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An overview of immigration advice services in England and Wales

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Introduction

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This report was commissioned in August 2018 to inform Paul Hamlyn Foundation's discussions with other trusts and foundations on a strategic response to bolstering immigration legal advice. It has been updated since then with the final update in March 2020 but the report was completed before the COVID-19 pandemic and subsequent lockdown.

The lockdown and social distancing rules have had severe consequences on the provision of legal services. Vulnerable clients will inevitably find it harder now to obtain immigration advice from those still managing to practice. Social distancing rules are likely to be around for some time and this will affect the number of clients legal advisers are able to see. The difficulties faced by vulnerable people in securing immigration legal advice, which have been highlighted in this report, will only have heightened during this pandemic. Thus, the level of unmet need will go up making the need for free good quality legal immigration advice greater than ever.

This report examines the level of unmet need for immigration legal advice and representation and looks at the impending immigration status challenges for European Union (EU[1]) citizens. The report's author was asked to assess if the evidence showed there was a need to increase free immigration legal provision to support vulnerable people who have migrated, and to consider how any new immigration advice provision should be prioritised. This was to be addressed by providing an overview of the immigration legal sector, examining the different types of immigration advisers, assessing the impact of the changes to legal aid and considering the groups most vulnerable to harm or injustice due to a lack of immigration advice and representation.

This report focuses on immigration law as opposed to asylum law, which, though a subset of immigration law and often provided by the same legal provider, has its own specific rules and legal aid concessions. However, where existing data reference asylum services these are mentioned in the report.

To evaluate existing immigration legal provision, the report looks at the difference between the two main types of immigration advisers – solicitors and advisers regulated by the Office of the Immigration Services Commissioner (OISC) – and examines the areas of immigration law in which they are allowed to practise.

Understanding who can provide legal immigration advice, and to what extent, is a significant factor when thinking about immigration advice capacity. The report also provides a brief overview of the immigration landscape at the time of writing and future plans post Brexit[2] to contextualise the difficulties faced by people who have migrated without regularised immigration status.

1. Reference to EU citizens in the report includes EU, European Economic Area (EEA) and Swiss nationals.
2. The noun coined to represent the withdrawal of the UK from the EU.

The report then looks at legal aid provision for immigration advice in England and Wales and the effect this has had on the number of providers and on access to justice. Regional immigration provision and advice deserts are highlighted. Although the report's scope is limited to England and Wales, data obtained from the Law Society and Legal Aid Agency (LAA) contain figures for providers in Scotland and Northern Ireland and therefore these are included. However, both of these jurisdictions have different legal landscapes, in terms of infrastructure, requirements and regulations from England and Wales and the report does not analyse capacity in these jurisdictions.

There is a more detailed look at the EU Settlement Scheme (EUSS), which is designed to off er EU[3] citizens and their eligible family members living in the United Kingdom (UK) the opportunity to protect their right to remain in the UK after the UK leaves the EU and free movement ends. There is an assessment of the types and numbers of individuals who are unlikely to qualify under the scheme and therefore have the potential to become undocumented. There is also an assessment of the two types of status granted under the scheme – 'settled' and 'pre-settled' – and the impact of the latter, lesser form of leave. The number and types of existing undocumented people estimated to be in the UK are also considered. People who are undocumented do not have the legal right to be in the UK and, accordingly, cannot work, access public services, housing or any benefits and are barred from making routine visa applications to remain in the UK. Undoubtedly, many in this cohort will be vulnerable and will have complex immigration cases. They are therefore more likely to require legal representation to regularise their immigration status. For undocumented people to be able to live lawful and meaningful lives in the UK it is imperative that they obtain the right to remain in the UK.

The report concludes that the evidence demonstrates it is imperative to increase the number of free specialist immigration advisers as need significantly outstrips supply. Suggestions are given on some possible areas to explore to increase free immigration advice and representation. Finally, the report suggests that increasing immigration legal provision could provide an opportunity to create a more strategic immigration legal sector that could have a strong national voice, the ability to meaningfully assist vulnerable clients and to reform immigration law over the long term.

3. Separate agreements have been made with EEA states and with Switzerland so that citizens of Iceland, Norway, Switzerland and Liechtenstein and their eligible family members are also able to participate in the scheme.

Immigration advice and regulation

2

Immigration advice is strictly regulated, which means only those registered with regulated bodies can provide advice and representation. It is a criminal offence for a person to provide immigration advice or services unless they and their organisation are regulated by the OISC or are otherwise covered by the Immigration and Asylum Act 1999.

Solicitors, barristers and legal executives can give immigration advice at any level without the need for OISC regulation, provided they belong to one of the following groups:

- Law Society of England and Wales
- General Council of the Bar
- Chartered Institute of Legal Executives
- Law Society of Scotland
- Faculty of Advocates
- Law Society of Northern Ireland
- General Council of the Bar of Northern Ireland

If an individual gives legal advice on immigration, asylum or nationality law in England and Wales funded by legal aid and whether as a solicitor, member of the Chartered Institute of Legal Executives or person regulated by the OISC, they will need to be a member of the Law Society's Immigration and Asylum Accreditation Scheme (IASS) and to have passed their accreditation exams. The type of immigration advice they can provide will depend on their level of accreditation.

Similarly, those individuals who are not solicitors, barristers or legal executives but have completed OISC accreditation exams can only give advice limited to their level of accreditation.

A key difference between solicitors and OISC-regulated individuals is that the former group is likely to have significantly more legal education. To qualify as a solicitor, an individual not only has to study law in an academic setting[4] but also has to gain practical legal experience as a trainee solicitor in at least three areas of law before qualifying. Many solicitors specialising in immigration law have experience of at least one other area of welfare law, allowing them to identify and often provide preliminary advice on clients' non-immigration legal needs, housing, debt, etc. On the whole, vigorous legal training results in better-quality legal advice.

4. Usually a three-year law degree and a year completing the Legal Practice Course, although there are also routes into the profession for people with non-legal degrees.

Most OISC providers are not lawyers but have gained accreditation after a short course in immigration law. More significantly, OISC Level 1 is extremely limited because advisers can only provide basic immigration advice and undertake simple routine applications: advisers are barred from making applications for illegal entrants, overstayers and those in detention or facing removal or deportation, and cannot undertake any appeal work.

The categories of vulnerable people who have migrated that this report focuses on are likely to have complex needs and to be undocumented or have insecure immigration status.

Whilst advisers at OISC Level 2 can undertake more complex work, they are still barred from substantive appeal work. They can lodge an appeal application, although they cannot have conduct of cases requiring specialist casework, for example challenging existing case law. They are prevented from applying for immigration bail in court or undertaking any judicial review proceedings, including issuing a pre-action protocol letter, an area for which there is an increasing need in immigration law as many immigration decisions do not attract a right of appeal and the only recourse to justice is through a judicial review.

At OISC Level 3, advisers can do more complex work but they cannot undertake judicial reviews. If they pass a separate Judicial Review Case Management accreditation, they are allowed to instruct barristers on judicial reviews. However, they are not allowed to undertake the litigation and advocacy steps of the application or to take any formal steps relating to the judicial review.

See **Appendix 1** for full details of what is allowed under the OISC levels.

The Immigration and Asylum Accreditation Scheme is required for legal aid remuneration. Thus, all solicitors and OISC advisers who provide immigration advice to clients under legal aid must complete the exams and be successfully accredited. The levels are as follows:

- Probationary Level (Trainee Caseworker)[5] – does not have conduct of cases but can do work delegated by senior caseworkers
- Level 1 (Casework Assistant) – equivalent to OISC Levels 1 and 2[6]
- Level 2 (Senior Caseworker) – equivalent to OISC Level 3 – have conduct of all matters
- Level 2 Supervisor (Supervising Senior Caseworker) – may conduct all matters and can supervise up to four others
- Level 3 Supervisor (Advanced Caseworker) – the Law Society has branded this as Immigration Law Advanced. Additional information can be found on the Law Society website.

For legal aid purposes, only senior caseworkers and above can work on the following cases (known as 'reserved matters'): cases relating to unaccompanied children seeking asylum and other minors, all matters for those who lack capacity within the meaning of Section 2 of the Mental Capacity Act 2005 and all matters relating to detained clients.[7]

It must be remembered that all solicitors can provide immigration and asylum advice at all levels without the need for the IAAS accreditation; the IAAS is only required for legal aid remuneration, although the Law Society encourages lawyers to obtain accreditation as a sign of competence and as a quality assurance mark.

5. The titles in brackets are from the new terminology that came into force on 1 September 2018. A few other changes to competencies at each level have also been made.
6. Providers can be at this level for a year but must become accredited as a senior caseworker to be paid by the Legal Aid Agency for work conducted under the 2018 Standard Civil Contract.
7. For more details, see '*Changes to the Immigration and Asylum Accreditation*' (The Law Society, 22 February) www.lawsociety.org.uk/support-services/accreditation/immigration-asylum/immigration-and-asylum-accreditationchanges/ accessed 18 March 2020.

Overview of immigration policy and rules

3

Immigration law relates to an individual's status in the UK: do they have the right to live, work or study in the UK legally? Immigration law also relates to entry into the UK of family members, foreign spouses or dependent relatives who may wish to join their family in the UK, whether for a temporary visit, as a tourist or to see family, and their right to remain on a longer-term basis. But once in the UK, a lack of clear status, overstaying a visa or not having the evidentiary material for a renewal of a visa can have devastating consequences, such as the loss of employment and housing, a lack of access to public services and, ultimately, detention, removal and or deportation. Furthermore, there are complex rules relating to nationality and citizenship rights. Those fleeing persecution and seeking asylum are subject to a different system – a system that, as with immigration, has become harder to navigate and satisfy.

Immigration law also applies to those who are victims of human trafficking and modern slavery, brought to the UK against their will, and those who are foreign nationals but have suffered domestic violence.

The Immigration Act of 1971 was the founding of modern immigration law but, since the 1980s, 10 new immigration acts have been introduced. The most recent two are the Immigration Act 2014 and the Immigration Act 2016 which introduced a new landscape for people who have migrated, including the 'hostile environment' (now known as 'compliant environment') and a reduction in appeal rights. Alongside the acts are Immigration Rules, which govern immigration policy and are a form of secondary legislation. The Immigration Rules are administrative rules made by the Secretary of State for the Home Office under Section 3 of the Immigration Act 1971. They are modified by statements of changes laid before Parliament by the Home Secretary.[8] There are also numerous and voluminous policy instructions and guidance documents, many of which have been interpreted and developed by a substantial body of judicial rulings.

A lot of new immigration policy is made through the Immigration Rules as they are easy to change and modify. This is because changes to the rules are passed by the negative resolution procedure. Under this system, an instrument becomes law on the day the minister signs it and any changes will only stop having legal effect if or when rejected by a motion to annul, which either the House of Commons or the House of Lords can pass (usually within 40 sitting days). Whilst not unheard of, such annulments are rare.

From 2010 to August 2018, there were 5,700 changes to the Immigration Rules. The constant changes and speed of change make the immigration system almost impossible to navigate. More than 1,300 changes were made in 2012 alone to enable the government's hostile environment policy.

8. The rules issued in 1994 were named HC 395, and all subsequent rules are thus an amendment to HC 395.

As the immigration and asylum barrister Colin Yeo wrote in the Guardian newspaper in August 2018:[9]

> ***"The rules are so precise it has become essential to use a lawyer, forcing applicants to pay 'astronomical' legal fees. The frequency of the changes means it's very difficult to keep on top of them, you have to read everything that's coming out and it's very hard to be certain you've captured every single change that might be relevant to your clients. The changes are often hurried out, which means they can be badly written. They can be very difficult to understand, even for judges and lawyers. We've seen a number of errors in drafting that have to be corrected in later versions."***

The EUSS, which was opened in March 2019, was introduced through a change in the Immigration Rules. The purpose of the scheme is to allow EU citizens resident in the UK prior to the end of the transition period after the UK's withdrawal from the EU to apply for status to remain in the UK after Brexit. The scheme and its implications for EU citizens is discussed in detail in the section entitled 'EU Settlement Scheme'. For the purposes of this overview it is worth noting that introducing significant changes to the law through Immigration Rules is controversial. As stated above, the Immigration Rules do not provide for adequate parliamentary scrutiny, either at first instance when they are made, or subsequently when they are amended through the statement of changes mechanism. The Immigration Rules are drafted by the Home Office and the only scrutiny is by the negative resolution procedure. Immigration Rules lack the status and clarity of primary legislation, which is debated, scrutinised and can be modified by Parliament before being passed by a vote. As the Immigration Rules can be amended or repealed by the statement of changes, the scheme is open to changes by Home Office ministers and, as discussed later, multiple changes have already been made to the scheme that contradict the government's public announcements. Finally, many lawyers argue that using the Immigration Rules specifically for the EUSS, which implements a commitment in an international treaty (the Withdrawal Agreement[10]), is inappropriate.

Politics drives changes in the immigration system and criticisms of both the system and the implementation of the Immigration Rules by the Home Office are widespread and well known. In 2006, John Reid, then Home Secretary, described the department's immigration section as "*not fit for purpose*". For many lawyers, judges and inspectors not much has changed and the rights of people who have migrated have eroded over time.

The future immigration landscape

The December 2019 General Election confirmed that the UK would leave the EU. The European Union (Withdrawal Agreement) Act 2020 came into force in January 2020 which confirmed that the UK would leave the EU on 31 January 2020. The UK is currently in a transition period which will last until 31 December 2020. During this time the UK will remain in the EU customs union and single market, therefore freedom of movement rules for EU citizens will remain the same. The government has announced that it wants to overhaul the immigration system and introduce a comprehensive Australian-style points base system which will apply to all migrants including EU migrants from January 2021 when free movement ends. A new immigration bill is expected in March 2020.

9. Martha Bozic, Caelainn Barr and Niamh McIntyre, '*Revealed: The Immigration Rules in the UK More than Double in Length*' The Guardian (London, 27 August 2018) <www.theguardian.com/uk-news/2018/aug/27/revealed-immigration-rules-have-more-than-doubled-in-length-since-2010> accessed 18 March 2020.
10. The European Union (Withdrawal Agreement) Act 2020 contains the details of deal agreed between the UK and the EU for the UK to leave the EU. https://services.parliament.uk/bills/2019-20/europeanunionwithdrawalagreement.html

The points based system will prioritise 'high-skilled' people, those earning above a salary threshold of £25,600, with lower thresholds for certain sectors of the economy, and will erect new barriers for low-skilled workers. Whilst the government has maintained its desire to reduce levels of immigration, in a change from previous policy no numerical targets have been promised.

It is interesting to note, however, that during his first appearance in the House of Commons as Prime Minister, Boris Johnson reiterated his support for an amnesty for undocumented people in the UK:

> ***"We need to look at our arrangements for people who have lived and worked here for a long time, unable to enter the economy and to participate properly or pay taxes, without documents."*** [11]

Whether or not an amnesty will be granted (and what the qualifying criteria will be) remains to be seen, but this would be a welcome move for potentially hundreds of thousands of people currently without status. However, based on the experience of past schemes, it is more than likely that legal assistance will still be necessary to ensure people who qualify obtain regularised status. See the section entitled 'Estimated numbers of undocumented people' for an assessment of the numbers and categories of people affected.

There are leaked media reports that a new 'digital immigration status' is also part of the government's immigration plans, set to be introduced in 2022, for the purposes of 'enhanced enforcement' and to make it easier for people who have migrated to prove their status. Concerns have already been raised that data in digital ID cards could be used incorrectly. Labour MP Chi Onwurah said:

> ***"The algorithms will be automating all the biases that are packed into the data that's being used. People can make judgements about the validity of data, algorithms can't and that is the key difference."*** [12]

We wait to see how the new immigration landscape will affect vulnerable groups, but irrespective of their nature, changes in rules mean that people need to understand what does and does not apply to them. As history shows, the Windrush scandal[13] being the most recent example, many people who have migrated fall foul of immigration law due to a lack of understanding of the rules, thinking they do not apply to them or not realising that they need to take active steps to apply for documentation. Once wrongfully identified as being undocumented, many from the Windrush generation were detained and removed from the UK due to a lack of free specialist legal assistance to clarify and regularise their status.

The UK's exit from the EU will result in a significant overhaul of immigration law and policy but at present the two most important changes that have had a detrimental effect on non-EU citizens are the introduction of the hostile environment provisions and the curtailment of appeal rights, both of which are discussed below in some detail as they demonstrate the very real need for specialist immigration advice.

11. HC Deb 25 July 2019, vol 663, col 1491.
12. *'Boris Johnson Gives More Details on Post-Brexit Immigration System and the Categories of Visas to be Issued'* (Electronic Immigration Network, 8 December 2019) <www.ein.org.uk/news/boris-johnson-gives-more-details-post-brexit-immigration-system-and-categories-visas-be-issued> accessed 18 March 2020.
13. People who arrived from the Caribbean on the ship Empire Windrush between 1948 and 1971 to help rebuild post-war Britain were wrongly told in 2017 by the Home Office that they did not have the right to remain in the UK as many were deemed to be undocumented. When the 1973 Immigration Act came into force, Commonwealth citizens living in the UK were given indefinite leave to remain before restrictions were introduced. However, paperwork was not issued and the Home Office did not keep a record of who was granted leave at the time. Many people were wrongly detained, denied legal rights, threatened with deportation and, in at least 83 cases, wrongly deported. The Home Office has acknowledged its mistake.

Immigration Acts 2014 and 2016

Curtailment of appeal rights

The Immigration Act 2014 reduced 17 appealable decisions to 4, in essence only allowing asylum and human rights cases to attract a right of appeal. Whilst this limited right was maintained, the Home Office also has the power to certify these cases as being 'clearly unfounded'.[14] Those refused student or dependent visas or refused citizenship can no longer appeal a refusal whether it is an extension of stay or indeed a revocation of their existing permission to stay. Those who raise human rights grounds (but who are not foreign national prisoners) are to get an in-country right of appeal unless their case is clearly unfounded. Time frames for lodging an appeal are short and once the appeal is heard there is no further right to pursue a human rights claim from within the UK. This makes the need for urgent and good immigration legal advice and representation critical.

All foreign national prisoners with a sentence longer than 12 months can now be deported.[15] Under the 2014 Act, foreign national prisoners can now be removed from the UK before they can appeal against their deportation – the so-called 'deport first, appeal later' provision. Many foreign national prisoners have indefinite leave to remain in the UK, so although they may have lived here for most of their lives, if they do not have citizenship they could be sent to a country they may not even know. Although this applies to crimes that result in a prison sentence of at least 12 months, a 12-month sentence can be given for low-level offences such as possession of false documents. The 'certificate' to remove them from the UK before they can appeal their deportation can only be challenged by way of judicial review.

On 1 December 2016, provisions to remove people from the UK prior to their appeal came into force for all immigration cases.[16] The Home Office has the power to certify all human rights cases under s 94B unless there is a real risk of 'serious irreversible harm' if a person is removed from the UK before any appeal is concluded.[17] If the case is certified, the individual will only be able to appeal from outside the UK, following their enforced removal or voluntary return, so a pending appeal is no longer a barrier to removal.

Bringing appeals from abroad is extremely difficult: a person in this position will not have access to their legal adviser and finding a lawyer abroad who understands UK law will be very difficult, the evidence they need to prepare their case will not be easily available from abroad, they will not be present at their appeal and, to date, Skype links or similar have not been functional in the tribunals. Moreover, people are often in countries with no support structure, family or friends.

In such circumstances, the only recourse is judicial review of the certificate before the person is removed from the UK. If the certificate to remove a person is successfully overturned, the person can get an in-country right of appeal.

Legal action was brought against this power to certify under s 94B in the cases of Kiarie and Byndloss,[18] which went all the way to the Supreme Court. In July 2017, the Supreme Court decided the deport first, appeal later policy was unlawful. It held that the Home Secretary had not established that the policy struck a fair balance between the rights of the appellants and the interests of the wider community. The court determined that the power given to the Home Office was incompatible with the procedural requirements of Article 8 of the European Convention on Human Rights (ECHR), which protects the right to respect an individual's private and family life, due to the significant difficulties they would face in mounting an effective appeal from abroad. The court also reported that just 72 out of 1,175 people subjected to the policy had lodged an appeal from overseas since the policy was introduced and that none had been successful.

14. Nationality, Immigration and Asylum Act 2002, s 94.
15. A person who has been sentenced to a period of imprisonment of at least 12 months, but less than 4 years, can resist deportation on Article 8 grounds but only if paragraph 398(b) of the Immigration Rules apply. The other relevant rules can be found in paragraphs 398, 399 and 399A. It is beyond the scope of this paper to discuss the deportation provisions in full.
16. Immigration Act 2016, s 63.
17. Original s 94B, inserted into the Nationality, Immigration and Asylum Act 2002 by the Immigration Act 2014, s 17(3); on 1 December 2016, s 94B was amended by the Immigration Act 2016, s 63 so as to expand the power to certify appeals other than those against deportation decisions.
18. R (on the application of Kiarie and Byndloss) v Secretary of State for the Home Department [2017] UKSC 42.

In ensuing cases, the Court of Appeal has made it clear that where an individual is deported on the basis of an unlawful certificate, the court has discretion to make a mandatory order against the Home Secretary to return an individual to the UK so that they can conduct their appeal in-country. There is, however, no presumption in favour of return, even where certification is unlawful. The exercise of discretion will be fact-sensitive. The extent to which the individual's appeal will be adversely affected if they are not returned to the UK will be highly relevant.

However, in response to the Supreme Court judgment in Kiarie and Byndloss, the Home Office has suspended removals pending appeal under s 94B. Also following this judgment, on 3 August 2017, the guidance entitled 'Certification under section 94B of the Nationality Immigration and Asylum Act 2002' was withdrawn. Thus, although this provision is still on the statute books, at the time of writing its application has been suspended. This highlights the need for specialist immigration solicitors who are able to challenge unfair legislation through the judiciary.

All of this involves complex law and requires specialist legal knowledge. Individuals need to be able to find legal advisers who can undertake complex appeals work and judicial review proceedings, otherwise they have very little chance of remaining in the UK to fight and win their cases.

Of all civil representation applications granted by the LAA, around 3,000 a year relate to judicial review. However, the number of judicial review certificates granted in July to September 2019 decreased by 10 per cent compared with the same quarter in 2018. Although nearly half of judicial reviews were for public law and one-quarter were for immigration cases,[19] this is a tiny fraction of the numbers affected by wrongful immigration decisions.

