td>15</td>
<td>42</td>
<td>63</td>
<td>55</td>
</tr>
<tr>
<td>Grants of Family or Private Life Leave</td>
<td>20</td>
<td>6</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>Family or private life as a % of all grants</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>0</td>
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</table>

Of the possible outcomes for an initial decision on the immigration case of an unaccompanied asylum seeking child, Asylum and Humanitarian Protection would usually ensure that these young people would remain within scope for legal aid, should they be required to make subsequent applications on similar grounds. A child who has been granted discretionary leave, UASC leave or Leave on the basis of Family and Private Life could, should they make a subsequent application that was not a fresh asylum claim, fall outside of the scope of legal aid.

Based on the table in 1.1, one could produce a minimum estimate of the numbers of unaccompanied former-asylum-seeking children who might fall out of scope of legal aid for a key aspect of their case in subsequent applications. Over the four years recorded, it would total 2,638 young people.

Unaccompanied and separated children in the community

Although the most visible unaccompanied and separated asylum seeking children are predominantly taken into local authority care, there are likely many more unaccompanied and separated children outside of the care system living with family members, relatives or individuals within their community networks. There are no official figures to help identify this cohort and so other sources must be used.

Sigona and Hughes estimated that approximately 120-140,000 children are living in the UK without any regular immigration status. Although they suggest that the majority of these children either arrived in the UK with their parents and that over half were born here, a proportion of these children will have arrived as an unaccompanied or separated child. Furthermore, of those children who do arrive with family members, some may later find themselves separated, often because of family breakdown. Research has shown that, for children separated after they have arrived in the UK, it

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can be very difficult for children’s social care to respond to their situation. Further information on the
outcomes for children in this scenario can be found in the work of Finch, who suggested that the
family courts are encountering “very large” numbers of foreign national children being subject to
child protection proceedings\(^\text{18}\).

Whilst there are unaccompanied and separated children living in private fostering arrangements, it
is difficult to determine the numbers of such children, partly because most these arrangements exist
unknown to children’s social care services\(^\text{19, 20, 21}\). Various estimates do exist to provide a baseline.
Official statistics for private fostering are no longer collected as of 2016\(^\text{22}\). The last recorded figures
show that 1,560 children were reported as being cared for and accommodated in private foster care
arrangements, as of 31 March 2015. In this last year of data collection, some 2,740 new private
fostering arrangements began\(^\text{23}\).

The difference between these official numbers and the reality is indicated by the British Association of
Adoption and Fostering, which suggests figures of between 15,000 to 20,000 children in private
foster care at any one time – a number that is still widely circulated within policy and practice
literature\(^\text{24}\). While these numbers relate to the total number of children in private foster care and not
solely refer to separated migrant children, Crawley (2012) suggests that a sizeable number of
children in private foster care will indeed be subject to immigration control\(^\text{25}\). The discontinued
Department for Education statistics show that in 2015, only 38% of children in private foster care
arrangements were UK born. Over time, the statistical set suggested that the number of UK born
children was declining as more and more children in private foster care arrangements were born
overseas.

If we apply the 38% figure for children born overseas to the estimates of children living in private
foster care offered by BAAF (above), then we can estimate that between 9,300 and 12,400 migrant
children may well be living in private foster care arrangements.

These sources together suggest that the number of unaccompanied and separated migrant children
living in the UK is relatively large and, therefore, that the impact of the legal aid reforms may be far
ranging, potentially affecting the lives of thousands of unaccompanied and separated migrant
children. As a minimum estimate, based on recent data and research there are at least 2,600
(2,638) children at risk in local authority care or as care leavers and a further 9,300 to 12,400 in the
community again potentially at risk. Combined this gives between 12,200 and 15,000 children
potentially out of scope. It can only be a minimum estimate and there are many groups who may not
be included like trafficked children, and others, but it does give an indicative scale to the problem.

\(^{18}\) Finch, N (2014) Always Migrants, Sometimes Children.. UK Report for the EU Commission CONNECT Project
Identifying Good Practice in and Improving, the Connections Between Actors Involved in Reception, Protection and
Integration of Unaccompanied Children in Europe.

\(^{19}\) Connolly, H (2014) For a While out of Orbit.: Listening to What Unaccompanied Asylum Seeking Children Say about

House of Commons.

00198-2010.pdf [Last accessed 7 June 2017].


\(^{23}\) Department for Education (2014) Statistical First Release of Notifications of Private Fostering Arrangements in England:
accessed 7 June 2017].


\(^{25}\) Crawley, H (2012) Working with Children and Young People Subject to Immigration Control: Guidelines for Best
Indeed, the Children’s Rights Alliance for England has proposed, in its Immigration, Asylum and Trafficking report forming part of their series of reports on ‘The State of Children’s Rights in England’, that:

“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”\textsuperscript{26}.

Chapter Two: Unaccompanied and Separated children out of scope

A subset of the unaccompanied and separated children discussed in the chapter above will be out of scope of legal aid under LASPO. Understanding the circumstances and immigration claims of these children is not straightforward.

Cut off from Justice (2015) attempted to separate children out into different categories to simplify the circumstances of children that are out of scope for legal aid and to create a typology of out of scope cases, which could be used as part of the research framework.

In updating the research, the decision was taken to use the same framework for consistency and clear comparison, but also because participants in 2015 reported that it helped them in responding to our surveys and questionnaires.

Table 1.2, below, gives a full breakdown of the different groups of children who are now out of scope and what their immigration claims and individual needs might be.

We identified 10 different categories of unaccompanied and separated children that are now out of scope for legal aid, in the original report. For this update, we have added one additional sub-category bringing the total to 11. The table is complex, listing a range of different scenarios and often with reference to the immigration rules. As such, for lay readers and simplification, we have further summarised it into the 6 broad headings summarised as follows:

**Trafficking**
Children who have been suspected to have been trafficked from outside the UK are at risk of being out of scope. These children, once confirmed as trafficked, or potentially trafficked, are in scope for legal aid. If, however they are unidentified victims, or awaiting decisions, they risk being out of scope for legal aid.

**Family Breakdown and Exclusion**
Another common reason for being out of scope is because of family breakdown. Children with insecure immigration status can be left behind by relatives that are moving on elsewhere, their adoption arrangement might break down, they might be excluded from a joint immigration claim made by their family, or they may become estranged from their parents. All of these things can put them at risk of being out of scope for legal aid.

**Mixed cases with asylum and non-asylum grounds**
Many children have ‘mixed’ cases. They might be applying for asylum but, for example, having lived in the UK for many years, may also have a claim based on a right to family or private life, in accordance with Article 8 of the European Convention on Human Rights. Any aspect of an immigration claim based on Article 8 rights would be out of scope for legal aid.

**Unresolved or problematic status**
Some young people may find themselves out of scope for legal aid because they have overstayed their visa, or perhaps are in care but their immigration status is unknown. Others may have lived in the UK for many years and be eligible for citizenship. Some may have had their status revoked because of criminal convictions which would put them out of scope for legal aid.

**Stateless children**
Children making statelessness applications are out of scope of legal aid.

**Misdiagnosis**
The final overarching group of out of scope children are not really out of scope. They are children who, having sought advice, have been told that they are out of scope because the professional they asked for help failed to identify that they had an asylum or protection claim, or were a victim of trafficking. We did not include this category in the 2015 report, but one of our major findings for the first report, which is echoed in this updated version, is that many legal professionals have reported to us that they frequently see children who have been told they are out of scope when they are, in fact, eligible for legal aid. This has tended to happen simply because the professional has not known enough about the young person’s case to identify the facts relevant to an asylum, protection or trafficking claim.

The full table below outlines the individual categories and circumstances.

**Table 2.1: Categories and Circumstances of Separated and Unaccompanied Children Out of Scope**

<table>
<thead>
<tr>
<th>CATEGORY OF CIRCUMSTANCES</th>
<th>PARTICULARS OF CIRCUMSTANCES</th>
</tr>
</thead>
<tbody>
<tr>
<td>TRAFFICKING</td>
<td>Trafficked children who have not been referred to a first responder and/or the National Referral Mechanism (NRM)</td>
</tr>
<tr>
<td></td>
<td>Trafficked children who have been referred to the NRM but are waiting for a 'reasonable grounds decision'.</td>
</tr>
<tr>
<td></td>
<td>Trafficked children who have been referred to the NRM but have received a negative 'reasonable grounds decision'.</td>
</tr>
<tr>
<td></td>
<td>Trafficked children who have been referred to the NRM but have received a negative 'conclusive grounds decision'.</td>
</tr>
<tr>
<td>CHILDREN SEPARATED FROM FAMILY DUE TO FAMILY BREAKDOWN</td>
<td>Separated children who have come to the UK at an earlier age but have since been abandoned by or separated from their parents and/primary care giver (e.g. due to child protection issues, domestic violence, death, family breakdown)</td>
</tr>
<tr>
<td></td>
<td>British children born in the UK to a non-national parent and British parent (or one with settled status) but it proves difficult to evidence the child’s citizenship rights because there has been a family breakdown.</td>
</tr>
<tr>
<td></td>
<td>Children who arrived into the UK as dependents of EU citizens but are no longer in the care of that parent / family member.</td>
</tr>
<tr>
<td>IMMIGRATION CASES-LEAVE TO ENTER OR REMAIN ON NON-ASYLUM MATTERS</td>
<td>Unaccompanied and Separated migrant children seeking leave to enter or leave to remain in the UK on non-asylum grounds including under the immigration rules and the non-protection elements of the European Convention on Human Rights. Including:</td>
</tr>
<tr>
<td></td>
<td>Unaccompanied and Separated migrant children who have reached 17.5 and are making a non-asylum grounds application for an extension of their existing leave</td>
</tr>
<tr>
<td></td>
<td>Unaccompanied and Separated migrant children granted UASC leave for 2.5 years but this leave expires before they have reached 17.5 years of age and where they are making an extension application on non-asylum grounds</td>
</tr>
<tr>
<td></td>
<td>Unaccompanied and Separated migrant children appealing a decision about their leave on non-asylum grounds</td>
</tr>
<tr>
<td></td>
<td>Unaccompanied and Separated migrant children seeking leave to enter or leave to remain in the UK on grounds of long residence</td>
</tr>
<tr>
<td>Category</td>
<td>Description</td>
</tr>
<tr>
<td>----------------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>MIXED CASES</td>
<td>Unaccompanied and Separated migrant children making applications to stay in the UK on a mixed case basis (because they have an asylum / ‘international protection’ claim mixed with a non-asylum claim). Only the asylum/international protection element of the case will now be funded by legal aid.</td>
</tr>
<tr>
<td>EXCLUSIONS FROM FAMILY CASES</td>
<td>Separated migrant children who initially arrived into the UK with family but were not included in the asylum and/or immigration claim of their primary care giver and have since separated from their family (and do not have a claim for asylum in their own right)</td>
</tr>
<tr>
<td>CRIMINAL JUSTICE PROCESSES</td>
<td>Unaccompanied and Separated migrant children involved in criminal justice processes who have had their immigration status revoked as a consequence of criminal activity and who face deportation.</td>
</tr>
<tr>
<td>STATELESSNESS</td>
<td>Children making a ‘statelessness’ application</td>
</tr>
<tr>
<td>INTERNATIONAL ADOPTION</td>
<td>Children who arrived in the UK via an international adoption arrangement where this has broken down.</td>
</tr>
</tbody>
</table>
| CITIZENSHIP                                        | Children with the right to obtain British citizenship after 10 years  
Children with the right to make an application for citizenship through their parents, even though separated from them, and with the right to apply for citizenship on the basis that their future is clearly in the UK. |
| UNRESOLVED IMMIGRATION MATTERS                      | Separated migrant children in the care system who do not appear to have a clear immigration status and this status remains unresolved  
Separated children in private fostering arrangements (e.g. in the care of an extended family member, family friend, member of community) who do not appear to have a clear immigration status and this status remains unresolved  
Unaccompanied and separated children who have overstayed their visa. |
| CHILDREN WITH PREVIOUSLY UNIDENTIFIED CLAIMS THAT WOULD FALL IN SCOPE | Unaccompanied and separated migrant children who have previously had immigration advice and representation that has failed to correctly diagnose circumstances relevant to an asylum or international protection claim.  
Unaccompanied and separated migrant children who have previously had immigration advice and representation that has failed to correctly diagnose trafficking circumstances  
Unaccompanied and separated migrant children with unresolved asylum / human rights / trafficking claims where these have not been identified by non-legal professionals such as social workers, teachers, youth workers / advocates |

(NB. These children are in scope for legal aid but our research has found they often think they are out of scope because of the quality of advice they have received.)
Chapter Three: Children’s Rights and access to justice

In both this report, and ‘Cut off from Justice’ (2015) an explicit choice has been made in the theoretical basis of the research – the way it is designed and conducted – to use a children’s rights framework informed by the United Nations Convention on the Rights of the Child (UNCRC)\(^27\), which the United Kingdom signed in 1990 and came into force in UK law in 1992. The Convention consists of 54 articles that state specific children’s rights and the ways that governments and international organisations should work to ensure that all children can access them.

In the first report, we highlighted how the UNCRC obligates the UK Government to ensure that the rights of all children in the UK are upheld and, more specifically, that procedural guarantees are in place for children throughout all administrative and judicial proceedings, including immigration processes\(^28\). To emphasise this, we quoted a recommendation from the 2006 ‘Day of General Discussion on The Right of the Child to be Heard’ that all signatories to the UNCRC should, without limitation:

> “Establish specialist legal aid support systems in order to provide children involved in administrative proceedings with qualified support and assistance\(^33\)”

Our research into the consequences of LASPO for unaccompanied and separated children has, from the outset, attempted to establish whether this specific cohort of children in the UK does have access to the ‘specialist legal aid support systems’ required to ensure that they have ‘qualified support and assistance’ during their journey through the UK’s immigration system.

It is worth reconsidering which provisions in the Convention are most relevant to the very practical question of children’s access to legal aid. For a fuller exploration of the most relevant provisions please refer to ‘Cut off from Justice’ (2015)\(^34\).

There are four ‘General Principles’ that form the backbone of the UNCRC (1989):

**Article Three – the best interests of the child**

Article 3 (1) establishes the legal standard that all institutions, both public and private, and including courts, administrative authorities and legislative bodies, have a duty to give primary consideration to the best interests of the child in all actions / procedures that concern and impact upon them. It

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\(^{32}\) Crawley, H (2012)


extends its obligations on States in Article 3 (2) by stating that they should further make sure that children receive the “protection and care as is necessary for his or her well-being” through “appropriate legislative and administrative measures”.

**Article Two – the right not to be discriminated against**

Article 2 (1) establishes the principle that all children should enjoy the rights of the UNCRC without discrimination in respect of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, birth or other status. It places an obligation on States to be proactive in measures preventing any discrimination.\(^{35}\)

**Article Twelve – the right to participate**

Article 12 (1) and (2) of the UNCRC relate to the right of children’s participation.\(^{36}\) They state that all children, with sufficient capacity for self-expression, should be given the opportunities to do this, particularly within circumstances where judicial and administrative procedures have the power to influence their lives. This article places a duty on states to generate favourable contexts and structures for children’s self-expression so that they can have some degree of self-determination in terms of what happens to them in formal processes.

