

Hurdle After Hurdle: The Struggle for Advice and Representation through Exceptional Case Funding



About BID

Bail for Immigration Detainees (“BID”) is an independent charity established in 1999 that exists to challenge immigration detention and assist those held under immigration powers in removal centres and in prisons to secure their release from detention through the provision of free legal advice, information and representation. Alongside our general casework, we engage in research, policy advocacy and strategic litigation to secure change in detention policy and practice. In 2014, BID set up its Article 8 Deportation Advice project (“ADAP”) to provide legal advice and representation to people challenging Home Office’s deportation decisions based on length or residence and/or family life in the UK under Article 8 of European Convention on Human Rights (“ECHR”).

BID is funded by grant-making trusts and foundations as well as charitable donations, and it is not in receipt of legal aid funding. BID, however calls for the provision of legal aid funding and legal advice and representation to everyone facing deportation.

You can find out more about BID's work on our website: www.biduk.org.

Acknowledgements

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Executive Summary

The Legal Aid, Sentencing and Punishment of Offenders Act (“LASPO”) took most immigration cases out of scope of legal aid. However, Exceptional Case Funding (“ECF”) was introduced as a ‘safety net’ for people whose cases fell out of the scope of legal aid but whose exclusion would result in breaches of their human rights. This report explored the hurdles of applying for ECF and then finding a legal aid lawyer for people facing deportation and those whose claims to remain in the UK were based on Article 8 (private & family life) of the Human Rights Act.

This report found:

- ECF applications are too complex for people to complete without legal assistance, and is therefore inaccessible. 100% of pro-bono lawyers who answered the question doubted that the applicant could complete the ECF application without legal help.
- When people do have legal support to apply for ECF, they are largely granted ECF, supporting the argument that legal aid should be restored for these cases. 70% of pro-bono lawyers said the complexity of immigration law was the reason why the applicant required legal aid.
- Once ECF is granted, applicants are faced with the additional hurdle of finding a legal aid lawyer to take their case

GLOSSARY

ADAP - Article 8 Deportation Advice Project
ARE - Appeal Rights Exhausted
CJS - Criminal Justice System
ECF - Exceptional Case Funding
ECHR - European Convention on Human Rights
IRC(s) – Immigration Removal Centre(s), also known as, ‘detention centre(s)’
LA - Legal Aid
LAA - Legal Aid Agency
LASPO(A) - Legal Aid, Sentencing and Punishment of Offenders (Act)
MOJ - Ministry of Justice