To compound this complex legal landscape, Home Office decision-making has worsened over the years and, despite limited appeal rights, the number of successful appeals has increased; Ministry of Justice (MoJ) figures show an increase in successful appeals year-on-year. At the time of writing, over 50 per cent of immigration and asylum appeals are upheld.[20] The success rate on appeals has not dipped below 50 per cent in any quarter since July–September 2017. Appeals on human rights grounds are the most likely to be allowed, with a 58 per cent success rate in 2018. According to Joe Egan, President of the Law Society for England and Wales, this is "*clear evidence of the serious flaws in the way visa and asylum applications are being dealt with*".[21]

Despite the success rate, the MoJ data show a continuing decline in the number of appeals lodged in the first place. There were around 44,000 case receipts in 2018–19, compared to 92,000 in 2014–15 and 146,000 in 2010–11. A reduction in appeal rights and legal aid, together with the difficulty of finding specialist immigration providers able to undertake this work, means fewer challenges to wrongful Home Office decisions.

Creation of a hostile environment

David Bolt, Independent Chief Inspector of Borders and Immigration (ICIBI), has published several critical reports in the last few years looking at different aspects of the immigration and asylum system. In his review of the government's hostile environment policy – conceived to make daily life impossible for undocumented people by preventing them access to housing and services such as bank accounts, driving licences and even medical assistance – Bolt has repeatedly found that the Home Office makes mistakes in data collection. Individuals are wrongly flagged as not having leave to remain and they have received letters informing them that they must leave the UK. The consequence of this is that a person's life falls apart with employment at risk, bank accounts frozen and driving licences revoked. The recent Windrush scandal exposed the dangers of the hostile environment resulting from Home Office errors.

19. *'Legal Aid Statistics Quarterly, England and Wales: July–September 2019'* (Ministry of Justice, 19 December 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853277/legal-aid-statistics-bulletin-jul-sep-2019.pdf> accessed 18 March 2020.
20. *'Tribunal Statistics Quarterly: July to September 2019'* (UK Government, 13 December 2019) <www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2019> accessed 18 March 2020.
21. *"Serious Flaws"* in the UK Immigration System, Law Society Warns' BBC News (London, 12 April 2018) <www.bbc.co.uk/news/uk-politics-43737542> accessed 18 March 2020.

The Right to Rent scheme, introduced as part of the hostile environment measures, is particularly discriminatory. The scheme requires private landlords to check the immigration status of tenants and they are prohibited from renting to anyone without valid leave to remain in the UK. Private landlords do not necessarily have the expertise to check and understand the various forms of leave granted in immigration documents. The sanction for landlords if they rent to someone without leave can give rise to both a civil penalty notice and a criminal offence whereby the landlord is liable, on conviction, for up to five years' imprisonment and/or an unlimited fine (the penalties were strengthened by the Immigration Act 2016). It is therefore understandable that landlords are cautious about renting to people who have migrated, but this is leading to racial profiling and discrimination against people with lawful status. Prior to the immigration acts coming into force, the Joint Council for the Welfare of Immigrants (JCWI) warned:

> ***"JCWI's main concern is that these proposals are very likely to lead to racial profiling and discrimination against BME [Black and Minority Ethnicity] prospective tenants. […] [The proposed immigration status checks] will serve to encourage indirect discrimination and in many cases direct discrimination."*** [22]

The ICIBI also highlighted that there are wrong Right to Rent decisions being made, often on the basis of racial profiling, and this leads to pressures on local authorities and, ultimately, sometimes to homelessness. If the Home Office incorrectly maintains that someone does not have leave to remain when they do, the consequences are obvious. At the time of writing, the scheme only operates in England but the government has stated its intention to roll it out to Wales, Northern Ireland and Scotland.

Further research conducted by the JCWI showed 51 per cent of landlords surveyed said that the scheme would make them less likely to consider letting to foreign nationals. Furthermore, 42 per cent of landlords stated that they were less likely to rent to someone without a British passport as a result of the scheme.[23] Based on repeated research, warnings and evaluations of the scheme, the JCWI ultimately challenged the government's scheme in court. The Residential Landlords Association, the Equality and Human Rights Commission and Liberty intervened in the case. On 1 March 2019, the High Court handed down its judgment:[24] Mr Justice Martin Spencer found the Right to Rent scheme to be unlawful, as it led to racial discrimination and was therefore incompatible with Article 14 ECHR in conjunction with Article 8 ECHR. He added that extending the scheme to Wales, Northern Ireland and Scotland would be irrational and would constitute a breach of the Equality Act 2010, s 149.

> ***"It is my view that the scheme introduced by the government does not merely provide the occasion or opportunity for private landlords to discriminate but causes them to do so where otherwise they would not."*** [25]

> ***"I have come to the firm conclusion that the Defendant has failed to justify the scheme, indeed it has not come close to doing so. On the basis that the first question for the court to decide is whether Parliament's policy, accorded all due respect, is manifestly without reasonable foundation, I so find. […] I would conclude that, in the circumstances of this case, Parliament's policy has been outweighed***

22. R (JCWI) v Secretary of State for the Home Department [2019] EWHC 452 (Admin).
23. https://www.jcwi.org.uk/passport-please
24. R (JCWI) v Secretary of State for the Home Department [2019] EWHC 452 (Admin).
25. ibid [105].

> ***by its potential for race discrimination. As I have found, the measures have a disproportionately discriminatory effect and I would assume and hope that those legislators who voted in favour of the scheme would be aghast to learn of its discriminatory effect as shown by the evidence set out. […] Even if the scheme had been shown to be efficacious in playing its part in the control of immigration, I would have found that this was significantly outweighed by the discriminatory effect. But the nail in the coffin of justification is that, on the evidence I have seen, the scheme has had little or no effect."*** [26]

> ***"In my judgement, the experience of the implementation of the scheme throughout England has been not that there will be merely a risk of illegality should the scheme be extended to the devolved territories but a certainty of illegality because landlords in those territories will have the same interests and will take into account the same considerations as their counterparts in England."*** [27]

The government has appealed this decision and litigation is still ongoing. We await a final ruling from the Supreme Court.

Charities, non-governmental organisations and those working in the immigration and asylum field repeatedly warned about the impact of the proposed hostile environment whilst the legislation was going through Parliament.

> ***"Measures to prevent access to public services are unworkable and will make unpaid border guards of ordinary citizens. Ascertaining immigration status is not as simple or straightforward as the government is purporting;it requires specialist legal knowledge. Forcing ordinary citizens who are not qualified in immigration law to check someone's legality will result in mistakes and inadvertent discrimination. This is not conducive to social cohesion or Britain's prosperity as a multi-ethnic country that thrives on diversity."*** [28]

Their concerns were not heeded and the law was passed, making border guards of private landlords, banks, the Driver and Vehicle Licensing Agency (DVLA) and the NHS. Document checks are now required to ensure undocumented people do not access housing or services; the policy's aim is to deter illegal migration.[29] However, many fall into irregularity due to onerous Immigration Rules, which they do not understand, or because they cannot access legal assistance to navigate them. These policies are forcing many lawful people who have migrated into destitution. Whether the policies have made any undocumented people leave the UK is highly questionable; indeed, as the evidence from the Right to Rent case shows, this has not been the effect.

As the recent cases of the Windrush generation show, people who have lived in the UK for decades can fall foul of Immigration Rules that are not understood or that people thought did not apply to them. The cohort falling within this category is likely to multiply after Brexit as EU citizens try and navigate their status; many could inadvertently become undocumented.

26. ibid [123].
27. ibid [133].
28. *'Briefing for the Second Reading of the Immigration Bill'* (Joint Council for the Welfare of Immigrants and Movement Against Xenophobia, 22 October 2013) <https://jcwi.org.uk/sites/default/files/Briefing%20Imm%20Bill%202nd%20Read_0.pdf> accessed 18 March 2020.
29. James Kirkup and Robert Winnett, Theresa May Interview: *'We're Going to Give Illegal Migrants a Really Hostile Reception'*, Telegraph (£), 25 May 2012.

Tendayi Achiume, UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, has stated that the UK's hostile environment policies are not only affecting undocumented people but also racial and ethnic minority individuals with regular status, many of whom are British citizens or are entitled to citizenship. She also added that, where the strategy of immigration enforcement is so overboard and results in exclusion, discrimination and subordination of groups and individuals on the basis of their race, ethnicity or related status, such a strategy violates international human rights law and the commitments that the UK government has made to racial equality.[30]

This is a stark indictment of the UK's current immigration policies and there seems to be no political will or capacity to change these provisions despite judgments from the courts condemning the policies.

30. Damien Gayle, '*UK has Seen 'Brexit-Related' Growth in Racism, Says UN Representative*' The Guardian (London, 11 May 2018) <www.theguardian.com/politics/2018/may/11/uk-has-seen-brexit-related-growth-in-racism-says-un-representative> accessed 18 March 2020.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and immigration legal aid

4

Until 2012, legal aid (free legal provision for those who cannot afford it) was available for almost all areas of law in England and Wales, subject to specified exceptions. LASPO Part 1 transformed the system overnight by making a much smaller and more specific list of legal areas eligible (or 'in scope') for legal aid. This represents the most significant change to legal aid since its introduction.

LASPO has introduced changes to the scope, eligibility and the rates paid for work, resulting in significant cuts to legal aid spend. The impacts of the cuts on providers have been ssevere and the LAA actually underspent its own budget by £117 million in the first year after LASPO. Many sources, including the Law Society (which has been particularly damning), have expressed concerns that these changes would significantly affect vulnerable people. In its review of LASPO four years on, the Law Society stated:

> ***"Throughout the passage of LASPO, the Law Society argued time and again that the bill would have a corrosive impact on access to justice. The evidence now available shows that our fears were justified."*** [31]

It is worth repeating the four consequences of the legislation as highlighted by the Law Society: [32]

1. Legal Aid is no longer available for those who need it.
2. Those eligible for legal aid find it hard to access it.
3. Wide gaps in provision are not being addressed.
4. LASPO has had a wider and detrimental impact on the state and society.

Prior to April 2013, individuals applying to the Home Office for either leave to enter or remain in the UK or for British citizenship were eligible for legal aid-funded assistance for advice on their applications, if they met the financial eligibility criteria. These individuals were also eligible for legal aid-funded advice and representation if the Home Office refused their application and they chose to appeal the decision. As noted above, although legal aid is no longer available for such appeals, the right to appeal has also been diminished.

LASPO has removed the majority of immigration cases from the scope of legal aid funding. All non-asylum immigration cases were taken out of scope, subject to narrow exceptions for some applications by victims of domestic violence and victims of trafficking. Applications for leave to enter or remain based on an individual's right to private and family life under Article 8 of the ECHR were also taken out of scope.

31. *'Access denied? LASPO Four Years On: A Law Society Review'* (The Law Society, 29 June 2017) 2.
32. ibid 5

This means that even long-term residents who do not have their status correctly recorded, such as those of the Windrush generation, do not have access to free legal advice. Anybody who does not have leave to remain in the UK is classified as an undocumented person and faces the measures of the hostile environment without recourse to free legal advice that can help them regularise their status. This creates a cycle of poverty and destitution and leads to immigration criminality, which is yet another ground for refusal of any application for leave to remain, potentially leading to detention and deportation. It would also mean any EU citizen who is unable to secure settled or pre-settled status after Brexit will be deemed to be here without leave and therefore will be considered an undocumented person. If they do not have the means to pay for legal assistance to resolve their status issues, they too could ultimately find themselves trapped, without the right to live or work in the UK and therefore subject to destitution, detention and, ultimately, removal from the UK.

Civil legal aid for immigration – What LASPO allows

Asylum

Rights to enter and remain in the UK arising from:

- 1951 UN Convention Relating to the Status of Refugees (the Geneva Convention)
- Articles 2 and 3 ECHR
- Council Directive 2001/55/EC 20.7.2001 (the Temporary Protection Directive)
- Council Directive 2004/83/EC (the Qualification Directive)

However, the following are no longer in scope:

- refugee family reunion
- asylum interviews unless allowed by regulations (e.g. for children)

Asylum support

Where accommodation is sought, but not for representation before the First-tier Tribunal (Asylum Support).

Immigration detention

- bail, temporary release or admission

However, the person's substantive immigration application is no longer covered.

Victims of domestic violence

- where the victim is applying for indefinite leave to remain after having been granted leave to remain as a 'partner' of a person 'present and settled'
- where the victim comes under EU law and is applying for a residence card with a retained right to reside (as a victim of domestic violence) or with a permanent right to reside

However, other than the above, the fact that the applicant is a victim of domestic violence does not generally entitle them to immigration advice (e.g. overstayers, or partners of those on short-term leave).

Victims of trafficking in human persons

- Applications by a victim of trafficking for leave to enter or remain where there has been a positive conclusive decision concerning their status under the Council of Europe Convention on Action against Trafficking in Human Beings .

If there has been a negative determination, assistance in challenging this can be by way of judicial review but immigration advice is not allowed.

Special Immigration Appeals Commission (SIAC)

- All cases proceeding before the commission on grounds of national security are included. These are usually covered under licensed work.
- Services provided in relation to terrorism prevention and investigation measures notice and control order proceedings are included.

Judicial review

Judicial review remains in scope for legal aid in immigration cases (whether asylum or non-asylum), although there are specific exclusions.[33]

What is out of scope of legal aid

The out of scope work under LASPO includes anything that is not specifically identified as covered by legal aid. For example:

- EU cases
- post-conviction deportation cases
- applications on the basis of ECHR Article 8, right to family life
- applicants who raise mental health or incapacity issues (other than on ECHR Article 3 grounds)
- entry clearance applications and appeals, for example for family members (including family reunion for the family members of recognised refugees)
- appeals in the excluded cases listed above, including appeals to the higher courts, such as the Court of Appeal and the UK Supreme Court

Any matters not specified as being in scope under LASPO do not qualify for legal aid, and an application would have to be made for 'exceptional case funding' (ECF) to try and secure some form of legal aid. The limitations of this are explored below.

33. Exclusion applies where "*the same issue or substantially the same issue was the subject of a previous Judicial Review or an appeal to a court or tribunal, the application was refused and this occurred less than a year before the current Legal Aid application*". In such circumstances a new judicial review certificate will not be funded.

Changes to legal aid eligibility

Previously, all applicants on benefits were automatically entitled to legal aid. Under LASPO, applicants on benefits will only be entitled to legal aid if they meet the capital limits too. Under the new rules the following changes have come into force:

- Passporting benefits – all applicants will be subject to means testing regarding their capital. Therefore, those on passporting benefits will only be passported in respect of the income part of the means test.
- Contributions – the levels of income-based contributions will be increased to a maximum of approximately 30 per cent of monthly disposable income.
- Subject matter of the dispute disregard will be capped at £100,000. This will apply for all levels of service including controlled work/legal help. There is a working illustration of this below.

For the purposes of financial eligibility, a partner's means must also be aggregated for the purposes of the calculation. A partner in this instance is a spouse or civil partner or an individual with whom the person lives as a couple.

Thus, for immigration clients, where the issue remains in scope, they will only be entitled to legal aid if:

1. They are receiving accommodation or subsistence support from the National Asylum Support Service (applicable to some people seeking asylum).
2. Their disposable monthly income is less than £733.
3. Their capital is less than £3,000.

See **Appendix 2** for a Summary Table of the main eligibility limits from 9 April 2018.

Prior to the introduction of LASPO in 2013, the maximum gross income cap for financial eligibility for civil legal aid, and all thresholds and allowances within the system, were regularly uprated to take inflation into account. Since 2013, there has been no such increase. This means that the income cap has reduced in real terms, as have all the fixed allowances for expenditure that the means test takes into account.

Only fixed allowances, irrespective of real costs, can be deducted for the means test to calculate disposable income.

The impact of these changes has been that those on modest incomes and those who live in large cities such as London (where living costs are higher) do not qualify for legal aid but are not able to pay for private legal services. Those that do qualify increasingly find they have to pay higher contributions, making legal aid unaffordable. **Table 1** shows fixed-rate allowances granted by the LAA.

Table 1: Fixed-rate allowances granted by the LAA

Fixed rate allowances (per month) from 9 April 2018	
Employment expenses (employees only)	£45.00
Dependents allowances	
Partner	£181.41
Child aged 15 or under	£290.70
Child aged 16 or over	£290.70
Housing cap (for those without dependants)	£545.00

The new capital limit introduced by LASPO means that even people on benefits who have a small amount of capital no longer qualify. The capital limit for entitlement to benefits is £16,000, but it is £8,000 for legal aid eligibility and even lower for those with immigration issues with the cap at £3,000.

A further change is the means testing for equity in a home. Means testing for benefits does not include this. Thus, for legal aid purposes, if an individual is on benefits or a very modest income but has a home valued over £100,000, they will not be entitled to legal aid.

The following two illustrations from the Law Society[34] summarise this very well:

- The legal aid means test only excludes the first £100,000 of equity, and only allows £100,000 of mortgage debt. This means that if you have a home worth £180,000 and a mortgage of £70,000, you are financially ineligible for legal aid even if you are on means-tested benefits.

- The means test is particularly unfair on those living in homes with negative equity. If an individual's home is worth £220,000 and their mortgage is £250,000, the legal aid means test will assess them as having £20,000 worth of available capital after all allowances have been applied, making them ineligible for legal aid.

34. ibid 11.

Exceptional case funding

Section 10(3) of LASPO provides for ECF for categories of law that are no longer in scope for legal aid and where failure to provide legal services would be in breach of an individual's human rights (within the meaning of the Human Rights Act 1998) or other enforceable EU rights relating to provision of legal services. Thus, it is there to provide a safety net for those otherwise excluded from legal aid, but as research for this report shows it is not assisting all of those who need legal advice and representation in immigration law.

It is fair to say that, initially, ECF did not achieve its aim. However, there have been significant improvements to the system after successful challenges through the courts and application numbers have significantly increased (see **Table 2**). Originally, the application was difficult and cumbersome with a very limited success rate. More fundamentally, the test for getting funding was stringent and the guidance on the scheme said that it did not consider that there was an obligation to provide funding in immigration proceedings to meet the procedural requirements of Article 8 ECHR. In addition, legal providers are not paid for making an ECF application; they are paid only if they are successful in obtaining an ECF grant. Even then, the payment is subject to the non-asylum standard fee (£234) and is far too unprofitable for many providers. The scheme was open for individuals to apply themselves but it was difficult to navigate. The Public Law Project (PLP) has estimated that around 80 per cent of the ECF applications were made by legal aid providers; the remainder were made by individuals, usually with the assistance of charities or pro bono lawyers who helped them navigate the process.[35]

The Court of Appeal decision in Gudanaviciene[36] acknowledged that the procedural obligations imposed by Article 8 ECHR could require the provision of legal aid for immigration proceedings and applications. Together with the case of IS[37] in 2016, the cases forced a widening of the criteria and led to practical improvements to the scheme. This led to a significant increase in ECF applications, especially in immigration law.

The most recent statistics (published 19 December 2019 for the period July–September 2019 [38]) show that 902 ECF applications were received by the LAA and 65 per cent of these (approximately 586 cases) were in immigration. However, despite a significant increase in immigration ECF applications and a much higher success rate at the time of writing than at the start, widespread take-up overall still remains low and below the LAA's original estimate. When LASPO went through Parliament, it was anticipated that the ECF would be a safety net with about 6,000 applications a year. Despite the increase in immigration ECF applications, many vulnerable people who have migrated are left without free legal assistance (see **Table 2**).

It would seem there are three key reasons for this:

1. There is a continued perception that probability of success in an ECF application is low.
2. There is an unwillingness on the part of immigration lawyers to spend time making ECF applications for which they receive no pay unless they succeed.
3. These are usually complex cases and there are far fewer specialist immigration lawyers than before the introduction of LASPO.

35. *'Written Evidence of the Public Law Project to The Joint Committee on Human Rights' Inquiry into Human Rights: Attitudes to Enforcement'* (Public Law Project, February 2018) <https://publiclawproject.org.uk/wp-content/uploads/2018/02/Written-submission-of-PLP-to-JCHR-inquiry-on-attitudes-to-human-rights-enforcement.pdf> accessed 18 March 2020.
36. Gudanaviciene and ors v Director of Legal Aid Casework and the Lord Chancellor [2014] EWCA Civ 1622.
37 IS (by way of his litigation friend, the Official Solicitor) v Director of Legal Aid Casework and the Lord Chancellor [2016] EWCA Civ 464.
38. *'Legal Aid Statistics Quarterly, England and Wales: July–September 2019'* (Ministry of Justice, 19 December 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853277/legal-aid-statistics-bulletin-jul-sep-2019.pdf> accessed 18 March 2020.

Table 2: ECF applications and grants

Year	Applications	Grants	Success rate (%)
2013 - 14	234	4	2
2014 - 15	334	57	17
2015 - 16	493	326	66
2016 - 17	1,008	693	69
2017 - 18	1,556	1,086	69
2018 - 19	1,950	1,523	78

Source: MoJ Legal Aid Statistics 2018–19, Table 8.2

As one practising senior solicitor in Cardiff who was interviewed for this paper said:

> ***"Cases which require ECF are usually very complex and time intensive. There is such a high administrative burden in legal aid cases anyway that you need to take on a high volume to make it financially viable. I am the only senior solicitor (there is one junior assistant in the practice) and I just don't have the time. I simply don't take on cases that are out of scope, so no, I don't make ECF applications."***

The effect of LASPO and access to justice

5

Fewer immigration lawyers and not-for-profit providers

The changes brought about by LASPO have severely impacted the supply and availability of free legal help, especially for access to advice delivered through legal practices and the not-for-profit sector.

The amount of legal aid provided for both advice and representation in civil cases has reduced significantly since LASPO came into effect; the number of cases where legal aid was provided for initial advice has fallen by more than 75 per cent compared with pre-LASPO levels, and the number of grants of legal aid for representation[39] has fallen by 30 per cent.

Legal aid in immigration cases has also significantly decreased. The figures provided by MoJ data only provide one overall immigration statistic (combining immigration and asylum cases). They explain this is because of a change made to operational processes in 2013 so providers report both types of cases under a single matter type code. The figures clearly show that, over the last five years, the number of matter starts (new cases opened) has been falling: from 60,792 (2011–12) to just 26,609 (2017–18). Although figures published at the end of 2019 show a slight increase to 29,051 (2018–19), at the time of writing they are still less than half of pre-LASPO levels.[40]

More worryingly, but as expected, this fall has been more dramatic in non-asylum immigration cases. In its post-implementation review (PIR) of LASPO (which is discussed below), the government's own analysis compared data in 2012–13 and 2017–18 and found that the effect of LASPO on legal help for non-asylum immigration cases has been an 85 per cent reduction in volume. For full representation of cases, the volume is 60 per cent lower.[41] These figures clearly show an extensive decline in free legal advice for immigration cases (see **Table 3**).