**Article Six – the right to survival and development**

Article 6 obliges states to ensure, “to the maximum extent possible”, the life, survival and development of all children. As Kohli et al (2014) suggest, this article is “central to all considerations for the protection of children across time, entailing immediate, medium term and durable solutions.”\(^{37}\)

These Articles provide four key questions to hold in mind throughout any reading of this report:

- To what extent does the UK’s immigration system, the processes, actors, and outcomes align with the best interests of each unaccompanied and separated child?
- To what extent does the UK’s immigration system, the processes, actors, and outcomes treat unaccompanied and separated children differently to other children because of their identity, experiences or specific needs?
- To what extent can unaccompanied and separated children participate in the UK’s immigration system and its processes? And to what extent are the actors and outcomes informed by their wishes and feelings?
- To what extent does the UK’s immigration system, the processes, actors, and outcomes ensure the survival and development of unaccompanied and separated children in the short and medium term, and as they transition into adulthood?

\(^{35}\) UNCRC (1989).


Chapter Four:
The legal landscape for unaccompanied and separated children

This chapter focuses on the legal terrain that unaccompanied and separated children must navigate; in order to find the advice they need to resolve their immigration claims.

The chapter attempts to “zoom in” from the wider terrain, down to specific factors that are relevant to unaccompanied and separated children. It begins by examining advice and casework provided under the Office of the Immigration Services Commissioner (OISC). Given that a significant proportion of this advice does not require payment of a fee and is administered through voluntary services, it is often the first point of contact an individual might have with the immigration system.

After examining OISC provision, the report looks at provision by immigration solicitors. Whilst solicitors do provide initial advice, they tend to have a larger role in more comprehensive casework.

Next, the chapter looks at the financial element of the immigration system. If a child is successful in accessing the right advice and securing someone to take on their case, they still need to be able to pay any relevant Home Office fees for their application and for the services provided by their immigration adviser, or solicitor.

After examining the effect LASPO has had on the legal aid system at large, Exceptional Case Funding (ECF) is examined as it is the main funding route available for out of scope immigration cases of unaccompanied and separated children.

Finally, the chapter looks at the experiences of immigration professionals themselves, when supporting unaccompanied and separated children, specifically their experience of the ECF system.

Finding and immigration adviser

Since the introduction of LASPO, we have regularly collected data from the Office of the Immigration Services Commissioner (OISC) about the number, location and level of immigration advice provided across the UK.

The data we have used comes from three Freedom of Information Requests for data from 31st December in 2012 (before LASPO was introduced), the 31st December in 2014 and finally on the same date in 2016. The full regional breakdowns, across all years, are published in Appendix C.

The OISC regulates the activity of anyone who provides immigration advice services and is not already regulated by another recognised body (as is the case for solicitors, barristers and legal executives). As such, OISC regulates a mixture of organisations including law centres, specialist private companies, self-employed advisers, charities, and community and faith groups offering immigration advice services, both at a cost and for free.

There are three different levels of immigration advice that OISC regulates, moving from Level One through to Level Three, depending on case complexity:

- Level One: basic immigration advice within the Immigration Rules
- Level Two: more complex casework, including applications outside the Immigration Rules

Level Three: Appeals to the First Tier, and the Upper Tribunals of the Immigration and Asylum Chamber

In our 2015 report, we observed five key findings:
- Fee charging providers are almost twice as common as non-fee charging providers;
- Non-fee services at Level One are much more available than advice at Levels Two and Three;
- Services at all levels, both fee and non-fee, are more readily available in London and the South East;
- All levels and fee structures of OISC regulated services had reduced by at least 30%, between 2012 and 2014;
- The largest cuts, of almost 50%, were to be found among free providers at Level Three.

Repeating our data collection for 31st December 2016 we found many of the same trends in evidence:
- Fee-paying providers remain almost twice as common as non-fee providers. In 2016, of all providers, 1089 (64%) were fee charging and 623 (36%) did not charge for their services;
- Non-fee Level One advice remains more available than Levels Two and Three, with 78% of non-fee providers offering Level One advice, 11% offering Level Two and 11% offering Level Three;
- Services remain concentrated in London and the South East, with one third of non-fee services based in these two regions;
- All levels and fee structures of OISC regulated services had reduced by an additional 20% from 2014 to 2016, having already reduced by 33% from 2012 to 2014. Overall, from 2012 to 2016, the number of immigration advice services regulated by OISC have reduced from 3,174 providers in 2012 to 1,712 providers in 2016. This is a reduction of 46%;
- The largest cuts, over the whole period of 2012 to 2016, were among providers offering free advice at Level Three (54%) and fee-paying advice at Level Two (56%).

Figure 4.1: Percentage cut in OISC providers for fee and non-fee services 2012 to 2014

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40 A ‘provider’ is an organisation providing immigration advice. Each organisation may have multiple advisers.
Finding a solicitor

This data from OISC does lend credence to the common argument that immigration advice deserts exist. It does not, however, give the whole picture. As part of the research, we also attempted to examine how solicitor provision had changed over the period in question. Unfortunately, we were not able to access reliable datasets that would quantify changes in solicitor provision accurately.

We made use of the Law Society’s online database41 to send out our survey to solicitors in as systematic a way as possible. This provided some useful insight into how a member of the public might seek legal representation and some of the challenges they might face in doing so.

The general search function returns a result of 2,367 solicitor firms offering personal immigration advice. Using the advanced search function, you can conduct more targeted searches. Providers offering asylum immigration advice and a subset of those who are funded through legal aid can be identified. There is also a function for general immigration advice and, again, a subset who are funded through legal aid. Finally, firms which offer advice on nationality and citizenship claims – common legal needs of the cohort in question can be searched for. The six searches, the general one and the five ‘advanced searches’ are the only ones available for immigration advice and services. The table below summarises the search results:

Table 4.1: Search results on ‘Find a Solicitor’ database at point of access, in 2016

<table>
<thead>
<tr>
<th>Search Term</th>
<th>Results</th>
</tr>
</thead>
<tbody>
<tr>
<td>All immigration</td>
<td>2,376</td>
</tr>
<tr>
<td>Asylum</td>
<td>827</td>
</tr>
<tr>
<td>Asylum - legal aid</td>
<td>7</td>
</tr>
<tr>
<td>General immigration</td>
<td>1102</td>
</tr>
<tr>
<td>General immigration - legal aid</td>
<td>1</td>
</tr>
<tr>
<td>Nationality and Citizenship</td>
<td>2488</td>
</tr>
</tbody>
</table>

Given that all non-asylum immigration cases are out of scope for legal aid, it is perhaps not unsurprising that only one result is returned for ‘general immigration – legal aid’. The number of firms offering legal aid services for asylum is of concern. Of the seven firms listed, one is in the North West of England, two in the South East and four in London.

The initial search for information does not reveal the entire picture. As we went through the database methodically to contact firms with our survey, we found that many of the firm’s entries were not correct. Some no longer offered immigration advice, for others we could not find websites or no-one answered the telephone when we rang to make further inquiries. We did not quantify exact numbers of entries that were not helpful in finding immigration advice, but this anecdotal evidence does demonstrate some of the difficulties that a member of the public might have in trying to identify a firm to provide them with immigration advice and casework and the accuracy of the database.

What are legal professionals seeing?

In our survey, we found further evidence of the fragmented nature of legal provision for unaccompanied and separated children. Whilst 22/29 responses to the survey were from legal professionals (with the rest acting as ‘signposters’, largely OISC trained, or non-practicing

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solicitors), the professionals were operating in differing contexts – including law centres, charities, pro-bono solicitor projects, as well as barristers and private solicitors and advisers.

Overall, these professionals did not work full time to meet the needs of unaccompanied and separated migrant children. The majority (24/29) worked with a range of clients which included, but was not limited to, unaccompanied and separated children. Only five respondents worked exclusively with the cohort.

Furthermore, the respondents were not evenly spread across the country – reinforcing the geographic trend we have previously highlighted where some areas have provision, whilst others go without. The majority did come from London (15/29), but we did manage to obtain responses from most other Government regions except for the East Midlands and the North East. This was reflective of the trends seen in immigration advice and casework regulated by the OISC, with London having the most provision and other regions like the North East and the East Midlands having minimal coverage.

Table 4.2: Geographic breakdown of survey respondents

<table>
<thead>
<tr>
<th>Region</th>
<th>Number of respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>London</td>
<td>15</td>
</tr>
<tr>
<td>South East</td>
<td>4</td>
</tr>
<tr>
<td>South West</td>
<td>3</td>
</tr>
<tr>
<td>Yorkshire and Humber</td>
<td>1</td>
</tr>
<tr>
<td>East Midlands</td>
<td>0</td>
</tr>
<tr>
<td>West Midlands</td>
<td>2</td>
</tr>
<tr>
<td>North East</td>
<td>0</td>
</tr>
<tr>
<td>North West</td>
<td>3</td>
</tr>
<tr>
<td>N/A</td>
<td>1</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>29</strong></td>
</tr>
</tbody>
</table>

The survey sought to understand what a typical caseload might look like for professionals working with unaccompanied and separated children.

27 respondents put an estimate on how many cases involving unaccompanied and separated children were in their current caseload. They estimated that they were currently working with 350 unaccompanied or separated children. The average number per respondent was 13 unaccompanied or separated clients, although this ranged from none, or just one, up to 50.

The 29 respondents spent varying amounts of their time working with unaccompanied and separated children. Most respondents (16/29) spent ‘some’ of their time on these types of cases (defined as 9-49% of their time). Only seven respondents ‘often’ worked with unaccompanied and separated children (50% or more of their time) whilst six rarely worked with the cohort (less than 9% of their time).

Considering the size of this cohort, it is important to then understand the subset of children who are out of scope for legal aid. Respondents were asked to categorise cases of children who are out of scope in two ways:
1) those exempt from legal advice and assistance,
2) those exempt from legal representation and,
In our questionnaire, as in our last research, and consultation with immigration solicitors, we defined legal advice and assistance as, writing letters, negotiation, getting a barrister’s opinion, preparing a written case. We defined legal representation as help preparing an immigration case before a tribunal, as well as representation at a tribunal hearing.

The above categorisation was an attempt to understand whether the removal of legal aid had more of an impact at either; specific stages in a child’s case or; across different types of immigration cases. It was difficult to draw any conclusions about this from the data. Given the wide range of respondents, it was clear that not every professional worked consistently at every stage of a case. A barrister, for example, would be unlikely to see a young person at the initial advice stage. Conversely, an advice worker for a non-fee charging OISC regulated provider would be less likely to be involved in representations to an immigration tribunal, although they might prepare written evidence. Similarly, citizenship applications require advice and assistance whereas a case based on an article claim would, in many instances, require representation.

However, this set of questions did help to provide some numbers for cases of unaccompanied and separated children that are out of scope for legal aid, among those that professionals are supporting.

1) exempt from legal advice and assistance
16 professionals said they had encountered unaccompanied and separated children who were out of scope for advice and legal help compared to 7 who had not. Of these 16 professionals, 13 estimated the total number of children they had encountered at about 150 since the introduction of LASPO. This created an average of 11 each, with individual respondents ranging from 2 to 25.

What our indicative sample tells us, is that LASPO has created the expectation that children will either be able to navigate the administrative and preparation processes of their immigration claims themselves or will always have adults to support them. Our evidence across both phases of the research shows that this is not the case. As one senior solicitor clearly told us:

“When children don’t have access to legal support, it just doesn’t get done. In my area, I have never met anyone who is helping these kids and I have never met a child who has done it on their own. “(Amanda, Senior Solicitor and Partner)

It may also offer us some insight into the types of cases where the most impact is happening, i.e. in those cases that do not require representation before a tribunal. In many ways, this is an inevitable finding as the bulk of immigration work happens in this context and either without or before the need for a tribunal.

2) exempt from legal representation
In total, 10 respondents felt they had seen children who were entirely out of scope for legal representation. Almost as many had not seen this, with 12 reporting they had not encountered such children. There could be many reasons for this. In the first instance, and as we have said above, it is likely to be an issue of numbers given that most children’s immigration and nationality applications will not require representation before a tribunal, at least not in the first instance. However, what is interesting to note is that 16 respondents had worked with children out of scope for legal advice and assistance (see above) and 10 had also seen children not entitled to public funds for their legal representation. This perhaps suggests that the biggest visible impact of LASPO is with children requiring representation for Article 8 appeals. This suggestion can certainly be corroborated internally within the questionnaire, as children with mixed cases, i.e. those with asylum and Article 8 claims, were the group that practitioners identified they are seeing the most. It is also one of the groups most highlighted in the interviews as well.
Of the 10 respondents who had seen children excluded from legal representation, 9 felt able to estimate the number of children, of which they reported to have encountered around 100. This gave an average again of 11 each, with a range of 1 – 25.

It is worth comparing these numbers with the total number of unaccompanied and separated children our respondents reported seeing. In total, 27 respondents told us they had seen 350 unaccompanied and separated children on their current caseload. A smaller number of respondents informed us that they were seeing between 100 and 150 children who were out of scope since LASPO was introduced.

There were 8 respondents who gave estimates of the number of children they had worked with across every category. Isolating this subset, gives us a very rough idea of how frequently a legal professional who regularly, but not exclusively, works with unaccompanied and separated children, might come across a child that is out of scope of legal aid.

Collectively in their current caseload, these professionals were working with 153 unaccompanied or separated children. Since LASPO was introduced, they had collectively seen between 100 and 120 unaccompanied and separated children who were either fully, or partially out of scope. Given that LASPO has been enacted for four full financial years, since it came into force in April 2013, this would equate to somewhere between 25 and 30 a year.

A rough approximation, proportionately reflecting the sample we have recorded, would suggest that one legal professional, who works regularly with unaccompanied and separated children, but not exclusively, might see about 19 children in this cohort a year. Of these, approximately 3 or 4 might be fully, or partially out of scope of legal aid. Given the sample size, and the variation within the data, this finding is limited but it does give a useful indication of the visibility of the cohort. What is most concerning is that the professionals who responded to our survey are the ones who clearly had knowledge and experience with the cohort; therefore, they would be likely to see children in these situations more than non-specialists. But even these professionals only see such children as a small proportion of their larger caseload, suggesting very few of the significant population of unaccompanied and separated children manage to find the immigration advice they need. This is best compared to the minimal estimate we made of between 12,200 and 15,000 children potentially out of scope of legal aid for their immigration claims.

Once a young person has found a solicitor or adviser to take on their case and found means by which to pay them, they must also secure further funding to pay fees to the Home Office for the application; these fees vary depending on the types of application42.

**Unaccompanied and separated children and Home Office fees**

It is important to consider how much an immigration claim may cost an individual applicant when analysing the impact of LASPO on children. Whilst legal aid may be available for casework, each application still requires an administration fee to be paid to the Home Office. Whilst there are circumstances where a fee waiver is available, there are also circumstances where it is not; most notable for our analysis is in relation to citizenship applications. Further, fee waiver applications generally require detailed evidence and submissions and carry risks of overstaying if refused in circumstances where the child has leave to remain.

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Since LASPO was introduced, Home Office fees have increased significantly. As mentioned previously, applicants are often expected to cover the cost of fees alongside costs for a solicitor or other legal representative, where legal aid is not available. The below table gives an indication of the typical increase for specific claims that are likely to be made by unaccompanied and separated children, as well as those who may have recently turned 18 and become adults.