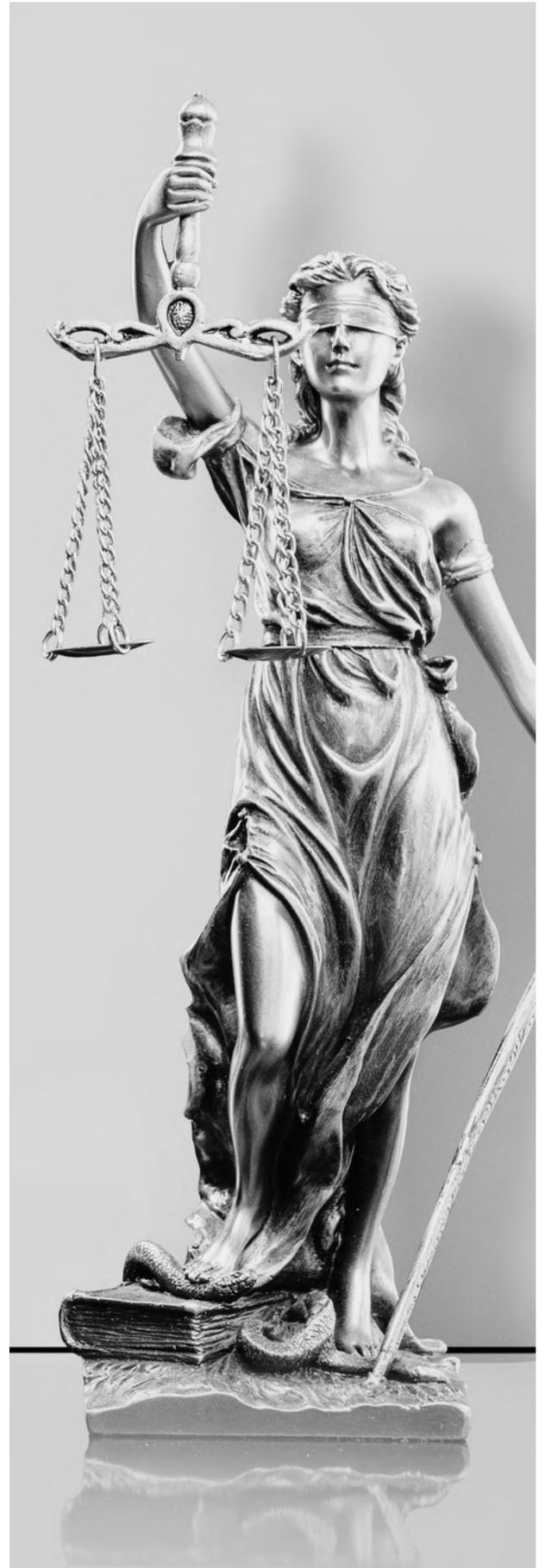
DEFINITIONS

Adjournment – To suspend legal proceedings to another time or place.
OASys - Assessment System. This is a risk and needs assessment tool used by the prison and probation services in England and Wales.
Immigration Rules - The Immigration Rules are regulations that govern who can enter, stay, work, study or settle in the UK. The rules are changed regularly by the Home Office and the immigration rules covering deportation are complex.
Immigration Tribunal (Immigration & Asylum Chamber) - The immigration court that hears deportation appeals

Recommendations

BID recommends five changes. Without such changes, people facing deportation, and their families affected by the deportation of a partner or primary carer, will continue to face very significant obstacles to accessing justice.

- We recommend that all immigration cases be brought back into scope of legal aid as a matter of urgency.
- We recommend that, so long as LASPO remains in force, the ECF application process is dramatically simplified in order that direct applicants feel able to complete the application forms and have a realistic prospect of being granted ECF.
- We recommend that immigration lawyers are paid for the work involved in preparing an ECF application, even if ultimately funding is not granted.
- We recommend that the number of immigration lawyers with a legal aid contract is significantly increased and that they are adequately and fairly remunerated for their work.
- We recommend that anyone who is in receipt of Schedule 10 support should be passported through the financial means tests, and automatically allocated legal aid, for greater access to justice.





Introduction:

LASPOA & The ECF Project

Legal aid enables an individual to instruct a legal aid lawyer to represent them and covers the cost of essential expert evidence, such as medical reports, risk of reoffending reports and independent social worker reports. This helps judges consider how deportation of primary carers may impact the well-being of the child, evidence that is pivotal to success in what are otherwise very hard-to-win cases. However, in April 2013, the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) took most immigration cases out of the scope of legal aid, which included people challenging deportation based on length of residence or family life in the UK or applying to remain in the UK for those reasons. Such claims are known as Article 8 claims as the right to respect for family and private life is protected by Article 8 of the European Convention on Human Rights (ECHR).

Where legal aid was now otherwise unavailable, LASPO introduced Exceptional Case Funding (ECF), a system through which applicants may apply for legal aid on specific and limited grounds: where the absence of legal aid would result in serious unfairness,

a breach of human rights and/or denial of effective access to justice.

When LASPO was first introduced, there were very few decisions made to grant ECF. The landmark case of *Gudanaviciene*[1], found that the then-existing ECF process lacked effectiveness or fairness, particularly in relation to complex human rights and deportation matters. Following *Gudanaviciene*, more applications for ECF have been successful.

However, the ECF application process remains a complex administrative procedure and a hurdle that a person must overcome before they are able to access legal advice and representation for their immigration case.

This is compounded by the lack of available immigration legal aid lawyers: even once ECF is granted, it can be very difficult to find a lawyer to take on the case.

In 2019 BID set up a project to work with pro bono lawyers from 4 commercial firms to prepare applications for exceptional funding legal aid.

This report explores the process of applying for Exceptional Case Funding (ECF) through the perspectives of the pro- bono lawyers. It reveals the complexity of the application process and explores the difficulties the project has faced when attempting to refer cases to legal aid lawyers once the LAA has granted ECF. It also draws on case evidence from applications for ECF made by the ADAP Legal Manager distinct from the work with the private law firms.

Legislation relating to deportation targets people without British citizenship, including those born and raised in the UK and long-term British residents with families who are raised in the UK with no or very limited ties to their country of origin.

Deporting people without British Citizenship who have committed a crime is predicated on structural racism within the British justice system. Statistics on Race in the Criminal Justice System (“CJS”) found in 2018 that:

“In general, minority ethnic groups appear to be over-represented at many stages throughout the CJS compared with the White ethnic group. The greatest disparity appears at the point of stop and search, arrests, custodial sentencing, and prison population. Among minority ethnic groups, Black individuals were often the most over-represented.”
[2]

Evidence shows that Black men are about 1.4 times more likely than white men to receive a custodial sentence for drug offences[3] and this pattern of conviction bias along racial lines puts Black families without British citizenship at a higher risk of deportation.