39. This means cases in front of the immigration and asylum tribunals.
40. MoJ Legal Aid Statistics: July–September 2019 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853277/legal-aid-statistics-bulletin-jul-sep-2019.pdf
41. *'Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)'* (UK Government, February 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf> accessed 18 March 2020 31.

Table 3: Matters started in immigration and asylum law – legal help and controlled legal representation

Year	Matter starts
2011 - 12	60,792
2012 - 13	52,371
2013 - 14	28,157
2014 - 15	30,362
2015 - 16	31,653
2016 - 17	29,111
2017 - 18	26,609
2018 - 19	29,051

In the five years since LASPO came into force, the overall number of civil legal aid providers has also fallen by just over one-third, from 4,282 (2013–14) to 2,939 (2018–19), including law firms and not-for-profit organisations.

There were 94 local areas with Law Centres or agencies offering free legal services in 2013–14, but by 2019–20 there were only 47 (confirmed by the MoJ in response to a parliamentary question by Richard Burgon, Shadow Secretary of State for Justice[42]). Between 2010–11 and 2018–19, MoJ funding for Law Centres through legal aid contracts dropped from £12.1 million to £7.1 million.

The Children's Society found that in the two years after LASPO came into force there was at least a 30 per cent cut in regulated immigration advice services across the country and a decrease of almost 50 per cent in regulated non-fee-charging services to deal with appeals and representation in court.[43]

In immigration law specifically, the overall number of providers able to undertake immigration (non-asylum) work has decreased from 249 (pre-LASPO levels) to 178 (2019) (see **Tables 4** and **5**). Thus, more than one-third of providers have been lost and not all registered providers will actually be able to represent new clients, as discussed below.

42. Paul Maynard, '*Law Centres: Written question – 273435*' (UK Parliament, 11 July 2019) <www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-07-04/273435/> accessed 18 March 2020.

43. Helen Connolly, '*Cut Off from Justice: The Impact of Excluding Separated Migrant Children from Legal Aid*' (The Children's Society, June 2015) <www.childrenssociety.org.uk/legal-aid> accessed 18 March 2020.

Figure 1: Number of civil legal aid provider offices completing legal aid work

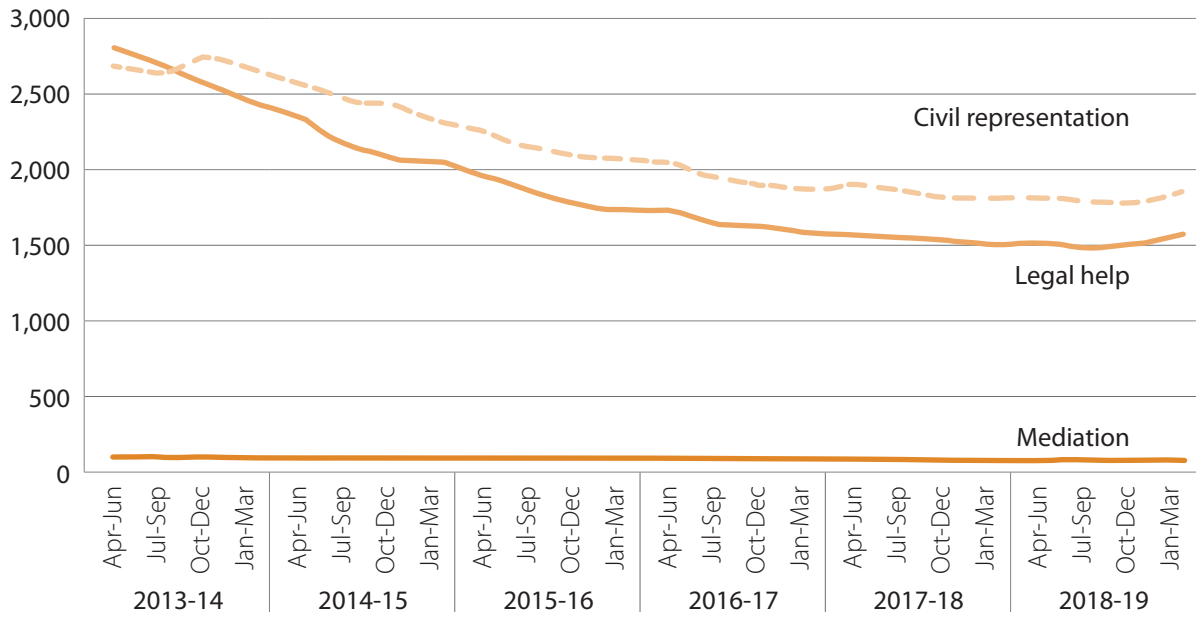


Table 4: Number of immigration legal aid provider offices completing work in legal help and controlled legal representation

	Immigration – Asylum	Immigration – Nationality and visit	Total
2011 - 12	280	274	257
2012 - 13	234	235	240
2013 - 14	348	276	360
2014 - 15	310	257	319
2015 - 16	274	205	276
2016 - 17	234	173	237
2017 - 18	225	161	228
2018 - 19	291	178	294

Source: MoJ Legal Aid Statistics 2018–19, Table 9.3

Notes: Data include solicitors and not-for-profit organisations (excluding community legal advice centres). The numbers do not add up as providers can be the same in both categories.

In its submission to the legal aid post-implementation review (PIR), the PLP commented specifically on advice deserts in Wales,[44] concluding that, from 2011–12 to 2016–17, the Wales region saw a 34 per cent fall in civil legal aid expenditure on solicitor firms and a 69 per cent fall in civil legal aid expenditure on not-for-profit organisations. For the same categories, the English regions saw average falls of 23 per cent and 63 per cent respectively. Between 2010–11 and 2016–17, legal aid funds fell by £950 million.

Reduced numbers of legal aid providers have meant those still providing legal aid are stretched to the limit and there are many accounts that even children claiming asylum have had to represent themselves. Recent figures show that less than half of people in detention have a legal representative and just over half have a legal aid solicitor.[45]

The House of Commons Justice Committee in 2014–15 looked at the impact of changes to civil legal aid. Julie Bishop, Director of the Law Centres Network, informed the committee that, at that time, nine Law Centres had shut down, representing one in six of its members. These were well-run centres but more than 80 per cent of their funding stream was from legal aid and they did not have local authority or any other support.[46]

In June 2018, the High Court summarised the position:

> ***"Each Law Centre generates its own funding, which comes from a mixture of sources; chiefly, legal aid contracts, local authority contracts, and grants from charitable trusts and foundations. legal aid contracts enable Law Centres to represent their clients in courts and tribunals, and thus provide the clients with a means of access to justice that they would otherwise be unable to afford.***
>
> ***Prior to the introduction of LASPO, typically legal aid contracts would account for around 40% of a Law Centre's income, with40% coming from local authorities and the remaining 20% from charitable trusts and foundations. Since LASPO, the overall income of Law Centres has halved. Law Centres were forced to close as a direct result of the reductions in civil legal aid work. Those which survived have stabilised, although all have fewer staff and reduced funding."*** [47]

The judges further commented on LASPO:

> ***"Many firms of solicitors have ceased to do civil legal aid work because it no longer provides sufficient income for them. There are areas, such as Cornwall, that are aptly described as 'legal aid deserts'. Even in the rare instances in which it is still available, legal aid is unlikely to be sufficient to meet all the needs of the client."*** [48]

Law Centres that remain open have had to change the type of work they do. Julie Bishop explained to the Justice Committee that they are now targeting certain groups of clients rather than offering an open-door service. Gillian Guy of Citizens Advice Bureau informed the committee that the bureau had lost 350 specialist advisers, despite the fact that it had a more varied funding stream than other not-for-profit organisations.

44. *'Submission to the Post-Implementation Review of the Legal Aid Sentencing and Punishment of Offenders Act 2012'* (Public Law Project, 27 September 2018) <www.publiclawproject.org.uk/wp-content/uploads/2018/09/LASPO-PIR-SUBMISSION-PLP.pdf> accessed 18 March 2020.
45. Damon Culbert, *'Legal Aid Cuts Hurt Vulnerable Immigrants'* (The Law Society Gazette, 17 May 2018) <www.lawgazette.co.uk/commentary-and-opinion/legal-aid-cuts-hurt-vulnerable-immigrants/5066147.article> accessed 18 March 2020.
46. Justice Committee, Impact of Changes to Civil Legal Aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (HC 2014–15, 311) para 78.
47. Q (on the application of Law Centres Federation Limited t/a Law Centres Network) v Lord Chancellor [2018] EWHC 1588 (Admin) [8]–[9].
48. ibid [6].

To compound this, people reported a surge in enquiries in areas out of scope for legal aid, primarily family, immigration and employment law. Hackney Community Law Centre reported that, in winter 2013, it saw a 400 per cent increase in people looking for help with welfare benefits, a 200 per cent increase in people looking for immigration help and a 500 per cent increase in calls made to its telephone advice line.

The National Audit Office (NAO)'s consultation with providers indicated that third-sector providers would not be able to meet the extra demand generated by the reforms. Among legal firms and advocate respondents, 49 per cent said they were referring more clients to third-sector organisations since April 2013 and 70 per cent of third-sector respondents said they could meet half or less of the demand from clients who were not eligible for civil legal aid.[49]

The NAO report further concluded that its finding was consistent with other research, including Citizens Advice Bureau reports that found a 62 per cent increase in people seeking advice online about help with legal costs since the reforms, while 92 per cent of Citizens Advice Bureaux were finding it difficult to refer people to specialist legal advisers since the reforms were introduced.

The Solicitors Pro Bono Group reported a year-on-year increase in pro bono clinics: between April 2014 and March 2015 there were 43,000 individual enquiries at clinics (55% increase on the previous year); between April 2015 and March 2016 there were 53,000 individual enquiries (24% increase); and between April 2016 and March 2017 there were 58,000 individual enquires (10% increase on the previous year).[50]

In 2017, the Bar Pro Bono Unit noted that it had received 2,274 applications for help, over 1,000 more than the number of applications received annually pre-LASPO. The unit further noted that the requests for assistance had increased by almost 65 per cent since April 2013 with the highest rise in immigration and family law.[51]

To assess unmet legal needs and the rising demand for legal support, the law firm Hogan Lovells, a leader in pro bono work, recently undertook a 'deep dive' study of London MPs surgeries' casework and found that 89 per cent of sessions observed involved problems of a legal nature. The data from the research showed that the three most common areas in which constituents had legal problems were housing (37%), immigration (23%) and welfare benefits (13%).[52]

Impact of low fees

Legal aid services are provided in the main by small legal businesses and charities, which need to be economically viable to survive. The fees paid to practitioners for legal aid work have not been increased in line with inflation since 1998–99, which equates to a 34 per cent real-terms reduction. As part of LASPO, the MoJ reduced the fees by 10 per cent without conducting any sustainability assessment on the market of those reduced fee levels. The current fixed fee for an immigration case is £234. For a full substantive hearing in the First-tier Immigration Tribunal an immigration solicitor is paid £237. Full fees for controlled work[53] are in **Appendix 3**.

The low fees make it hard for specialist immigration lawyers to be remunerated well, creating a financial disincentive for younger members joining the profession. The Young Legal Aid Lawyers[54] interviewed 200 lawyers with less than 10 years' post-qualification experience and found that more than half earned less than £25,000 a year. The New Law Journal[55] summarised this in its headline 'Legal Aid Lawyers Are Undervalued, Underpaid and Under Pressure'.

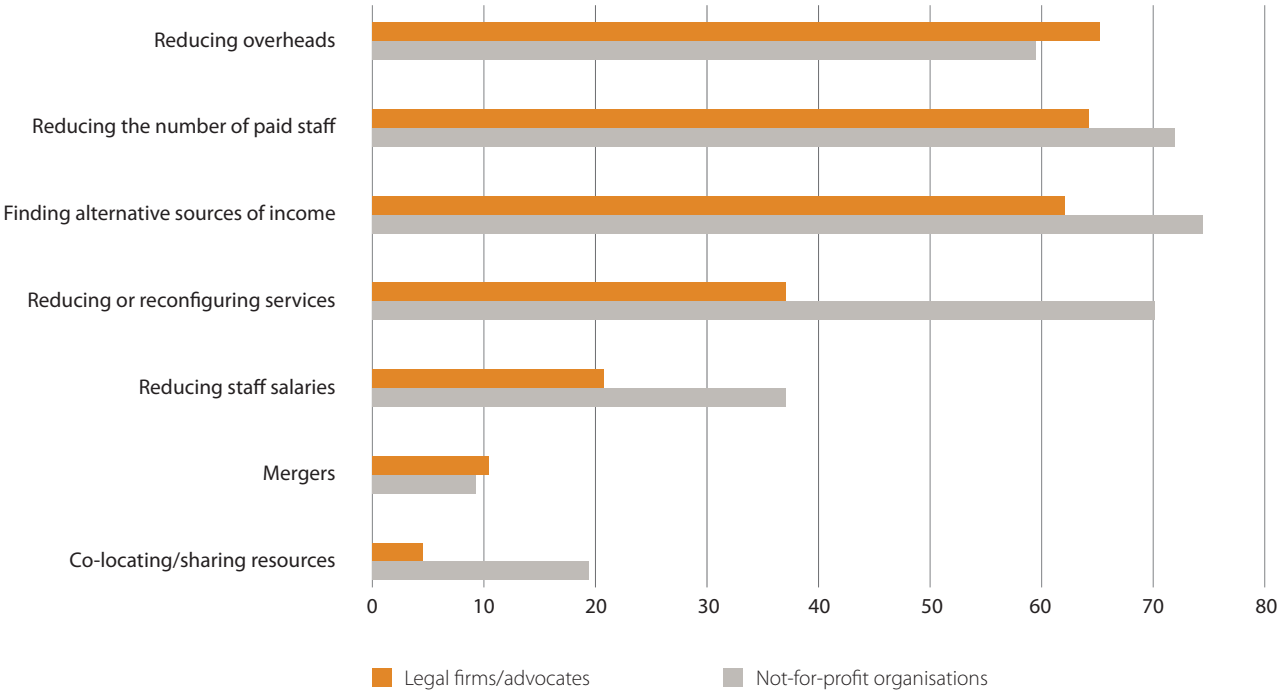
49. National Audit Office, Ministry of Justice and Legal Aid Agency: Implementing Reforms to Civil Legal Aid (HC 2014–15, 784) paras 2.13–15.
50. LawWorks is the operating name of the Solicitors Pro Bono Group. See Clinics reports 2016–18. https://www.lawworks.org.uk/sites/default/files/LawWorks%20Clinics%20Report%202016-17.pdf and https://www.lawworks.org.uk/sites/default/files/files/LW-Clinics-Report-2017-18-web.pdf
51. '*Submission to the Post-Implementation Review of the Legal Aid Sentencing and Punishment of Offenders Act 2012*' (Public Law Project, 27 September 2018) <www.publiclawproject.org.uk/wp-content/uploads/2018/09/LASPO-PIR-SUBMISSION-PLP.pdf> accessed 18 March 2020 para 28.
52. '*Mind the Gap: An Assessment of Unmet Legal Need in London*' (Hogan Lovells, 24 April 2017) <www.hoganlovells.com/publications/mind-the-gap-an-assessment-of-unmet-legal-need-in-london> accessed 18 March 2020.
53. Legal help and representation are classified as controlled work and judicial reviews form part of the licensed category. Also called certificated work.
54. Homepage (Young Legal Aid Lawyers, undated) <www.younglegalaidlawyers.org> accessed 18 March 2020.
55. Jon Robins, '*Dark Days for Legal Aid*' (New Law Journal, 23 March 2018) <www.newlawjournal.co.uk/content/dark-days-legal-aid> accessed 18 March 2020.

Recruitment of specialist immigration lawyers is difficult. A small immigration specialist provider in London with expertise in highly complex cases has struggled to recruit a legal aid specialist despite a higher than average salary; it simply could not find lawyers with the right experience to meet its clients' complex immigration needs. Similarly, a larger than average legal aid practice, but with only two immigration practitioners in Cardiff, has been trying to recruit a second immigration supervisor for over a year without success.[56]

Many existing immigration lawyers have turned away from legal aid-funded work and now concentrate on private immigration law, which earns them a better salary. Those continuing to undertake legal aid work do so out of passion and dedication – they certainly do not stay in the sector for financial remuneration – but their workload has increased and the LAA's bureaucracy makes it very time-consuming to secure small amounts of money. Many immigration lawyers feel their work–life balance is intolerable. Most good lawyers spend far more time on cases than they can recuperate in legal aid fees, and this is seen as par for the course.[57]

Low rates of pay also mean law firms struggle to remain financially viable. As a result of fee cuts and the removal of vast areas of law from legal aid, law firms and not-for-profits have had to make significant changes to their workload and working models, significantly decreasing their capacity to assist clients. Pre-LASPO, legal aid firms coped financially by the volume of casework across a breadth of areas as fees have always been extremely low.

Figure 2: Actions taken by providers to improve their financial situation



Notes:
1. There were 212 valid responses to this question (158 legal firms or advocates and 54 not-for-profit organisations); 2,448 firms carried out civil legal aid work in 2013-14.
2. These are the results of an online consultation exercise and should not be taken as representative of the views of all providers.

Source: National Audit Office consultation with civil legal aid providers, July 2014

56. Information from two interviews carried out with solicitors for this paper.
57. For more details see Jo Wilding, '*The Business of Justice: State Driven Market Failure in Immigration and Asylum Legal Aid*' (DPhil thesis, University of Brighton 2019).

As the evidence shows, 30 per cent of legal aid immigration providers have been lost and there has been around a 50 per cent fall in new immigration cases being opened. This has dramatically reduced the numbers of vulnerable people that can be assisted by immigration specialists. **Figure 2**, taken from an NAO consultation, highlights the changes organisations have made post LASPO.

With the reduction of law firms, not-for-profits, charities and Law Centres providing legal immigration assistance, not only are vulnerable clients being left without legal representation, but specialist immigration advisers are also being lost. Immigration is a complex area of law and usually engages a person's fundamental rights to live, work and remain with their family in this country. Home Office failures, incorrect decisions and delays are notorious. Where people can appeal, over 50 per cent succeed. Incorrect decisions, removals and deportations are often only stopped by judicial review, a technical and highly skilled area of law. Without specialist legal expertise the rights of far too many people who have migrated will simply be denied.

Further detrimental changes brought about by the Civil Legal Aid Regulations (September 2018)

This section has looked at civil legal aid in broad terms and the overall effect changes have had on immigration providers. In order for providers to undertake legal aid work they need to tender for and procure a civil legal aid contract. New contracts were issued in 2018. The contracts are due to last for three years with the ability to extend for a further two years. The Civil Legal Aid Regulations 2018 set out the rules for all forms of civil legal services, and change frequently.

It is beyond the scope of this report to analyse the specifics of the civil legal aid contract provisions and accompanying regulations and the impact they have on specific strands of immigration law and practice. Practitioners report many additional hurdles as a result of the regulations.

However, as the new 2018 standard civil contracts came into force on 1 September 2018, it is worth noting a couple of points. There are numerous changes from the previous contracts, some of which concern civil and family costs. Most of these changes further restrict what solicitors can claim in terms of expenses (e.g. interpreters' fees) and disbursements (e.g. hiring an expert to provide a medical report), which are not subject to prescribed rates/fees under the Civil Legal Aid (Remuneration) Regulations.[58] Expert evidence is vital for the credibility of an individual's claim and these changes are yet another financial obstacle to obtaining that evidence.

The Civil Legal Aid Regulations 2018 also act as a barrier to legally aided clients moving their appeals from the First-tier Tribunal to the Upper Tribunal by removing them from the scope of controlled work and only allowing the work to be undertaken by licensed providers. Thus, OISC organisations cannot undertake such work. One example of the impact of this is in Devon and Cornwall, where the Migrant Legal Project is based. At the time of writing, it was the only provider of legal aid services for such matters for people seeking asylum in the region. As it is an OISC-regulated organisation, it will no longer be able to represent clients in these cases. This means there is no legal aid provider in Devon or Cornwall capable of doing such work[59] (see the next section for more details on legal advice deserts).

Post-implementation review of LASPO

The MoJ published its long-awaited PIR on LASPO[60] and action plan[61] in February 2019. Both have been met with widespread disappointment from legal aid practitioners and others concerned about access to justice.

58. Civil Legal Aid (Remuneration) Regulations 2013, SI 2013/422.
59. The Strategic Legal Fund has awarded the Migrant Legal Project funds for research and preparation of briefing materials to call for a reversion of the Civil Legal Aid Regulations.
60. *'Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)'* (UK Government, February 2019). <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf> accessed 18 March 2020 31.
61. *'Legal Support: The Way Ahead'* (Ministry of Justice, February 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777036/legal-support-the-way-ahead.pdf> accessed 18 March 2020.

The PIR concludes that the reduction in cases and expenditure in immigration (non-asylum) was broadly in line with predictions as the changes were meant to ensure that most of the spending was on asylum cases and not immigration matters. The PIR notes that spending on legal help cases declined by 80 per cent against an estimate of 89 per cent. There was an expected fall in the volume of cases of 92 per cent but this was actually 85 per cent and, in terms of full representation, the volume of cases is 60 per cent lower and the spending is 64 per cent lower.[62] However, civil representation for both asylum and non-asylum declined by £7 million rather than the predicted £1 million.

The report acknowledges that there has been a decrease in both the volume of and spend on civil legal aid cases since the implementation of LASPO, which has played a key part in this, "*but other factors (such as wider changes in society and the justice system in particular) are also involved*". [63]

As anticipated, there is no desire to reintroduce legal aid for immigration work. The PIR reiterates the decision to limit legal aid to asylum law and, whilst it acknowledges that immigration provision has decreased, this is deemed to be an intended consequence of the original scope changes brought about by LASPO. However, there has been a welcome commitment to introducing legal aid for separated child migrants for immigration matters, which is now in place.

The government acknowledges the existence of advice deserts but its response is that the LAA regularly monitors capacity and accessibility to services and takes action where it identifies gaps in services or where demand is greater than the available supply. Where the LAA is unable to secure face-to-face provision in an affected area, its contract has sufficient flexibility for providers to offer alternative ways to deliver advice, for example by offering outreach services in conjunction with the delivery of advice through digital methods.[64] There is a proposal for looking at digital solutions, although details are unclear and the viability of such solutions may be questionable.

