**Submission to the review of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012**

September 2018

BID is an independent national charity established in 1999 to challenge immigration detention. We assist those held under immigration powers in removal centres and prisons and make applications for bail to secure their release from detention through the provision of free legal advice, information and representation. Between 1 August 2017 and 31 July 2018, BID assisted 5,941 detainees across the detention estate. Alongside our legal casework, we engage in research, policy advocacy and strategic litigation to secure change in detention policy and practice.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”) removed non-asylum immigration cases from within the scope of legal aid funding. It is this aspect of the cuts to legal aid under LASPO (“the LASPO cuts”) that will be the focus of BID’s submission to this review.

The LASPO cuts have had a direct impact on BID’s client base. As the Immigration Law Practitioners’ Association (ILPA) stated when LASPO was passing through parliament:

*“Unlike other administrative decisions, people’s liberty is immediately at stake when immigration decisions are taken. And the lawfulness of a person’s detention or the prospects of that person being granted bail are intrinsically linked to his or her ability to articulate, present and pursue a claimed entitlement to remain.”[[1]](#footnote-1)*

The consequences of the LASPO cuts alongside the implementation of the government’s hostile environment policy have been devasting.

In helping our clients apply for bail, BID’s legal team works alongside other legal practitioners who have conduct of our clients’ main immigration case where they are represented. Despite bail matters being within scope of legal aid, the majority of detainees that we work with are unrepresented. BID is therefore well positioned to report on the impact of the cuts to legal aid on immigration detainees.

**SUMMARY**

* Many detainees do not have legal representatives. In paragraph 3 we set out quantitative data on the increased number of unrepresented detainees since the LASPO cuts. In May 2018, only 50% immigration detainees had a representative while detained.
* Immigration detainees held in prisons have been particularly affected by the LASPO cuts as there is no immigration legal advice in prisons provided under legal aid as there is in detention centres. Our recent surveys have found that just 1 in 10 detainees accessed any immigration legal advice in prison.
* The children of parents whom the Home Office seeks to deport have also been particularly affected by the cuts.
* Immigration law is complex and changes often; it is almost impossible for a lay person to navigate the system without assistance.
* Where a deportation appeal turns on the parent’s private and family life, the evidence required by the Home Office and Tribunal may be extensive and without legal aid funding few can afford to fund the expert reports required to evidence their private and family life.
* Exceptional Case Funding (ECF) has not filled the funding gap left by the LASPO cuts. There are many barriers to accessing ECF. Applications are time consuming and require an understanding of the legal merits of the case; however, preparation of ECF applications are not funded by legal aid. Furthermore, ECF decision-making can be variable and delayed. Many lawyers are not willing to take the risk, which acts as a further barrier to individuals in accessing legal representation.
* Legal aid practice has become less viable and there are fewer firms with immigration expertise and capacity willing to take on complex cases. Such complex cases include ‘mixed’ cases where individuals have both an asylum claim and an Article 8 claim. Due to the difficulty in securing ECF for the Article 8 aspect of the case, some solicitors avoid mixed cases. As a result, many individuals who are particularly in need find it extremely difficult to find a representative. Our case studies demonstrate this.
* BID’s Article 8 Deportation Advice Project (ADAP) was established in response to the growing need for legal advice within our client base following LASPO. The ADAP project provides valuable assistance to many on a pro bono basis but is unable fill the gap left by the LASPO cuts. It is not realistic or fair to expect voluntary organisations and individuals to undertake pro bono work in place of an adequately funded legal aid scheme.
* The problems with accessing representation are compounded for those individuals who do not live in London but in areas where firms conducting legal aid work are scarce.
* BID considers that taxpayer savings should not justify sacrificing access to justice for those who are the most in need. Without access to legal representation, individual’s cases are more difficult to progress, and are likely to cost the taxpayer more in the long run. Worse still, many people are deported in breach of their rights through lack of legal representation.

**Access to legal advice in immigration detention**

1. Many immigration detainees do not have the means to pay for legal representation. Since the legal aid cuts were implemented in April 2013, BID has documented an increase in the number of detainees who are unrepresented.
2. In November 2010, BID began to conduct surveys every six months regarding immigration detainees’ access to legal representation from within detention. A summary of the quantitative findings from these surveys can be found at Annex A of this submission.
3. In November 2012, prior to the implementation of the legal aid cuts, 79% of surveyed detainees reported that they had a legal representative at the time of survey, 75% of which were funded by legal aid. In May 2013, immediately after the introduction of LASPO cuts to legal aid, the proportion of those surveyed with a legal representative fell to 43%. In total, under a third (29%) had a legal aid solicitor. The results have shown little change since. The most recent survey conducted in May 2018 found that 50% of those surveyed did not have a legal representative and 30% had a representative funded by legal aid. 57% of participants in the latest survey advised us that money was the reason they did not have a lawyer.
4. Legal advice and representation facilitates the efficient and fair progression of immigration detainees’ cases. It is also important have access to a lawyer to ensure they are protected from unlawful detention.
5. Many detainees who cannot find a legal aid lawyer are forced to scrape together funds from friends and family to pay for private legal representation. These fee-paying clients often have insufficient means to pay for enough immigration advice to progress or conclude their case. There is also no guarantee of quality. Essential disbursements (e.g. expert reports) and evidence collection prove unaffordable for most detainees who are paying privately. This handicaps the instructed legal advisor, and disadvantages the client in a fair resolution of the case.
6. Lack of access to legal advice is often a contributory factor to prolonged periods of detention. This comes at significant cost to the public purse that undermines any short-term savings associated with LASPO legal aid cuts.