The decision under LASPO to exclude such people from legal aid for their Article 8 case, and requiring them to overcome obstacles before they can receive legal advice and representation on fundamental human rights issues, raises salient questions about the discriminatory impact of legal aid provision following the introduction of the LASPO.

This report raises serious concerns about the systemic inequalities embedded in the justice infrastructure, revealing the hurdles people face to securing legal aid funding and representation to enable them to legally challenge deportation and defend their fundamental human rights.

The ECF Project

BID's casework demonstrated that many people facing deportation required legal aid representation to have a fair opportunity to make out their case against deportation, but they were often unaware of the existence of ECF and/or were simply unable to make an application directly to the LAA unassisted.

The Immigration Rules covering deportation and the deportation process are complex. Early legal representation and provision of expert evidence can make all the difference to the success of a human rights-based claim to remain in the UK.

Cases are referred to the scheme by the Legal Managers at BID, who oversee BID's advice line and who provide representation in detention and bail matters, as well as by external agencies.

The ADAP Legal Manager reviews referrals, collates key documents, then refers the application out to one of the pro bono partner firms.

The applications are then prepared by pro bono lawyers, supervised by the ADAP Legal Manager. Pro bono lawyers are from four partner firms.

The participating firms are not immigration specialists, so pro bono lawyers were often coming to immigration law and the ECF application process for deportation matters without prior experience. As a result, the ADAP Legal Manager also provides training on the ECF process and on related human rights and deportation issues.

Once an application is prepared, the ADAP Legal Manager reviews applications and finalises them for submission to the LAA.

If ECF is granted, BID and the pro bono lawyers attempt to refer successful applicants to a legal aid lawyer using the LAA website <https://find-legal-advice.justice.gov.uk>, which allows a search by postcode and category of law to find a list of specialist immigration lawyers closest to where the client was detained or living. These firms are then contacted individually by phone or email with a referral enquiry.

BID also use postings on web-based groups such as the Refugee Legal Group and ILPA (Immigration Law Practitioners Association) Google group. Both are online forums for lawyers to post queries and seek representation for cases.



Clients of the ECF Project

Many long-term British residents are subject to deportation proceedings following a criminal conviction, which has a devastating impact on families and communities, particularly on racialised people. Many of BID's clients are detained in IRCs or prisons pending deportation or are living in the community on immigration bail. ECF Project clients include both asylum seekers and people born or brought up in the UK from an early age with families, children, siblings and communities in the UK. Additionally, many of those facing deportation do not have any meaningful family or social support network in the country of proposed deportation.

From March 2019 to July 2023, 59 clients were referred to pro bono lawyers. Of those, 41 had children. Not all referrals progressed to an ECF application being lodged with the LAA. 18 cases did not progress to the application stage for a variety of reasons, including changes in the client's circumstances (e.g. that an application was no longer appropriate, or the client failed to provide the necessary instructions or documentation).

Of the referrals to the volunteer lawyers, 41 progressed to a legal aid application. 40 (98%) of the applications were granted by the LAA.

Case Stages of the ECF Project Clients

The cases of clients covered within the ECF Project encompass all stages of the deportation process, from Stage One Notice of Liability to deportation to deportation appeal and Appeal Rights Exhausted (“ARE”).

Those who are Appeal Rights Exhausted cannot appeal further to the immigration courts and are liable for removal from the UK. However, many are not removed from the UK and continue to live in the community with their families on immigration bail for many years.