Thus, the current legal aid regime will remain in place for immigration cases and the analysis provided in this report on the detrimental impact of LASPO on free immigration advice is set to continue.

62. However, the PIR states that where a category of law saw a decline in volumes and spend immediately before LASPO, the actual change in volume and spend is not directly comparable to the impact assessment estimate. See '*Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)*' (UK Government, February 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf> accessed 18 March 2020 31 Figure 3.
63. ibid.
64. ibid 36.

Legal advice deserts

6

In 2015, the House of Commons Justice Committee stated that they had urged the government (in 2011) to conduct research into the geographical distribution of legal aid providers to ensure sufficient provision to protect access to justice. The committee concluded:

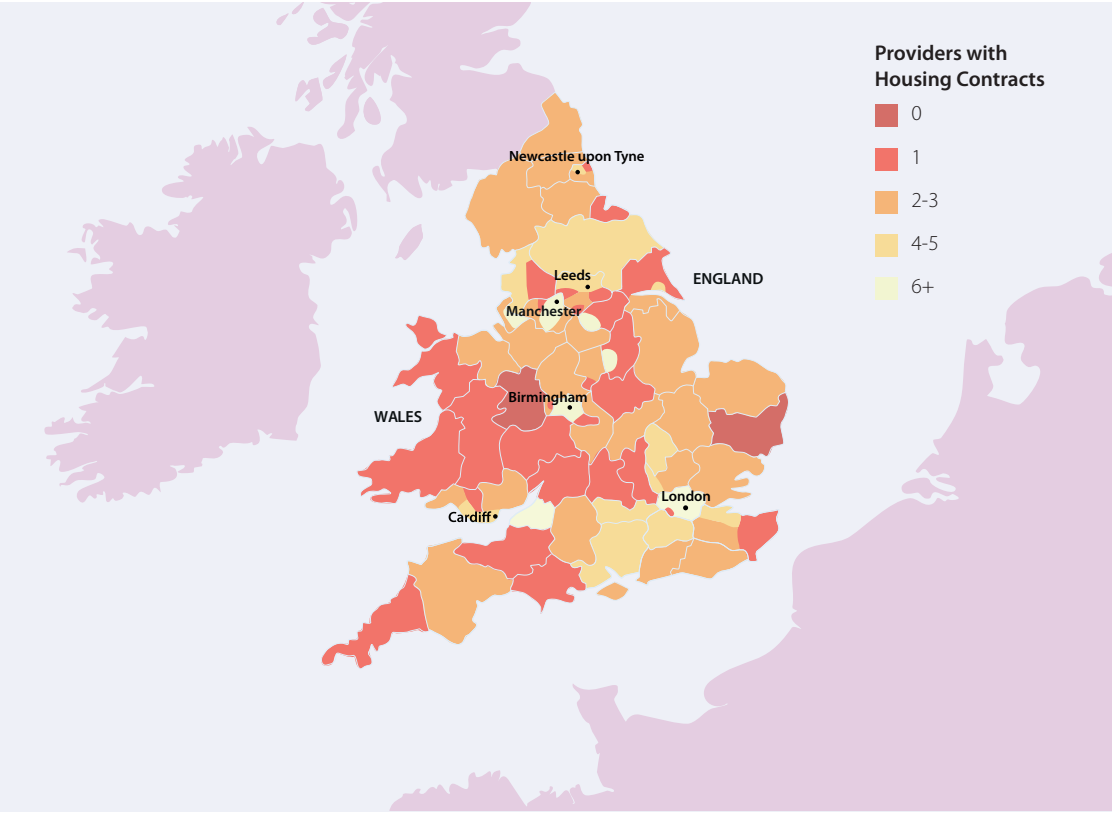
> ***"Not only did the Ministry of Justice fail to heed our warning, it has also failed to monitor the impact of the legal aid reforms on the geographical provision of providers. We do not know for certain if there are advice deserts in England and Wales, and nor does the Ministry of Justice. This work needs to be carried out immediately because once capacity and expertise are lost the Ministry of Justice will find it difficult, and potentially expensive, to restore them. In some areas it may already be too late."*** [65]

Organisations and charities working on the front line of legal provision have since tried to map legal aid services themselves. All data show there are clear advice deserts across the UK as a result of LASPO. This section looks at this evidence and provides new data specifict o immigration law.

The Law Society for England and Wales mapped the fall in housing providers post LASPO in England and Wales,[66] concluding that almost one-third of legal aid areas have just one, and in some cases no, law fi rms providing housing advice available through legal aid. The Law Society has developed a 'heat map' highlighting these shortages. The map is interactive and shows numbers of providers in selected areas (see **Figure 3** below).

65. Justice Committee, Impact of Changes to Civil Legal Aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (HC 2014–15, 311) para 89.
66. *'End Legal Aid Deserts'* (The Law Society, undated) <www.lawsociety.org.uk/Policy-campaigns/Campaigns/Access-to-justice/end-legal-aid-deserts/> accessed 18 March 2020.

Figure 3: Law Society heat map showing housing providers post LASPO



Note: The regions in red and burgundy have one or no providers.

The Law Society concludes that the worst affected areas are:

- the South West – over half of the areas have only one housing provider
- the West Midlands – over half of the areas have one or no housing provider, and Shropshire has no provider
- Wales – half of the areas have only one housing provider

Refugee Action recently mapped legal aid provision for people seeking asylum. In its report 'Tipping the Scales: Access to Justice in the Asylum System',[67] it found that, between 2005 and 2018:

- 56% of immigration and asylum providers were lost
- 64% of not-for-profit providers were lost

It also highlighted that there is inadequate provision in several places and that provision does not keep pace with need: by March 2018 there were 26 local authorities with more than 100 people seeking asylum where there was no legal aid provision.

67. *'Tipping the Scales: Access to Justice in the Asylum System'* (Refugee Action, 2016) <www.refugee-action.org.uk/tipping-scales-access-justice-asylum-system/> accessed 18 March 2020 11.

Evidence from practitioners adds to these findings. Writing for openDemocracy in 2017, Ronagh Craddock says:

> *"My own firm, Ben Hoare Bell solicitors, is one of the few remaining firms offering this service, and we cannot keep up with demand. Our Newcastle office receives referrals from across the North East, including Sunderland, Middlesbrough, Stockton and Durham. There is nowhere else in the North East to refer the cases we cannot take on. There are a few excellent organisations providing support to refugees and asylum seekers – the North East Refugee Service, Justice First and the Red Cross – but their service does not include legal support."* [68]

Refugee Action's research further mirrored this by highlighting that organisations working with vulnerable people are facing barriers to securing government-funded legal assistance: 76 per cent of their respondents found it 'very difficult' or 'quite difficult' to refer people to legal representatives, and 87 per cent of respondents found referrals harder than six years before (pre-LASPO). Respondents said that, even where legal provision exists, referrals are hard to make due to a lack of capacity within law firms. They highlighted the difficulty of taking on time-consuming and complex cases that cost far more than the remuneration offered by the LAA.[69] These findings are repeated by providers in relation to non-asylum immigration cases.

Immigration advice deserts

Using the LAA's spreadsheet of all immigration legal aid providers in England and Wales (October 2018), it has been possible to group all the organisations listed by towns or cities and regions. This allows a regional breakdown of the numbers of providers with legal aid contracts in immigration and asylum law (set out in full in **Appendix 4**). This shows that, following the issue of new legal aid contracts in September 2018, there are 314 organisations with immigration and asylum legal aid contracts at the time of writing.

From **Table 4** we know that only 161 providers completed immigration work (non-asylum) in 2017–18. This increased slightly to 178 in 2018–19.

In addition, as can be seen from **Table 4**, the total number of providers actually completing immigration and asylum work in 2018 was 228 compared to the 314 providers who have legal aid contracts in these areas of law. The LAA data show the number of providers whilst the statistics produced by the MoJ show the number of providers that are actually undertaking immigration work. Thus, the numbers of providers capable of undertaking immigration work do not necessarily equate to the number who are actually undertaking immigration work.

Using the same spreadsheet but from an earlier date, together with answers to two parliamentary questions[70] which showed the number of providers with legal aid contracts in each financial year from 2010/11 through 2017/18 and a freedom of information (FOI) request to the LAA for the number of suppliers and the number of matter starts allotted in each access point, Dr Jo Wilding has created a map that shows advice deserts and reflects the number of providers and available matter starts in each area (see **Figure 4** [71]).

68. Ronagh Craddock, '*Asylum Seekers are Left Destitute and Homeless Due to a Lack of Legal Aid*' (Electronic Immigration Network, 9 February 2017) <www.ein.org.uk/blog/asylum-seekers-are-left-destitute-and-homeless-due-lack-legal-aid> accessed 18 March 2020.
69. '*Tipping the Scales: Access to Justice in the Asylum System*' (Refugee Action, 2016) <www.refugee-action.org.uk/tipping-scales-access-justice-asylum-system/> accessed 18 March 2020.
70. Lucy Frazer, '*Legal Aid Scheme: Immigration: Written question – 139017*' (UK Parliament, 8 May 2018) <www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-04-27/139019/> accessed 18 March 2020; Lucy Frazer, '*Legal Aid Scheme: Immigration: Written question – 139019*' (UK Parliament, 8 May 2018) <www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-04-27/139019/> accessed 18 March 2020.
71. Jo Wilding, '*The Business of Justice: State Driven Market Failure in Immigration and Asylum Legal Aid*' (DPhil thesis, University of Brighton 2019).

It is important to understand that the apparent large increase from Dr Wilding's data in 2017 (showing a total of 196 providers) to the most recent November 2018 spreadsheet in **Appendix 4** (which shows 314) does not represent a large increase in the number of providers: provider numbers have been steadily decreasing, as the MoJ statistics show. Historic data show that new providers spike when new legal aid contracts are issued, then, as firms drop out, figures decline again.

Data sets kept by the LAA also vary as some figures include only the whole firm whilst others include every office. For example, if there are three offices each with a contract allowing, say, 100 matter starts (i.e. 300 for the firm as a whole), some data sets will treat this as one provider and other data sets will treat this as three providers. Similarly, where a provider with a normal contract has an immigration detention centre contract, some sets of data count this as two providers whilst others will count this as one. This would explain the discrepancy between the figure of 237 providers completing immigration matters in **Table 4** for 2016–17 and Dr Wilding's figure of 196 available providers.

To this end, whilst using the number of providers gives a good indication of the spread and availability of services and is useful for visually depicting regions with many and few providers, matter starts provide a better indicator of just how many cases are started and completed. Unfortunately, such a breakdown of matter starts by region is not available at the time of writing.

It would be worth exploring why providers with legal aid contracts do not take on immigration cases and why many who have obtained legal aid contracts drop out. Understanding and addressing the causes of this could go some way to improving capacity.

Dr Wilding's conclusion is that: [72]

- The overall market of providers fluctuates in size, composition and distribution over time but appears to be following a general trend towards fewer providers, with not-for-profits' market share declining markedly.
- There is a mismatch between supply and demand but this is difficult to quantify due to lack of effective data collection on demand.
- There is a **difference between notional supply**, or the number of matter starts available in an area, and functional supply, or **the actual capacity of providers to take on new clients** (emphasis added).

72. ibid 228, 229.

Figure 4: Providers contracted to the LAA in England and Wales

Source: Map reproduced courtesy of Dr Wilding.

73. here is a discrepancy in figures for Devon. Freedom of information requests from the LAA show five providers in Plymouth and Devon, but the Law Society's Find a Solicitor only shows one provider and this provider has confirmed that they believe they are the only one in the area.

A similar picture of lack of providers emerges when the number of people registered with the OISC to provide immigration advice nationwide is considered. **Appendix 5** has a breakdown of OISC-registered providers in 2016, obtained through an FOI request, broken down by individuals and organisations (fee charging and non-fee charging) to provide a full picture of the level of service available.

It is worth remembering that to provide specialist legal advice an OISC-registered individual needs to have at least a Level 2 qualification, but this still does not allow them to run appeals or take on certain types of cases. Thus, only Level 3-registered advisers can provide a full range of advice, except judicial reviews. To even be in a position to identify judicial reviews and instruct a barrister, an OISC Level 3 will need to have completed a Judicial Review Case Management accreditation, as discussed earlier.

Data from 2016 show that there are 90 Level 3-registered individuals in the UK in 69 non-fee-charging organisations. In the North East, Northern Ireland and Scotland there are none. Although Scotland does show one registered organisation at Level 3, the individual must have stopped practising as there are no registered individuals in Scotland according to the OISC.

The majority of providers at all levels are in London, with 44 individuals at Level 3. Level 3 provision in the other regions is as follows: Yorkshire (14), the North West (9), the West Midlands (6), the South East (5), Wales (4), the East of England and the South West (3) and the East Midlands (2).

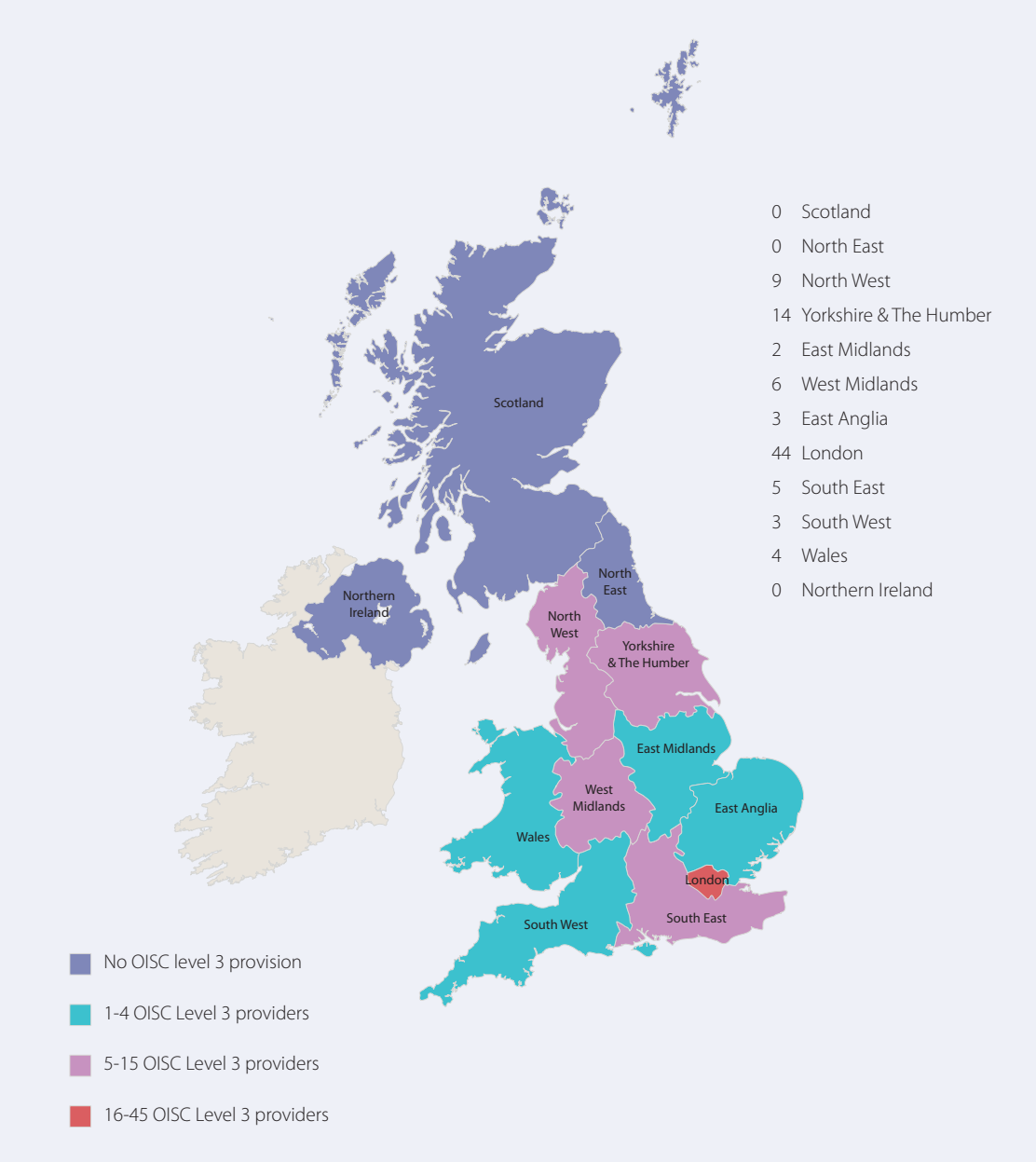
The total number of fee-charging individuals at Level 3 is much higher nationally at 485. Apart from Northern Ireland (where there are none) there are Level 3 individuals in all regions, distributed as follows: London (243), the North West (42), Yorkshire (40), the West Midlands (30), the East of England and the South East (26), the East Midlands (19), the South West (11), the North East (9), Scotland (8) and Wales (7).

In regions where there are very few or no non-charging providers, such as the North East, there are significantly more charging providers.

The OISC map in **Figure 5** displays by region the number of non-fee-charging individuals at Level 3 to illustrate the number of specialist OISC immigration advisers.

What emerges from all of the research and data is that there are very real advice deserts throughout the country, where immigration advice either does not exist or is extremely minimal. Dr Wilding's map breaks down the regions into counties. The OISC data is in regions. Thus, even where there is regional provision (and in most cases this is less than 10) there is likely to be a range of counties within the region that may not have any provision. In any event, when numbers are so low provision is extremely precarious. Even in regions where legal aid immigration provision exists, large numbers of vulnerable individuals cannot be assisted due to shortages in legal advisers with capacity to take on new clients.

Figure 5: Map showing OISC Level 3 advisers in 2016



Notes: Areas with fewer than five providers are considered advice deserts.

LASPO has also created advice deserts in multiple areas such as housing, employment and family law. Vulnerable people often have complicated and mixed needs and therefore are adversely affected by the overall reduction in free legal assistance. However, it is worth remembering that for people who have problems with their immigration status, regularisation is imperative – without it they do not have rights to any public benefits or assistance and are barred from assistance from local authorities under community care law (except in specific circumstances, usually where children are involved, but even this is very limited).

7

Mapping populations of people who have migrated and groups needing legal assistance

Between January and December 2017 there were approximately 6.2 million people with non-British nationality living in the UK and 9.4 million people who were born abroad.

London's population of people who have migrated is relatively high; around 36 per cent of people living in the UK who were born abroad live in the capital city. After London, the English regions with the highest proportions of their population born abroad are the West Midlands (13.7%), the South East (13.6%) and the East Midlands (12.9%). In each of these regions the proportion of people born abroad is lower than for England as a whole (15.7%), which is skewed by London.

Of all the nations and regions of the UK, the North East has the lowest proportion of people born abroad (6.2%), followed by Wales (6.3%), Northern Ireland (7.4%) and Scotland (9.0%) (**Table 6**).[74]

Table 5: Numbers of people with non-UK nationality

Jan-Dec 2017	Non-British estimate	Non-UK-born	Resident population	Population of people who have migrated with non-UK nationality (%)
England	5,573,000	8,575,000	54,932,000	65
N Ireland	124,000	138,000	1,852,000	90
Scotland	378,000	477,000	5,311,000	79
Wales	135,000	193,000	3,081,000	70
Total	**6,210,000**	**9,383,000**	**65,176,000**	**66**

Source: Extrapolated from Office for National Statistics (ONS) by country of birth and nationality, 2017

74. Georgina Sturge, 'Migration Statistics: Briefing Paper No. CBPO6077' (House of Commons Library, 6 March 2020) <https://researchbriefings.files.parliament.uk/documents/SN06077/SN06077.pdf> accessed 18 March 2020 20.

In theory, the 6.2 million people who have migrated to the UK but have not acquired British citizenship could need legal assistance over the next five years. However, there are several caveats to this, not least that some people may only be here temporarily and have no intention of seeking permanent settlement. Some may have permanent settlement in the UK (indefinite leave to remain) and may wish to maintain their current nationality and never seek British nationality. Many will leave, but this could be countered by new arrivals. Many will have straightforward entitlement and will be able to make a citizenship application without the need for legal assistance. Assuming that over half of the non-British estimate are EU citizens (see the section below on the EU citizens who might not be able get settlement), that still leaves more than 2 million people (6,210,000 non-British - 3,800,000 EU nationals = 2,410,000 non-EU, non-British) who do not have citizenship. This is a broad-brush snapshot of the potential volume of people who may well wish to obtain citizenship and may need legal assistance.[75]

Research done by the Migration Observatory in May 2018 [76] helps to drill down a little more into the numbers of people who may need legal assistance for citizenship applications.

In 2017, just over 123,000 foreign nationals naturalised as British citizens, and 7,414 people (6 per cent) were refused. The reasons for refusal can be found in **Appendix 6**. They range from incomplete applications to the oath not being taken in time. Naturalisation applications have also declined in recent years with more difficulties being presented by stricter Immigration Rules.

The refusal rate for citizenship has fluctuated over time. It increased sharply from 3 per cent in 2013 to 9 per cent in 2015, and stood at 6 per cent in 2017. The Home Office explains that the recent decline in the grant rate is due to the introduction of "*enhanced checks on cases requiring higher levels of assurance*" in April 2015.[77]

The majority of refusals (40%) were because of a failure to meet the 'good character' requirement. The British Nationality Act 1981 does not provide a definition of good character. Home Office caseworkers are advised to consider all aspects of a person's character, including both negative factors (e.g. criminality, immigration law breaches, deception) and positive factors (e.g. contributions to society).[78] Often, these are grounds upon which a specialist lawyers can make detailed representations to mitigate an automatic refusal. However, there will of course be cases where a refusal is inevitable.

Applicants with lawyers are also less likely to be refused on the basis of 'delay in replying to enquiries' from the Home Office or because of incomplete applications, which together account for 18 per cent of refusals. Thus, whilst it is not possible to conclude that all of these applications would have been successful with legal representation, it does demonstrate that 18–58 per cent of applicants may well have had a different response if they had been legally represented.