Table 4.3: Home Office fees for a variety of most relevant applications (amount in £), 2013/14 to the present

<table>
<thead>
<tr>
<th>Year</th>
<th>Indefinite Leave to Remain in UK</th>
<th>Leave to Remain in the UK - other</th>
<th>Nationality Registration for a Child</th>
<th>Nationality Registration for an Adult</th>
<th>Naturalisation</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013/14</td>
<td>1051</td>
<td>578</td>
<td>673</td>
<td>753</td>
<td>874</td>
</tr>
<tr>
<td>2015/16</td>
<td>1500</td>
<td>649</td>
<td>749</td>
<td>913</td>
<td>1005</td>
</tr>
<tr>
<td>2017/18</td>
<td>2297</td>
<td>993</td>
<td>973</td>
<td>1163</td>
<td>1282</td>
</tr>
<tr>
<td>13 - 15 % increase</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>13 - 17 % increase</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

As the table shows, whilst there have been increases of at least 45% across all the categories included in the table there are some applications, most notably ‘Indefinite leave to remain’ which often marks the end of an individual’s immigration journey, which have increased by a substantially larger amount, in this case by 119%.

In the weeks before this report was published, UK Visas and Immigration announced that from June 1st 2017 each email sent to them concerning a single immigration claim would cost the claimant £5.48; another financial barrier that individuals will have to overcome.

The Legal Aid landscape

Since LASPO was enacted in April 2013, the legal aid landscape in England has changed significantly. In this report, we are focusing on how it has changed in relation to immigration. With all immigration cases now out of scope, except for asylum and other protection claims, one of the first consequences was a shift in the number of applications accepted by legal aid providers.

Before LASPO was introduced, Just Rights and The Children’s Society sent a Freedom of Information Request to the Ministry of Justice to find out how many children would fall out of scope of legal aid. Based on the legal aid data from 2009/10 received, a total of 2,490 cases, out of the 2,700 children’s non-asylum immigration cases granted legal aid that year would be out of scope after the introduction of LASPO. It is against this minimum estimate of 2,490 cases of children who

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would have received support pre-LASPO, that the following sections on legal aid, and specifically ECF should be read.

The number of applications made for civil legal aid has fallen from 599,931 in 2012/13 (before LASPO was implemented) to 166,848 in 2016/17. This is a fall of 72%. The number of ‘matter starts’ for legal aid has also fallen from 573,746 in 2012/13 to 157,967 in 2016/17, again a fall of 72%.

Over the period the number of applications for legal aid for asylum, and the numbers matter starts have stayed relatively constant. Over the period 2012/13 to 2016/17 asylum applications fell by 3%, but matter starts for asylum legal aid increased by 6%. On average, throughout the LASPO period, there have been about 36,500 asylum applications a year with an average of about 30,000 matter starts.

The case is very different for non-asylum immigration legal aid. Applications have fallen by 82% from 23,527 in 2012/13 to 4,161 applications in 2016/17. Matter starts have fallen from 22,496 in 2012/13 to just six in 2016/17.

Therefore, asylum cases, which used to make up 8% of all legal aid applications before LASPO, now account for 23% of all applications. Non-asylum applications, out of scope, have disappeared. This was the intention of the policy; to reduce the amount spent on legal aid. At the time of LASPO, however, the Government attempted to put in place a safety net. The Exceptional Case Funding Scheme was intended to ensure that, where the removal of legal aid would likely breach someone’s human rights, they would still be able to access funding awarded on a case-by-case basis. Practically speaking, the ECF scheme should have potentially been the safety net for the 2,490 children who received support in the last year of the pre-LASPO regime detailed above.

**Exceptional Case Funding**

In our last report, one of the starkest findings of our research was that none of the participants across our participant groups of solicitors, social workers, NGO’s, and even children and young people themselves, had known of any children who had been advised to, or were indeed able to access the Exceptional Funding Scheme. This was also reflected in the ECF statistics. This time our research is showing a different picture; one that appears to be a complex amalgam of perceptions, practices and outcomes.

In the first year of the Exceptional Case Funding (ECF) Scheme, only 1,516 applications were made in total, for all age groups. The low application rate fell in the second year from 1,516 to 1,172. There are likely to be a variety of reasons for this, but certainly one is the low prospect of success for the outcome of the application. In the first year, with 1,516 applications lodged, only 70 were granted. A success rate of just 4.6%.

Since its inception, a number of judicial rulings on ECF have resulted in an increased number of successful applications. These changes are detailed in Appendix B and they have meant that, by

48 Each legal aid provider gets an annual quota of matter starts – the number of legal aid cases in a specific area of law that they can take on in each year.


2015/16 there were 1,333 ECF applications determined, of which 661 were successful. This gives a much-improved success rate of 50%.

Public Law Project obtained some data from the Legal Aid Agency regarding the geographical distribution of ECF applications across the country, between November 2015 and June 2016. The table below details the response:

Table 4.4: Applications for non-inquest Exceptional Case Funding received between 9 November 2015 and 30 June 2016

<table>
<thead>
<tr>
<th>Region</th>
<th>Total</th>
<th>% of all applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>East Midlands</td>
<td>37</td>
<td>4</td>
</tr>
<tr>
<td>Eastern</td>
<td>22</td>
<td>3</td>
</tr>
<tr>
<td>London</td>
<td>419</td>
<td>50</td>
</tr>
<tr>
<td>North East</td>
<td>34</td>
<td>4</td>
</tr>
<tr>
<td>North West</td>
<td>44</td>
<td>5</td>
</tr>
<tr>
<td>South East</td>
<td>54</td>
<td>6</td>
</tr>
<tr>
<td>South West</td>
<td>34</td>
<td>4</td>
</tr>
<tr>
<td>Wales</td>
<td>28</td>
<td>3</td>
</tr>
<tr>
<td>West Midlands</td>
<td>71</td>
<td>8</td>
</tr>
<tr>
<td>Yorkshire and the Humber</td>
<td>65</td>
<td>8</td>
</tr>
<tr>
<td>Neither England nor Wales</td>
<td>9</td>
<td>1</td>
</tr>
<tr>
<td>No fixed abode</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Unknown</td>
<td>21</td>
<td>3</td>
</tr>
<tr>
<td><strong>Grand Total</strong></td>
<td>840</td>
<td>100%</td>
</tr>
</tbody>
</table>

The evidence in the table demonstrates the overwhelming proportion of ECF applications made in London. One conclusion that can be drawn from this is that, outside of London, finding a solicitor or adviser who will support a client with an ECF application is not as common as inside London. This suggests that the safety net provided by ECF is not evenly spread across the country.

The Legal Aid Agency provides further information about the category of law ECF applications were made under. When looking at ECF for all immigration claims specifically the following applications and grants were made in the first three years:

Table 4.5: ECF applications and grants made for immigration cases

<table>
<thead>
<tr>
<th>Financial Year</th>
<th>Applications</th>
<th>Grants</th>
<th>Success Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013/14</td>
<td>234</td>
<td>4</td>
<td>2%</td>
</tr>
<tr>
<td>2014/15</td>
<td>334</td>
<td>57</td>
<td>17%</td>
</tr>
<tr>
<td>2015/16</td>
<td>493</td>
<td>326</td>
<td>66%</td>
</tr>
</tbody>
</table>

---

51 With thanks to Public Law Project
Through a Parliamentary Question\textsuperscript{53}, we obtained some additional information about children and young people’s access to ECF for immigration.

Table 4.6: Applications and grants of ECF to children and young people for immigration matters

<table>
<thead>
<tr>
<th>Financial Year</th>
<th>Children under 18</th>
<th>Young people aged 18 - 24</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Applications</td>
<td>Success Rate</td>
</tr>
<tr>
<td>2013/14</td>
<td>0</td>
<td>n/a</td>
</tr>
<tr>
<td>2014/15</td>
<td>14</td>
<td>29%</td>
</tr>
<tr>
<td>2015/16</td>
<td>15</td>
<td>80%</td>
</tr>
</tbody>
</table>

The figures presented demonstrate that ECF applications are low in volume and that children and young people are not well represented by the scheme. Indeed, even in 2015/16, after the scheme had been running for three years and the acceptance criteria had been significantly relaxed, children and young people were only involved in 15% of cases where ECF was granted for immigration when the numbers published by the Legal Aid Agency in Table 1.10 are compared with the number received through the Parliamentary Question in Table 1.11.

Post-LASPO legal aid and ECF do not appear to provide as much coverage for children and young people with immigration claims, when compared with the system that predated LASPO. Even in 2015/16, with the much-improved success rate, only 15 applications were made for immigration claims under ECF for children. This accounts for only 1% of the 2,490 cases that were expected by the Ministry of Justice (according to the aforementioned FOI response) to fall out of scope of legal aid, once LASPO was implemented.

\textsuperscript{53} UK Parliament (2017) Parliamentary Questions: Legal Aid Scheme: Children and Young People: Written question - 68895 (Kate Green MP) \url{http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-03-23/68895/} [Last accessed 6 June 2017]
Given the breadth and depth of data we have collected about knowledge and perceptions of the exceptional funding scheme held by children’s legal practitioners, and how these intersect with the ways in which they use it, we would suggest that the historically low success rate continues to be a significant factor in explaining the low numbers of applications for migrant children nationally.

**Professionals’ experiences of ECF**

Exceptional Case Funding still appears to be wholly under-utilised in children’s immigration cases. In many ways, we still cannot know how appropriate or effective the system is for equal and effective access to justice for children’s immigration cases.

Yet, there are, unlike before, ‘pockets’ of immigration practitioners who have been ‘testing the water’ with it and have been beginning to see outcomes that are favourable in children’s cases, as illustrated in the quotes from practitioners below:

“I didn’t use it initially. I started doing some for complicated Article 8 cases for adults, and then was discussing with a colleague about how difficult the children’s cases were and they suggested, let’s try and get exceptional funding for children, and so far, they have been approved, but I don’t think that people generally think that.” (Amanda, senior immigration solicitor and partner).

“So, we did apply for exceptional funding and it was granted, but two things emerged from that. The first was, jolly good, exceptional funding is available for exceptionally complicated cases. But you need to know that it is available and make the applications and so on and so forth, and the numbers of applications on exceptional funding is incredibly low. Although the success rate on applications is quite high, the sheer numbers of individuals applying is miniscule compared to the number of individuals involved.” (William, senior immigration solicitor and partner)

The above quotes also indicate that those pockets of practitioners who are beginning to make use of the exceptional funding scheme may well belong to specialised local communities of practice, sharing and building knowledge, whilst simultaneously generating and responding to new standards and expectations of practice that have arisen in gaps left by LASPO.

“I have not done that many exceptional funding applications but I was talking to somebody at a conference a couple of weeks ago who had a lot of success with them……I am learning that quite a lot of them are being granted and that there has been very much a shift since the Gudanaviciene and IS cases.” (Fozia, Law Centre Immigration Solicitor)

**Different Perceptions of when to make use of the Exceptional Funding Scheme**

Whilst the above response is most definitely a step in the right direction, our evidence shows that only a small community of practice is making use of the exceptional case funding for children, and that the majority of immigration practitioners working with children’s cases do not belong to it. The negative consequences for children are clear and discriminatory – children whose immigration advisors and solicitors are immersed in certain networks are more likely to be able to access the scheme than those whose solicitors and advisors are not.

This remains a relatively new community of practice and, as such, there are variations of perception around the way that the exceptional funding scheme works and its purpose. Practitioners are engaging with it in different ways for children, creating another factor that builds discrimination into the system. Some practitioners consider it to be a system designed for ‘exceptions’, i.e. for complex immigration cases only, with their understanding of complex being any cases that do not fit within the framework of the immigration rules.
“The difficult cases, the ones we will apply for exceptional funding for, are the ones that don’t meet the rules thresholds.” (Maya, Immigration Solicitor, Manager of Migrant Children’s Project)

“The more unusual ones, maybe they have been in care or something, where it is discretionary, where they are complex cases, these probably fit exceptional funding. With other cases, as a hard-minded lawyer, you would think they are not complicated, they don’t really meet the exceptional case funding criteria, therefore, I am not going to get exceptional funding. Lawyers are approaching it in a legal way, and thinking the only thing I have got is a child, and as important as I think that is, they are unsure about whether that is one of the criteria, if that fits the criteria” (Amanda, Senior Immigration Solicitor and Partner)

Echoing our previous report, other practitioners were very clear that children’s status as separated and unaccompanied minors intrinsically rendered their cases complex given their special vulnerabilities. They drew attention to this group of children’s vulnerabilities as children not yet transitioned into maturity, as children alone, as children with personal immigration and asylum histories, and as children having to face the goliath system of the Home Office with its complex and shifting sands processes and systems. For these reasons, they thought that an application to the exceptional funding scheme as appropriate.

“For example, refugee family reunion, under the immigration rules, can be fairly straightforward. But even the courts have said that if you are not familiar with the courts, or the process, or don’t speak English, you can’t do it yourself. And that is for straight-forward-ish cases. If you are talking about an in-country application under Article 8- family and private life – then that is horrendously complicated now. We used to just have Article 8 and then the Government have brought it within the immigration rules, and now have another Act whose factors everybody has to take into account. There is loads of case law on best interests of the child that run in tandem but are not the same. All of that is just a mess and to expect somebody to be able to do deal with that themselves is just ridiculous. Even the judges don’t know what they are doing with this. Ideally, we’re looking at applying for children in every single case and see what happens, but at the moment because of resources, it is only for appeals or particularly complex cases at the beginning.” (Steven, Law Centre Immigration Solicitor)

Other respondents in our research considered whether the exceptional funding scheme was appropriate in contexts where convention rights, i.e. human rights obligations of the Human Rights Act and EU law, would be in potential violation if funding was not made available to children.

“It essentially comes down to proving to the Government that they would be breaking the law not to fund you. So that will either be HR obligations – Article 6, fair trial – that doesn’t apply in immigration, but it could be the procedural guarantees under Article 8, or it could be a point of EU law. And although the guidance is a little bit more broadly written, that is essentially what it comes down to.” (Janice, Immigration Solicitor and Legal Director, Policy Organisation)

The survey asked a series of questions around exceptional case funding to better quantify professionals’ views about the scheme and how much they use it.

<table>
<thead>
<tr>
<th>Frequency</th>
<th>Number of professionals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>0</td>
</tr>
<tr>
<td>Often</td>
<td>2</td>
</tr>
<tr>
<td>Sometimes</td>
<td>4</td>
</tr>
<tr>
<td>Rarely</td>
<td>2</td>
</tr>
</tbody>
</table>

Table 4.7: Number of respondents making ECF applications for children out of scope for legal aid
The mechanics of the exceptional case funding scheme is at odds with its function as a safety net

Most respondents recorded in the table above have never made an application for ECF for a child. Among those who did apply for ECF, every respondent reported that they either always, or often, were successful in securing the ECF funding. This suggests that, despite the increased success rate for ECF generally, professionals are still not applying. This is worrying given the nature of the respondents; professionals who were regularly dealing with unaccompanied and separated children and who likely know about the availability of ECF but are still not applying for it.

The interviews shed more light on the reasons behind this, but there appear to be a number of factors at play including; a preconception that they will not succeed; a decision not to waste unpaid time on an application for which they may not receive any payment and lack of knowledge that ECF exists.