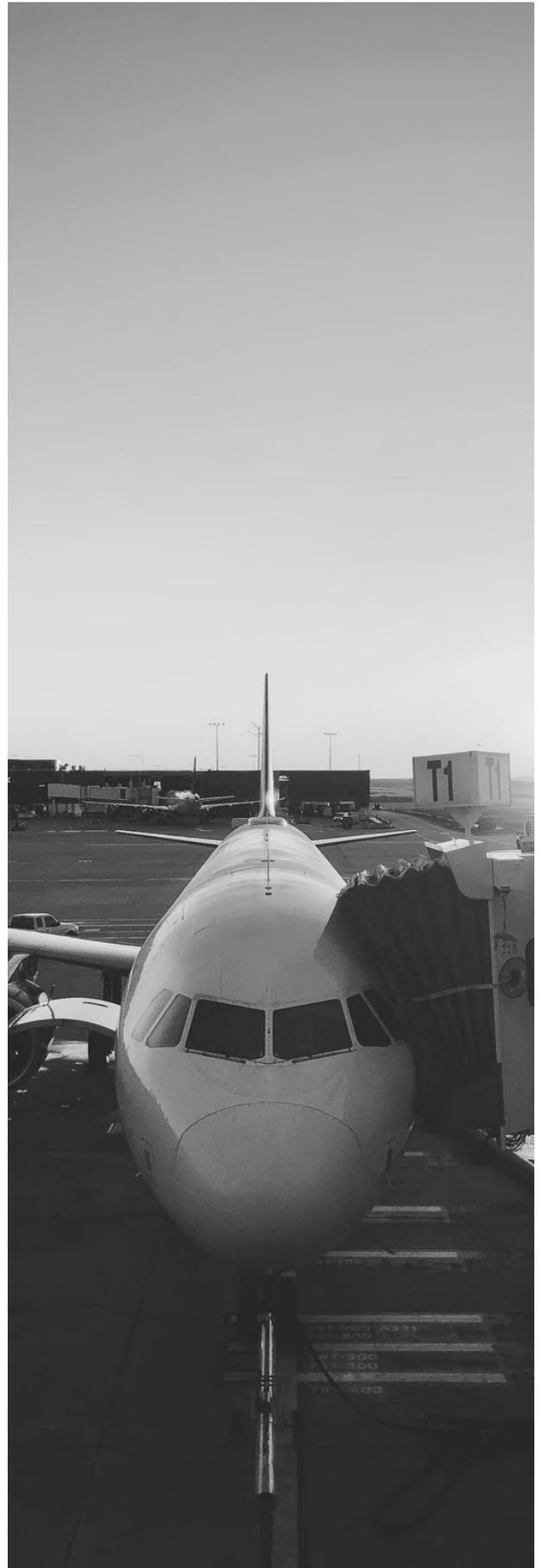
Part I: Legal Background of Deportation.

The Immigration Rules and the Deportation process – A Brief Overview

Under the UK Borders Act 2007[4], those sentenced to 12 months or more in prison are liable for 'automatic deportation' unless they can show that deportation would breach their human rights. The Act enshrined in law that it was in the public interest to deport 'foreign criminals.'[5]

In July 2012, the Immigration Rules were amended to include substantial changes in how the law dealt with claims to resist deportation under Article 8 of the ECHR. Under the Rules, the default position became that deportation was deemed to be in the public interest unless a person could show that they fell within strictly interpreted 'exceptional circumstances', based on length of residence and/or family life in the UK. The exceptions only applied to individuals sentenced to less than 4 years in prison.

For those sentenced to 4 years or more in custody, the threshold is even higher. They have to demonstrate 'very compelling circumstances' over and above the specified exceptions to successfully resist deportation. What may amount to 'very compelling circumstances' is inevitably very case sensitive.



For example, the normal test in deportation cases is to assess whether deportation would have an 'unduly harsh' impact upon a deportee, partner or their child. Such a case would require a number of expert (e.g. medical, Independent Social Worker, rehabilitation) reports to have a realistic prospect of making out the case against deportation. This would be even more so where a person is facing deportation after having been sentenced to 4 years in prison.

In addition, those who do not meet the threshold for 'automatic deportation' can still be deported under the 1971 Immigration Act on the grounds that their deportation is 'conducive to the public good'.

Additionally some EU nationals and their family members still benefit from the EEA regulations post-Brexit, which provide greater protection than the Immigration Rules, and are equally complex.

The Right to Family Life - Exceptions based on Article 8 of the ECHR

Under the Immigration Rules, it is possible to challenge a deportation decision on the basis of family life or length of residence on three grounds.

Firstly, in order to resist deportation on the basis of their family life with a child, people must show that:

- they have a subsisting parental relationship with a 'qualifying child' **and**
- that it would be 'unduly harsh' on the child to remain in the UK without the parent (this is referred to as the 'stay test'); **and**

- it would be 'unduly harsh' to relocate to the proposed country of deportation (this is referred to as the 'go test').

Secondly, to resist deportation based on family life with a partner, people must show that:

- they are in a genuine and subsisting relationship with a qualifying partner, (British citizen or Settled in the UK), **and**
- the relationship did not begin when the foreign national to be deported was in the UK un-lawfully or when their immigration status was precarious; **and**
- it would be unduly harsh for that partner to live in the country to which the foreign national is to be deported; **and**
- It would be unduly harsh for that partner to stay in the UK without the foreign national who is to be deported.