Using our very rough 2 million estimate (whilst bearing in mind there could be many who may not qualify for or wish to apply for citizenship), this equates to between 360,000 and 1.16 million people who may have benefited from legal assistance. Of course, there may well be other reasons why these people could have been refused citizenship, such as irregularities in their immigration history, but they may still benefit from legal assistance, especially if the Home Office made any incorrect decisions along the way. Further research would be needed to try and quantify and disaggregate this cohort.[79]

Research has shown that legal barriers, language and integration and poverty in country of origin affect naturalisation rates.[80] Whilst it is also beyond the scope of this paper to assess the impact of increasing fees on vulnerable groups, it should be borne in mind that application fees have increased significantly

75. The 2 million figure is only to demonstrate potential scale; it has not been obtained through robust statistical analysis. Comparative and accurate data is simply not available to make accurate predictions.
76. '*Citizenship and Naturalisation for Migrants in the UK*' (The Migration Observatory, 17 March 2020) <https://migrationobservatory.ox.ac.uk/resources/briefings/naturalisation-as-a-british-citizen-concepts-and-trends/> accessed 18 March 2020.
77. ibid.
78. '*Nationality: Good character requirement*' (Home Office, 14 January 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770960/good-character-guidance.pdf> accessed 18 March 2020.
79. This is an example of an area where examination of the types of cases refused on the grounds of good character would evidence operation of this rule and its fairness. Assessing outcomes for clients refused on this basis would allow for an impact assessment of the rule. Such evidence would assist any call for change. A lot of this information could be harnessed by the proposed model of coordinating data through an 'umbrella organisation' articulated in the last section.
80. The process of becoming a British citizen is referred to as naturalisation.

for all immigration applications, and, for many low-income individuals, this is a significant obstacle. The cost to the Home Office of a naturalisation application is £372. In 2007, the Home Office fee for an adult application was £700. At the time of writing, it is £1,330.

Legal aid, even where it exists, does not cover application fees. David Bolt, the ICIBI, announced in June 2018 that work has begun on an inspection of Home Office charges relating to asylum, nationality and immigration, which will look to see whether the Home Office is providing services efficiently and effectively.

EU citizen population

There is no centralised record of the number of EU citizens living in the UK, so we have to estimate this number using surveys, such as the Annual Population Survey and the UK Census. The estimated resident population for 2018 shows that there are approximately **3.8 million EU nationals in the UK.**[81] There are other groups that will be impacted by the UK's withdrawal from the EU that are impossible to estimate, for example non-EU family members of EU citizens and people who are eligible for leave to be in the UK post Brexit but are currently living elsewhere.

Here for Good is a relatively new organisation set up to provide free advice for EU citizens post Brexit. It was founded in May 2017 by two law graduates with the help of the law firm Bindmans LLP. [82] It now has a number of existing civil society partners supporting its work.

In 2018, Here for Good mapped free legal provision for EU citizens regionally, concluding that there is a major problem facing EU citizens looking for legal advice: support is either too expensive or too far away. Here for Good has referred to advice deserts as being areas of the country that have high numbers of EU citizens, but not enough legal advice to support them. **Table 6** has been compiled using Here for Good's data on free and relevant provision together with the figures on EU citizens available at the time of writing. An additional column has been inserted to show the number of legal advisers with legal aid contracts who are available in the same regions. As noted previously, not all of these providers will have the capacity to assist new clients and many will not have the expertise to deal with the complex cases with which vulnerable EU clients present or, indeed, the ability to apply for ECF grants to provide free advice, as routine EU applications are not covered by legal aid. Many will also not have the specialism or desire to deal with EU settlement.

81. *'Population of the UK by Country of Birth and Nationality'* (Office for National Statistics, 28 November 2019) <www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/datasets/populationoftheunitedkingdombycountryofbirthandnationality> accessed 18 March 2020.

82. *'About Us'* (Here for Good, 2020) <www.hereforgoodlaw.org/about-us> accessed 18 March 2020.

Table 6: Regions, EU citizens and free legal advice

Regions	No. of non-governmental organisations and law firms providing free relevant legal advice	Number of immigration legal aid providers	Number of EU citizens
England	**Source: Here for Good mapping exercise**	**Source: LAA (Appendix 4)**	**Source: House of Commons Library Aug 2018**
North East	1	17	53,000
North West	10	34	274,000
Yorkshire & Humber	5	22	235,000
East Midlands	3	7	290,000
West Midlands	6	49	308,000
East of England	5	0	335,000
London (incl. greater London)	30+	134	1,221,000
South East	5	24	476,000
South West	3	12	216,000
Wales	1	15	79,000
Scotland	data not available	data not available	235,000
N Ireland	data not available	data not available	92,000
Total	**69+**	**314**	**3,814,000**

The Greater London Authority (GLA) has also produced a European Economic Area (EEA) hub that provides information on free legal advice.[83] Despite the category being labelled 'UK-wide', the list of immigration providers is limited to 21 London law firms and organisations. Until recently, this list comprised 16 providers with the following caveat: "*Please note that many of these services are charities and civil society organisations that are doing what they can to fill the gaps in advice and information provision.*" Although the list now contains a few more providers and the caveat has been removed, immigration capacity is still clearly very limited. The GLA has also provided pop-up free advice surgeries to EU citizens, and there may be similar initiatives by other groups.

Nonetheless, it is clear that the provision of free legal advice is incredibly limited compared to the number of EU citizens. Whilst it is anticipated that the vast majority of EU citizens will be able to obtain leave to remain in the UK, free legal assistance will be very difficult to obtain for anybody requiring legal advice. The type of people who will require legal assistance are likely to have more complex cases, and not many lawyers specialise in the area of EU law. This topic is discussed in more detail in the section below entitled 'EU citizens likely to need legal advice and assistance'.

Not-for-profits may be the first port of call for many applicants, and advisers will need to be versed in the legal landscape of complex scenarios, for instance EEA Regulations on retained and derived rights, the definitions around exercising treaty rights and the requirements of the Settled Status Scheme. Advisers will also need the ability to deal with or signpost anybody who has received removal directions from the Home Office due to non-exercise or misuse of treaty rights. An estimation of numbers and types of scenarios with which people may present is explored below.

EU Settlement Scheme

Introduction to the EUSS

As part of the UK's membership of the EU, EU citizens have been able to enjoy free movement rights and have not required a visa to enter or remain in the UK. However, with the UK's withdrawal from the EU on 31 January 2020, EU citizens' rights of free movement will eventually change.[84] Until 31 December 2020, the UK will be in the transition period and will still follow all the EU's rules and regulations; it will remain in the single market and the customs union and the free movement of people will continue. The government has confirmed that the rights and status of EU, EEA and Swiss citizens living in the UK during the transition period will remain the same until 30 June 2021. EU citizens who move to the UK during the transition period can also apply to stay on afterwards. This means they must be living in the UK by 31 December 2020, with the deadline for applications under the EUSS being 30 June 2021.

The EUSS was introduced to protect the rights of EU citizens in the UK (and in hope of reciprocity for UK citizens in the EU). The scheme enables EU citizens[85] and their families to obtain UK immigration status when the UK leaves the EU. Irish citizens will not need to apply as their current rights to live and work in the UK, which pre-date EU free movement, will be preserved and the Common Travel Area will remain. The EUSS however requires an active application within a set time period. EU citizens without indefinite leave to remain in the UK or British citizenship applying after the deadline could find themselves undocumented. The Immigration Rules now make provision for two new immigration statuses – essentially providing for special forms of indefinite leave to remain and limited leave to remain for EU citizens – now commonly referred to (including by officials) as 'settled status' and 'pre-settled status', however these terms do not appear in the Immigration Rules. EU citizens who are granted either status will then be subject to the UK's immigration laws. However, the rights and benefits under the scheme broadly mirror EU law rights.

83. https://www.london.gov.uk/what-we-do/eu-londoners-hub

84. Free movement will not automatically end on the UK's departure from the EU. The European Union (Withdrawal) Act 2018 (Consequential Modifications and Repeals and Revocations) (EU Exit) Regulations 2019 repeals the European Communities Act 1972 on exit day and thereby ends the UK's membership of the EU. The act also converts EU law into UK law (known as retained EU law) to 'ensure continuity of law'. Primary legislation is needed to enable the government to repeal the retained EU law related to immigration, including free movement rules. This means that even after the UK leaves the EU, free movement will continue until legislation is passed to repeal it. This is going to be done through the Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2017–19.

85. Separate agreements have been made with EEA states and with Switzerland so that citizens of Iceland, Norway, Switzerland and Liechtenstein and their eligible family members are also able to participate in the scheme.

The EUSS was fully opened on 30 March 2019 following a pilot phase (28 August 2018 to 29 March 2019) during which 230,000 people applied. The EUSS had various teething problems with public trials not going to plan and many people experiencing either technical glitches or issues in matching their data with Her Majesty's Revenue and Customs (HMRC) and Department for Work and Pensions (DWP) database. Initially, applicants had to pay a £65 fee (£32.50 for children). There was much criticism of the fee but the government defended it robustly for months. However, in a U-turn on 21 January 2019, former Prime Minister Theresa May said the fee would be withdrawn and refunds would be processed for those who had already paid. It is now free to apply.

All EU citizens need to apply under the scheme if they wish to remain lawfully in the UK after 30 June 2021. This also applies to:

- people born in the UK but who are not a British citizen
- EU citizens who already possess a permanent residence document
- family members of an EU, EEA or Swiss citizen who do not need to apply, including if they are from Ireland
- EU, EEA or Swiss citizens with a British citizen family member

Only EU citizens with indefinite leave to remain or those who have acquired British citizenship are exempt from having to apply under the scheme.

Those who already have a permanent residence document (obtained after five years of continuous residence whilst exercising EU Treaty Rights in the UK) will be able to exchange it for a settled status document, subject to ID verification, submission of a photograph, a security check and confirmation of ongoing residence. The government has stated that it will not reassess previous residence for those with existing permanent residence.[86]

The application process is an online process and can now be undertaken on any device, such as a laptop, Android device or iPhone, evidentiary documents can be scanned in through a smartphone although documents can also be submitted by post if an applicant does not have a smartphone. The government has promised that the scheme will require minimal evidence and that the online form will be easy to use.

Applicants will need to prove their:

- identity (passports or identity cards, submission of a facial photograph checked against the biometric data in the identity documents)
- eligibility (National Insurance number checked against HMRC and DWP records to verify UK residence)
- suitability (declaration of any criminal convictions: EU citizens with serious or unspent convictions or who have been subject to deportation or exclusion orders are likely to be refused)

Certain categories of people are barred from applying online and need to contact the EU Settlement Resolution Centre by phone, where they will be asked a few questions and a paper application will then be sent out to them. This applies to non-EU, EEA or Swiss citizens who are applying as the:

- family member of a British citizen who lived with them in Switzerland or an EU or EEA country that is not the UK

86. *'Technical note: citizens'* rights, administrative procedures in the UK' (UK Government, 8 November 2017) <www.gov.uk/government/publications/citizens-rights-administrative-procedures-in-the-uk/technical-note-citizens-rights-administrative-procedures-in-the-uk 8 November 2017> accessed 18 March 2020.

- family member of a British citizen who also has EU, EEA or Swiss citizenship and who lived in the UK as an EU, EEA or Swiss citizen before getting British citizenship
- primary carer of a British, EU, EEA or Swiss citizen
- child of an EU, EEA or Swiss citizen who used to live and work in the UK, and is in education or the child's primary carer

Where people are deemed eligible to apply for settled status, serious criminality or security are the only grounds for refusal. However, as explained in the next few sections, the changes made to the Immigration Rules have expanded the number of people who could be refused settled status or have their status curtailed or cancelled after it has been granted.[87]

Right to appeal a decision

A right of appeal to the immigration tribunal for people refused pre-settled or settled status under the EUSS came into force on 31 January 2020 under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. It will allow appeals against a decision to refuse an application as well as a decision to grant pre-settled status where the applicant believes they should have been granted settled status. It also provides a right of appeal against decisions to revoke settled status and against deportation orders. However, the right of appeal only applies to decisions made on or after 31 January 2020. Applicants wishing to challenge decisions made before this date will have to challenge the decision either by administrative review or judicial review. Appeals will be heard in the immigration tribunal, but in line with other immigration cases, decisions can be certified in the interests of national security or public interest, in which case the appeal will be heard by the Special Immigration Appeals Commission. If a decision is certified on the basis the person is liable to deportation, the individual does under these new rules have the right to return to the UK in order to attend their appeal hearing in person, unless their return may cause serious problems to public policy or public security.

Applicants are also entitled to seek an administrative review of the decision if they feel it is wrong. There is an £80 fee for this. This is an internal review process where another official within the Home Office reviews the initial caseworker's decision to check for errors. If it is deemed to contain errors the original decision can be changed or overturned. Interestingly, unlike administrative reviews in other immigration applications, applicants can put new evidence in front of the reviewer to show they qualify for a grant or different grant of status. However, the new Immigration Rules for EU Settlement do not allow administrative review of a decision to refuse settled status on grounds of 'suitability' and misleading or false information which is discussed more fully in the section below.

Since the appeals regime has come into force it is possible for an applicant to seek an administrative review before deciding to appeal. Both systems are intended to run in parallel.

In the absence of a right of appeal or the ability to seek an administrative review applicants may be able to seek a judicial review. This is also the only potential legal redress option open to those who do not succeed at appeal. However, it should be noted that the grounds for judicial review are limited. As discussed previously this is a specialised area of law, is very costly for the applicant[88] and is actually much more limited in scope than an appeal. Judicial review is not a review of the decision, but of the decision-making process, therefore even if a judge determines that a decision was made unlawfully, the Home Office could make the same decision after reconsideration. This is why well-drafted grounds and a properly prepared evidentiary bundle of documents by a specialist lawyer are important.

87. ibid. "*In accordance with our obligations under the Withdrawal Agreement, EU citizens and their family members who can evidence to the UK authorities that they fall within the scope of the Withdrawal Agreement (i.e. are lawfully resident before the specified date) must be granted status by the UK authorities unless one of the grounds for refusal permitted by the agreement is met. The UK authorities will have no discretion to refuse an application in other cases.*"

88. Unless a Legal Aid provider can make an exceptional case funding application. But the limitations on both eligibility for applicants and difficulty of finding advisers to do this has been discussed previously.

Settled and pre-settled status

On 7 March 2019, a statement of changes to the Immigration Rules was laid before Parliament to provide for the full opening of the scheme from 30 March 2019. In a written statement to Parliament, Caroline Nokes, the Minister of State for Immigration at the time, expressly said the purpose was for

> ***"resident EU citizens and their family members to obtain the UK immigration status which they will require in order to remain here permanently [emphasis added] after the UK's withdrawal from the EU."***

Furthermore:

> ***"the full opening of the EU Settlement Scheme from 30 March 2019 will provide a straightforward and user-friendly means for resident EEA and Swiss citizens and their family members to remain here permanently [emphasis added]. They make a huge contribution to our economy and society and the full opening of the scheme is tangible evidence that we want them to stay."*** [89]

Settled status is available to EU citizens who have accrued five years of continuous residence[90] in the UK prior to 31 December 2020. Those who moved to the UK prior to 31 December 2020 but who have not yet lived in the UK for five years may be eligible for pre-settled status.

The pre-settled status is not permanent and only allows the applicant the right to remain in the UK for five years. After this time, they are entitled to apply for settled status, but this must be before their leave expires.

Whilst the five-year residence test is in line with other permanent immigration status requirements, there is serious concern that too many EU citizens are being awarded pre-settled status due to difficulties in providing full and correct documentation or proving continuous residence, and errors in data-processing systems used for determining residence.

The House of Commons Home Affairs Select Committee conducted a review of the scheme and took a wide range of evidence, including from ministers, in February 2019.[91] The committee questioned the then Home Secretary Sajid Javid on people not being able to prove their status and therefore incorrectly getting pre-settled status. In a follow-up letter on 1 May 2019, Mr Javid clarified that "*applicants are successfully being granted the status they qualify for*" because of "*the Home Office's flexible overall approach*". Moreover, caseworkers will accept a "*wide range of evidence*" and "*applicants can rely on any evidence available to them, reflecting their personal circumstances*". Mr Javid added that the Home Office will "*exercise discretion in the applicant's favour*", asserting that "*the 'correct' immigration status is the status for which the applicant demonstrates that they qualify*". [92]

The Home Affairs Select Committee in its final report on 14 May 2019 said that while they welcomed the flexible approach they were "*particularly disappointed*" by the Home Secretary's assertion that "*the 'correct' immigration status is the status for which the applicant demonstrates that they qualify*". They called this "*callous*", adding that a

> ***"rigid enforcement of this line would not be fair or just, as it would allow for the possibility of long-term EU residents of the UK – who, for whatever reason, are unable to evidence their eligibility for settled status—being granted a lesser status than that to which they are rightfully entitled."*** [93]

89. Caroline Nokes, 'EU Settlement Scheme: Written statement – HCWS1387' (UK Parliament, 7 March 2019) <www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-03-07/HCWS1387/> accessed 18 March 2020.
90. There are exceptions to this and a period of 12 months for an important reason (e.g. childbirth, serious illness, study, vocational training or an overseas work posting) will be allowed as will departure from the UK for military service, as a member of the armed forces or family member of someone in the armed forces or as a Crown servant or family member of one.
91. Home Affairs Committee, EU Settlement Scheme (HC 2017–19, 1945).
92. Letter from the Home Secretary (1 May 2019) <www.parliament.uk/documents/commons-committees/home-affairs/Correspondence-17-19/19-05-01-Letter-from-the-Home-Secretary-relating-to-EU-Settlement-Scheme.pdf> accessed 18 March 2020.
93. https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1945/194508.htm

In June 2019, the ICIBI reported that some caseworkers have been incorrectly applying the guidance given to them on the flexile evidentiary approach.[94]

The Home Affairs Select Committee was also concerned that the Home Office had confirmed to them that 14 per cent of the applicants who were granted settled status were initially offered pre-settled status and had to submit additional information to obtain a status to which they were entitled.[95] This to them demonstrated the need for conclusive evidentiary proof before the correct status was granted, something not all vulnerable groups would be able to provide.

Current statistics show that of the 2.45 million applications decided by the end of December 2019, 58 per cent were granted settled status and a significant 41 per cent were granted pre-settled status (see **Table 7**).

Via a series of FOI requests, the PLP discovered that 90 per cent of challenges by way of administrative review by applicants who had been granted pre-settled rather than settled status were successful:[96] 451 administrative reviews had been requested up to 12 September 2019; the PLP requested but was refused more up-to-date data. Of the total 325 administrative reviews that had been decided by that date, 291 resulted in a decision of pre-settled status being overturned and settled status being granted. The PLP says this success rate is "*drastically higher*" than other Home Office administrative reviews, which was recorded in 2016–17 as 3.4 per cent, and raises "*red flags*" for EU citizens trying to settle in the UK.[97]

Although the number of administrative review applications (451) is very low as a proportion of the 885,000 pre-settled status decisions that may be eligible for challenge, it does not prove that correct decisions are being made. Some people may choose to reapply rather than challenge a decision to avoid the £80 fee, particularly if they wish to submit further evidence. The Home Office has not released statistics on the number of reapplications; they are recounted and added to the overall figure of applications made under the scheme. Thus, it is unclear how many of the total applications received are duplicates. Others may not challenge an incorrect decision to grant pre-settled status if they have problems securing evidentiary documents, do not know how to challenge the application or are just prepared to accept a grant of status rather than go through the process again or because they are not aware that they have been granted fewer rights because of their pre-settled status.

Thus, it is very hard to conclude from the low rate of administrative review applications that the system is providing people with the correct status. In addition, it is hard to believe that 41 per cent of people who have applied to date, which is around 3.1 million people, have all been in the UK less than five years and therefore can only be granted pre-settled status.

Furthermore, the PLP has concluded that, based on the available data on administrative review fee refunds, 48 per cent of pre-settled status grants could be incorrect. If an application is successful, the £80 fee to apply for the administrative review is refunded but not if the decision is overturned due to the applicant providing new evidence or if the application is invalid. Without up-to-date statistics from the Home Office on the number of invalid administrative reviews, it is not possible to determine exactly how many refunds are provided as a result of caseworker errors. The PLP reached its conclusion that 48 per cent of applications have been incorrectly decided by taking the 192 refunds processed by September 2019 and estimating the number of invalid applications from data provided in May 2019.[98]

These statistics are worrying as many vulnerable applicants may not have the means or the required evidence, or may not understand the mechanisms, to challenge an incorrect decision. The disadvantages of pre-settled status are discussed below.

94. David Bolt, '*An Inspection of the EU Settlement Scheme, Nov 2018–Jan 2019*' (Independent Chief Inspector of Borders and Immigration, May 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/799439/An_inspection_of_the_EU_Settlement_Scheme_May_WEB.PDF> accessed 18 March 2020.
95. https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1945/194507.htm
96. '*Admin Review & EU Settlement Scheme: What Does the 89.5% Success Rate Show?*' (Public Law Project, 3 December 2019) <https://publiclawproject.org.uk/blog/admin-review-eu-settlement-scheme-what-does-the-89-5-success-rate-show/> accessed 18 March 2020.
97. Lisa O'Carroll, '*Data Shows 90% of EU Settlement Scheme Appeals Successful*' The Guardian (London, 3 December 2019) <www.theguardian.com/uk-news/2019/dec/03/data-shows-90-of-eu-settlement-scheme-appeals-successful-brexit> accessed 18 March 2020.
98. ibid.

What does pre-settled status mean for individuals?

An individual with settled status, which in law is classified as indefinite leave to remain, will be able to stay in the UK for as long as they like, apply for British citizenship (if eligible), work in the UK, use the NHS, enrol in education or continue studying, access public funds such as benefits and pensions (if eligible), travel in and out of the UK and bring close family members to the UK after 31 December 2020. Any child born in the UK to a citizen with settled status will automatically be a British citizen, and individuals with settled status should be able to spend up to five years continuously outside the UK without losing their status.

Individuals granted pre-settled status, otherwise known as 'limited leave to remain', would retain many of the same rights but would only be able to spend two years continuously outside the UK without losing their status. Any children born to individuals in the UK after they receive pre-settled status would only be British citizens (at birth) if they qualified for it through their other parent, though they would be automatically eligible for pre-settled status. Individuals can stay in the UK for five years from the date of receiving pre-settled status, but they must apply again and get settled status if they want to stay for longer.

However, pre-settled status will be vulnerable to future changes in the Immigration Rules. Although, at the time of writing, people are being told they can apply for settled status after five years, after the UK has left the EU and the procedural safeguards offered by membership of the EU are no longer available, subsequent governments could alter the terms of the scheme or introduce requirements other than residence. The major concern is that with such a large number of people being granted pre-settled status there is a risk that a significant number could be left without a legal basis for remaining in the UK when their leave expires.