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| **Case study: Mohamed**(The names in all case studies have been changed)Mohamed is an Afghani refugee who came to the UK when he was 12 years old. He has a partner in the UK and is the father of two British children. Mohamed suffers from PTSD as a result of traumatic experiences experienced early in his life. He became involved in crime and was convicted and subject to a deportation order. The deportation order would require that he be removed to Afghanistan, thus permanently separating him from his children and partner. Following his criminal sentence, he was placed in immigration detention in an IRC. Mohamed’s PTSD symptoms worsened significantly in detention. He had a legal aid lawyer for his deportation appeal based on his asylum and family life claims, with BID acting on his behalf in his bail application. However, one week before his deport appeal hearing at the First Tier Tribunal, Mohamed contacted BID and instructed that his lawyer had dropped his case and he didn’t know why. At this time, Mohamed’s mental state was very poor. BID contacted his lawyer to make enquiries about the status of his case. His lawyer explained that the firm had ceased practising legal aid work and so they could no longer represent him. Mohamed drafted a letter to the Tribunal requesting an adjournment of his deportation appeal so that he could retain a representative and explained to the Tribunal his particularly poor mental health at the time of the hearing, submitting healthcare reports from the Immigration Removal Centre. The Tribunal refused his request for an adjournment. On the day of the deport appeal hearing, Mohamed made another request for an adjournment; however, the adjournment was again refused, and the appeal proceeded. Mohamed represented himself and lost the appeal. As a result, Mohamed also lost his bail hearing at this time. He was dismayed and his mental state deteriorated further. BID encouraged him to keep trying to find a representative, especially as his case had merit and he had not had a fair hearing. At BID’s urgings, Mohamed made another appointment to see a Detention Duty Advice[[2]](#footnote-2) (DDA) lawyer within the IRC. The DDA lawyer did not take on Mohamed’s case, citing capacity, and recommended that he keep trying to find a lawyer. BID also encouraged Mohamed to return to the DDA lawyer as many times as necessary until he could find a firm with capacity to take his case. He eventually had an appointment with a DDA solicitor who accepted him as a client. Mohamed was granted permission to appeal and his appeal is upcoming. Issues:* It is often the most vulnerable of individuals such as Mohamed, who are left to navigate the complex legal system alone. As an unrepresented appellant, Mohamed lost his appeal.
* Due to the difficult financial climate for legal aid firms following the LASPO cuts, many legal aid practices have stopped accepting legal aid cases or their practices have been whittled down such that they have very limited capacity. As a result, many detainees such as Mohamed who meet the merits and means test cannot find legal aid lawyers to take their cases.
* This is an example of a “mixed” asylum and Article 8 human rights case discussed above.
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**Access to legal aid representation from within prison**

1. According to Home Office statistics, there were 321 people being held in the prison estate under immigration powers at the end of June 2018.[[3]](#footnote-3) Detainees held in the prison estate are former foreign national offenders who are subject to automatic deportation under the UK Borders Act 2007 following a custodial sentence of 12 months or longer. Unlike IRCs, there are no legal aid advice surgeries held in prisons. BID’s research has shown that this group has been particularly badly affected by the removal of immigration matters from legal aid scope as many are long-term residents, including EEA nationals, who are issued with deportation orders despite having strong Article 8 claims. BID’s report, “***Denial of justice: the hidden use of UK prisons for immigration detention***” published in 2014, found that:

*“Detainees held in the prison estate suffer from multiple, systemic, and compounding barriers to accessing justice, with an often devastating effect on their ability to progress their immigration case, seek independent scrutiny of their ongoing detention from the courts and tribunals, and seek release from detention, as well as on their physical and mental wellbeing.”[[4]](#footnote-4)*

1. In November 2017, BID conducted a small-scale survey of detainees’ experiences of obtaining legal advice from prison. The majority found it extremely difficult. Though the study was too small to yield quantitative data, most respondents were unrepresented, and the reports of their experiences illustrate the struggle to access legal advice from within prison:

*“I have been writing to solicitors for support. Legal aid is no longer for immigration. I need help.”*

