

## Guidance on supporting separated and unaccompanied children to access legal aid in immigration cases

November 2019

Following a successful legal challenge, the Government amended the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ['LASPO'], bringing all non-asylum immigration and citizenship matters for separated children back into the scope of legal aid. The amendment<sup>1</sup> came into force on the 25<sup>th</sup> October 2019. The aim of this briefing is to raise awareness among social workers, advocates, lawyers, foster carers, and others supporting this group of children with their immigration, asylum and nationality cases that they are now eligible for legal aid for advice and representation, and assist them in securing legal advice.

### Which children are affected by this change?

This change applied to all children under 18, including those whose age has been disputed by children's services,<sup>2</sup> who are not being cared for by a parent or by a person with parental responsibility for them or who are looked after as defined by section 22 of the Children Act 1989. This includes, for example, unaccompanied children who are in care or receiving section 20 support from a local authority. It also covers children who are in kinship care, those in private fostering arrangements, children who have been reunited with family members under Dublin III transfers, and other informal arrangements, 'including where a child is caring for themselves'.<sup>3</sup>

### What types of immigration matters are covered?

For these children legal aid is now available for an application for leave to enter or leave to remain in the United Kingdom (whether under or outside of the immigration rules) and citizenship applications. This includes, for example, applications based on long residence and a child's rights under Article 8 of the European Convention on Human Rights (ECHR), applications for registration under the British Nationality Act 1981, family reunion advice and support, trafficking cases including pre-National Referral Mechanism (NRM) advice and support (if advice is being given regarding a leave to remain application). It also includes support for children who may be stateless and who need advice, support and representation to access the statelessness procedure. It includes support to children who are requesting a transfer to the UK under EU and UK law.

Applications made by children to the EU settlement scheme will also be eligible for legal aid. Though the scheme is designed to be straightforward, there will be many looked after children whose cases are complex because, for example, they may face problems with obtaining documentary evidence, may engage the suitability thresholds or may already be British and need nationality advice.

<sup>1</sup> The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Legal Aid for Separated Children)(Miscellaneous Amendments) Order 2019, at <http://www.legislation.gov.uk/ukdsi/2019/9780111188903>

<sup>2</sup> Providing they are 'being treated by the Director as being under the age of 18', referring to the Director of the Legal Aid Agency. Under the 2018 Standard Civil Contract Specification, a child means a 'client who is under 18 years of age, unless the context relates to the Immigration Category, in which case "Child" means either:

(a) a Client who is under 18 years of age; or,

(b) a Client whose age is uncertain or in dispute who, in your reasonable opinion, appears to be under 18 years of age;

<sup>3</sup> See [http://www.legislation.gov.uk/uksi/2019/1396/pdfs/uksem\\_20191396\\_en.pdf](http://www.legislation.gov.uk/uksi/2019/1396/pdfs/uksem_20191396_en.pdf) at para 7.9

Support is also available where children have so-called 'mixed cases', involving both asylum and immigration matters. For example an unaccompanied asylum seeking children who was granted limited leave as an unaccompanied asylum seeking child until they turned 17 ½ may need to raise both protection concerns and arguments based on their Article 8 rights when applying to extend ('vary') their leave. Legal aid will be available both (as one matter) for the application and any necessary representation at appeals that engage other non-asylum grounds. This should allow legal aid lawyers to provide comprehensive support to children, not only limited to the asylum grounds in their case.

Practitioners should consider whether further work could be carried out in relation to evidencing the child's private and family life in the UK, ability to comply with any aspect of the immigration rules, or the potential to register as British. This could be the case where children have spent long periods of time in the UK, or have particular needs as a result of trauma, health problems, disability or being a looked-after child.

### **Accessing legal advice and representation**

Immigration legal advice is highly regulated and anyone who gives immigration advice must be qualified to do so. It is very important that those working with and supporting migrant children are aware of this and that they ensure these children and young people receive quality legal advice and representation from regulated legal aid providers. Anyone providing immigration and asylum legal services to child clients under a legal aid contract from the Legal Aid Agency must be accredited at Level 2 within a scheme called the Immigration and Asylum Accreditation Scheme, which is operated by the Law Society. In addition those providing advice/assistance to children must have enhanced DBS checks.

Who instructs the legal representative for a child will depend on whether the child has the capacity to make legal decisions. This will involve an assessment of a child's maturity and understanding of the issues. Like all professionals, a legal representative will conduct their own assessment of whether a child is competent to understand the advice they are given and to give instructions. As competence changes depending on what a child or young person needs to understand, a lawyer might find that a child is not competent even where a social worker believes that they are.

Where a child is competent, they will still need assistance to find a lawyer who can represent them. The child will also often need help to gather any documentary evidence that the lawyer may require in respect of their case. It is very important that children have representatives who have experience of working with children and a clear understanding of children's best interests.

An unaccompanied or separated child with unresolved immigration issues should be assisted, usually by their social worker, to find a solicitor as soon as possible once they have been identified. For children who are 16 or 17, immigration advice should be considered as part of the Pathway Plan. It is important that children get legal advice as soon as possible in this scenario, as the immigration process can take a long time and their position may be prejudiced by delay or by a change in circumstances (such as turning 18). For example, some applications may not be open to them at the age of 18, there may be more onerous requirements, or a delay may lead to gaps in their immigration history which could cause serious problems down the line.

## Finding legal representation

Children should be assisted in finding a legal representation and should be accompanied to the first appointment. If you frequently work with unaccompanied or separated children then it is a good idea to build up close working relationships with legal representatives who offer high quality services. However, others may not have this experience and making referrals to solicitors is particularly difficult in certain parts of the country where there are few legal aid providers. Sometimes it can involve a lot of work and many enquiries before finding a firm or organisation which has capacity to take the case on.

- The Law Society has a directory of all solicitors, which can be searched by area of law (<http://solicitors.lawsociety.org.uk>). This search will also tell you if the law firm has any accreditations and the names of qualified solicitors at the company.
- The Ministry of Justice provides a search engine to find legal aid representatives (<http://find-legal-advice.justice.gov.uk>). This list only includes firms or organisations that hold contracts for legal aid work with the Legal Aid Agency.
- The Law Centres Network ([www.lawcentres.org.uk](http://www.lawcentres.org.uk)) has information about local law centres and the services they provide. In general, law centres will only be able to give advice and representation to local residents.
- The Immigration Law Practitioners' Association also has a directory of members and search engine to find nearby immigration advisers (<http://www.ilpa.org.uk/search-directory.php>).

## Legal aid funding

Hourly rates will be payable for these cases. They will have an initial limit of £500 on Legal Help (£400 disbursements) and £1200 on Controlled Legal Representation (including disbursements). If providers have queries about availability of additional New Matter Starts (NMS) to undertake immigration work for unaccompanied and separated children they should initially approach their contract manager.

Legal Aid funding is also available to children in relation to statutory appeals in the Upper Tribunal and Court of Appeal though the legal representative will usually have to make an application for this to the Legal Aid Agency who will assess the merits and means.

Funding for Judicial Review applications has always been available regardless of whether the matter is non asylum related and this remains unchanged.

**For more information, please contact the Migrant Children's Project advice service:  
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