Restriction of rights for those with pre-settled status has already commenced. At the outset of the scheme, individuals granted pre-settled status had the same right to benefits, housing and homeless assistance as those with settled status. In 2019, three statutory instruments came into force[99] that limit access to these benefits. Now, in order for individuals with pre-settled status to access certain types of benefits and tax credits, as well as housing assistance, they require an additional EU right to reside in the UK, in addition to the limited leave to remain they obtain under pre-settled status. Other changes could be made in the coming years. This status is very different to the promise made by the government in the last few years and repeated in March 2019 of permanent settlement for all EU citizens resident in the UK prior to Brexit.

Failure to apply

If EU citizens do not apply for status under the scheme by 30 June 2021, they will be considered to be in the UK unlawfully. They will therefore become undocumented and could be subject to the hostile environment, immigration detention and removal. In October 2019, Security Minister Brandon Lewis indicated EU citizens could be "*deported*" [100] if they did not apply by the December 2020 deadline. However, after Guy Verhofstadt, the European Parliament's Brexit negotiator, visited the UK on 17 January 2020, the government confirmed that there would be no "*automatic deportation*" of applicants who miss the deadline to apply; they may have the possibility to apply late, provided they can explain why they didn't apply within the time limit. How this will work in practice remains to be seen. However, given UK Immigration Rules will apply after the transition period to all EU citizens, and this commitment is not enshrined in law, the government's statement cannot be held as a cast-iron guarantee.

Independent review body

The Government's Statement of Intent for the Scheme[101] stated that EU citizens' rights are to be monitored by a new Independent Monitoring Authority (IMA), created through primary legislation. The IMA will have

99. The Child Benefit and Child Tax Credit (Amendment) (EU Exit) Regulations 2019; Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) (EU Exit) Regulations 2019; Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019.

100. Whilst the media and politicians often use the word 'deportation' to include deportations and removals from the UK, the two have very different meanings: deportations are comparatively rare and only for serious criminals who have served a 12-month+ sentence. People with irregular immigration status are removed from the UK far more regularly.

101. 'EU Settlement Scheme: Statement of Intent' (Home Office, 21 June 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718237/EU_Settlement_Scheme_SOI_June_2018.pdf> accessed 18 March 2020.

the power to receive complaints from EU citizens and take appropriate action if it believes there has been a failure on the part of the authorities to implement the terms of the withdrawal agreement. It will also, like the Equality and Human Rights Commission, have the power to hold formal inquiries and launch legal action if it believes there have been systematic failures with the scheme. The IMA is meant to remain in place for at least eight years after the end of the transition period, when it may be abolished if the UK and EU agree that it is no longer required.

However, the government has provided little public information on how the IMA is to be structured or function in practice or any timescale for its set-up.

EU 'suitability' criteria – A cause for concern?

Assurances that most EU citizens will be granted permanent settlement under the EUSS by default and only serious criminals will be refused have been widely given by ministers and the former prime minister as well as articulated in the withdrawal agreement.[102] The issue of pre-settled as opposed to settled status has been discussed above. In its guidance on the EUSS, the government has also made clear that individuals convicted of minor crimes will still be eligible for settled or pre-settled status, and judgements will made on a case-by-case basis.[103] The general intention was to "*identify any serious or persistent criminals, or anyone who poses a national security threat*".[104] However, new Immigration Rules were laid before Parliament on 20 July 2018 and came into force on 28 August 2018,[105] introducing two new rules: EU15 and EU16 of Appendix EU. Applications could be refused on a mandatory basis if the applicant was subject to a deportation order (or of a decision to make such an order) or an exclusion order (or exclusion decision) – both of which were in line with refusing permission to serious criminals. However, the Home Secretary also inserted provision EU15(c) prohibiting granting of status to those subject to a removal decision on the grounds of their non-exercise or misuse of EU Treaty Rights and EU16 allowing refusal to those who had submitted false or misleading information in their application.

EU15(c) could apply: to someone who has been issued with a removal notice or notice of liability to be removed because they aren't working or don't have a genuine prospect of work; on the grounds of a supposed 'sham' marriage; under the Home Office's previous unlawful policy of treating rough sleeping as an abuse of rights; and to victims of trafficking with criminal convictions.

JCWI criticised the government for breaking its promise to EU citizens that only serious and persistent criminals would be penalised. It brought a judicial review against the Home Office to challenge this mandatory exclusion of applicants who satisfy the eligibility criteria but were "*subject to a removal decision under the EEA Regulations on the grounds of their non-exercise or misuse of rights under Directive 2004/38/EC*". The JCWI maintained that the expansiveness of what was then Rule EU15(c) was such that it was disproportionate in its effect and a breach of a legitimate expectation that only serious and persistent criminals were to be excluded from the scheme. In response, before the scheme fully opened on 30 March 2019, the Home Office settled JCWI's claim by agreeing to incorporate the principle of proportionality into the application of that specific element of the suitability criteria.

Data can be extrapolated on those not exercising treaty rights at present. The Migration Observatory[106] estimates the number of non-Irish EU citizens[107] above the age of 18 who have been economically inactive for five years or more to be 213,000. JCWI argues that some of these individuals may have permanent residence status allowing them to be here lawfully (although they still need to apply under the scheme). However, some individuals will not have permanent residence status and could face mandatory refusal (despite the newly added proportionality requirement) and be issued with removal

102. These assurances were given on record to parliamentary committees and to Parliament by Brandon Lewis when he was Immigration Minister, by Caroline Nokes, the current Immigration Minister, and by Sajid Javid as Home Secretary.

103. '*Apply to the EU Settlement Scheme (Settled and Pre-Settled Status)*' (UK Government, undated) <www.gov.uk/settled-status-eu-citizens-families/applying-for-settled-status> accessed 18 March 2020.

104. 'David Bolt, '*An Inspection of the EU Settlement Scheme, Nov 2018–Jan 2019*' (Independent Chief Inspector of Borders and Immigration, May 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/799439/An_inspection_of_the_EU_Settlement_Scheme_May_WEB.PDF> accessed 18 March 2020 para 1.13.

105. Home Office, Statement of Changes in Immigration Rules (Cm 9675, 2018) inserted a new Appendix EU to the Immigration Rules to provide for applications by resident EU citizens and their family members for leave to remain in the UK under the EU Settlement Scheme.

106. '*Unsettled Status: Which EU Citizens are at Risk of Failing to Secure Their Rights After Brexit?*' (The Migration Observatory, 12 April 2018) <https://migrationobservatory.ox.ac.uk/resources/reports/unsettled-status-which-eu-citizens-are-at-risk-of- failing-to-secure-their-rights-after-brexit/> accessed 18 March 2020.

107. Irish citizens will automatically have rights and do need to apply for settled status.

directions if they applied under the scheme, or they could be issued with removal directions if they come to the attention of the Home Office before applying. Most people in this situation may have no idea that this is the case as these rule changes have not been publicised by the government.[108]

The need for legally versed specialists to observe, hold to account and challenge rule changes is paramount if the rights of people who have migrated are to be fully protected.

The government has made the further commitment that "*once granted, status under the scheme is secure*".[109] In its report in May 2019, the House of Commons Home Affairs Select Committee responded to this by stating:

> ***"However, given the Windrush scandal, this statement may not carry the weight the government wishes it did, and there remain serious fears that EU citizens are at risk of losing their rights and their legal status in the UK."*** [110]

Despite this, on 9 September 2019, additional changes were made to the Immigration Rules that amended the scheme and came into effect on 1 October 2019.[111] In particular, they tighten the regime around suitability and allow both the settled and pre-settled status to be cancelled or curtailed – in other words, once granted, status is not secure. A detailed analysis of the various scenarios where this could apply cannot be provided in this report but some examples are offered. If an applicant has previously been refused entry to the UK under EEA Regulations, this historic decision may be used as grounds to refuse or cancel an application under the EUSS. An application may also be refused or cancelled if it relates to someone who previously had leave to enter or remain in the UK, but that leave was cancelled sometime in the past. The Immigration Rules also provide for the cancellation of leave where the applicant no longer meets the requirements of Appendix EU of the Immigration Rules. For example, if a family member ceases to be a family member during the pre-settled status grant, they could find their leave cancelled and would only be able to remain in the UK if they found another route to acquiring leave under the Immigration Rules; they would most likely need specialist advice for this. Pre-settled status is therefore not a guaranteed route to settlement.

Under these rule changes, even settled status is not a guaranteed status, although the refusal or curtailment of the application must be justified on public policy, public security or public health grounds under the EEA Regulations.

Either statuses could also be cancelled on the basis that false or misleading information, representations or documents were submitted and that untruthful material was used to obtain the status. It does not matter whether the applicant knew the material was false or misleading.

A lack of permanency of the new status for EU citizens was initially a concern highlighted by lawyers and experts. It has now come into effect. Individuals who face curtailment or cancellation of their leave will very likely need specialist immigration advice. As discussed previously, Immigration Rules can change the law without headline policy announcements and with minimal scrutiny.

Statics published by the Home Office and released on 16 January 2020 show that, since the introduction of the scheme, only six applications have been refused status on suitability grounds.[112] This is reassuring, however it is much harder to assess how many people have or will receive a removal notice before they come to apply for settlement. What existing data do show is that the proportion of enforced returns of EU nationals has increased in recent years, from 6 per cent in 2010 (976 out of 15,828) to 46 per cent in 2019 (3,519 out of 7,624),[113] despite the overall drop in enforced removals generally. Since the Windrush scandal, there has been a notable decrease in enforced removals, but this is not the case for EU citizens who are actively being identified and removed.

108. The Strategic Legal Fund has awarded the Migrant Legal Project funds for research and preparation of briefing materials to call for a reversion of the Civil Legal Aid Regulations.
109. *'EU citizens in the UK and UK nationals in the EU'* (Department for Exiting the European Union, Citizens' Rights, December 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790570/Policy_Paper_on_citizens_rights_in_the_event_of_a_no_deal_Brexit.pdf> accessed 18 March 2020.
110. Home Affairs Committee, EU Settlement Scheme (HC 2017–19, 1945) 16 para 40.
111. Home Office, Statement of Changes to the Immigration Rules (HC 2631).
112. *'EU Settlement Scheme Statistics, December 2019'* (Home Office, 16 January 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/857589/eu-settlement-scheme-statistics-december-2019.pdf> accessed 18 March 2020.
113. *How Many People Are Detained or Returned?'* (UK Government, 28 November 2019) <www.gov.uk/government/publications/immigration-statistics-year-ending-september-2019/how-many-people-are-detained-or-returned> accessed 18 March 2020.

Thus, it is clear that the right to remain in the UK after the transition period is not available to all EU citizens currently residing in the UK. Some of them could be denied the right to apply under the scheme or lose the status currently granted. This would mean that they would be in the UK unlawfully if they remained, subject to the hostile environment and therefore liable for removal or deportation. As the next section highlights, there are several groups of people who may noteven apply and who will therefore automatically become undocumented after 30 June 2021.

EU citizens likely to need legal advice and assistance

Thus, it is clear that the right to remain in the UK after the transition period is not available to all EU citizens currently residing in the UK. Some of them could be denied the right to apply under the scheme or lose the status currently granted. This would mean that they would be in the UK unlawfully if they remained, subject to the hostile environment and therefore liable for removal or deportation. As the next section highlights, there are several groups of people who may noteven apply and who will therefore automatically become undocumented after 30 June 2021.

EU citizens who have applied for the EU settlement scheme

The Migration Observatory, having analysed data on EU citizens, concluded in April 2018 that for the majority of EU citizens the application will be straightforward and simple:

> ***"The large majority of EU citizens should not have difficulty making an application. EU citizens in the UK have high average levels of education, a large majority are working, most are relatively young and most do not report any problems such as low language ability or poor health. The share of EU citizens who are not internet users is low, so most should be in a good position to navigate an online application system."*** [114]

Whilst for most people it does seem the application process is straightforward, as more than 2 million people have applied, this will not necessarily be the case for many vulnerable people. There have been numerous reports in the media and in the evidence given to the Home Affairs Select Committee[115] of individuals facing significant technical difficulties in applying, error messages, problems with document scanning and ensuing anxiety and stress. There are also serious questions regarding the number of people who have been given pre-settled status rather than the grant of permanent settled status as discussed above.

Nicole Masri of Rights of Women said that the application process was a really resource-intensive activity for an organisation let alone an individual without technological and personal support, and Marianne Lagrue reported that, while applications made by the Coram Children's Legal Centre took 1.5-2 hours on average, those with documentary or technical challenges took upwards of 10 hours. She added that some applicants did not realise that the email they received from the Home Office was actually their final decision, as all documentation – and the guidance and the application process itself – is currently provided in English.[116] The types of vulnerable people who have migrated who may have problems applying is discussed in the below.

114. *'Unsettled Status: Which EU Citizens are at Risk of Failing to Secure Their Rights After Brexit?'* (The Migration Observatory, 12 April 2018) <https://migrationobservatory.ox.ac.uk/resources/reports/unsettled-status-which-eu-citizens-are-at-risk-of- failing-to-secure-their-rights-after-brexit/> accessed 18 March 2020.
115. Home Affairs Committee, EU Settlement Scheme (HC 2017–19, 1945).
116. ibid [100], [101].

Table 7: EUSS statistics, December 2019*

Total applications received by 31 December 2019	Total applications concluded by December 2019	Outcome in concluded cases: Settled Status granted	Outcome in concluded cases: Pre-Settled Status granted	Outcome in concluded cases: Other**
2,756,100	2,450,100	58%	41%	0.7%

Notes: * The statistics are released as 'experimental statistics', meaning they are going through development and evaluation.
** 'Other outcomes' includes any that did not result in a grant of leave because the application was withdrawn or void (including where the applicant was ineligible to apply, e.g. because they were a British citizen), was invalid as it did not include the required proof of identity and nationality or other mandatory information, or was refused on eligibility or suitability grounds. Six applications have been refused on suitability grounds.

In May 2019 the Home Affairs Select Committee said the following:

> ***"We are very concerned by the fact that large numbers of EU citizens are at risk of being left out by the EU Settlement Scheme. We understand that, due to the functioning of free movement, the government cannot be expected to know exactly how many people are eligible or should be applying to the Settlement Scheme. However, we believe that the government needs to take additional action, beyond general awareness and publicity campaigns, to ensure that extra support is targeted towards children and vulnerable people to mitigate the risk of them being left out and potentially jeopardising their future in the UK."*** [117]

This section looks at the types of people who may not apply to regularise their status. The categories listed here are from the Migration Observatory's report '*Unsettled Status? Which EU Citizens Are at Risk of Failing to Secure their Rights after Brexit?*' [118] with additional observations and context. The statistics quoted are from that report.

It should be noted that in April 2019, the government pledged that up to £9 million would be available to help vulnerable groups. It said 57 organisations across the UK will receive funding to provide practical support to help a total of 200,000 people access the scheme who may be marginalised or in need of help.[119] However, 200,000 may be an underestimate of the number of vulnerable people who have migrated who actually need help. The International Organization for Migration will lead a partnership with three other organisations – St Mungo's, the3million and Here for Good – to support vulnerable EU citizens resident in the UK. Funding will also go to Citizens Advice, food banks, libraries, addiction centres and EU community organisations. All this is welcome, but it does not plug the gap for the specialised legal advice that many complex cases will require.

117. Home Affairs Committee, EU Settlement Scheme (HC 2017–19, 1945) para 91.
118. *'Submission to the Post-Implementation Review of the Legal Aid Sentencing and Punishment of Offenders Act 2012'* (Public Law Project, 27 September 2018) <www.publiclawproject.org.uk/wp-content/uploads/2018/09/LASPO-PIR-SUBMISSION-PLP.pdf> accessed 18 March 2020 para 28.
119. *'Funding Awarded to Support Vulnerable EU Citizens Apply for Settled Status'* (UK Government, 10 April 2019) <www.gov.uk/government/news/funding-awarded-to-support-vulnerable-eu-citizens-apply-for-settled-status> accessed 18 March 2020.

People who do not realise that they can or need to apply

Although applicants in this group may not necessarily require a lawyer's assistance, it will depend on their individual circumstances. What this section shows is the large number of people who could unintentionally become undocumented after the EUSS comes to a close and therefore be unlawfully here and liable to removal if their status is not regularised. Legal representation for applicants at this point could be imperative – their plight could be reminiscent of what the Windrush generation faced.

Many people may not apply because they incorrectly believe they do not need to. The government has spent £3.75 million on advertising campaigns and has pledged a further £1 million. However, the Advertising Standards Authority banned a radio advert that was produced from this money for being misleading: the advert said EU citizens living in the UK needed only a passport or ID card to qualify for settled status, even though more than one-quarter of applicants have been asked for proof of address or other documentation. How effective future advertising will be in reaching all vulnerable groups remains to be seen.

Organisations working with EU citizens report that people are unclear about the need to apply and even their experience is skewered as most individuals in contact with them are likely be more aware of the EUSS than those they have not heard from. Based on past experiences in the UK and abroad, there are clear problems with uptake of any government scheme. The following groups may well not realise they need to apply:

a) **People with existing permanent residence documents.** People with such documentation may not realise they need to reapply. Since 2004,146,000 non-Irish EU citizens have been granted permanent residence but do not have British nationality.

b) **Children**. People who do not apply may not realise that their children also need to apply. Many mistakenly also believe that because their children are UK-born they will automatically be British citizens, which is not the case. Nationality law is complicated and unless a child is born to a British or EU parent with permanent residence, they do not automatically acquire citizenship.

In 2017, there were an estimated 727,000 children reported to be non-Irish EU citizens. Among them, 442,000 were born outside of the UK and thus would either need to apply for settled status or naturalise with their parents (assuming the parents are eligible to do so).

A further 116,000 children were born in the UK but their parents had not been in the UK for five years or more, therefore the parent would not be able to acquire settled status and the children would not automatically get British citizenship.

An additional 239,000 UK-born children had parents who were EU citizens but they were reported by their parents to be British. But as the EU parent requires permanent residence, which can only be achieved after five years' continuous residence in the UK, we can conclude that 55,000[120] of these children did not have a parent who had been in the UK for more than five years. Thus, they could not be British.

Home Office data suggest that only about 29,700 EU (including Irish) citizens under the age of 18 have been granted UK citizenship.[121] Thus, the Migration Observatory argues that possibly tens of thousands of children of EU citizens have parents who do not realise that they are not automatically UK citizens, and so are unlikely to register them for settled status.

Early in January 2020, the GLA published its research on London's children and young people who are not British citizens. It estimates that there are 797,000–821,000 EEA national children resident in the UK (up to age 17) and 328,000–338,000 young people (aged 18–24). The GLA concludes that there is a risk

120. *'Unsettled Status: Which EU Citizens are at Risk of Failing to Secure Their Rights After Brexit?'* (The Migration Observatory, 12 April 2018) <https://migrationobservatory.ox.ac.uk/resources/reports/unsettled-status-which-eu-citizens-are-at-risk-of- failing-to-secure-their-rights-after-brexit/> accessed 18 March 2020.

121. ibid.

that barriers to applying for settled status before the deadline of 30 June 2021 will result in a significant proportion of children and young people becoming undocumented.[122]

c) **People with very long residence**. By 2017, 92,000 EU citizens had lived in the UK for at least 40 years, 146,000 for at least 30 years and 284,000 for at least 20 years. Some of these people may not realise that, despite their long residence, they still need to apply. One elderly Polish lady who runs a cafe in Belsize Park said she had been in the UK for over 35 years, so she knew she was safe and didn't have to do anything. She said "*They won't be coming for me*", but she was worried about her nephew. She was unaware that there was an application process and, in any event, did not believe that it would apply to someone like her.[123]

Complex cases

a) **Victims of domestic violence**. In the year ending 2017, it was estimated that there were 53,000 female EU victims and 34,000 male EU victims who had suffered domestic violence.[124] Such victims are usually controlled by their partners and may fail to produce documentary evidence of their residence, especially if they rely on their partner for it. It is very hard to gauge the exact circumstances of individual cases and whether any such individual would seek independent help.

b) **Victims of exploitation or trafficking**. Similarly, such victims are unlikely to have evidence of their residence or income. Working unlawfully would also be a crime that could bar these individuals from a settlement grant even if they did manage to apply. Individuals in this category will have multiple issues to resolve in order to regularise their status and will need legal and professional assistance. Numbers are very hard to estimate. In 2013, the Home Office estimated the number of victims at 10,000–13,000 of any nationality. The 'duty to notify' introduced by the Modern Slavery Act 2015 requires public bodies such as the police, the National Crime Agency and local authorities to report to the government all potential adult victims of modern slavery encountered in England and Wales. Between November 2015 and June 2017, these agencies reported 746 cases of potential victims in England and Wales who were from an EEA country.

c) **People with mental health issues and other disabilities**. People in this situation may struggle to understand both the need to apply and the process. They may not be able to show continuous residency documentation. It has not been possible to obtain data for this cohort. However, with regard to mental health, 45,000 non-Irish EU citizens reported a mental health issue. About half said that this condition limited their daily activity 'a little' and one-quarter said that it limited their daily activity 'a lot'. [125] People may have barriers to accessing or understanding the system itself.

d) **Third-country family members**. People who suffer from any of the above, or whose partner has died and are reliant on their partner or family member for their status, may have even more difficulties as they have no right to apply in their own right. Existing EU law does allow for retained rights of residence in these circumstances. Again, this is hard to navigate and it can be very hard for people to provide relevant collaborative evidence. Individuals would benefit from legal advice, especially as the new scheme (with its low evidential requirements and online form) does not allow for detailed explanations of an individual's particular circumstances. Legal representation will also be necessary if an individual needs to challenge a Home Office refusal through the courts.

122. *'London's Children and Young People Who Are Not British Citizens: A profile'* (GLA, January 2020), <https://www.london.gov.uk/sites/default/files/final_londons_children_and_young_people_who_are_not_british_citizens.pdf> accessed 18 March 2020.

123. An interview conducted for this paper. The author explained the scheme to her and informed her that everyone needed to apply when it went live.

124. Data provided by ONS from Crime Survey of England and Wales, year ending March 2017; population estimates from Migration Observatory analysis of Labour Force Survey for Q1 2016 – the mid-point of the period during which crimes reported in YE March 2017 would have occurred. This measure of any domestic abuse experienced in the last year relates to adults aged 16–59 only and is taken from the self-completion section of the survey, which is designed to reduce the extent of underreporting for sensitive issues that respondents may not want to discuss openly with an interviewer. Full details of the offences included are provided in ONS (2018b, p. 52). All figures include Irish nationals.