*“It's hard to get help, it's like no-one wants to help.”*

*“No one has spoken to me while I’ve been locked up for 6 months, two weeks. Staff are not helping me, not tried to call immigration or asked someone to come in and talk to me about my case.”*

*“they [lawyers] asked for too much money which I don't have.”*

*“[I] tried to get someone to talk to me from immigration. Phoned my criminal lawyer to help, asked staff at Pentonville to help but no luck.”*

*“There are prison officers who are allocated as foreign national representative but they work with immigration basically serving notices and offer no information about where to get help to stop deportation or their rights if any.”*

1. BID’s twice-yearly Legal Advice Survey questions detainees about their experiences of accessing immigration representation from within prison, if they have been transferred to an IRC from prison. Our most recent surveys conducted in November 2017 and May 2018 showed that just 1 in 10 detainees received immigration legal advice in prison. Prior to the implementation of the cuts, the proportion of detainees who received advice in prison was approximately 1 in 5, a reduction of half. Refer to Annex A for a comparison of results.

**Complexity of the law**

1. During the passage of LASPO, the government claimed that the immigration cases that would be placed outside of scope did not require legal aid funding because the process for making applications is accessible and straightforward.[[5]](#footnote-5) BID does not consider this to be the case. British immigration law is extremely complex and has become more so in recent years. The legislative provisions have been repeatedly amended and expanded.[[6]](#footnote-6) In addition to the proliferation of legislation, the Immigration Rules have more than doubled in length since they were drafted, running at over 1000 pages.[[7]](#footnote-7) There have been 5,700 changes to the Immigration Rules since 2010, and 230,000 words added.[[8]](#footnote-8) As well as the Immigration Rules, there are also rafts of other guidance documents on the Home Office website that are subject to constant change (and are not publicly archived online). It is near impossible to navigate this area of the legal system without a lawyer. Sir Ernest Ryder, the Senior President of Tribunals gave evidence on the issue to the Select Committee on the Constitution in November 2016:

*“If you are an unwitting litigant whose first language is not English, and you have no recourse to public funding, because this is an immigration case, not an asylum case, your chances of accessing any of that material and putting it together in a coherent way are negligible.”[[9]](#footnote-9)*

1. Colin Yeo, immigration and asylum barrister at Garden Court Chambers, in evidence to the Home Affairs Select Committee described the situation as follows:

*“On the issue of complexity, I think there are two problems. One is that sometimes the Home Office makes mistakes. The rules are very complicated and mistakes do happen and there is a reasonably high error rate… The other situation that arises - and this is probably more common - is that because the rules are so complex and bureaucratic, it is very hard for applicants to make a successful application without a lawyer now.”[[10]](#footnote-10)*

The Windrush scandal has brought the gravity of Home Office ‘mistakes’ in the application of the law into sharp focus. Recent statistics[[11]](#footnote-11) show that the Home Office now loses most of its appeals[[12]](#footnote-12).

1. In Singh v SSHD, Underhill LJ described the immigration rules as incomprehensible even to legal professionals:

*It is no doubt unrealistic to hope that every provision will be understandable by lay-people, let alone would-be immigrants. But the aim should be that the Rules should be readily understandable by ordinary lawyers and other advisers. That is not the case at present”[[13]](#footnote-13).*

The Law Commission is currently working on reviewing and simplifying the rules. However, this does not mean that immigration law will become easily comprehensible to a lay person and contrary to what the government has stated, access to legal advice and representation is vital in matters of this gravity.

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| **Case study: Daniel** Daniel is the primary carer of two British children in London. One of the children has a serious health condition and requires much support from Daniel. Notwithstanding this, the Home Office ordered that Daniel be removed from the UK and separated from his children. Although he has a meritorious Article 8 case, he couldn’t afford a lawyer. He does not have an asylum claim. Daniel appealed the deportation decision unrepresented; however, he was ill equipped to do so with little understanding of the legal system. He did not submit any expert reports or witness statements, and as a result he lost the appeal. Daniel desperately needed a lawyer, and BID is looking into whether they can help to challenge his deportation, but this may be unlikely due to limited capacity.  |