"I am not a big fan of the exceptional funding because of the way it works. By the time we have done the application, it is gone back and forth, and we actually start the work, the £234 funding is not worth the time. We may as well write it off and do it as pro-bono…… With exceptional, you either have to do a huge amount of work to make it pay or you have to do next to nothing." (Gary, Legal Manager and Immigration Solicitor)

"Providers are put off ECF and escaped cases generally. Escaped cases\textsuperscript{54} are all scrutinised by a Legal Aid Agency caseworker and often assessed down or nil assessed and, while there is a right to appeal, the risk of an error coming to light is far greater than it would be in the standard audit procedures.

Errors are quite easy to miss unfortunately, due to the complexity of the different types of cases… and of the means assessment provisions, the application of which is assessed subjectively (such as whether unexplained payments to a bank account make the assessment unreliable, or the fact that a person must be properly in receipt of a passporting benefit)…

This is a problem even for providers like us who have a pretty good handle on this stuff…

This is an awkward issue in some ways, but the complexity and risk certainly makes legal aid generally, and especially ECF and escaped cases, less attractive." (Daniel, Law Centre Immigration Solicitor)

Our research has enabled us to identify that the design of the exceptional funding system, even after case law that challenged its mechanics and thresholds, still offers legal practitioners with limited opportunities to make it a workable option for them and, ultimately, for the children and young people they work with. Fundamentally, the process of submitting an exceptional funding application requires legal practitioners to undertake ‘up front’ and ‘at risk’ work, meaning that there is no funding for the time they spend with children to apply, unless the application is successful. This means that not all the ‘successful’ work that legal practitioners do with, and for, children in their applications is remunerated. Practitioners also raised concerns that, even when cases are granted

\textsuperscript{54} Escaped cases are cases where the amount of work done is three times the total of all fee levels payable plus the total of all additional payments payable. The Legal Aid Agency checks all 'escaped fees' (normal cases are sample audited) to ensure that the work is all relevant and costs have been correctly stated.
ECF funding, the rate of remuneration for ‘mixed cases’ matter starts, such as applications that combined a claim for asylum and engage Article 8 ECHR\textsuperscript{55} rights, is capped at the asylum rate: ‘Any associated or additional application to an application within scope of Part 1 of Schedule 1 to the Act on human rights grounds will also form part of the same Asylum Matter’\textsuperscript{56}.

Certainly, the majority of the legal practitioners that took part in our research expressed very real concerns over a gap that exists between the time they spend on ‘lead-in’ work for the application, which is not recoverable from the Legal Aid Agency, and the process of actually doing and putting in the application. There was a consensus amongst practitioners that this formative and unpaid work probably requires anywhere from an hour and a half, up to 10 hours’ worth of pro-bono work on their part; with some being very clear that, whilst there was ‘some’ replication of the work they did for legal aid prior to LASPO, the exceptional case funding system requires significantly more unpaid time and more and more free work. This expectation had already begun before LASPO, but is now amplified and unsustainable.

“But the criticism here is that exceptional case funding is very time consuming, the assessments that we do often take an hour, hour and a half for exceptional case funding, but that’s what you’re looking at when you apply for funding. You’re looking to do an hour, hour and a half’s free work with the risk of not getting this money. Also, again, if funding is refused what do you do with this kid? The temptation would normally be don’t apply for exceptional case funding, don’t spend an hour and a half because at the end of the day, you’re raising expectations for this child and it’s heart breaking.” (Julie, Senior Immigration Solicitor and Project Manager)

Concerns were also raised by some practitioners that the exceptional funding system is less able to deal with urgent cases from children and young people, than the legal aid system before LASPO.

“Exceptional funding is not a safety net, no, because of the delay it causes in actually having to apply for it, the delay in waiting for them to make a decision and the unknown. I mean the whole point of the Children Act is that you are meant to have certainty quickly for children in all actions relating to children and this idea of having to make an application for exceptional funding…They have a standard time frame of about 40 days. They will sometimes look at it more quickly if you need them to. We have had situations where, especially with extension of leave applications for young people at 17.5, in at least two cases, the deadline has been on a Thursday and they grant me the funding on a Monday.” (Elizabeth, Immigration Solicitor)

“They say that they make a decision within 20 working days - I don't think I have ever had them made quicker - they usually come on day 20. I have had a few that have been longer. If they are rejected, I can't remember how long a review takes. I am guessing another month or so.” (Louisa, Law Centre Immigration Solicitor and Manager of Migrant Children Project)

This is significant in children and young people’s cases, in the sense that evidence from within this report, as well as from our previous report (Connolly, 2015), has shown that children’s immigration issues often have to be dealt with quickly. It is also not uncommon for children to be on a precarious cliff-edge at the point where they seek legal support. Both of our reports have established that there are many related factors leading to this:

- Children may be reluctant to resolve, or not know that they need to resolve their status; amplifying the risk of them moving into undocumented status.

A child’s status may not have been identified until a legal, social or bureaucratic transition point where so much is at stake for them, such as the risk of no access to public funds and services, or even return to a county that, at best, they no longer identify with, have limited social ties with and can’t call home, and, at worst, is unsafe, frightening and can’t offer them a sustainable future.

With certain immigration applications, such as Article 8 extensions, there is a very narrow window of opportunity to submit them, usually at the point they have been refused asylum and removal is pending.

“The difficulty is in cases with Article 8, because you can’t argue it until they are about to be removed, and they can’t remove them until they are 18, so the problem is that is a very narrow window.” (Jessica, OISC Advisor, Solicitor and Support Worker for separated children)

Exceptional Funding: A Poor Substitute for Legal Aid

Overall, it was felt by respondents in our research (save two who felt that in theory it could work but conceded problems in practice), that the exceptional funding scheme is not acting as a sufficiently robust system for children to be able to, without discrimination, access their effective and unhindered right to a legal remedy in their immigration cases. It was generally felt that the exceptional funding scheme was not equivalent to the system of legal aid that had existed before LAPSO and that legal aid should, and could, absolutely be ‘carved out’ for children. As one barrister summarised:

“It seems to have a lot of holes in it and it is fixed so close to the floor that if you fall, you are hitting the floor anyway. It is not working.” (Matt, Immigration and Asylum Barrister)
Chapter Five:  
An alternative route? Local authorities and access to justice

Local Authority Policies, Organisational Contexts and Practices: A Complex and Inconsistent Picture

In the first report, local authorities were identified as an important actor when ensuring that unaccompanied and separated children can access the legal system. Local authorities were found to support children in two main ways: either with financial support to cover solicitor costs, or by supporting young people to access free legal advice. It was also recognised that social workers can play an important role, when properly instructed, in assisting to gather the important documents and evidential proofs of a child’s claim.

The report’s major finding in relation to local authorities was that practice is highly variable. In 2015, it was found that only one local authority had an explicit policy regarding how to ensure children could access immigration advice and make decisions around the funding of their cases. The most common response from local authorities was that they did not have any prescribed way of assessing children’s immigration needs.

For this report, an update on local authority practice was clearly required. In 2015, we found that for at least four local authorities, developing a formal policy around this was a priority. It was important to establish what progress has been made in providing a more standardised approach to the immigration needs of vulnerable unaccompanied and separated children.

Our Freedom of Information request to all local authorities achieved a response rate of 73%, which is equivalent to 111/152 of the local authorities in England.

Local authority knowledge about children at risk

We first wanted to establish how much local authorities knew about the children who might be subject to immigration control in their area –both those in their care as looked after children but also those living in the local community.

Local authorities could tell us how many unaccompanied asylum seeking children were in their care, as they must report on this annually to the Department for Education (DfE). The local authorities that responded to FOI requests told us they were caring for a total of at least 4,446 unaccompanied children under the age of 18. Given the sample size, this is broadly in line with the official DfE figure, which for 2015/16 stood at 4,210. Our figure suggests that there is now a larger population, but this seems logical given that the DfE figure is not the most recent financial year’s data and that number of unaccompanied children arriving has been increasing in recent years.

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We also asked local authorities how many children they identified as suspected victims of trafficking, in the calendar year of 2016, and subsequently referred to the National Referral Mechanism (NRM). The outcome of the NRM referral, as well as the length of time in which a decision is being made, is of critical importance as to whether a child is within scope for legal aid. Furthermore, our survey and interviews suggest that, of the limited number of unaccompanied and separated children that legal professionals did see and advise, trafficking was commonly identified.

“I’ve got a Vietnamese minor who claimed asylum and was referred to the NRM and was waiting months, and months and months. I threatened judicial review, they said they’d make a decision and they didn’t. I threatened judicial review again, they then issued a ‘reasonable grounds’ decision but they still haven’t issued a ‘conclusive grounds’ decision following that, and that’s been over six months.” (Steven, Law Centre Solicitor).

A total of 36 local authorities answered the questions on identification of trafficking. This makes up 24% of all local authorities in England. They reported referring 185 children to the NRM, in 2016. They were also able to tell us that 121, or 65%, of the children were subject to immigration control.

An interesting comparison between the official NRM statistics and the local authority data returns is the recorded proportion of trafficked children subject to immigration control. Local authorities told us that 65% of the children they referred were subject to immigration control. In the official NRM statistics, a total of 1,204 children were referred to the NRM in 2016. Of these, 247 were from the UK and the other 957, or 79%, would have been subject to immigration control in some way (some were EU nationals)\(^60\).

It is likely that other agencies referring children to the NRM, such as the UK Visas and Immigration Authority, are more likely to be reporting non-UK citizen children that local authorities through virtue of when they encounter children who may have been trafficked. The data still suggests local authorities have some way to go until they have reliable data demonstrating how many children have been trafficked in their area and how many of these are subject to immigration control.

**Children in private fostering arrangements**

Of all local authorities that we contacted via Freedom of Information, 91 reported 2,427 children in private fostering arrangements in their jurisdiction. 13 of these local authorities reported a total of 39 migrant children in private foster care and a much larger number of 77 of authorities recorded no migrant children in foster care. Another 11 local authorities recorded no information, or were unable to complete the FOI response in time. Given research reviewed in chapter one finding that some 120-140,000 children are likely to live in private foster care\(^61\) the accuracy of local authorities' records, and ability to identify privately fostered children, must be questioned.

Importantly, of all the local authorities that recorded migrant children in foster care, only 3 reported that they had supported children to access legal advice for immigration applications, with a total of 12 children supported to access free immigration advice and assistance. One local authority said that it had paid for legal advice, for less than 5 children. That leaves between 23 and 26 cases of children where it is not clear if they were required to resolve their immigration status and, if so, what support was offered to do so.

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Table 5.1: Data for children in private foster care

<table>
<thead>
<tr>
<th>Description</th>
<th>Number of children</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of children in private foster care</td>
<td>2,427</td>
</tr>
<tr>
<td>Number of migrant children in private foster care</td>
<td>39</td>
</tr>
<tr>
<td>Number of migrant children supported with access to legal advice for immigration cases</td>
<td>12</td>
</tr>
<tr>
<td>Number of children who the local authority funded legal advice for immigration cases</td>
<td>&lt;5</td>
</tr>
<tr>
<td>Number of migrant children where there is no information on what support was offered for immigration</td>
<td>Between 23 and 26 children</td>
</tr>
</tbody>
</table>

Children that have arrived in the UK through Dublin III regulations

In research, policy and practice terms, next to nothing is known about the ways that the protection needs of unaccompanied children that have come to the UK via the Dublin III regulation are being met. Whilst Dublin III children are arguably outside the remit of this research – their family means are often aggregated with their own in an application for legal aid and the family members are often responsible for the payment of their claims and their claim is an in-scope asylum claim – we have uncovered concerning findings that show that this set up is sometimes putting this group of children at risk of sub-standard legal representation, or even no representation at all.

“So, to deal with the initial application…you’re probably looking at… if you do the legal aid rates, which are low, we get £800 to deal with a case plus costs of going to their interviews. So, if you say about £1000 for the application stage at legal aid rates. If they had to pay privately then it’s going to be double that. If they’re refused, they have a right of appeal, then you’re probably looking at another £2000.” (Steven; Law Centre Immigration Solicitor)

In many ways, the data we have collected about this group of children is formative. We did not set out to explore, in any great depth, the needs and circumstances of Dublin III children. However, we are clear that what has been shown to us in this research is likely to be reflective of a broader picture across England and Wales, given that the participants in our research, who made mention of this issue, spanned different regions of the UK.

Through FOI requests, we found that 43 local authorities received children being reunited with family through Dublin III regulations, into their local area. A total of 245 children were recorded across these authorities. 53 local authorities recorded that no children had arrived in their area through Dublin III. Of the local authorities that reported children arriving through Dublin III in their jurisdiction, London authorities recorded a total of 92 children, which is by far the highest proportion of children. The second highest proportion was recorded in Yorkshire and Humber, at 47.

Overall, the interview participants that spoke about children arriving through Dublin III had observed a rise in the numbers since the end of 2016. In one area alone, they spoke about dealing with approximately 20 new Dublin III arrivals in the last few of months of 2016.

Of the local authorities that recorded children arriving through Dublin III in their jurisdiction, one single authority reported that it had funded access to legal advice for that young person. 14 other local authorities recorded that they had supported young people to access free immigration advice and assistance with their claims.

We have decided to include these findings in this report for three reasons. Firstly, these children arrive in the UK as unaccompanied children and depending on the outcomes of both their claims and their family reunion may have to make subsequent out of scope claims in the future. Secondly, like the other groups of children we have highlighted in this report, they are not able to access legal advice through their own financial means and must rely on others. Thirdly, because they share
many of the same risks and vulnerabilities as the other children we have focused on in this report and our 2015 report. As our evidence will demonstrate, we are beginning to identify a protection gap with this group of children that needs to be addressed.

One way to begin narrowing this protection gap is to allow the children to apply for legal aid on an individual basis, rather than aggregating the means of their family members in their application for legal aid. This seems appropriate given the circumstances, as children are submitting independent asylum and immigration applications. At the moment, the Legal Aid Agency ‘Guide to determining financial eligibility for certificated work’ does outline a way for solicitors to apply to have family means ‘non-aggregated’ from a child’s in civil proceedings, if it is necessary. However, we have heard from professionals that Legal Aid Agency decisions on awarding funding in Dublin III asylum cases do not routinely reflect this guidance.

“The children on Dublin III started arriving in November last year and there is an issue of legal aid because they are supposed to be supported by their family members and, when I was trying to get them legal representation, the common question was ‘what is the income of the family, and most of these families are on benefits, but then with some cases, they are on really, really low incomes and for them it has been an issue. In some cases, the legal support was denied to children after they had expected the families to pay…. For example, one family where their entire income for the year was £8,000, and they had a family of their own, the support was denied and it wasn’t possible for the family to pay and it caused significant delays.” (Hamid, OISC Registered Support Worker for Unaccompanied Asylum Seeking Children)

The arrival of increased numbers of Dublin III children has seen local children’s services having to assess family members to ensure they are able to properly look after their relatives. Our research revealed a mixed picture of these assessments and local authorities providing varying levels of support after reunification. If necessary local authorities can, and should, considered these young people a ‘child in need’ in accordance with Section 17 of the Children Act 1989. This would allow them to practically support them and their families to access and navigate the asylum and immigration process, and, where necessary, to support them financially to do this. This is not always happening at present and we have heard of examples where this lack of support, coupled with the expectations on families to pay children’s legal fees, has sometimes resulted in the breakdown of the families and children being left without adequate support and care.