125. Migration Observatory analysis of Labour Force Survey, 2017. Respondents select from list of possible health problems and are included here if they select both *'depression, bad nerves or anxiety'* or 'mental illness or suffer from phobias, panics or other nervous disorders' and if they report that this is their main health problem and that it has lasted or is expected to last at least 12 months.

Here for Good [126] has provided one such case study from a client it assisted:

- D is a third-country national, married to an EU national. They have lived and worked in London since 2003 but are now separated, in the process of divorce.
- Several years ago, D's partner secretly annulled their marriage, which took place in their home EU country in 2004. This was overturned in court, but the couple are now going through formal divorce proceedings.
- D had a Home Office residency card provided in 2004. They have since applied for further documentation, which has been rejected by the Home Office due to evidential issues arising from the family situation. This means D cannot work.
- Here for Good is supporting the appeal.

e) **The elderly.** Many will be long-term residents, as discussed above, but degenerative conditions such as dementia caused by Alzheimer's disease may mean that older residents have limited information on their past immigration status. Those who have family members to help will be less at risk than those who are more isolated or in care homes. The 2011 Census included 5,600 non-Irish EU born people aged 75 or older who were living in communal establishments such as care homes.[127] Older foreign-born residents were also among those more likely to report not having a passport in the 2011 Census. Online literacy is an additional barrier for this cohort as the application process is electronic.

f) **People with chaotic lives**. This group will struggle to provide evidence of residence in order to obtain settled status easily. One example is rough sleepers, for example: the Housing, Communities and Local Government (2018) estimate said there were 760 EEA national rough sleepers in England during the autumn of 2017, but the Combined Homelessness and Information Network counted 3,000 EEA national rough sleepers in London alone between April 2016 and March 2017. People from Roma communities who move about frequently may well be affected too; in the 2011 Census,[128] 59,000 people reported their ethnicity as Gypsy or Traveller.

People without proof of residence could substitute this with proof of work. However, a lot of people with informal and casual work may struggle to provide such evidence. In addition, people who do unpaid work, such as caring for elderly or ill relatives, will struggle to prove it.

g) **People with limited literacy or fluency in English**. In the 2011 Census, 288,000 EU citizens reported not speaking English well or at all. People in this category may have difficulty accessing and completing the application without assistance and they may be hesitant in approaching community groups or charities for help.

h) **People who choose not to apply because they fear rejection**. This could include the 85,000 people previously refused permanent residence, those with minor or spent criminal convictions, those who have been homeless at some point in time in the UK and those involved in cash-in-hand work.

As the above data show, it is very difficult to predict the numbers of EU citizens who will struggle to secure settled status, however, on any analysis, this could be hundreds of thousands.

Here for Good has stated that even if 10 per cent of the EU citizens currently in the UK are vulnerable or have difficulties with their applications, it would amount to 380,000 people. The figure of 10 per cent is reiterated by many immigration lawyers as a conservative rule of thumb.

126. Details provided by Tahmid Chowdhury, co-founder of Here for Good.
127. Census 2011 table DC2118EWla.
128. Census 2011 table CT0769.

Undocumented people – Subjects of the hostile environment

8

Who is undocumented?

To understand the legal needs of people who have migrated, it is important to understand the groups of people who do not have existing leave to remain in the UK and so present as undocumented.[129]

1. The dominant perceived image of most undocumented people 'arriving in the back of a lorry' is misplaced. This is actually thought to be the smallest category of undocumented people. This category includes those who evade formal immigration controls and those who present false papers or enter the country without the correct the documentation.
2. The second category is people who have been lawfully present in the country but remain after the end of the permitted period. This category includes two main subcategories:
   - **i.** People seeking asylum who stay in the country despite a final decision refusing them a right to remain
   - **ii.** People whose period of legal residence has expired without renewal. This group includes those who are no longer eligible to apply for extensions of stay because of the introduction of the points-based system, or because other Immigration Rules have changed. Thus, the following people all become overstayers: people in work and students on previous two-year post-study schemes who no longer qualify to remain but have made a life in the UK, people originally on visitor visas who have stayed on to look after ill or elderly family members and people on limited discretionary leave who have not been able to extend their leave, such as minors who are now adults.
3. The third category is children born in the UK to parents who are not British nationals. They have not migrated themselves but lack immigration status. This includes children whose parents fall within the first two categories, in addition to children who have been trafficked without formal documentation, and former unaccompanied minors granted temporary leave to remain until the age of 17.5 who are then refused leave to remain upon reaching adulthood.

Estimated numbers of undocumented people

In 2005, the Home Office commissioned a study on the numbers of undocumented people.[130] The overall estimate was presented as a range between 310,000 and 570,000 with a central estimate of 430,000, as at census day 2001. Commissioned by the mayor of London, the London School of Economics (LSE) conducted its own study in 2007.[131] It updated Woodbridge's study by including the

129. The words 'undocumented', 'irregular' and 'illegal' are used interchangeably. There is much debate on choice of language. This report has used the word 'undocumented' but published work is cited by title.

130. *'Sizing the Unauthorised (Illegal) Migrant Population in the UK in 2001'* (Home Office, 2005) <www.ons.gov.uk/aboutus/transparencyandgovernance/freedomofinformationfoi/illegalimmigrantsintheuk> accessed 18 March 2020.

131. 'Economic impact on the London and UK economy of an earned regularisation of irregular migrants to the UK' (GLA, May 2009) <www.ons.gov.uk/aboutus/transparencyandgovernance/freedomofinformationfoi/illegalimmigrantsintheuk> accessed 18 March 2020.

children of undocumented people. The LSE's range was between 417,000 and 863,000 with a central estimate of 618,000, as at the end of 2007. About 70 per cent of all undocumented people were estimated to be in London. In November 2019, the Pew Research Centre also produced figures for undocumented people in the EU including the UK.[132] It estimated that there were between 800,000 and 1.2 million undocumented people living in the UK without a valid residence permit. Its other keys findings were: [133]

- around one-third of undocumented people had been living in the UK for 10 years or more
- they included similar shares of men and women, and around 14 per cent were children
- there was no evidence of any increase in the number of undocumented people living in the UK since 2014
- half came from the Asia Pacific region, with no breakdown by individual country
- the UK had one of the largest undocumented populations in Europe, alongside Germany

The Pew study uses the 'residual method' to estimate the numbers. It compares the estimated number of non-EU citizens living in the UK to an estimate of the number holding a valid residence permit in the same year. In 2019, the ONS and the Home Office produced a joint statement suggesting they did not plan to produce a new estimate using this method because of limitations in the data and methodologies.

The Pew Research Centre recognises that the numbers are based on estimates, but also adds:

> ***"The London School of Economics study placed the number of unauthorized immigrants residing in the country between 417,000 and 863,000 in 2007. Ten years later, after hundreds of thousands of additional migrants from non-EU–EFTA countries entered and stayed in the UK, our 2017 estimate of 800,000 to 1.2 million unauthorized immigrants with waiting asylum seekers would be consistent with recent migration trends."*** [134]

The GLA research on children and young people referred to in the section above and published in 2020 estimates that the UK undocumented population lies between 594,000 and 745,000 with a central figure of 674,000. The report's key findings are as follows:[135]

- More than half (397,000) of the UK's 674,000 undocumented adults and children live in London.
- The population of undocumented children in the UK increased by almost 56 per cent between March 2011 and March 2017. There are now estimated to be 215,000 undocumented children in the UK.
- Of the estimated number of undocumented children (under 18 years of age), 107,000 are living in London and there are a further 26,000 undocumented young Londoners (aged 18–24).
- It is estimated that around half of all children with insecure immigration status were born in the UK.

As the GLA's central estimate of 674,000 and Pew Research Centre's central estimate of 1 million undocumented people demonstrates, figures vary tremendously, based on the methodology used.

132. Phillip Connor and Jeffrey S. Passel, *'Europe's Unauthorized Immigrant Population Peaks in 2016 Then Levels Off'* (Pew Research Center,13 November 2019) <www.pewresearch.org/global/2019/11/13/europes-unauthorized-immigrant-population-peaks-in-2016-then-levels-off/> accessed 18 March 2020.
133. *'Pew Research Centre Estimates on the Irregular Migrant Population the UK and the Rest of Europe'* (The Migration Observatory, 13 November 2019) <https://migrationobservatory.ox.ac.uk/resources/commentaries/pew-research-centre-estimates-on-the-irregular-migrant-population-the-uk-and-the-rest-of-europe/> accessed 18 March 2020.
134. Phillip Connor and Jeffrey S. Passel, *'Europe's Unauthorized Immigrant Population Peaks in 2016 Then Levels Off'* (Pew Research Center,13 November 2019) <www.pewresearch.org/global/2019/11/13/europes-unauthorized-immigrant-population-peaks-in-2016-then-levels-off/> accessed 18 March 2020.
135 *'London's Children and Young People Who Are Not British Citizens: A profile'* (GLA, January 2020), <https://www.london.gov.uk/sites/default/files/final_londons_children_and_young_people_who_are_not_british_citizens.pdf> accessed 18 March 2020.

The authors of the GLA research write:

> ***"As there are no official national statistics for the size of the undocumented population in the UK or London, estimates in this report are constructed from different data sources, with different methodologies and purposes, including the most recent census (ONS, 2011); representative samples (IPS); and administrative data (National Insurance number allocations). Therefore, the final figures must be seen not as definitive, but as a central estimate within a likely range, based on existing data sources, and should be used with caution."*** [136]

Whether the total figure is 594,000 (the lower estimate predicted in the GLA report) or 800,000 (the lower Pew estimate) or falls within the much higher estimates, what is clear is that there is a significantly large volume of people without a legal right to remain in the UK.

To understand the legal issues faced by undocumented people and to consider how best they can be assisted, it is useful to try and quantify the different categories. There are significant official data gaps, which prevent accurate or up-to-date estimates, but it is possible to draw some rough numerical estimates. There are many statistical caveats and the purpose of these numbers is illustrative at best.

The majority of undocumented people are seeking asylum and there is some statistical data for this category. In 2001, there were 286,000 people who were refused asylum. Taking into account removals and voluntary departures, it is estimated that there was a resident population of 219,000 people refused asylum as at 2007, representing almost two-thirds of the Home Office's estimate of total undocumented people. In 2019, David Wood, former Director General of Immigration Enforcement, estimated that half of all people refused asylum are still in the UK. He analysed figures between 2010 and 2016 and found that 80,813 people were refused or withdrew their asylum applications; of these, only 29,659 were removed.[137] The House of Commons research unit has reached a similar estimate through different data sets.[138]

The LSE estimates that there are between 44,000 and 144,000 children who were born in the UK to undocumented parents. The GLA research puts the total number of undocumented children at 215,000, showing a 56 per cent increase in numbers between 2011 and 2017, and finds that around half of undocumented children were born in the UK. These numbers are extremely worrying as it shows the current immigration system is failing children.

The remaining figure is made up of illegal entrants and overstayers, and whilst it is very difficult to disaggregate this category, it is widely believed that the majority of people in this category are overstayers; many have now been in the UK for lengthy periods of time. The Pew Research Centre estimates that a third of undocumented people have been in the UK for over 10 years.

As the authors of the GLA report summarise, following successive government policies since 2010, more individuals have risked becoming undocumented with dwindling prospects of securing their status. Various barriers – the rising cost of Home Office fees, increasingly complex immigration systems, reduced availability of high-quality and free legal advice and government cuts to legal aid for most immigration cases,[139] – have led to a low number of individuals attempting to regularise their immigration status.

136. ibid

137. David Wood, *'Controlling Britain's Borders: The Challenge of Enforcing the UK's Immigration Rules'* (Civitas, January 2019) <http://civitas.org.uk/publications/controlling-britains-borders/> accessed 18 March 2020..

138. *'Asylum Statistics'* (House of Commons Library, 17 March 2017) <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01403#fullreport> accessed 18 March 2020.

139 *'London's Children and Young People Who Are Not British Citizens: A profile'* (GLA, January 2020), <https://www.london.gov.uk/sites/default/files/final_londons_children_and_young_people_who_are_not_british_citizens.pdf> accessed 18 March 2020.

The lack of immigration status and the wider costs to society

It has not been possible to present a data-driven analysis of the wider costs to society of an undocumented population, but it is fair to say that the very high personal costs to individuals of not having immigration status are also mirrored in costs to society. Costs emerge in multiple ways and some are identified below.

The immigration legal framework bars people without status from applying for routine visas to obtain the right to remain in the UK. Complicated individual cases, with which most vulnerable people present, can only really be resolved by appeals (where they still exist) or, in many cases, judicial review proceedings, both of which are costly to the public purse.

Undocumented people are often placed in detention and remain there for long periods of time as they cannot easily obtain legal advice and where removal from the UK is not prompt and often unfeasible. The widespread use of detention in the UK has been the subject of much debate and criticism. Detention estates are very costly to run and the cost of this is borne by the taxpayer. Additionally, in cases where detained individuals do obtain legal representation and have been wrongly detained, their lawyers will be able to sue the Home Office for unlawful detention. The Home Office has had to pay out substantial sums of money in damages for successful claims over the years. In June 2018, the Home Affairs Select Committee received figures showing that, in the period 2012–17, 850 people were unlawfully detained and the government had to pay out £21 million in compensation.[140] This is a further cost to the state.

There are of course significant costs of detention for individuals, not least in terms of their physical and mental wellbeing. In some cases, this personal cost translates into costs to the state where people need medical attention and even long-term counselling when finally released. During detention, people often lose their jobs and sometimes their home and so need to completely rebuild their lives. These costs when not picked up by the state are often picked up by charities. Detention or even the threat of removal affects a person's family members too, and can often have serious negative effects on children.

The Law Society and the NAO have commented on the wider implications for society resulting from LASPO reducing the scope of legal aid and from costs generated elsewhere in public services as a consequence of problems remaining unresolved for individuals. There are also increased costs to the court system as people try and represent themselves. Immigration tribunals do not keep statistics on the numbers of litigants in person. Anecdotally, however, it is widely acknowledged that there has been an increase in the number of people representing themselves in immigration tribunals. The family courts do keep such figures and, using these, the NAO reported in 2014 that in the year following LASPO there was a 30 per cent year-on-year increase in family court cases in which neither party had legal representation. Furthermore, the NAO estimated additional costs to Her Majesty's Courts and Tribunals Service of £3 million per year, plus direct costs to the MoJ of approximately £400,000.[141]

The NAO also echoes the costs to public health, highlighting the potential costs to the wider public if people whose problems could have been resolved by legal aid-funded advice suffer adverse consequences to their health and wellbeing as a result of no longer having access to legal aid.[142]

From a fiscal position, the LSE concluded that regularisation of undocumented people could be expected to contribute to higher levels of national output as it would enable a greater proportion of irregular residents to work and to make better use of their human capital. Estimates suggest that, over the long run and with supportive policies, this might add £3 billion per annum to GDP.

140. Amelia Gentleman, '*Home Office Pays Out £21m After Mistakenly Detaining 850 People*' The Guardian (London, 28 June 2018) <www.theguardian.com/uk-news/2018/jun/28/wrongful-detention-cost-21m-as-immigration-staff-chased-bonuses> accessed 18 March 2020.

141. '*Implementing Reforms to Civil Legal Aid*' (National Audit Office, 20 November 2014) <www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf> accessed 18 March 2020.

142. ibid paras 1.17–1.34.

The social, economic and legal needs of each category (and subcategory) vary considerably. It is therefore difficult to draw general conclusions on the whole cohort. However, undocumented people do not contribute most types of taxation, some may sleep rough and they are not entitled to public benefits or access to public services such as obtaining driving licences or opening bank accounts, or indeed the ability to rent accommodation. Many feel isolated, suffer mental health issues and live in fear of the authorities, preventing them from leading normal fulfilled lives and contributing to society. A hidden population leads to an increase in the underground economy, whether through unscrupulous employers or rogue landlords ready to exploit the situation. A hidden population also represents a cost to social cohesion and the functioning of a democratic society.

Denise McDowell of the Greater Manchester Immigration Unit said:

> ***"We do not give counselling, but […] we are often trying to maintain people's mental health. People are in a situation which is unbearable; they are neither moving forward nor being removed."***

Increasing immigration provision – A new opportunity?

9

This final section looks at possible areas to explore to help increase provision of free immigration advice and to create a more strategic legal advice sector. The suggestions here are not detailed working models but potential ideas for philanthropic funders to consider. If the ideas in principle gain traction then more detailed work needs to be done on devising the models, identifying the mechanism of delivery and creating the most cost-effective and sustainable way of doing so. Much work to date has been done on evaluating existing models from which lessons can be drawn, including Ceri Hutton and Jane Harris' work, Methods of Increasing the Capacity of Immigration Advice Provision.[143]

Immigration law in the UK has continuously eroded the rights of people who have migrated over time. Statistics show that over one-third of immigration (non-asylum) providers have been lost as a result of LASPO. What is clear is that the current prognosis for free immigration advice is dire, if it is not to be extinguished completely, and if the current immigration framework is to be successfully challenged, a bold new vision and strategy is needed.

Increase the number of specialist immigration advisers

The conclusion from this work is that it is imperative that the number of specialist immigration providers willing and able to provide free immigration advice is increased. There is a shocking shortage of specialist immigration advisers who are able to provide free legal advice for complex immigration cases. The population of undocumented people is now estimated to be between 674,000 and 1 million[144] and may increase significantly if even 10 per cent of EU citizens do not obtain legal status through the EUSS.

Analysis of the types of complex cases with which people present demonstrates that increasing advice in one strand of immigration law, for example detained cases, family migration or registration for children with insecure immigration status, is not sufficient: undocumented people have a wide range of legal issues that need to be addressed. Most pre-existing undocumented people will have a complicated and irregular immigration history and, by default, will be unlawfully present in the UK and will therefore be barred from routine applications. It is necessary to unravel this, provide mitigating representations with documented evidence and seek to rely on exceptionality and case law, both national and from the European Court of Human Rights. Areas such as deportation, domestic violence, trafficking and modern slavery are specialised areas. Immigration advisers also need to be able to stop removals and deportations that are not lawful, deal with the appeals process and, where necessary, judicially review a Home Office decision; only specialist immigration solicitors are able to do this although advisers at OISC Level 3 are also able to undertake most of this work (save substantive judicial reviews).

143. Hutton, Ceri and Harris, Jane (2020) Methods of Increasing the Capacity of Immigration Advice Provision <https://www.phf.org.uk/publications/methods-of-increasing-the-capacity-of-immigration-advice-provision/>

144. Central estimates from the GLA and Pew Research referenced in earlier sections.

Early legal intervention could be vital for EU citizens with complex cases so that they can secure legal status and avoid becoming undocumented. Ensuring that vulnerable EU citizens are aware of the EUSS or can access it is another significant challenge. The very nature of the cases in which people will not automatically qualify means they will present with complicated scenarios, which will need meaningful representations from specialist advisers. Thus far, the need for legal advisers to have detailed EU law knowledge has been low, but the present situation highlights the lack of specialist advisers familiar with the intricacies of EU law. This is a factor to consider when trying to increase capacity.

Therefore, a sensible first step to improve legal support would be to increase the number of specialist immigration lawyers and OISC Level 3 providers (ideally with a good understanding of EU regulations and directives) who can offer free immigration legal advice and representation to vulnerable clients. Although limited in scope and cumbersome, a suggested starting point would be to assess existing provision of legal aid.

Enhancing existing free provision

Legal aid

Legal aid obviously enables free legal provision. LASPO has removed free legal advice for most immigration cases. However, where a matter is out of scope but an individual's fundamental human rights are engaged, usually in immigration cases in the form of Article 8 (the right to private and family rights), it is possible to apply for ECF.

This report presents three key findings on legal aid:

a) Immigration providers with legal aid contracts are not making ECF applications.

It would be possible to increase free legal advice through the existing ECF framework, which has been simplified and, as the statistics demonstrate, is clearly proving successful in many immigration cases. It is however clear that immigration providers who already have the knowledge and capacity to make these applications are doing so but probably do not have the capacity or financial ability to do more. However, many providers are not utilising the ECF option for fear of the difficulties and 'at risk' time it takes. This is an area where peer learning, information and training in making applications would assist in increasing take-up.

Importantly, the difficulties of applying for ECF have been noted in the PIR of LASPO, and the government has made three commitments due to be implemented by the end of 2019:[145]

- to work with legal practitioners to consider whether the process for applying for ECF can be simplified and ensure that the forms and guidance are as accessible as possible
- to work to improve timeliness of the ECF process to ensure that people can access funding when they need it
- to consider whether it is necessary to introduce a new emergency procedure for urgent matters to access ECF

145. *'Legal Support: The Way Ahead'* (Ministry of Justice, February 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777036/legal-support-the-way-ahead.pdf> accessed 18 March 2020.

b) Immigration providers with legal aid contracts are not taking on cases.

Assessing why providers who apply for legal aid contracts fail to use their matter starts would enable a better understanding of the difficulties with legal aid. What is it that changes for a law firm/organisation that applies for a certain number of cases, presumably calculated on the basis of existing capacity, but then is unable to fulfil them? Understanding the reasons behind this and then addressing the problems would greatly assist the sector since these firms already have legal aid contracts and the infrastructure in place to deliver legal assistance.

c) Immigration providers apply for legal aid contracts but then leave the scheme.

There are spikes in numbers when new legal aid contracts are issued, but then data show that the numbers subsequently reduce. This poses similar questions to the previous category. Why do firms/organisations that feel they can deliver immigration advice, and go through the complex and costly application process, subsequently cease to run immigration legal aid contracts? Addressing this would help to ensure that those intending to deliver free legal advice are actually able to do so.

Harnessing existing private and pro bono provision

One option for increasing capacity is to encourage private immigration solicitors to undertake work for vulnerable groups. A large pool of trained immigration lawyers already exists: 1,607 private firms have an immigration practice compared to 314 organisations that provide free assistance under legal aid. Their skills can be harnessed by encouraging them to include free immigration advice. A 'provision-enhancing' model could be utilised where, as an example, the individual lawyer uses 50 per cent of their caseload for free applications for vulnerable people who have migrated and half their salary is funded. A starting point might be to identify firms that already provide pro bono immigration assistance and make this a more permanent arrangement. **Appendix 7** lists all firms undertaking immigration work by region, which will assist in mapping such an initiative. Fee-charging OISC organisations are also shown by region in **Appendix 5**.