**Article 8 and separated families**

1. The legal aid cuts have particularly affected families, as the removal of legal aid for private and family life claims has worked to strip many parents of the ability to challenge their deportation. Many parents are detained pending deportation. There is no other setting in which children in the UK could be separated from their parents with such little attention paid to the child’s welfare.
2. BID works with many families where the Home Office is seeking to remove or deport parents from the UK without their children. BID’s Separated Families’ project provides representation to parents held in immigration detention to enable them to apply for bail. BID therefore has a special insight into the challenges that many families face in accessing legal representation to challenge their deportation or removal.[[14]](#footnote-14)
3. In addition to our Separated Families project. BID has an Article 8 Deportation Advice Project (ADAP) which was established in 2014 in response to the LASPO cuts. The ADAP project represents people with family and private life claims in the UK who cannot access legal aid and whom the Home Office seek to deport (the project is discussed further below in paragraphs 32-35).
4. In 2015, BID published a research paper “Rough Justice: children and families affected by the 2013 legal aid cuts” (Annex B). In this research we investigated the cases of 102 parents who were separated from 219 children under the age of 18 by immigration detention, deportation or removal from the UK. We found that 22 of the 102 parents were removed or deported without their children. Of the 102 cases, BID is only aware of two for whom an application for Exceptional Case Funding (ECF) was made. It must be noted that the research was undertaken before the Gudanaviciene and others v Director of Legal Aid Casework and the Lord Chancellor, [2014] EWCA Civ 1622, the case which found that the LAA was unlawfully refusing certain applications; however, we are still very concerned that ECF is not being accessed as it should be (see paragraphs 25-29 below).
5. Over 80% of children in the study for whom we were able to obtain data were British citizens and 93% were born in the UK.[[15]](#footnote-15) A third of the parents in the study either did not have a representative or were dropped by their representative. Approximately a third were represented by private lawyers. A number of these parents who were privately represented reported that they could not pay for all the work needed, or that there were deficiencies in their solicitor’s work.
6. Parents in the sample were detained for an average of 228 days. In one case a parent was held for 870 days. In some cases, children had no other parent to care for them and so were in foster care during their parent’s detention.
7. We refer to the fourth objective of the LASPO cuts as set out in the terms of reference for this review: “to deliver better overall value for money for the taxpayer”. Where single parents are removed or deported and their children are left in Local Authority care, which leads to direct costs to the state. In cases where one parent is expelled and the other remains in the UK with the children, this may also result in costs to the state. For example, if a father is deported leaving a British partner with several young children in the UK, the mother may well be unable to work and be forced to rely on benefits as a result of the deportation. Furthermore, psychological studies show that children who are separated from parents in other contexts, such as parental imprisonment, are at greater risk of poor outcomes in terms of education, health, and anti-social behaviour.[[16]](#footnote-16) This is likely to lead to long-term costs to the state.
8. The Home Office does not publish data on the number of families that are separated due to deportation and detention and they refuse to provide responses to BID’s numerous FOI [requests](file:///%5C%5Cbiduksvr%5CS%5CResearch%20%26%20Policy%5CRudy%5CFOI%20requests%5Cresponses%5CFOI%2049562%20separated%20families%20%27we%20don%27t%20store%20the%20data%27%20-%20Sullivan.pdf). We have seen that Home Office decision-makers tend to ignore the welfare and best interests of children, despite having a statutory duty to safeguard and promote the welfare of children who are in the United Kingdom, pursuant to s55 of the Borders, Citizenship and Immigration Act 2009. These same parents and children who have been disregarded by Home Office decision-makers have great difficulty in accessing legal aid for representation in order to challenge these decisions. This structure enables the Home Office to systematically evade accountability.
9. Access to legal representation in this complex area of law is therefore necessary to hold Home Office decision-makers to account. The repeated failings of the Home Office which have come to light make this more important than ever. The recent case of AJS is demonstrative. In this case, the Home Office had separated a father from his 3-year-old British daughter who was left without a carer. AJS’s daughter was days away from being adopted when the pair were reunited. BID provided expert evidence in the case. The Home Office admitted they acted unlawfully and paid £50,000 in damages to AJS. Without legal representation, AJS would have lost his daughter.[[17]](#footnote-17)
10. Another issue that families face is that few can afford to pay for the expert reports needed to evidence an Article 8 case to the satisfaction of the Tribunal without legal aid. It is well documented that the Home Office places a high evidentiary burden upon those subject to the Immigration Rules. BID’s assistant director, Pierre Makhlouf, giving oral evidence on the Detention of the Windrush generation, explained that one of the reasons the Windrush scandal occurred was that individuals were unable to prove their legal status:

*“It is evident that, without information and some legal advice, people are completely confused… People think: “If I explain that I have been here since I was a child, and I have family and children of a young age, they are going to listen to me. Everyone will think that a family should not be separated. That is a logical thing. I do not need to do much more. I have said the important things”. But that is not enough.’*[[18]](#footnote-18)

1. BID considers it unfair that individuals are required to meet such a high evidentiary burden in proving their case, while being prevented from accessing funding to facilitate the necessary evidence collection. Independent social work or psychiatric reports on children can cost £1000-2000 or more.
2. Legal aid funding should be provided for advice, representation and expert reports for those with Article 8 cases who meet the means and merits tests.