“We have had a few children whose uncles have accepted these kids, from countries like Afghanistan, Eritrea and Sudan. They are brought under Dublin so they are not in care at all, and legal aid does not accept these children. What we are doing, the lawyers seem to say that basically if the child is living with the uncle then uncle’s means must be taken into consideration. If they separate, if they really separate, as in the kid runs away and refuses to live with the uncle, then we need evidence of how they are supporting themselves to the LAA, whoever is providing the ‘floor’ or the free food, or foodbank, for these 16 year olds. They are not in care, so nobody gives them anything, and they won’t take them into care because they say basically that they must reconcile.” (Jessica, OISC Advisor, Solicitor and Support Worker for separated children)

What local authority support, and how much?

We asked local authorities to give us information about how they funded legal advice for unaccompanied asylum seeking children.

12 local authorities said that they did pay for legal advice for a total 24 unaccompanied asylum seeking children. This is a very small faction of the 4,446 unaccompanied children in care that we have recorded through local authority FOI data. Many unaccompanied children would be eligible for legal aid because they have an asylum claim, but it must be clearly stated that not all will be eligible to claim asylum and will, instead, have complex ‘mixed’ cases which involve, for instance a claim under Article 8 of the ECHR.

68 local authorities stated that they did not fund immigration advice for unaccompanied asylum seeking children in their care. A further 31 local authorities either did not answer the question, or had an exemption they applied allowing them not to answer.

Many more local authorities supported unaccompanied asylum seeking children to ‘access’ legal advice. We defined this as ensuring that young people were properly linked up with pro-bono or free advice. 57 local authorities supported 1,196 children to access advice. A small number of local authorities (14 in total) stated they did not support unaccompanied asylum seeking children to access immigration advice. This is very concerning – even those eligible for legal aid are unlikely to be able to find credible advice and work closely with their solicitor, or caseworker, without some level of support. 40 local authorities either did not answer, or exercised their exemption rights.

We also asked local authorities to tell us who they consulted with to determine if a child needs immigration advice.

Table 5.2: Actors advising social workers on immigration needs

<table>
<thead>
<tr>
<th></th>
<th>In-house legal team</th>
<th>External Council</th>
<th>Case by case/ internal &amp; external</th>
<th>No response/ exemption right</th>
</tr>
</thead>
<tbody>
<tr>
<td>No. of local authorities</td>
<td>14</td>
<td>29</td>
<td>48</td>
<td>20</td>
</tr>
<tr>
<td>% of respondents</td>
<td>13%</td>
<td>26%</td>
<td>43%</td>
<td>18%</td>
</tr>
</tbody>
</table>

The responses demonstrate that just under half of local authorities are making decisions on a case-by-case basis. This is unlikely to be satisfactory. Social workers and others may be making assumptions about the level of advice needed, children are likely to be receiving varying levels of support, and it is unlikely that the appropriate checks and balances are in place to ensure that mistakes are not being made.

This pattern was reinforced when we asked for local authorities to provide the internal policy they used when working with children subject to immigration control. In total, 2 local authorities had a formal policy. In 2015 only one local authority had such a policy63 64. 6 local authorities told us that a policy was ‘in development’. For our 2015 report, four local authorities responded that they had policies in development. For this report, 71 local authorities told us they did not have a policy. Equally concerning were the 16 local authorities who claimed to have a policy, but in reality, did not. These local authorities referenced guidance documents such as the Department for Education’s Unaccompanied and Trafficked Children’s Statutory Guidance65, Home Office guidance66, or

64 Unfortunately, the local authority that had a written policy in the first report did not respond to the new Freedom of information Request. Therefore, there could be three local authorities with policies in place. 65 Department for Education (2014). Statutory guidance: Care of unaccompanied and trafficked children. https://www.gov.uk/government/publications/care-of-unaccompanied-and-trafficked-children [Last accessed 7 June 2017].
general looked-after children guidance\textsuperscript{67}. None of these documents provide any specific detail on how local authorities should be making decisions when securing immigration advice for unaccompanied and separated children and young people.

The interview data relating to the ways in which local authorities are supporting unaccompanied and separated migrant children to access legal advice and representation very much mirrors the picture from our last report. It also reflects the data from our most recent freedom of information requests. Overall, the findings from our interview participants highlight that a complex and inconsistent picture still exists within and across local authorities, when it comes to supporting unaccompanied and separated children and young people with their immigration needs.

**Too much discrimination in the ‘system’**

What this means is that, as with the exceptional funding scheme, there is too much discrimination built into the system and not all unaccompanied and separated migrant children in local authority care, care leavers, or even those supported under Section 17 of the Children Act (1989), will have equal opportunities to access the legal advice and representation they need to redress their immigration problems. In many ways, there are no significant surprises or shifts in the findings since our last report, and the headlines remain the same. Importantly, however, the context of these findings is new. The post-LASPO environment is no longer something that is new and the responses of local authorities cannot simply be explained as something that is transitional. Their responses should be understood as something much more complicated, requiring either policy, organisational and practice shifts from within social work itself, or an intervention from Government that acknowledges the consequences LASPO has had on local authorities acting as corporate parents and custodians of protection for unaccompanied and separated migrant children.

As in our last report, the interview findings have shown that there are variable policies and practices of local authorities when it comes to the procurement of legal services for unaccompanied and separated migrant children. This undermines any potential argument that legal aid is still consistently available for these children, either through local authority public funds or the exceptional funding system. As demonstrated in the quotes below, it is much more complicated than this. On the one hand, there is evidence that some local authorities will be filling, or at least trying to fill, the gap that has been left by LASPO:

“We get a lot of referrals from people just trying to regularise their status, many will be children, either being abandoned by their parents, or for whatever reason, their family has broken down then children come into care, and primarily, social services pay for that in our area, so they are filling the gap.” (Diana, Immigration and Asylum Barrister)

“The family related, the private life related, that is where there is a real dearth of funding but in my experience, personally, LA’s are stepping in the vast majority of the time.” (William, Senior Immigration Solicitor and Partner)

Conversely, evidence shows that local authority support for accessing and or funding legal services for unaccompanied and separated migrant children through legal processes is much more uneven.


“I have seen various approaches by local authorities in the areas I cover. I have seen local authorities paying and paying solicitors fees as well and on a private basis to make further leave applications. The almost ‘gold standard’ approach is where I have had local authorities pay for outstanding asylum appeals, and to protect their rights under UASC leave, the application for further leave has been made under that as well, concurrently. Then with others I have also had disputes regarding what support they are willing to provide for children out of scope.” (Fozia, Law Centre Immigration Solicitor)

“I am very concerned at the moment. Social services tell us that they would have to look very carefully at any application from a young person or a request for the sort of funding to fight an application on an Article 8 case, which can be difficult to win. When they are very close to being Appeal Rights Exhausted, and becoming care leavers, at which point the care leaver service obviously stops68, so what they are saying is, they don’t know if they can do that because social services have to show that they are spending their money properly.” (Jessica, OISC Advisor, Solicitor and Support Worker for separated children)

Local Authority Funding for Children’s Cases: Unsustainable and Unsuitable

Whilst some local authorities do seem to be paying the legal fees for some unaccompanied and separated children some of the time, concerns were raised by legal professionals in this phase of the research that this is not only something that is unsustainable for local authorities but that it is an entirely unsuitable alternative source of public funding when it comes to children’s immigration cases.

“There are some local authorities who have been funding Article 8 extensions or settlement protection route applications, and the application fee as well, if it is not something we have been able to get a fee waiver for. There have often been the methods of funding so far, but I don’t know how far this is going to go because I know that Local Authorities are struggling with the more complicated cases.”

The question marks raised in this phase of the research around the sustainability of this method of funding echo our findings in the first phase of this research from participating local authorities themselves. In this context, we have found that solicitors have been offering local authorities reduced rates, as a prompt for local authorities to support unaccompanied and migrant children to access legal advice and representation. Concerns have been raised that responses to these offers are ad hoc, supporting our point in this section that relying on local authorities to step into the gap left by LASPO is problematic and unsuitable.

“At the beginning of LASPO, I went to LA’s and said, look, these are not going to be covered anymore. If you want them done, then we will give you a reduced rate. Absolutely, we are not interested. They just said, we don’t have a budget for that so we will have to think again about how this is done and so now, any payment by social services is really ad-hoc and small. It is not an alternative source of funding...... Some local authorities have absolutely no interest in paying anybody anything. It’s a mess” (Amanda, Senior Immigration Solicitor and Partner)

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68 Currently appeal rights exhausted care leavers are entitled to leaving care support but there is regulation forthcoming from the Immigration Act 2016 which will remove leaving care support from care leavers who are appeal rights exhausted. In this interview, it was unclear if the respondent was speculating on future practice, or had experienced local authorities mis-applying the law, as it stands, and illegally excluding appeal rights exhausted care leavers from their leaving care services.
Local authorities being ‘blind eyed’ to the appropriate legal channels for children and young people.

In this worrying context, evidence is also beginning to emerge of some local authorities being wilfully ‘blind eyed’ to the legal needs of the children and young people in their care (as distinct from not seeing children’s immigration needs). We appear to have uncovered some evidence of local authorities actively limiting the types of legal status applications they will fund for children and young people, and potentially constraining their chances of securing the most appropriate form of legal protection.

“Some just don’t want to know. Some have difficulties and internal conversations that they can’t spend whatever money then need to refer them. The one thing they are doing is referring children to the nationality checking service. It is what it says on the tin. They just check without looking at the facts. We recently had a rejected referral from a local authority. It took 15 emails and they went back and thought about it. They are worried about the registration fee of £933. They are saying to me ‘well, actually there is no fee for leave to remain or indefinite leave to remain if it’s a looked after child’ and there isn’t but the registration fee is the best protection you can give to a child. So, they have gone away and thought about it. These are the types of things you are looking at now. In some ways, you can’t criticise local authorities because their budgets are very tight.” (Julie, Senior Immigration Solicitor and Project Manager)

We have further evidence that unaccompanied asylum seeking care leavers, with failed asylum claims, are at a heightened risk of local authorities choosing to ignore any other legal avenues that are available for them to ensure their stay and protection in the UK - such as Article 8 ECHR extensions. This appears to be a ‘received wisdom’ within, and across, some local authorities with a high proportion of care leavers. Fears have been expressed in this research that, in some local authorities, social workers may be taking unaccompanied asylum seekers to the police station on their 18th birthday to prompt Home Office removal; again, without the will or the time to submit alternative immigration applications.

“They categorise these young people as asylum seeking children, and if that fails, then they are eventually going back home when they become an adult and that is the end of our responsibility to them, without thinking about plan B if their asylum fails. I have had several enquiries from social workers saying, we are taking the asylum seeker to the police station on their 18th birthday and I know that some local authorities have made a kind of policy decision on that without anyone looking at whether there is an Article 8 claim in the interim and no check on whether the asylum advice was good or the decision right or challengeable. What they say is ‘we have spoken to your lawyer and they have said you are not entitled to asylum, so you are not an eligible child and we are going to withdraw support’. (Dipti, Immigration Solicitor, Migrant Children’s Project)

Local Authorities not always identifying children’s immigration needs in their role as corporate parent.

The section above addresses the issue where local authorities are wilfully ignoring children’s immigration circumstances. However, where local authorities do not meet children’s immigration and citizenship needs, it is often not because they are intentionally choosing to do that. Rather, the immigration backgrounds of children are often complex, as too are the laws, policies and processes that determine their entitlement and how to access their entitlements. The majority of social workers often just do not have the legal and practical knowledge to be able to diagnose and appropriately refer children on to solicitors that can help. Furthermore, as our freedom of information requests show, there is no legal requirement for them to document the immigration statuses of children in their care and no statutory impetus for them to better understand what is becoming an increasingly significant area of practice within a post LASPO-context. Much more planning is needed, in terms of funding, developing relationships with good quality providers and finding appropriate solicitors to
work with children on their claims. Local authorities will also need to consider their responsibility as a corporate parent and how this interacts with the ‘corporate parenting principles’ of the Children and Social Work Act 2017\(^{69}\), once this section of the Act is enacted.

“Local authorities are not that good at identifying separated children who need their immigration status resolved. We did some training with social services to try to raise the issue with a bit more and since then we seem to be getting more referrals.” (Steven, Law Centre Immigration Solicitor)

“My experience is that very few social workers have any immigration law training, quite understandably. Where there is a good legal aid contract in place, then hopefully there will be a good liaison between the social worker and the solicitor, but if that is not a possibility then that becomes problematic. Most social work professionals rely on, for their own personal protection, other professionals that are expert in that area.” (Diana, Asylum and Immigration barrister)

### Legal professionals’ experiences of local authority support

The survey attempted to measure what local authorities were telling us in the Freedom of Information Request returns against what legal professionals were experiencing in their own practice.

Two questions were asked concerning whether local authorities were routinely paying the legal costs of children in their care, both separated and unaccompanied children in their care as looked-after children and those in the community living with extended family, being supported under section 17 of the Children Act 1989\(^ {70}\). The answers to this question show that it is rare for local authorities to never, or always, pay legal fees for children that are out of scope for legal aid, there was a mix of practice across different local authorities. Responses on the children in, and out, of the care system were evenly spread among the ‘rarely’, ‘sometimes’ and ‘often’ options provided to respondents.

These responses are broadly in keeping with local authorities’ own and reinforce a picture of varying practice, where children receive help based on the local authority’s views and perceptions of their individual case, rather than in a standardized and rigorous way. The result is a postcode lottery. These responses are also consistent with the interview data, and as such there is good validity for this finding across all our data sources.

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Chapter Six:  
What are children experiencing?

Thus far, this report has adopted something of an external stakeholder approach to understanding how unaccompanied and separated children are accessing immigration advice. This was an important approach because many of the challenges these children face is because of the wider context; the changing landscape of immigration advice, the shifting rules of the legal aid system, and the varying practice of local authorities.

In this chapter, the focus is on the experiences of children themselves; what they are experiencing within the system that has been outlined in the previous sections. In ‘Cut off from Justice’ (2015) we focused closely on the stories of children themselves, told in their own words. We also focused on the experiences of the non-legal professionals supporting the children – their knowledge of the immigration system and some of the strengths and weaknesses they display when assisting children in navigating this complex legal field.

In this report, we chose to focus on the perspective of legal professionals. Although what follows is focused on children's experiences, it is not providing first-hand accounts from the children. The details below indicate some of the key themes that legal professionals regularly see young people encounter, as they support them through their immigration claim. This information has been reported to us through the survey and the semi-structured interviews.

Children living complex lives

During the passage of LASPO, one of the Government Ministers responsible for the Bill as it progressed through Parliament stated in a letter to the Refugee Children’s Consortium that the cases of out of scope unaccompanied and separated children were likely to be a “relatively straightforward process” because their cases would require simple applications under the immigration rules.

The legal professionals who participated in the research had different experiences of the children in question. In the survey, one question asked whether unaccompanied and separated children had complex, or straightforward immigration cases using the following definitions:

A complex case:  
Where any administrative, factual or legal circumstances of the case present a risk to a fair outcome of the case

A straightforward case:  
Where administrative, factual or legal circumstances do not present a risk to the fair outcome of the case.

None of the respondents told us that they had never seen a complex case for an unaccompanied child, or that all the cases they saw for this cohort were straightforward. The majority of respondents saw complex cases regularly. Indeed, some respondents said they only saw complex cases for this cohort, including most of the immigration circumstances that were now out of scope.