Geographic need and provision

There are clearly many advice deserts around the country and this needs to be addressed. The statistics obtained for this report are not sufficient to unpick regional differences in legal provision versus need; detailed mapping would be needed to identify the type of immigration providers, private, pro bono and legal aid within each region. The exact number of immigration advisers and the nature and number of cases they take on should be considered in light of the need presented in those areas. Obtaining details from existing providers of the types of cases they deal with and discussions with not-for-profits and charities, together with existing statistics, should provide a clearer picture of supply and demand and how to redress any imbalance.

Although London has the most immigration providers it also has the most vulnerable people who have migrated in need of legal assistance. Of the 618,000 undocumented people identified by the LSE in 2007, 70 per cent are in London. The GLA study identified 674,000 undocumented people in 2018, with 60 per cent living in London (approximately 397,000). A large proportion of EU citizens (around 1.2 million) live in London. There are 134 legal aid providers in London and approximately 30 organisations that provide relevant advice for EU citizens. Hence, free legal provision even in London is extremely limited.

Create a more strategic immigration legal sector

Thinking about increasing specialist immigration provision provides an opportunity to conceive a more strategic legal sector. A new model should be considered that would allow the immigration legal sector to have a strong and national voice, the ability to meaningfully assist vulnerable clients and to actually change immigration law and practice in the long term.

It must be noted that the government has stated its intention to review aspects of the constitution via a Constitution, Democracy and Rights Commission, including the relationship between the government, Parliament and the courts, and access to justice for ordinary people. Some civil society organisations have expressed concerns about the implications of this commission for judicial review and the UK's human rights framework, which could restrict the rights of individuals to seek justice against unlawful actions by public bodies. The scope for individuals or organisations to challenge policy through this mechanism may also be affected, and the section below should be read in this context.

Brexit provides an opportunity to rethink Immigration Rules

The 2020 immigration bill will retain the hostile environment and the current legal framework on family migration and the appeals regime. The government will implement an Australian-style points-based immigration system with a focus on skilled migration, reducing numbers of people migrating and deterring low-skilled people who have migrated and emphasising more robust immigration enforcement. Despite this, the prime minister has indicated that he would be willing to consider an amnesty for some undocumented people. Despite this, at the time of writing, it appears that civil society has not yet been able to persuade the government to make comprehensive immigration reforms for more vulnerable people who have migrated or to end the hostile environment.

Any discourse on future immigration policy does need a debate on rights and principles, and civil society should be a fierce advocate for fairness, justice and equality. However, arguing for comprehensive immigration reform is a political battle and the outcome is politically dependent. Parliamentary acts for example the Immigration Acts 2014 and 2016, represent the government's public announcement of its immigration policy and follow a detailed parliamentary timetable. It is not easy to reverse these or for civil society to demand new legislation. Despite compelling evidence from civil society during the passage of these Acts on the injustices that vulnerable people who have migrated would face, the Acts passed through Parliament fairly unscathed. The immigration sector lacks the scale and the scope at present for effective opposition. But even if such scale and scope existed, parliamentary opposition to legislation is a political numbers game.

In the meantime, immigration advisers have to work within the existing legal framework to secure rights for their clients. There is a potentially much more strategic, informed and arguably more effective way to change the impact of immigration policy on vulnerable people who have migrated in the short term, and that can feed into longer-term policy goals for a reformed immigration system.

As this report illustrates, Immigration Rules are constantly amended and are the vehicle by which the immigration acts are implemented. Therefore, Immigration Rules provide a route to change without asking for a change in legislation and without public fanfare.

This report provides examples of very specific aspects of the Immigration Rules that cause injustices, ranging from the wording of grounds for refusal to time limits on appeals. Each is small and nuanced

and does not make immigration policy headlines. For example, politicians were happy to announce that the EUSS would allow most EU citizens the automatic right to permanently remain in the UK with a very low refusal rate. Yet, as we have seen from the changes made to the Immigration Rules on the suitability criteria, the Home Office has introduced the power to curtail and cancel the grant of status such that, at the time of writing, over 40 per cent of people have been granted temporary pre-settled status – the complete opposite of the policy announcement. Therefore, a new approach would be to focus on these details and draw out evidence to make a cogent argument for rule change. Some of these rules will be new and will require urgent and, perhaps, vocal articulation. Legal action, such as the JCWI's action on EU15(c), may be required and may even generate headlines if rules are seen to be principle policy U-turns. Other rules will be more deeply embedded, requiring more sustained, softer campaigning.

An ambitious model could be the creation of a national legal policy umbrella body, organisation or network, which would coordinate legal policy advocacy based on evidence and outcomes from legal case work. Rethinking the way immigration legal advisers working with vulnerable people who have migrated can influence immigration policy rather than just individuals may well be difficult but could provide a lifeline to a sector that is shrinking. Strategic litigation is an obvious way to bring about widespread changes but conducting such litigation is difficult, time-consuming, specialist work and cannot be done on a regular basis. To complement this, there is arguably an enhanced role for legal policy campaigning.

Such strategic campaigning should stem from legal evidence and data. A new model could see specialist legal advisers and policy leads working together to gather a portfolio of case studies, identify particularly thorny rules and their impact and provide data on outcomes and costs, both for individuals and for society. Whilst a specialist legal adviser would undertake the casework, the policy lead would focus on evidence-gathering, sharing and campaign strategy. The various impacts of the Immigration Rules on people who have migrated should be identified across regions, with implications for local communities embedded in the process, so that national campaigning is filtered through a regional pyramid. A national umbrella body would provide the infrastructure to coordinate data collection and sharing, and could lead on campaigning. Through its membership, the legal advice sector would be able to gather and share evidence and advocate with one powerful voice. Digital solutions would be vital to allow this level of data coordination.

As the Windrush scandal clearly showed, it was very hard for those working in the legal sector to actually provide case studies to build a picture of the extent of the problem. In addition, the lack of legal aid meant there was no free advice for those individuals who were having difficulties, and many did not turn to lawyers.

Once journalists exposed the story, it was also apparent that the immigration sector as a whole was unable to galvanise itself to broaden the narrative to other areas of the hostile environment or to other groups affected and successfully demand the end of the policy. Windrush has been treated by the government as a one-off mistake that applied to one cohort of individuals so there is no overarching policy change in the pipeline.[146] Indeed, it appears that these policies will be maintained, even though the term 'hostile environment' is no longer used by government. This is a missed opportunity but completely understandable given the conditions in which legal advisers operate and the lack of national advocacy capacity within the immigration sector.

However, none of this can be done, rules cannot be identified and their impact cannot be assessed without legal evidence from those utilising the rules: lawyers and clients. Their evidence needs to be embedded in policy and campaigning work and it needs to be coordinated nationally.

146. The White Paper says the government is working to ensure the immigration system is humane, in particular in its treatment of vulnerable people and is working on the Windrush Lessons Learned review.

This report also referred to the deport first, appeal later rules and the case of Kiarie and Byndloss. This and other Supreme Court judgments that have found government policy to be unlawful do not usually make headlines outside of legal circles. Even when a judgment is reported in the media, it is often a one-off event to be forgotten the next day, and the legal sector does not have the capacity to coordinate and galvanise a demand for policy change around it. It is hoped that the new model advocated above may change that. Case successes, especially at the highest level, would galvanise a campaign supported by numerous case studies and outcome assessments from lawyers up and down the country coordinated by the national umbrella organisation.

Restructuring the immigration advice sector in this way will take time, effort, resources and will. Creating a legal policy umbrella body and a mechanism whereby specific legal issues, outcomes, and evidence of costs for the individual and society can be documented and shared among legal providers around the country is ambitious. It is however a goal that could be a real game changer for the migration sector as a whole and for the immigration legal advice sector in particular. Over time, it would provide a wealth of information and evidence that could be utilised strategically to campaign effectively for rule change and, ultimately, legislative change. Small examples of such coordinated efforts have led to many 'concessions' that are now part of the Immigration Rules. A national umbrella would be able to assist the immigration legal advice sector, enhancing it, providing support and creating a sense of shared purpose – all of which could also assist with recruitment and retention of specialist lawyers.

Brexit provides a small window of opportunity for sustained and systematic campaigning on the specifics of the new Immigration Rules that will apply in the post-Brexit era. The approach suggested here is more strategic than publicly campaigning for root-and-branch immigration reform (which is obviously politically sensitive), but could yield results in the long term if the sector rethinks how it operates.

It is vital that EU citizens do not become undocumented and, in advocating for fair settlement rights for vulnerable EU citizens, there is a real opportunity to push for a level playing field for all vulnerable people who have migrated. This equality is the thrust behind the government's new immigration policy: "*There will no longer be one immigration system for non-Europeans and another for EU citizens. The future system will apply in the same way to all nationalities.*"[147] Thus, if the injustices of the current Immigration Rules are fully exposed, there is a chance that rule change will have resonance in political circles and with the wider public as long as it is evidence led.

147. ibid 8

Appendix

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APPENDIX 1: Summary of OISC levels

Summary of OISC Levels and Categories			
Category	**Level**	**Work permitted**	**Work NOT permitted**
Asylum & Protection	1	Notifying UKVI of a change of address. Straightforward applications to vary the conditions attached to leave already granted by the Secretary of State. Travel document applications for a person already granted Humanitarian Protection/ Discretionary Leave to Remain.	Applications for Asylum or Family Reunion. Settlement (protection route) applications. Lodging notices of appeal and substantive appeals work including making representations to or appearing before courts or tribunals. Representations in relation to leave to remain for illegal entrants or overstayers. Applications for release from detention or applications to prevent removal or deportation from the UK. Judicial Review.
Immigration	1	Basic applications for entry clearance, leave to enter or remain in the UK, or any EU Member State under EEA regulations. Applications for Administrative Review, apart from applications refused on the basis of credibility or fundamental issues of the genuineness of documents or relationships. Straightforward applications to vary the conditions attached to leave already granted by the Secretary of State.	Lodging notices of appeal and substantive appeals work including making representations to or appearing before courts or tribunals. Representations in relation to leave to remain for illegal entrants or overstayers. Applications for release from detention or applications to prevent removal or deportation from the UK. Judicial Review.

Summary of OISC Levels and Categories continued

Category	Level	Work permitted	Work NOT permitted
Asylum & Protection	2	All aspects of asylum applications and related Human Rights Act (HRA) applications, Case Resolution and Active Review. Lodging Notices of Appeal and Statements of Additional grounds. Family Reunion and Settlement (protection route) applications. Representations to UKVI, on illegal entry, overstayers, removal and deportation cases and applications for Secretary of State bail.	Substantive appeals work including making representations to or appearing before courts or tribunals. Applications for Immigration bail before the First-tier tribunal. Judicial Review.
Immigration	2	Basic applications for entry clearance, leave to enter or remain in the UK, or any EU Member State under EEA regulations. Applications for Administrative Review, apart from applications refused on the basis of credibility or fundamental issues of the genuineness of documents or relationships. Straightforward applications to vary the conditions attached to leave already granted by the Secretary of State.	Lodging notices of appeal and substantive appeals work including making representations to or appearing before courts or tribunals. Representations in relation to leave to remain for illegal entrants or overstayers. Applications for release from detention or applications to prevent removal or deportation from the UK. Judicial Review.

Summary of OISC Levels and Categories continued

Category	Level	Work permitted	Work NOT permitted
Asylum & Protection	3	All aspects of asylum applications and related Human Rights Act (HRA) applications, Case Resolution/ Legacy Cases and Active Review. Lodging Notices of Appeals and Statements of Additional grounds. Family Reunion and Settlement (protection route) applications. Representation to the UKVI, on illegal entry, overstayers, removal and deportation cases and applications for bail to the Secretary of State and First-tier Tribunal. Substantive appeals work, including representation at First-tier and Upper Tribunal hearings, and specialist casework. Pre-action protocol letters in advance of Judicial Review.	Judicial Review.
Immigration	3	Discretionary and complex applications. Out-of-time applications, concessionary policies, lodging Notices of Appeal and Statements of Additional Grounds. Representation to the UKVI on illegal entry, overstayer, removal and deportation cases and applications for bail to the Secretary of State and First-tier Tribunal. All applications for Administrative Review. Substantive appeals work, including representation at First-tier and Upper Tribunal hearings and specialist casework. Pre-action protocol letters in advance of Judicial Review.	Judicial Review.
Judicial Review Case Management	3	Instruct appropriate counsel through the Licensed Access Scheme to provide litigation and advocacy services to the client. Support instructed counsel in the preparation of the client's case and administration of the matter. Instruct appropriate counsel where an urgent application is required. Instruct counsel to seek reconsideration of a decision to refuse a full hearing or to seek permission to appeal to the Court of Appeal.	Litigation and advocacy elements of Judicial Review applications. Formal steps related to Judicial Review proceedings. Judicial Review case management of categories of work in which the adviser is not authorised at Level 3.

Source: https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/604807/OISC_GoC_2017.pdf

APPENDIX 2: Main eligibility limits (from 9th April 2018)

Type of matter	Stage 1 (legal help)	Stage 2a (controlled legal representation)	Stage 2b (controlled legal representation)
Legal help **Family help (lower);** **Family help;** **Help with family mediation;** **Family mediation;** **Legal representation for proceedings in:** i) the immigration and asylum tribunal of the First-tier tribunal ii) the immigration and asylum tribunal of the Upper tribunal in relation to an appeal or review from the immigration and asylum tribunal of the First-tier tribunal	Gross income not to exceed: **£2,657** per month* Disposable income not to exceed: **£733** per month	Disposable capital not to exceed: **£3,000** [legal representation in respect of an immigration matter set out in Regulation 8(3)] **£8,000** [All other forms of civil legal services]	Clients properly in receipt, directly or indirectly, of: • **Income support** • **Income-Based Job Seeker's Allowance** • **Income-Related Employment and Support Allowance,** • **Guarantee Credit** **or** • **Universal Credit** are passported through the gross income and disposable income test but capital must be assessed in all cases. **For controlled work asylum and immigration matters only described in regulation 6(1) of the financial Regulations:** clients properly in receipt, directly or indirectly, of NASS support are passported through both the income and capital tests.

*Note: A higher gross income cap applies to families with more than 4 child dependants. Add £222 to the bas gross income cap shown above for the 5th and each subsequent child dependant.

APPENDIX 3: Immigration and asylum standard fees

Immigration and asylum standard fees

Immigration and Asylum[148]			
Type of matter	Stage 1 (legal help)	Stage 2a (controlled legal representation)	Stage 2b (controlled legal representation)
Asylum	£413	£227	£567
Immigration – non asylum	£234	£227	£454

Additional Payment – UKBA Interview

Representation at UKBA Interview	£266

Additional Payments for Advocacy Services

Oral Case Management Review Hearing	£166
Telephone Case Management Review Hearing	£90
Substantive Hearing in the Immigration and Asylum Chamber of the First-tier Tribunal	Asylum – £302 Immigration – £237
Additional Day Substantive Hearing	Asylum – £161 Immigration – £ 161

Immigration Removal Centres Standard Fees (for Exclusive Schedule Holders only)

On Site Surgery – advising 5 or more clients	£360
On Site Surgery – advising 4 clients or less	£180
Fast Track Standby Payment	£34.02

148 The Civil Legal Aid (Remuneration) Regulations 2013 Schedule 1, Table 4

APPENDIX 4: Data From LAA showing Provider Offices in immigration & asylum in England & Wales

Note: Correct on15/10/18 (This has been sorted by region for this paper)

Region	Cities		Total for region
North East	Gateshead	2	
	Middlesburgh	5	
	Newcastle	6	
	Northhampton	7	
			=20
North West	Bolton	5	
	Bury	1	
	Greater Manchester	1	
	Greater Manchester – Oldam	1	
	Greater Manchester – Rochdale	1	
	Manchester	19	
	Liverpool	6	
			=34
Yorkshire & Humber	Birstall	2	
	Bradford	5	
	Dewsbury	1	
	Halifax	1	
	Huddersfield	2	
	Hull	1	
	Leeds	8	
	Wakefield	2	
			=22

Region	Cities		Total for region
East Midlands	Derby	2	
	Lecister	5	
			=7
West Midlands	Birmingham	27	
	Dudley	1	
	Coventry	2	
	Nottingham	4	
	Oldsbury	1	
	Sheffield	8	
	Stoke-On-Trent	1	
	Walsall	2	
	Wednesbury	1	
	Wolverhampton	2	
			=49
East Of England			
			=0
London & Greater London	Barking	1	
	Croydon	7	
	Edgware	2	
	Brentford	1	
	Bromley	1	
	Harrow	7	
	Hayes	2	
	Hounslow	5	
	Ilford	4	

Region	Cities		Total for region
London & Greater London continued	London (Unspecified)	90	
	Morden	2	
	Pinner	1	
	Slough	1	
	Southall	3	
	Thornton Heath	2	
	Wallington	1	
	West Croydon	1	
	Wembley	2	
	Watford	1	
			=134
South East England	Aylesbury	1	
	Brighton	1	
	Greater Central Milton Keynes	1	
	Cheam	1	
	Farnsborough	1	
	Folkestone	2	
	Luton	7	
	Maidstone	1	
	Middlesex	1	
	Milton Keynes	1	
	Oxford	1	
	Reading	1	
	Rotherham	2	
	Southampton	1	

Region	Cities		Total for region
South East England continued	Waterlooville	1	
	Windsor	1	
			=24
South West England	Bristol	9	
	Feltham	1	
	Plymouth	1	
	Swindon	1	
			=12
Wales	Cardiff	7	
	Cardiff Bay	1	
	Newport	3	
	South Wales, Barry	1	
	Swansea	2	
	Wrexham	1	
			=15
Scotland			
			=0
Northern Ireland			
			=0
			TOTAL = 314

APPENDIX 5: Regional breakdown of OISC advisers

Source: From FOI a Regional Breakdown of OISC Advisers FOI/AH/17/08 – 17 March 2016OISC Registered Non-Fee Charging Providers (Organisations)

OISC Registered Non-Fee Charging Providers (Organisations)

Region	Level 1	Level 2	Level 3	Total
All Regions	487	67	69	**623**
London	68	21	33	**122**
East Midlands	28	2	1	**31**
East of England	45	6	1	**52**
North East	16	2	0	**18**
North West	42	3	4	**49**
Northern Ireland	20	0	2	**22**
Scotland	64	4	1	**69**
South East	73	6	5	**84**
South West	35	1	3	**39**
Wales	22	1	1	**24**
West Midlands	34	8	6	**48**
Yorkshire	26	7	10	**43**
Other	14	6	2	**22**

OISC Registered Non-Fee Charging Providers (Individuals)

Region	Level 1	Level 2	Level 3	Total
All Regions	543	125	90	**758**
London	195	43	44	**282**
East Midlands	12	4	2	**18**
East of England	24	5	3	**32**
North East	8	2	0	**10**
North West	27	16	9	**52**
Northern Ireland	5	0	0	**5**
Scotland	25	7	0	**32**
South East	115	12	5	**132**
South West	13	1	3	**17**
Wales	17	0	4	**21**
West Midlands	32	14	6	**52**
Yorkshire	49	14	14	**77**
Other	21	7	0	**28**

OISC Registered Fee Charging Providers (Organisations)

Region	Level 1	Level 2	Level 3	Total
All Regions	560	100	429	**1089**
London	274	58	215	**547**
East Midlands	25	3	18	**46**
East of England	29	4	24	**57**
North East	6	1	10	**17**
North West	41	4	30	**75**
Northern Ireland	3	1	0	**4**
Scotland	18	1	10	**29**
South East	51	9	30	**90**
South West	13	2	6	**21**
Wales	9	1	5	**15**
West Midlands	26	5	31	**62**
Yorkshire	23	4	31	**58**
Other	42	7	19	**68**

OISC Registered Fee Charging Providers (Individuals)

Region	Level 1	Level 2	Level 3	Total
All Regions	1684	222	485	**2391**
London	723	140	243	**1106**
East Midlands	97	5	19	**121**
East of England	93	11	26	**130**
North East	25	2	9	**36**
North West	110	10	42	**162**
Northern Ireland	3	1	0	**4**
Scotland	69	3	8	**80**
South East	187	13	26	**226**
South West	62	5	11	**78**
Wales	38	1	7	**46**
West Midlands	82	18	30	**130**
Yorkshire	88	8	40	**136**
Other	107	5	24	**136**

APPENDIX 6: Reasons for refusal of naturalisation applications, (2015-2017)

Reasons for refusal	2015	%	2016	%	2017	%
Incomplete applications	254	2%	128	1%	52	1%
Parent not a British citizen	749	7%	931	7%	300	4%
Not of good character	4,524	42%	5,525	44%	3,119	40%
Delay in replying to enquiries from UKVI	1,254	42%	1,698	13%	1,319	17%
Residence	2,825	27%	2,632	21%	1,659	22%
Oath not taken in time	14	0%	9	0%	1	0%
Insufficient Knowledge of English and KOL	531	5%	673	5%	720	9%
Other	495	5%	996	8%	544	7%
Total	**10646**		**12592**		**7714**	

Source: Source: Home Office immigration statistics table cz_09

APPENDIX 7: Firms doing immigration work by region

Sizes of firms (by number of solicitors)		Regions											
		North East england	North West england	Yorshire & Humber	East Midlands	West Midlands	East of England	London	South East England excluding London	South West England	Wales	N/A	TOTAL England & Wales
Number of solicitors		0	0	0	0	0	0	0	1	0	0	0	**1**
Small	1 solicitor	2	37	24	14	48	14	294	28	3	5	3	**427**
	2-5 solicitors	6	87	41	28	78	24	513	38	5	9	3	**832**
Medium	6-12 solicitors	2	25	8	5	15	4	114	7	4	3	0	**187**
	13-40 solicitors	1	8	3	0	4	4	37	7	2	0	0	**66**
Large	41-170 solicitors	0	1	3	1	2	0	21	5	1	0	0	**34**
	171+ solicitors	0	1	0	0	1	0	9	1	2	0	1	**15**
Not available		0	0	0	0	0	0	0	0	0	0	0	**0**
Total all sizes		**11**	**159**	**79**	**48**	**148**	**46**	**988**	**87**	**17**	**17**	**7**	**1607**

Note: July 2017 figures of Firms stating they carry out Immigration Work

Source: Source: Law society Research Unit (07 Nov 2018)

phf Paul Hamlyn Foundation

An overview of immigration advice services in England and Wales

Saira Grant

Research commissioned by
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