**Barriers to accessing Exceptional Case Funding (ECF)**

1. During the passage of LASPO, the Justice Minister Jonathan Djanogly advised parliament that ECF would provide “an essential safeguard for the protection of an individual’s fundamental right to access to justice.”[[19]](#footnote-19) BID has found that this is not the case.
2. The ECF application process is not easy to complete, and yet the work conducted to prepare ECF applications is not funded by legal aid. Indeed, the process for making an application for ECF is complex and requires an understanding of the legal merits of the case. The application also requires detailed representations and are time consuming to prepare. If legal representatives make applications for clients, they take the risk that they will receive no payment for work conducted on the file. The financial risk for legal aid practitioners, who are already stretched in the current climate, is considerable and it is not financially viable for firms to make applications in many cases. This represents a significant barrier to accessing legal aid funding.
3. We have also heard concerns raised about the quality of the Legal Aid Agency decision-making in deciding ECF applications. In Gudanaviciene & Ors v Director of Legal Aid Casework & Anor [2014] EWHC 1840 (Admin), the High Court found that the Legal Aid Agency had been unlawfully refusing ECF for Article 8 (and other) cases. Although it is now possible for those with an Article 8 claim to make a successful ECF application, the quality of decision-making remains variable and unreliable. This acts as another disincentive for legal practitioners to take a financial risk and prepare ECF applications.
4. BID considers that many of the problems with the current process could be improved if the Legal Aid Agency were to provide funding to practitioners to prepare ECF applications.
5. Another problem that has arisen in relation to ECF applications is that they can take a long time to process and for decisions to be made. Unlike an application for legal aid, which can take approximately 48 hours, a decision on an application to provide ECF may take a month or more. Individuals’ cases are not stayed while their ECF application is being considered by the Legal Aid Agency. As a consequence, during the time that the ECF application is being processed, an individual’s hearing may proceed while the individual is still unrepresented. We have observed that if a deport appeal is listed prior to the lawyer receiving a decision on an ECF application, some legal practitioners will not apply for an adjournment of the hearing, as the adjournment application would need to be made pro bono. An example of a case such as this is given below (see: ‘Case study: Darryl’) in which the detainee represented himself in his appeal and lost because the Tribunal did not grant him an adjournment pending the result of his ECF application. When his lawyer obtained the ECF they appealed the decision. We note that the first aim of the LASPO cuts was to “discourage unnecessary and adversarial litigation at public expense.” The cost to the taxpayer to undo such preventable injustices can be significant, as additional judicial review proceedings and/or appeals are made necessary. In case of Darryl, the poorly designed ECF funding process resulted in two unnecessary hearings. This is in addition to the cost to the taxpayer of processing ECF applications.

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| **Case study: Darryl** TheHome Office was seeking to deport Darryl, separating him from his family and life in the UK. Darryl managed to retain a legal aid solicitor who was willing to submit an ECF application for him and prepare his deport appeal. However, the ECF application was still being processed when his hearing was listed. The solicitor advised Darryl that he could not represent him until the ECF application was approved. As a consequence, Darryl was required to seek an adjournment unrepresented. The adjournment was refused by the Tribunal and the hearing proceeded with Darryl unrepresented. Darryl lost the appeal. The ECF application was finally successful and his solicitor appealed the decision at the Upper Tribunal. Permission was granted on the basis of procedural unfairness, wasting Tribunal resources and also legal aid resources. Issues: * Unrepresented clients are often unsuccessful in the Tribunal, even in relatively simple procedural matters such as seeking an adjournment. This can have grave consequences such as in this case; and
* LASPO savings are often spent elsewhere. If the case had been stayed whilst the ECF was being decided, the necessity of an appeal to the UT would likely have been avoided. This was a waste of legal aid funding but also Tribunal resources.
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**Mixed cases: asylum and Article 8**

1. We are concerned that, due to the lack of legal aid funding for Article 8 claims, many solicitors are reluctant to take on ‘mixed’ cases, that is, cases which involve both an asylum and Article 8 claim. In BID’s experience, lawyers are reluctant to take on ‘mixed’ cases due to the complications associated with accessing funding for the Article 8 claim, and this creates a barrier for detainees in accessing legal aid for the asylum aspect of their case as well. Although legal aid remains available for asylum cases, it is not financially viable for firms to carry out pro bono work on the private and family life aspects of more than a handful of cases, particularly given that they would likely have to pay for expert reports for the private and family life case. Ignoring an entire human rights element of a case sits uncomfortably with the lawyer’s duty to act in their client’s best interests.
2. This is an unintended consequence of the LASPO cuts and is gravely concerning given the potential consequences of refoulement for refugees. The case study of Tanyar (see paragraph 35 below) illustrates this issue.

**Reliance on the voluntary sector and pro bono work**

1. As noted above, in response to the need that resulted from the LASPO cuts, BID set up an Article 8 Deportation Advice Project which provides free legal advice, information and representation to individuals with Article 8 claims who cannot access legal aid. The project was established in response to a significant increase in correspondence from long-term “foreign national” British residents in prisons needing legal assistance to challenge their deportation. Many of these callers had a strong private and family life in the UK, and many had partners and children who are British Citizens. Under the provisions of the UK Borders Act 2007, any foreign national with a criminal conviction of 12 months or more is subject to automatic deportation, regardless of length of residence in the UK.
2. In his most recent report, former prisons and probations ombudsman Stephen Shaw was ‘deeply troubled’ by the Home Office’s practice of routinely seeking to remove foreign national former offenders, even when they had grown up in the UK. He stresses the impact that the LASPO cuts have had on access to justice for this particular group.