“

The only straightforward cases that I have had have been applications to register as British under S 1(4) of the British Nationality Act. These are straightforward as there are set requirements and no

Home Office discretion but it can be time consuming to get the necessary evidence, such as from social services. All other immigration cases are complex in nature. The law itself is complex and cases involving children involve different statutory provisions, policies and considerations. There is also a large body of case law on Article 8 cases which needs to be understood and applied, along with the careful collection of evidence and preparation of witness statements is necessary as well.” (Questionnaire Respondent)

We asked respondents to explain why the cases were complex. 16 respondents gave free text answers. Seven of them referred to the regular inclusion of a human rights claim, often Article 8, in their case and the difficult factual and evidential nature of preparing these representations.

Four talked about how age disputes often introduced a level of complexity that was challenging. Three mentioned adverse credibility findings by the Home Office and how difficult it was to overcome these given that children often did not fully recall their own story, the choice to leave their country of origin had been out of their hands or knowledge, made for them by others, or they had been told to present a previously devised story about their circumstances. Of additional note is the administrative complexity of gathering evidence, which was highlighted as an issue across different immigration and nationality circumstances by questionnaire respondents; such as Article 8 private and family life claims, discretionary citizenship and children in local authority care without legal status in the UK. Four respondents said that obtaining documents from children’s social care, separated family members and other sources posed a significant challenge. Without these documents, it is unlikely a case would succeed, but obtaining them is often difficult and laborious.

These issues, and more, were also highlighted within and across the 22 interviews we undertook in this phase of the research. In these interviews, practitioners were clear that children’s cases are more often than not complex. Some practitioners validated their assertions of complexity by cross-referencing them with recent case law that has established the intrinsic complexity of immigration laws and systems more generally, even before factoring in children’s particular vulnerabilities.

“It is difficult to describe immigration cases as straightforward when both the Court of Appeal and now, more recently, the Supreme Court, have criticised the Home Office and the almost unintelligible nature of immigration laws under which these claims are decided. They are so complex and so difficult even for lawyers and courts to understand. So, it is difficult to defend immigration cases.” (Asha, Immigration Solicitor and Legal Officer, Policy Organisation)

In addition to the in-built complexity of immigration cases, it was also acknowledged by questionnaire participants that, even in circumstances where the factual, legal and administrative aspects of children’s cases may be straightforward on the surface, the reality is that the way these aspects of their cases interact with their minority status and the vulnerabilities arising from their lack of ‘locus’ (see below), and difficult family histories, can make their cases especially challenging. Children’s cases, therefore, require careful stewardship by solicitors and legal practitioners. It is, significant to note, as we did in our last report, that in the post-LASPO context, the stewardship that is required throughout the evidence-gathering process to reduce any risk to the success of children’s cases, has been undermined, either because of children having to go it alone, the volume of demands now placed on pro-bono work, and, as we have seen in this report, from the exceptional funding system.

“There is an element of having a relationship with an expert, a qualified expert or solicitor who is going to give you that extra level of care. It is a lot about stewardship. There is definitely a thing about that being something you don’t get without legal aid.” (Luke, Project Manager, Migrant Children’s Project)

Concerns around the position and representation of complex human rights issues in children and young people’s claims were repeatedly highlighted in the questionnaires and interviews. In the first instance, their intrinsic complications were raised as illustrated in the quote below:
“There was a study of all the Article 8 cases that had reached the High Court of Appeal and the Supreme Court in the last few years. We said if there are that many questions requiring the attention of the Higher Courts, then it is not ‘straightforward’. Article 8, if you picked an area of law that has engaged the Court of Appeal and the Supreme Court the most, then Article 8 would be in there.” (Janice, Immigration Solicitor and Legal Director, Policy Organisation)

It is worth noting that concerns were raised in the interviews about the way that the exclusion of applications engaging an Article 8 claim from the scope of legal aid is playing out within the context of children’s ‘mixed cases’ In particular, where it may play into the asylum case:

“The reality of the situation is, yeah, the client may have done a year at basic entry level mechanics, and that might need to be explained as part of the asylum claim, but sometimes the information that goes in and the Article 8 claim can impact the asylum claim.” (Elizabeth, Immigration Solicitor)

As a broader point to the one made above concerns were raised that different routes to regularisation have been unhelpfully separated out when awarding funding because of LASPO, which has unhelpfully amplified the procedural complexities of children’s immigration cases.

“So, I think, specific to my own work, it’s where there are risks with overlaps between the asylum part that I’m representing on and then any parts that are out of scope. Most often what we’re finding is, for young people where we have concerns around trafficking, there’s an asylum claim concern around trafficking but prior to the initial decision from the Home Office about person getting referred into the NRM and getting their initial indication on whether they’ve been trafficked, we don’t have any funding to cover them for that initial advice and a lot of the trafficking claims initially show up as somebody who has entered illegally, and it’s not until someone takes the time to sit down and explore these issues that you realise that they didn’t do so of their own accord.” (Elizabeth, Immigration Solicitor)

It is not just the immigration cases of these children that were complex. Their lives were often just complex in general. Survey respondents listed a wide range of factors they felt often caused problems, including family breakdown, separation and lack of parental support and advice, children’s care status, history of safeguarding issues, poor mental health, learning disabilities, trafficking and exploitation, experiences of trauma, including trauma as a legacy of their experiences before arriving in the UK, from their difficult journeys to the UK, or from discovering that they are not British or they don’t have legal status to be in the UK, a lack of support from, or trust in authority, lack of familiarity with the English language and children’s exclusion from education was also raised. These issues pose their own daily challenges for the children concerned, but they also have consequences for the child’s immigration claim. 14 out of 19 respondents in our survey stated that these kinds of factors often, or always, present a risk to the fair outcome of the case.

Indeed, in many ways, a child’s immigration situation is just another factor in a complex life. According to 16 out of 19 respondents to the survey, it often, or always, made these children more vulnerable. This echoes our findings about the super-vulnerability of unaccompanied and separated children in ‘Cut off from Justice’

“The ways in which vulnerability in one area can create and increase vulnerability in others, evoking the very real ways in which the interplay between their childhood, migration status, and situation as children without legal caregivers work to generate a fourth vulnerability as human rights / child rights subjects.”

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Many of the children’s vulnerabilities identified in the interviews have corresponded to those raised in the survey and in our previous research. Interview participants raised additional concerns about vulnerability to those in the survey, these included parental abandonment, limited, if any, knowledge of family histories, children having to adapt to life in a new culture with little help, children living a lie about their status and pretending to be British, homelessness, poverty and destitution, sexual abuse, children living between the limits of their immigration status and the margins of their social worlds, children living with a profound existential fear of the future - not knowing whether they belong ‘here’ or ‘there’ and even not knowing where ‘there’ is. Ultimately, children are rendered helpless in the face of circumstances because they are forced to confront the fear that nobody can, or will want to, support them to address the multitude of hurdles they face as they grow out of their childhood.

“Some of them are even fully integrated into society, in London life maybe, indistinguishable from young people that have British papers but they are going through this whole secret thing that they don’t talk to anyone about. We have got multiple referrals from one particular school, children all in the same year and yet none of them know about the other. And there is so much they don’t know about their past and the auntie they live with won’t give them the information. It is totally precarious. Lots of them have mental health problems as a result of living a kind of lie. Also, the people they live with are not their blood relatives and there is a definite feeling of being second tier, not quite part of the family and having to be totally indebted to people who aren’t your blood relatives and know that, actually, when I turn 18 or 19, they are not going to be looking after me forever, but if they are not, and if I can’t work, what am I going to do? These are the things that are hitting young people when they are hitting 15, 16, 17.” (Luke, Project Manager, Migrant Children’s Project).

Family history and the journey to the UK

The past experiences of the unaccompanied and separated children that legal professionals came across had often clearly played a role in forging some of the vulnerabilities they face in the present, as well as explaining just why their immigration cases were so complex.

Based on the typology of children that are out of scope created in ‘Cut off from Justice’ (see page 14 of the 2015 report), the survey attempted to quantify the frequency with which legal professionals were seeing different kinds of case. There were 19 responses to the survey that could be used for this purpose and, as such, this small sample can only give an initial suggestion as to what the larger patterns might be.

Table 6.1: distribution of ‘out of scope’ cases encountered by legal professionals

<table>
<thead>
<tr>
<th>Frequency</th>
<th>Type of case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Least commonly seen</td>
<td>International adoption</td>
</tr>
<tr>
<td></td>
<td>Criminal convictions</td>
</tr>
<tr>
<td></td>
<td>Statelessness</td>
</tr>
<tr>
<td></td>
<td>Unsettled Immigration Matters</td>
</tr>
<tr>
<td></td>
<td>Family Breakdown</td>
</tr>
<tr>
<td></td>
<td>Citizenship</td>
</tr>
<tr>
<td></td>
<td>Claims where in-scope issues had not previously been identified</td>
</tr>
<tr>
<td></td>
<td>Trafficking</td>
</tr>
<tr>
<td></td>
<td>Non-asylum applications</td>
</tr>
<tr>
<td>Most commonly seen</td>
<td>Mixed cases</td>
</tr>
</tbody>
</table>

16 out of 19 respondents had come across mixed cases in their work, whereas only two had experienced cases involving the breakdown of international adoption agreements.
Finding their way

Given that we have found unaccompanied and separated children to be especially vulnerable it was important to understand the routes by which unaccompanied and separated children found their way to legal advice.

Legal professionals could shed some light on how unaccompanied and separated children found their way to immigration advice.

Table 6.2: Frequency by which actors signpost young people to legal advice

<table>
<thead>
<tr>
<th>Source of signposting/referral</th>
<th>Local Authority</th>
<th>Friends</th>
<th>Family</th>
<th>Self</th>
<th>Other legal professionals</th>
<th>Youth &amp; advocacy services</th>
<th>Unknown</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Experienced frequency</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Always</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Often</td>
<td>5</td>
<td>4</td>
<td>3</td>
<td>0</td>
<td>3</td>
<td>2</td>
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<tr>
<td>Sometimes</td>
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<td>5</td>
<td>4</td>
<td>0</td>
<td>0</td>
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<tr>
<td>Rarely</td>
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<td>3</td>
<td>5</td>
<td>3</td>
<td>2</td>
<td>3</td>
<td>3</td>
<td>4</td>
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<tr>
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<td>0</td>
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<td>0</td>
<td>4</td>
<td>1</td>
<td>2</td>
<td>1</td>
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</tbody>
</table>

The table suggests that local authorities are playing the biggest role in connecting young people up to legal advice although, based on the evidence gathered around local authorities’ practices in relation to immigration costs for chapter 5, the local authorities do not appear to be helping to fund applications. Interestingly, friends are playing a bigger role than family. This is a pattern that we identified in our first report and perhaps has implications for the ways in which organisations, such as our own, engage with legal education in this area. It also has implications for specialist organisations that work on a ‘referral in’ basis only. This indicates the role that peers and the community to which the young person belongs play in signposting them to services. Also of note is the finding that self-referral appears extremely uncommon. This supports the argument that children fundamentally need social support around them in the first place if they are to engage at all in the resolution of their immigration claims. In our first report, we highlighted the negative consequences, especially in relation to accessing good quality legal advice, when children and young people relied on each other with signposting and our argument can be maintained within the context of these findings. Youth, advocacy and other legal professionals appear to also play a significant role.

Children out of scope and ‘in sight’

In our questionnaire, as in the last phase of the research in the 2015 report, we asked respondents to identify which sets of immigration circumstances, now out of scope, they have been seeing in their work with children. Whilst respondent numbers are relatively low, there is considerable stability in them when triangulated with the interview data. It is important to note that the majority of questionnaire respondents (N=22) were different to our interview participants. Further validity can be given to the findings this time across the interviews and questionnaires when compared with the findings of the questionnaire and interviews from the last phase of the research in 2014/2015.

Mixed Cases
Evidence seems to indicate that, where a case contains asylum circumstances that would be in scope for legal aid alongside out of scope circumstances, things can become very complex procedurally. Examples given to us in this phase of the research include children with asylum and Article 8 ECHR claims, as well as asylum and trafficking, which is not covered until the NRM positive reasonable grounds decision is granted. Both these contexts are described below.

In the survey, mixed cases and trafficking claims were two of the most commonly seen types of cases professionals identified. Indeed, 15 respondents had seen young people with mixed cases whereas 9 had not. Of the 15, 12 estimated that they had seen 140 children with mixed cases. This would give an average of 12 cases per professional, ranging from 1 to 30 each.

**Mixed Asylum and Immigration Cases**

Across the 22 interviews, it was very evident, as it was in the questionnaires, (both for this report and the last, emerging with more emphasis and urgency this time) that one of the main groups to have fallen out of funding so comprehensively has been unaccompanied asylum seeking children with refused asylum claims, who need to replenish their leave with an application to the Home Office engaging Article 8 ECHR once their UASC leave expires, by the time they reach 17.5 years-old. The interviews demonstrated that, within this category of children, many children also exhaust all rights of appeal after the submission and refusal of a fresh asylum claim. For many interview participants, the Article 8 claim is a final effort to stay in the UK and, naturally, is of great significance, which they have to negotiate alongside the risk of being denied access to legal advice and representation. This sense of urgency is encapsulated in the quotes below:

“**The problem is obviously where there is no longer an asylum claim, and we have had a few of those, where it has just been Article 8, and that has been unbelievably stressful.**” (Jessica, OISC advisor, solicitor and support worker for separated children)

In addition to the centrality of Article 8 for this group of children in their applications to remain in the UK, the interviews also highlighted just how difficult it is to succeed with an Article 8 claim. This further compounds the need for children to be able to have access to legal advisors to maximise their chances of submitting precise representations of their circumstances, that are also developed in accordance with the expectations of the legal and bureaucratic standards of Article 8 applications.

“**Article 8, knowing how hard it is to succeed ………they are so vulnerable these 17.5 year olds. They have not succeeded in their asylum claims. To just dump them as children just seems ridiculous. There is a lot riding on it and there should be recognition that children should not be expected to put their cases themselves. Legal aid should be there for this small group to do their extensions.**” (Amanda, senior immigration solicitor and partner).

There is an urgency to ensuring adequate timing of decision making, with an emphasis on this group of 17.5 year old children, and the often narrow window of opportunity that exists to submit an ‘in time’ Article 8 application for them. The legal value of this group of children having timely access to an effective legal remedy is evident in the sense that it is vital to ensuring that there are no procedural obstacles that will place them at risk of becoming overstayers. However, there is also significant value beyond the case itself, for ensuring that they are resolved in a timely way. Indeed, as children transition into adulthood and become care-leavers, their access to public funds and future changes to care leavers provision becomes contingent on their immigration status.

A case study of two unaccompanied asylum-seeking children from Afghanistan living in the same town.
Asif was just 14 years old when he arrived in the UK from Afghanistan. When he first submitted his asylum application, it was refused and he was given discretionary leave to remain. When it was time for his leave to be extended, an Article 8 claim for leave to remain was submitted. In between his asylum claim and the extension of his leave, Asif had begun to settle into his new life with a very supportive foster family. He had been suffering from PTSD and had been self-harming for some time after his arrival but this had improved with the sustained kindness and hospitality of his foster carer. Asif had no contact with family in Afghanistan. His Article 8 application to extend his leave was not covered by legal aid and there were significant issues in accessing public funds not just for legal provision, but for the necessary expert psychiatric evidence. Asif was lucky. His foster family were able to all pull together to finance the process and his case was successful.