“*The removal of these individuals raises real ethical issues. Not only does their removal break up families in this country, and put them at risk in countries of which they have little or no awareness. It is also questionable how far it is fair to developing countries, without the criminal justice infrastructure of the UK, for one of the richest nations on earth to export those whose only chance of survival may be by way of further crime.*

*“Having said that, I acknowledge that the 2007 UK Borders Act is in very strong terms[[20]](#footnote-20). Moreover, since 2013, when the Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into force, legal aid is not available for people facing deportation to argue that it would be disproportionate to deport them because they have established a private and family life in the UK.”*

1. The ADAP project only receives a small amount of charitable funding (which may or may not be renewed) **and the need for representation far outweighs our current capacity.**
2. BID’s legal managers make every effort to try to help detainees find representation in their immigration case. However, access to representation should not be contingent on this type of assistance from charities such as BID. The government’s devolvement of responsibilities to voluntary organisations and individuals willing to undertake pro bono work is not sustainable or fair. The voluntary sector is unable fill the gap left by the LASPO cuts.

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| **Case study: Tanyar** Tanyar fled war in the Democratic Republic of the Congo (the DRC) 20 years ago and was recognised as a refugee in South Africa. She has not lived in the DRC since fleeing and had children in South Africa. Tanya came to the UK to start a new life, fearful of the xenophobic violence that is prevalent in South Africa, after an attack on her son. The Home Office apprehended Tanyar and tried to remove her to the DRC. She appealed her decision and the Tribunal found that she should be removed to South Africa rather than the DRC. Notwithstanding this, removal directions were set for the DRC, a country that Tanya and her family had not lived in for 20 years. Tanyar no longer has any ties or family in the DRC, all her family members having fled in the war. It would not be possible for her husband and her children to move to the DRC. Tanyar could not afford a lawyer and she could not find a legal aid lawyer willing to take her case. BID represented Tanyar in her application for bail and instructed a pro bono barrister to appear for her at the bail hearing. BID and Tanyar’s barrister were very concerned that Tanyar’s asylum case had not been properly considered, and that her Article 8 case had not been considered at all. On a pro bono basis, the barrister submitted a fresh claim on Tanyar’s behalf, based on both her asylum case and article 8 case. The barrister also managed to commission a pro bono expert report on state of the DRC and the dangers that Tanyar would face if she were removed there. Because of counsel’s submissions in the week prior to her planned removal, Tanyar’s removal did not go ahead and she had more time to find representation. Issues:* That Tanyar was not removed to a country that would potentially violate her rights under the Refugee Convention, and also her Article 8 rights, was a matter of luck. She was lucky that a barrister took it upon themselves to submit representations for her on a pro bono basis. The administration of justice where the stakes are this high should not rely on luck or access to pro bono services provided by third parties who cannot possibly support all those in need;
* Unrepresented litigants rarely have access to the expert reports they require to evidence their claim. In this case, Tanyar was lucky to receive pro bono assistance from an expert. This is extremely rare;
* The Home Office failed to consider Tanyar’s Article 8 case and she could not find a lawyer willing to take on her case and make an ECF application for her. This is an example of a ‘mixed’ case with dangerous potential consequences of refoulement; and
* Counsel’s submissions may have saved Tanyar from deportation to a country that she fled 20 years ago. This is another example of the important role that legal representatives play in holding the Home Office to account in its exercise of wide-ranging powers.
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| **Case study: David**David came to the UK as an unaccompanied child refugee. He experienced many childhood traumas and now suffers from severe mental health problems (bipolar and PTSD). David has two British children and a partner. He was subject to a deportation order after serving a sentence for robbery. A law firm took on his case to challenge his deportation on the grounds of asylum; however, the law firm would not take on his Article 8 claim. BID applied for and was granted ECF for David’s Article 8 claim. Once the ECF was accepted the law firm agreed to represent David in both aspects. Issues:* If BID had not made the ECF application, it is likely that David’s Article 8 claim would have been neglected.
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**Quality of private representation**

1. As legal aid practice has become less tenable since the LASPO cuts, it appears that there are fewer firms with immigration expertise willing to undertake legal aid work. Concerns have been raised regarding the quality of work undertaken by some private solicitors. In most circumstances, individuals simply cannot pay private solicitors the amount that they would require to prepare the case properly and fund the disbursements necessary to evidence the case. In many circumstances practitioners are paid a meagre amount and can do very little to assist clients unless they conduct work pro bono.
2. The dearth of legal aid firms with expertise, capacity and willingness to take on cases has provided fertile ground for some unscrupulous individuals to take advantage of the many people in need of help. We sometimes hear of detainees paying significant sums of money for private representation that the client simply cannot afford, only to find that their money has been wasted. Sadly, it is often the most vulnerable who are exploited in this way.

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| **Case study: Ryan** Ryan originally came to the UK to study bio-medical sciences in 2004.  He later had a post-study work visa and began a career in the NHS.  He met and married his wife and continued to work.  In 2010 their relationship broke up and he contacted a lawyer about his visa.  His world was turned upside down when he paid a bogus solicitor £6,000 to deal with his immigration affairs.  He ended up being convicted for working illegally and fraudulently completing papers.  He was detained post-sentence and is now facing deportation. Ryan currently has an EU national partner that he met in 2013 before being convicted and they have a four-year-old son.  He was detained in immigration detention for 6 months post-sentence. He could not find a legal aid lawyer and BID’s ADAP project has taken on his Article 8 case. He has now been released from detention on bail and is living with his partner and children, preparing for his deport appeal hearing later this year.  |

**Access to legal aid outside of London**

1. The barriers to accessing representation are even greater outside of London where firms conducting legal aid work are scant.

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| **Case study: ‘M’**M is an EEA national who came to the UK in 2014. She received a notice of intention to deport following conviction for various petty offences which led her to receive fines, a total of 2 days of custodial sentence, and a 6 month conditional discharge. In March 2018, BID put in an Exceptional Funding Application to secure legal aid to appeal the Home Office’s Deportation Decision. This was on the grounds that the case was too complex for self-representation because of mental health issues, her experience of compulsory labour, language barriers, and her minor child. On 24 April 2018, the LAA had still not responded due to a large backlog in cases. ECF was granted on 26 April 2018. M booked an appointment to see a legal aid solicitor in Yarl’s Wood, though she had to wait over a week for this appointment. She was released from detention on 14th May, to an address in Hereford.BID was unable to find her a legal aid solicitor in Hereford, but found one in Newport, a town an hour away. M did not have the money to make this journey – it cost around £20 for the round trip. M was considerably distressed about not being able to afford the cost of travel to the Newport solicitors. Her partner was willing to help her financially, but he was himself dependent on benefits. BID arranged to reimburse M, if she borrowed money from her partner when he received his benefits, though we do not generally pay travel costs. This was a one-off offer given the importance of her attending the appointment. Unfortunately, her partner did not receive benefits in the relevant week so she was unable to travel to this appointment.On 30th May, M moved to Birmingham. This meant BID needed to once again seek a new solicitor for her. We emailed over 10 different firms requesting legal aid services for M. Most did not reply. Those who did said they did not have capacity, or they did not do legal aid work for immigration. One was based in London and M could not afford the travel. On June 21st, Central England LC accepted the case. An appointment was made for her on 9 July 2018, but the relevant solicitor was based in the Coventry office. M did not attend because she did not have the money to travel. We have since lost contact with M.  |

**Recommendations**

1. Immigration matters should be brought back into scope for legal aid funding. We are specifically concerned that legal aid funding should be provided for advice, representation and expert reports for those with Article 8 cases.
2. While there is no legal aid funding, legal representatives should be paid to make Exceptional Case Funding applications.
3. The application process for Exceptional Case Funding should be simplified, so that no means test is required until a decision on merit has been made.
4. A process should be introduced for immigration matters to be stayed pending a decision on Exceptional Case Funding.
5. Any necessary work undertaken on a client’s case while the outcome of an Exceptional Case Funding application is pending should be funded.
6. The Legal Aid Agency should increase the level of skill and experience required of staff making decisions on Exceptional Case Funding applications.