Hassan, also from Afghanistan, arrived in the same town as Asif. He too had a foster carer but did not have a secure base with them. Hassan was forced to turn to local informal networks to fund his case. His project worker, Jessica, who we worked with for our research informed us that she understood that he was left with a large debt to the tune of ‘several thousands’ to pay for lawyers. She said to us ‘so now it means that you have got a boy with status but he has this massive debt, and he, some of them, are only given no recourse to public funds as they become care-leavers.’

Paying the bill

We asked respondents to tell us how, in their experience, young people paid their legal fees if they could not access either legal aid, or local authority support:

Table 6.3: Sources of funding for unaccompanied and separated children

<table>
<thead>
<tr>
<th>Experienced frequency</th>
<th>Self</th>
<th>Family</th>
<th>Friends</th>
<th>Youth &amp; advocacy services</th>
<th>Pro-bono legal services</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>1</td>
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<tr>
<td>Often</td>
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<td>4</td>
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<tr>
<td>Sometimes</td>
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<td>4</td>
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<tr>
<td>Rarely</td>
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</tbody>
</table>

This table demonstrates that, other than pro-bono legal advice, unaccompanied and separated children struggle to find other sources of funding for their legal fees. The next most common source of support is friends, followed by family. In our first report, we found children to be at significant risk when relying on friends, family and community for support as it often came with strings attached perhaps putting young people at risk of exploitation and certainly putting them in a state of informal indebtedness. Section 3.3.4 of Cut off From Justice 2015 (see page 48 of the 2015 report) sheds light on the exploitation faced by young people in these situations.

In the previous phase of our research in 2015, we drew attention to evidence which demonstrated ‘the complications and errors that had been made in diagnosing children’s immigration needs’, particularly where trafficking and international protection was concerned, and how this worked to exclude them from legal aid edifice. (Connolly, 2015). Again, evidence from this phase of the
research has drawn attention to this, with 6 survey respondents suggesting that this is something that they either 'sometimes' (N=5) or 'often' (N=1) encounter in their work with separated migrant children. This also continues to appear again as a pattern in the interviews, and again, when mentioned, there is a focus on this being a risk factor when assessing the claims of trafficked children.

Children’s International Protection / Human Rights and Trafficking Claims Previously Unidentified

“We see unidentified protection cases. I think trafficking most often – a lot of the trafficking claims initially show up as somebody who has entered illegally and it’s not until someone takes the time to sit down and explore these issues that you realise they didn’t do so of their own accord. It takes time to get that evidence. Trafficking claims are amongst the most difficult because you’re not entitled to legal aid until you are identified as a victim of trafficking” (Elizabeth, Immigration Solicitor)

Many participants in our research were very clear that the risks for trafficked children in not getting the legal support and advice they need to ensure their protection have grown significantly within a post-LAPSO context. Whilst there was evidence of this in the last report, what we have seen this time, is very clear evidence that the procedures that were put in place after LAPSO to ensure that persons who have been trafficked do not go without legal aid, not only are not working, but are dangerous, and are leaving a very profound protection gap for one of the most vulnerable groups of children in our society. The role of lawyers is key to the identification, support and protection of trafficked children, and a lot of the crucial work in the evidence gathering and identification process is front-loaded, at the point the children first present with immigration or asylum claims. This is hugely problematic as there is, at present under the LASPO ‘system’, no legal aid for trafficked children at the formative stages of their immigration and asylum claims.

“You only get legal aid once you have the reasonable grounds position and the majority of work in all of these cases is done before that – so the trafficking thing is useful it is really limited.” (Louisa, Law Centre Immigration Solicitor and Manager of Migrant Children Legal Project)

Whilst, in theory, legal practitioners could make use of the exceptional funding system, as we have established earlier, given that it is time consuming, and at risk work, this only forms another barrier to prevent the correct identification of trafficked children’s legal needs and ultimately, their protection and safety.

Before children qualify they had to have been referred into the National Referral Mechanism and furthermore, received a positive reasonable grounds decision to open the door to their access to legal aid. Procedurally, our evidence is showing that this is not working. In the last report, and substantiated by subsequent national research (Kohli et al, 2015), we highlighted that many children are just not being referred into the National Referral Mechanism in the first place. This still remains true in the evidence that has emerged from this report as illustrated in the quote below and in the case study of the work of solicitor, Ryan, also below.

“You can only access legal aid once there's identified reasonable grounds, but up until that point, there is no grounds for legal aid for preparing that application to the national referral mechanism. It's an unnecessarily high threshold. It's supposed to be a test where you identify indicators and then investigate whether there might be trafficking in the background but the way the test is applied is as a much higher threshold.” (Asha, Solicitor and Legal Officer, Policy Organisation)

Case Study: Abebi, 16 Year Old Girl Trafficked and Out Scope
Ryan, an immigration solicitor, was asked to support what he first thought was an immigration application from an adult when it became very clear that what was in front of him was an application from a child, with very palpable trafficking indicators and a history of forced marriage.

The child, Abebi, who he thinks is 16 years old, has been in the country since she was 13 years old. She has been age assessed as 27 from the Home Office and the Local Authority are refusing to accept that she is a child, despite bone density scans that indicated an age range between 16 to 20 years.

The local authority has refused to take her into care, despite repeated attempts by Ryan for them to reconsider their decision. The girl is highly vulnerable. She has spoken to Ryan about having been sold and she has been forced to work in a brothel. There is evidence of torture and branding by the traffickers and the girl’s mental health is in a critical state, threatening suicide. She is living in adult hotel accommodation in a notoriously unsafe area of the town where she has found herself. At the point of the interview, Ryan had been working on this girl’s case for 6 months free of charge, as she is out of scope for legal aid funding, and he describes the whole situation as a “huge disaster.”
Conclusions and Recommendations

1. This report has examined the situation faced by separated and unaccompanied children in immigration proceedings, following the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act in 2012, and compared the new findings to those to we found in 2015.

2. We analysed publicly available data, submitted freedom of information requests to a range of statutory agencies, sent out a questionnaire and conducted individual interviews with legal professionals and others who support separated and unaccompanied young people in immigration proceedings. These findings were compared against the data collected for the 2015 report.

3. As we found in our 2015 report, a child’s status as a separated or unaccompanied minor invites complexity into their immigration cases, given their specific vulnerabilities; as children, not yet transitioned into maturity, alone, with complex personal histories, and having to face increasingly bureaucratic Home Office systems, sometimes without any adequate support and direction. It is important to frame these vulnerabilities in the context of children’s rights, which should be protected in accordance with the UNCRC. Article 3 and the standard of the best interests of the child in all decision making that affects a child’s life, Article 12 and the ways in which children can effectively participate in the immigration process, and Article 6, which intends to secure a child’s right to life, survival and development.

4. By identifying and exploring the effects of 11 common situations that separated and unaccompanied children may find themselves in, when they come to regularise their status in the UK, it was possible to demonstrate the multiple factors that might influence the applications of these children. Such complex cases, naturally, require a nuanced professional response from an immigration advisor that understands the intricacies of children’s immigration cases.

5. The incidence of non-linear routes to regularising immigration status for this cohort, and the absence of asylum and protection claims means that their cases are not eligible for legal aid funding, under LASPO.

6. Children’s claims for asylum or support as victims of trafficking, are not identified adequately. Poor funding and a lack of trained professionals exacerbates this and prevents early intervention.

7. There are serious issues facing young people that wish to access immigration advice services. Our report finds, as with the 2015 report, that there is a geographical disparity in access to immigration advice and representation services. Furthermore, not all advisors have specialised knowledge of children’s immigration cases and it does not form the large proportion of their immigration work.

8. There has been a significant diminution in the availability of free sources of immigration advice since LASPO and the numbers of organisations authorised by OISC to provide legal advice without a fee.

9. The Exceptional Case Funding scheme, which was introduced as part of LASPO, does not appear to be fulfilling its function as a ‘safety net’ for funding cases that are out of scope for straightforward legal aid funding. Although there has been an increase in applications made since the scheme was set up, many of the professionals that we interviewed had yet to complete an application for ECF. Reasons included a preconception that they will not succeed; a decision not to use unpaid time on an application for which they may not receive any payment and a lack of knowledge about ECF generally.
10. Our research has enabled us to identify that the design of the exceptional funding system, even after case law that challenged its mechanics and thresholds, still offers legal practitioners limited opportunities to make it a workable option for them and, ultimately, for the children and young people they work with.

11. Our research has shown that whilst the exceptional funding scheme is not working for all unaccompanied and separated migrant children, it is particularly inappropriate for children with trafficking claims and children with mixed cases, where some elements are in and out of scope.

12. We have found little evidence that local authorities have been able to fill the gaps in provision caused by LASPO. Our research has found that local authorities have varying practice, when it comes to facilitating access to immigration advice and representation for children in their care. Most local authorities do not appear to have any sort of guidance on how to support these children, with many local authorities dealing with the immigration needs of young people on a case by case basis, instead of having a standardised policy. This remains largely unchanged since our last report, though the demands placed upon local authorities have arguably increased since then as more children arrive into the UK.

13. As with the exceptional funding scheme, there is too much variation built into the system and not all unaccompanied and separated migrant children in local authority care, care leavers, or even those supported under Section 17 of the Children Act (1989), will have equal opportunities to access the legal advice and representation they need to redress their immigration problems. In many ways, there are no significant surprises or shifts in the findings since our last report, and the headlines remain the same. Important, however, is the time that has elapsed since our previous report; the suggestion that local authority practice is simply transitory no-longer holds.

Recommendations

To fulfil its obligations under the UNCRC, the Government should reinstate legal aid for all unaccompanied and separated migrant children in matters of immigration by bringing it back within ‘scope’ under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Separated and unaccompanied children are super-vulnerable. LASPO introduces further barriers to the regularisation of their immigration status and hinders the realisation of their best interests (Article 3 UNCRC) and right to participate in decision making about their lives (Article 12 UNCRC). Furthermore, the long term consequences of irregular immigration status put in jeopardy a child’s right to life, survival and development.

At the very least, the government must provide a full timeline and complete its intended 5-year review of LASPO, with appropriate consultation of stakeholders that support unaccompanied and separated children in immigration proceedings. The government should fully consider recommendations made about improving access to justice for this cohort and implement them.

The Government had promised a 5-year review of the legal aid changes, once LASPO was introduced in 2012. A review was announced by the Minister for Courts and Justice in January 201773, intended to ‘look at impact of implementation on litigation and various reviews undertaken by NAO and others’74 but the formal timeline for this review has not yet been announced. Although the Minister for Courts and Justice stated that the Government would ‘work closely with key partners

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73Joint meeting minutes – All Party Parliamentary Groups on Legal Aid, Pro Bono, Public Legal Education Speaker: Sir Oliver Heald QC, MP, Minister of State, MOJ [Accessed 16 June 2017]
74 Ibid.
across the sector’ in conducting the review, there remains very little information about the intended stakeholders and the ways for stakeholders to contribute to the review about the impact of LASPO.

As part of a review of LASPO, the ECF system must be fully assessed. As it was designed as a safety net to protect vulnerable people through legal processes, the implementation of ECF for this function must be fully considered. The evidence from our research has shown that it is still not being used by solicitors and other immigration representatives to support children in their immigration applications. A review should take a whole systems approach to understanding the scheme, addressing the knowledge and perceptions of legal practitioners, the mechanics of the decision-making processes, the experience and expectations of children, in addition to the advocacy and care professionals that support them.

The Government should formalise the role of local authorities in relation to immigration advice for separated children given the ambiguity that has been created around whether a local authority is under any obligation to provide legal services to separated or unaccompanied children that it is either ‘looking after’ or ‘assisting.’ Our research demonstrated the ongoing difficulties faced by local authorities, where there is no clear direction to attend to the pressing needs to regularise a child’s immigration status. Clarifying the role of local authorities, particularly in light of any legal responsibility outlined in the ‘corporate parenting principles’ introduced through the Children and Social Work Act 2017, would offer clarity. The present state of affairs is unhelpfully ambiguous.

All children suspected of being trafficked, whether they have been referred into the National Referral Mechanism or not, should have access to legal aid either by being brought within ‘scope’ under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 or by clear exceptional funding guidance. Given the numbers of trafficked children that we have heard about throughout the course of this research that were excluded from legal aid, we would recommend that the Government change the current restrictions on legal aid for child victims of trafficking. The current rules require that a positive reasonable or conclusive grounds decision has been made under the NRM for legal aid to become available. This should be changed so that if a solicitor or the Legal Aid Agency is satisfied there is a reasonable suspicion that the child has been trafficked legal aid can be made available. The nature of this gap also illustrates the significance of guardians for all unaccompanied and separated migrant children.

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. Our evidence demonstrated that, at times, local authority social workers and managers had to make legal appraisals on the nature and predicted outcomes of children’s immigration cases with a view to determining whether to fund legal advice and representation. These kinds of judgements compete with safeguarding and corporate parenting duties and we recommend that, if the Ministry of Justice does not reinstate legal aid for unaccompanied and separated children, all local authorities, where a child cannot afford to pay for legal advice and or representation, provide them with free legal advice and assistance by a solicitor or barrister with the relevant qualifications and expertise. We recognise the difficulties for local authorities in accepting the transfer of costs for legal aid for migrant children either in their care, or that they are assisting, and would argue that the Ministry of Justice should shoulder these costs by bringing children back into scope for legal aid.

Local authorities should ensure the systematic collection of data for separated children with non-asylum immigration claims both in their care and known to them.

75 Legislation.gov.uk Children and Social Work Act 2017 Section 1
During our research for both reports, we noted that local authorities, unlike with unaccompanied asylum seeking children, are not required to gather statistics on unaccompanied and separated migrant children without asylum claims. The systematic collection of data is key to the development of effective policies and practices that can best protect the best interests of this vulnerable group of children about whose needs little is known.

**Until legal aid is reinstated, local authorities should train social workers and independent reviewing officers in the identification of children that are out of scope and how to best support their legal needs within this new and complex territory.**

This is based on our findings, which suggest that many unaccompanied and separated children do not discover their irregular status until they are older, or indeed do not realise the significance of their status until they are older.

**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.**

This is based on our findings for both reports, which suggest that many unaccompanied and separated children do not discover their irregular status until they are older, or indeed do not realise the significance of their status until they are older. As part of this outreach, valuable work could be done with children and young people to reduce the shame and isolation they feel about their legal status as a way of encouraging them to step forward to resolve their immigration issues.

**The Government should commission external independent research into the existing capacity and level of ‘specialism’ in children’s immigration law cases.**

This is based on our research findings, which suggest that the legal aid changes appear to have reduced the availability of immigration legal advice - both fee paying and non-fee paying.

**The Government should waive application fees and the health surcharge for unaccompanied and separated migrant children and young people up to the age of 25 in their immigration applications.**

In addition to legal fees, children also must pay the administrative fees for their immigration applications and the health surcharge brought in under the Immigration Act 2014. These additional fees cause unnecessary anxiety for children who cannot afford to pay them.