**Contact:** Rudy Schulkind, Research & Policy Coordinator: rudy@biduk.org, 0207 456 9762

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| **Case study: Sam**Sam was a victim of modern slavery and forced to grow cannabis by a criminal gang. Eventually the drug operation was uncovered but instead of being granted protection, Sam was convicted and subject to an automatic deportation order back to Vietnam. Sam did not receive good advice in her criminal matter and the fact that she was trafficked was not submitted to the Court. Instead she pleaded guilty at first instance. Sam had three children in the UK, one of whom was a newborn. As result of her incarceration, Sam was unable to properly bond with her baby, and she became seriously depressed and suicidal. The Home Office considered that it would not be unduly harsh for her children to be permanently separated from her. Sam was transferred to Yarl’s Wood and BID assisted her to obtain bail. With the help of BID, she eventually found a firm willing to represent her in her protection claim and she was referred to the NRM; however, the firm was unwilling to take on her Article 8 case. BID’s Article 8 Deportation Advice Project helped Sam with her Article 8 case. BID applied for and was granted ECF and eventually the lawyer dealing with the protection matter took on the Article 8 case as well as the protection matter. Issues:* Sam, like most, was not provided with immigration advice in prison; and
* This is another example of a ‘mixed’ case, involving complex protection and private life claims that needed to be considered, whereby it was very difficult to find a legal aid lawyer despite the client meeting the means and merits test.
* Without BID’s assistance, Sam would not have been able to make an ECF application and obtain representation for her Article 8 matter.
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1. ILPA briefing, Legal Aid, Sentencing and Punishment of Offenders Bill June 2011: Matters of relevance to Immigration Detention. [↑](#footnote-ref-1)
2. The Detention Duty Advice scheme is a system whereby legal aid law firms are given contracts by the Legal Aid Agency for lawyers to enter IRCs and take appointments with detainees, to give legal advice and possibly take on cases for representation [↑](#footnote-ref-2)
3. National Statistics, Detention tables, published 23 August 2018, retrieved from: <https://www.gov.uk/government/statistics/immigration-statistics-year-ending-june-2018-data-tables> [↑](#footnote-ref-3)
4. Bail for Immigration Detainees, “Denial of justice: the hidden use of UK prisons for immigration detention” September 2014, retrieved from <https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/157/Denial_of_Justice.pdf>. [↑](#footnote-ref-4)
5. Coram Children’s Legal Centre, Rights without remedies: legal aid and access to justice for children, February 2018 retrieved from <https://www.childrenslegalcentre.com/wp-content/uploads/2018/05/Rights-without-remedies_Final.pdf> [↑](#footnote-ref-5)
6. Immigration legal provisions and can be found in statutes from 1971, 1988, 1999, 2002, 2004, 2006, 2007, 2008, 2009, 2014 and 2016. Refer to Colin Yeo, “How complex is UK immigration law and is this a problem?”, *Free Movement*, 24 January 2018, retrieved from <https://www.freemovement.org.uk/how-complex-are-the-uk-immigration-rules-and-is-this-a-problem/> [↑](#footnote-ref-6)
7. Martha Bozic, Caelainn Barrm, Niamh McIntyre and Poppy Noor, “Revealed: immigration rules in UK more than double in length”, *The Guardian,* 27 August 2018, retrieved from <https://www.theguardian.com/uk-news/2018/aug/27/revealed-immigration-rules-have-more-than-doubled-in-length-since-2010> [↑](#footnote-ref-7)
8. Ibid. [↑](#footnote-ref-8)
9. Oral evidence taken on 16 November 2016, HL Select Committee on the Constitution, Q42 retrieved from: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/legislative-process/oral/43682.pdf> [↑](#footnote-ref-9)
10. Oral evidence taken on 10 October 2017, HC (2017–19) 421, Q52. [↑](#footnote-ref-10)
11. https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-october-to-december-2017 [↑](#footnote-ref-11)
12. https://www.freemovement.org.uk/uk-immigration-statistics/ [↑](#footnote-ref-12)
13. Singh v Secretary of State for the Home Department [2015] EWCA Civ 74, Underhill L.J at [59]. [↑](#footnote-ref-13)
14. BID’s Separated Families project represents approximately 150 detained parents each year in their bail applications; last year the project supported 167 parents separated from their 322 children. [↑](#footnote-ref-14)
15. Data were obtained on place of birth for 179 of the 219 children in the sample. Of these 179, 168 were born in the UK. [↑](#footnote-ref-15)
16. For example, a 2008 meta-analysis of existing research found that children of prisoners have about twice the risk of antisocial behaviour and poor mental health outcomes compared to children without imprisoned parents: Murray, J. & Farrington, D.P. 2008 ‘The Effects of Parental Imprisonment on Children’ in M. Tonry (Ed.) *Crime and Justice: A review of research* Vol. 37 pp133-206. See also: Phillips, S.D. Erkanli, A. Keeler, G.P. Costello, E.J. and Angold, A. 2006 ‘Disentangling the Risks: Parent Criminal Justice Involvement and Children’s Exposure to Family Risks’ *Criminology and Public Policy* Vol.5 pp677–703. While no longitudinal studies have been carried out with children in the UK who are separated from parents by removal or deportation, BID’s 2013 report *Fractured Childhoods: the separation of families by immigration detention* found that children lost weight, had nightmares, suffered from insomnia, cried frequently, and become very socially isolated during their parent’s detention. [↑](#footnote-ref-16)
17. <https://www.bhattmurphy.co.uk/files/documents/AJS%20Press%20Release.pdf> [↑](#footnote-ref-17)
18. Oral evidence taken on 16 May 2018, HC 1034. [↑](#footnote-ref-18)
19. *Hansard* HC Committee, 8 Sept 2011: Column 419. [↑](#footnote-ref-19)
20. 88 In respect of automatic deportation the Act says in part:

(1) In this section “foreign criminal” means a person—

(a) who is not a British citizen,

(b) who is convicted in the United Kingdom of an offence, and

(c) to whom Condition 1 or 2 applies.

(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.

(3) Condition 2 is that—

(a) the offence is specifed by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal), and

(b) the person is sentenced to a period of imprisonment. [↑](#footnote-ref-20)