**The Legal Aid Agency should properly apply its own ‘Guide to determining financial eligibility for certificated work’ guidance and allow a child’s means to be non-aggregated from family, in an application for legal aid in a Dublin III case.**

Our research found that decision making from the Legal Aid Agency on applications from children arriving in the UK through the Dublin III regulation is not consistently applying non-aggregation of means, where necessary. The outcome of this is that families are paying excessive costs for immigration applications of children and young people who are arriving to live with them, which puts financial strain on the families and creates tension.

**It is also necessary that, when this group of children first arrive, they are considered a ‘child in need’ in accordance with Section 17 of the Children Act 1989, as a way of practically supporting them and their families to access and navigate the asylum and immigration process, and, where necessary, to support them financially to do this.**

All children newly arriving in a local authority should be fully assessed in accordance with Section 17 of the Children Act 1989, so their safeguarding and other needs are fully supported.

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76 Immigration Health Surcharge [https://www.gov.uk/healthcare-immigration-application/overview](https://www.gov.uk/healthcare-immigration-application/overview) [Last accessed 16 June 2017]
Appendix A: Literature Review

Precarious Citizenship – Migrant and Refugee Children’s Legal Unit (2017)\textsuperscript{77}

This report by the Migrant and Refugee Children’s Legal Unit, based at Islington Law Centre, examined the experiences of 52 undocumented children in need of legal advice and representation across several different domains extending beyond immigration to include other areas of law like education, housing and social welfare.

It found that children, and non-legal professionals were not able to identify the existence of trafficking and international protection claims (including asylum) without specialist legal advice\textsuperscript{78}. Without the knowledge that they had an asylum, trafficking or other international protection claim young people and other professionals were liable to assume that no legal aid would be available putting a significant barrier between them and the crucial legal advice they required.

Of the cohort, 61\% either had their immigration problem incorrectly identified by other professionals when they were referred to the project or had no identified immigration needs identified\textsuperscript{79}. Again, highlighting how, without specialist support, children and young people are unlikely to access legal advice leaving them at long term risk and with increased vulnerability.

Half of the cohort had a protection claim identified by the project, of these 34\% were unidentified before the referral to the project\textsuperscript{80}.

Further evidencing the number of unaccompanied and separated children living in private fostering arrangements, 29\% of the cohort were living in the community in a private fostering arrangement\textsuperscript{81}. Of these 80\% broke down highlighting the fragility of such placements and the susceptibility they have to situations of exploitation, abuse or neglect developing within the home.

Bach Commission Interim Report – 2016\textsuperscript{82}

The Bach Commission’s interim report usefully sets out some of the key challenges currently facing the legal aid system and access to justice in England and Wales. Its interim conclusion is that “exceptional case funding has failed to deliver for those in need”\textsuperscript{83}. In support of this it utilises the figures we relied on in our first report comparing the Government’s prediction of how many children and young people would access ECF against the numbers that actually did. The government suggested around 847 children and 4,888 young adults would be granted ECF each year, in fact

between October 2013 and June 2015 only 8 children and 28 young adults were granted legal aid under the scheme\textsuperscript{84}.

**Justice Denied: Impacts of the government’s reforms to legal aid and court services on access to justice – Justice for all (2016)\textsuperscript{85}**

Whilst this report did not address immigration legal aid in any detail it does give some useful background around what legal aid cuts and other changes to the justice system, like court closures, have meant more generally. It also usefully highlights some of the consequences this can have for children and for litigants in person.

In relation to immigration cases the report focused on nationality and visits. It details how representation matters started in these categories fell from 28,221 in 2011/12 to just 6 in 2015/16 after they were taken out of scope under LASPO\textsuperscript{86}.

In relation to children, the report found that in family law the needs of children specifically either were often being overlooked, or were prevented from coming to court because of the lack of legal aid. Specific examples included fathers not pursuing contact with their children as they could not afford it and mothers struggling to prevent their children seeing their fathers after domestic violence\textsuperscript{87}.

The report also highlights the struggles that litigant in person face in receiving a fair hearing. 67% of court professionals stated that cases had a longer duration post-LASPO than before the changes. Many commented on the difficulties in explaining procedures to litigants in person\textsuperscript{88}.

Whilst the above is not directly relevant to unaccompanied and separated children progressing their immigration cases it does reflect the wider context. It suggests that throughout the reforms to Legal Aid and the justice system as a whole, the needs and rights of children in court proceedings have not been properly protected.

**Cuts that hurt – Amnesty International\textsuperscript{89}**

Amnesty International’s report, ‘Cuts that hurt’, adds additional dimensions to the existing literature on the effects of LASPO and wider court reform. Amnesty International also conclude that the Exceptional Case Funding, which they judge to be reliant on pro bono work, due to the lengthy


application form that must be completed without guarantee of remuneration, is neither an effective safety net, nor a ‘panacea’ for all the problems in the legal aid system\textsuperscript{90}.

Their report goes further than others however, in its examination of two specific groups relevant to unaccompanied and separated children. In its examination of the consequences of legal aid reform on children and young people the report finds that in cases where children are involved, the lack of legal advice available for their parents or carers is detrimental to their needs. Similarly, to the work by Speak up for Justice\textsuperscript{91} it found problems in cases where parents were trying to gain, or restrict contact to/with their children\textsuperscript{92}.

The report also comments on how the changes in LASPO have affected migrants it focuses specifically on family reunion and article 8 cases. The report finds that the onerous evidence gathering requirements of an article 8 claim pose a barrier to claimants. A barrier, which cannot be overcome without significant legal advice and considerable expense\textsuperscript{93}.

Amnesty International conclude that both children and young people and migrants are particularly vulnerable in the post-LASPO context to not having their rights to justice upheld. In our initial report, it was argued that separated and unaccompanied children could be described as being ‘super-vulnerable’ due to their complex legal and support needs – which are because of, but not limited to, their status as both children and migrants. These conclusions are mutually supportive.

The Value of Justice Manifesto – Bar Council 2017\textsuperscript{94}

In advance of the 2017 General Election the Bar Council released its manifesto for Justice in the UK. It added its voice to the range of organisations and publications already calling for a full and comprehensive review of Legal Aid post-LASPO\textsuperscript{95}. The Bar Council also made an observation that was made in the Bach Commission’s interim report\textsuperscript{96} – that many vulnerable people often have to access justice in order to challenge poor decision making by those in authority. Whilst the Bach Commission focussed on the number of decisions made by the Department for Work and Pensions overturned in the courts\textsuperscript{97}, the Bar Council instead chose to focus on poor decision making in relation to immigration cases \textsuperscript{98}. Such an observation is very relevant to our research on


unaccompanied and separated children, particularly those whose asylum claim has been rejected but they still have other article 8 aspects to their case which require representation and examination but fall out of scope of legal aid.

Other Background Sources

*Henry Brooke Blog*[^99]  
For a good overview of the some of the changes to ECF since the introduction of LASPO the below article on the Henry Brooke legal blog is a good place to start

This report, published around the same time as our previous report into unaccompanied and separated children, reviews some of the older literature and has sections focussing on children and immigration.

[^99]: Henry Brooke (2016). Three Years of Exceptional Case Funding in non-Inquest Cases.  
Appendix B:
Challenging Exceptional Case Funding

Exceptional Case Funding

Since the introduction of LASPO, there have been a number of developments in the administration and decision making process of the Legal Aid Agency’s Exceptional Case Funding (ECF) Scheme. ECF is the safety net for the legal aid system in this country – if an individual’s case falls out of scope for legal aid, they may, in certain circumstances, be able to apply for funding through the ECF scheme.

LASPO states¹:

10 **Exceptional cases**

(3) For the purposes of subsection (2), an exceptional case determination is a determination—

(a) that it is necessary to make the services available to the individual under this Part because failure to do so would be a breach of—

(i) the individual’s Convention rights (within the meaning of the Human Rights Act 1998), or

(ii) any rights of the individual to the provision of legal services that are enforceable EU rights, or

(b) that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach.

How the primary legislation is interpreted, and the regulations and guidance that go along with it has been subject to challenge in the courts since LASPO was enacted in 2013.

The first case which really tested the ECF scheme was ‘Gudanaviciene and ors v Director of Legal Aid Casework and the Lord Chancellor’. This case considered the circumstances in which ECF could be granted and concluded in December 2014.

The Government argued that the appropriate test for ECF was whether it would be ‘practically impossible’ for the applicant to represent themselves without funding. They also argued that there was no obligation to provide ECF in immigration cases, other than where EU rights were engaged, because no such obligation to provide funding arose under Article 8 ECHR.

Neither the High Court¹⁰¹ nor the Court of Appeal¹⁰² agreed with the government. The Court of Appeal confirmed that an obligation to fund legal representation does not just arise under Article 6

¹⁰¹ England and Wales High Court (Administrative Court) Decisions (2014) Gudanaviciene & Ors v Director of Legal Aid Casework & Anor [2014] [Last accessed 16 June 2017].
¹⁰² Ibid
EHCR\textsuperscript{103} and that it is inherent within other Convention rights in order to ensure they can be exercised. Crucially the court found that in order for an individual to exercise their Article 8 ECHR right they may require funding for legal representation. Furthermore, this funding might be required at the application stage, as well as when a case is before a court or tribunal.

This part of the ruling confirmed that ECF would need to be provided in immigration cases beyond those with EU rights engaged, in order to uphold ECHR rights.

The Court of Appeal also found that, rather than the ‘practically impossible’ test, the test was whether an applicant would be able to present their case effectively and without obvious unfairness (para 56).

Despite the Court of Appeal confirming that the Lord Chancellor’s ECF (non-inquest) Guidance was unlawful in December 2014, it was not until 9 June 2015 that the Government published amended guidance.

The Courts in Gudanaviciene and ors considered the test for when ECF funding should be made available (with particular focus on the immigration context). However, one of the Gudanaviciene Claimants, ‘I.S.’, also argued that there were systemic flaws in the ECF scheme which meant that individuals who should be entitled to funding were not receiving it. These arguments were separated from I.S.’s individual case (which was determined in the Gudanaviciene litigation), and were heard by the High Court in June 2015 in ‘I.S. v Director of Legal Aid Casework and the Lord Chancellor’.

In the judgment\textsuperscript{104}, Judge Collins found that the ECF scheme, the regulations and the guidance were all unlawful. The scheme itself gave rise to too much risk that an individual might not obtain funding. The regulations required cases to have more than a 50% chance of success which the Judge felt to be too high.

In his judgement, Judge Collins noted that the success rate for ECF applications remained very low. He concluded that the scheme was “not properly providing the safety net which [it] is supposed to provide”. He found that the forms were too complex for both professionals and unrepresented applicants, and do not reflect the test outlined in Gudanaviciene. He also commented on the lack of funding for the initial investigation of whether an applicant might be eligible for ECF, felt that the process was not swift enough to deal with urgent applications, and made a number of other observations, all of which can be seen below:

\begin{center}
\begin{tabular}{|p{7cm}|}
\hline
a) & The forms are too complex, for both practitioners and unrepresented applicants, and do not reflect the test in Gudanaviciene (paragraphs 43, 54, 55, 56, and 105) \\
b) & The system is not meeting needs of unrepresented. (paragraphs 43, [46], and 62) \\
c) & There is no funding for the initial investigation of whether a potential applicant would be entitled to ECF. (paragraph 57) \\
d) & The procedure for determining urgent applications for ECF is inadequate. (paragraph 78) \\
e) & An applicant is required to provide an unnecessary amount of detail with an application for ECF. (paragraph 65) \\
f) & It should not be necessary for an applicant to provide full means information for a grant of ECF to be made in principle, subject to full means information being provided, with a grant of funding made once financial eligibility had been determined. (paragraph 63) \\
g) & It is incorrect to assume that, because Courts and Tribunals have experience of dealing with \\
\hline
\end{tabular}
\end{center}

\begin{footnotesize}
\textsuperscript{103} European Convention on Human Rights (2010) Article 6 is the ‘Right to a fair trial’\url{http://www.echr.coe.int/Documents/Convention_ENG.pdf} [Last accessed 6 June 2017]. \\
\textsuperscript{104} IS v The Director of Legal Aid Casework & Anor [2015] (15 July 2015) \url{http://www.bailii.org/ew/cases/EWHC/Admin/2015/1965.html} [Last accessed 16 June 2017].
\end{footnotesize}
litigants in person, an unrepresented individual will receive a fair hearing; the extent to which it is proper for a judge to assist a party to litigation is limited. (paragraph 71)

h) The way in which the LAA has assessed the merits of cases has been flawed: “it is not for the LAA to carry out the exercise which the Court will carry out, in effect prejudging the very issue which will be determined by the Court.” (paragraphs 72, 96, 97)

i) The hurdle to accessing ECF for those lacking capacity, particularly the evidential requirements, is too high (paragraphs 74, 75, 80)

Following this case, the LAA introduced a revised ECF application form in November 2015, together with an updated provider pack. The new form is shorter, at seven pages, and contains provision for an application to be made for legal help to investigate whether a further funding application could be made.

On 24 July 2015, the Lord Chancellor laid new merits regulations which came into force on 27 July 2015. Under these regulations, funding was available for a case in which the prospects of success were poor or borderline (i.e. 20-50%).

The Director of Legal Aid Casework and Lord Chancellor appealed Judge Collins judgment, and the case was heard by the Court of Appeal in March 2016. Two of three Court of Appeal judges found that the Exceptional Case Funding scheme was not “inherently or systematically unfair” and was, therefore, operating lawfully.105

The findings about the difficulties with the scheme were not really overturned, rather those two judges did not accept that they meant that the scheme was inherently unfair and so unlawful. Laws LJ observed that “It is plain that there have been real difficulties; and there is no contest but that improvements could be made, not least to the ECF form.” All three judges disagreed with Judge Collins and found that the merits regulations and the Lord Chancellor’s Guidance were lawful.

On 22 July 2016, the Lord Chancellor laid further new merits regulations, which continue to be in force. These regulations are more generous than the merits regulations in force at the time of the High Court judgment in I.S. as they allow for certain cases, including immigration cases, to be funded when the prospects of success are between 45 and 50 percent and the case is of overwhelming importance to the individual, concerns a breach of ECHR rights, or is of significant wider public importance.

I.S. applied for permission to appeal to the Supreme Court, but the application was refused on 8 December 2016.

Appendix C:
Availability of advice

The following tables are produced from the Freedom of Information requests we submitted to the Office of the Immigration Services Commissioner since LASPO was introduced.

Table C1: OISC Provision Fee charging 31st Dec 2012:

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Tables comparing % cuts between 2012, 2014 and 2016

**Table C7: Percentage cut in OISC providers for fee and non-fee services 2012 to 2014**

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**Table C8: Percentage cut in OISC providers for fee and non-fee services 2014 to 2016**

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<td>20%</td>
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**Table C9: Percentage cut in OISC providers for fee and non-fee services 2012 to 2016**

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</thead>
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<td>Level Two</td>
<td>56%</td>
<td>17%</td>
</tr>
<tr>
<td>Level Three</td>
<td>39%</td>
<td>54%</td>
</tr>
</tbody>
</table>
Too many children and young people in this country don’t feel safe, loved or able to cope.
No child should feel alone.

Together we can change their lives.

The Children’s Society is a national charity that runs local services, helping children and young people when they are at their most vulnerable.

We also campaign for changes to laws affecting children and young people, to stop the mistakes of the past being repeated in the future.

Our supporters around the country fund our services and join our campaigns to show children and young people they are on their side.

For more information on this report please contact:
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