Thirdly, to resist deportation on the basis of their length of residence (private life), they must show:

- they have lived lawfully in the UK for more than half their life, **and**
 - they are socially and culturally integrated; **and**
 - There would be very significant obstacles to reintegration in their home area.
-

The Immigration Rules are very complex and subject to frequent ‘statements of changes’, which are changes that are made to immigration legislation with minimal parliamentary scrutiny. The Court of Appeal and Supreme Court frequently re-interpret and issue new guidance on the meaning of key tests such as ‘unduly harsh’ and ‘very compelling circumstances’ and ‘very significant obstacles.’

The complexity makes it very hard for unrepresented people to understand the legal tests that they must meet and the evidence they need to produce if they are to have a fair chance to put their best case forward. It also makes completing the ECF application form, explaining why their case is complex, very difficult.

In the context of this complexity, the stakes could not be higher for the individual facing deportation and their family. If an individual is deported, this will usually mean permanent separation from their family in the UK, including their children. The impact of this has been found, in research undertaken by BID [6] as well as academics, including Dr Melanie Griffith from the University of Birmingham, ‘*to have a potentially catastrophic effect on the whole family, including children and British citizens*’.[7] The effects of family separation due to incarceration, detention and/or deportation may result in a ‘*severe emotional cost, stress, pressure on the left-behind family, financial difficulty and risk of the children developing long-term mental health problems*.’[8]



The Deportation Process

People facing deportation are first served by the Home Office with a Stage One Notice of Liability to Deportation. This requires them to provide written reasons, within a specified timescale, as to why deportation would breach their human rights.

The Home Office will then decide whether to continue with deportation. Invariably, it does and a Stage Two Refusal of a Human Rights claim and deportation order will be issued. This usually comes with a right of appeal to the Immigration Tribunal.

Should a person lose their case and become 'Appeal Rights Exhausted', they can make a fresh human rights application and application to revoke (cancel) the deportation order if the ongoing enforcement of the order breaches their human rights. This can be done from within the UK or from abroad once removed. However, the threshold for cancellation of a deportation order is a high one.

Importance of Securing Legal Representation Early

For people going through deportation proceedings, time is of the essence at all stages. Delays in securing legal representation can be detrimental to the individual and their families. For example, for those at the Stage One Notice of Liability to Deportation, legal submissions by a lawyer and appropriate expert evidence will assist the Home Office in making an informed decision on whether to proceed to issue a Stage Two deportation decision and deportation order.

For cases at the appeal stage, legal representation assists the Tribunal in determining a case as it will benefit from legal arguments directly addressing the key material issues in the appeal, along with expert reports as may be required. If a case is at the appeal stage, an individual may need to request time to gather necessary supporting evidence and apply to the court to adjourn an appeal to allow time to prepare it. However, in our experience, unrepresented appellants are generally either unaware that they can apply to adjourn or do not understand how to prepare an adjournment request. Consequently, they risk having to represent themselves at appeal without the benefit of legal argument or expert evidence.

People who are Appeal Rights Exhausted, and require a fresh human rights application are at risk of removal from the UK at any point. Securing legal aid representation as early as possible is therefore essential.

In all deportation cases, where there are children who will be affected by the potential deportation of a parent or primary carer, early resolution of the uncertainty around immigration status is clearly in the best interests of the child.



The Best Interests of the Child

Section 55 of the 2009 Immigration Act requires that the best interests of the child are treated as a primary consideration in immigration decisions by the Home Office and the Immigration Tribunal.

Expert evidence as to how a child may be impacted by possible permanent separation from their parent is therefore essential for the decision-maker to identify the best interests of the child and to conduct the balancing exercise between the rights of the applicant and the public interest in deportation.

The Role of Expert Evidence

In BID's experience, expert evidence plays a critical role in assisting people to demonstrate their personal circumstances, and how the 'exceptions' to deportation or the 'very compelling circumstances' test is met. The expert reports are most often required to address the key material issues for the Home Office or the Tribunal to be in a position to fairly and objectively determine a deportation case.

These include:

- Independent Social Worker reports that consider the impact of deportation of a parent/primary carer on the well-being of the child;
- Expert medical reports by a mental health expert to address the medical condition of the applicant/partner/child and the likely impact of deportation;
- Risk of reoffending report by a Consultant Forensic Psychologist to consider the risk of future reoffending.

However, these reports are very expensive, averaging £1,000-2,000 each, and would be covered by legal aid. An individual without access to legal aid will have very little prospect of being able to meet the costs of such essential reports.

The ECF Application Process

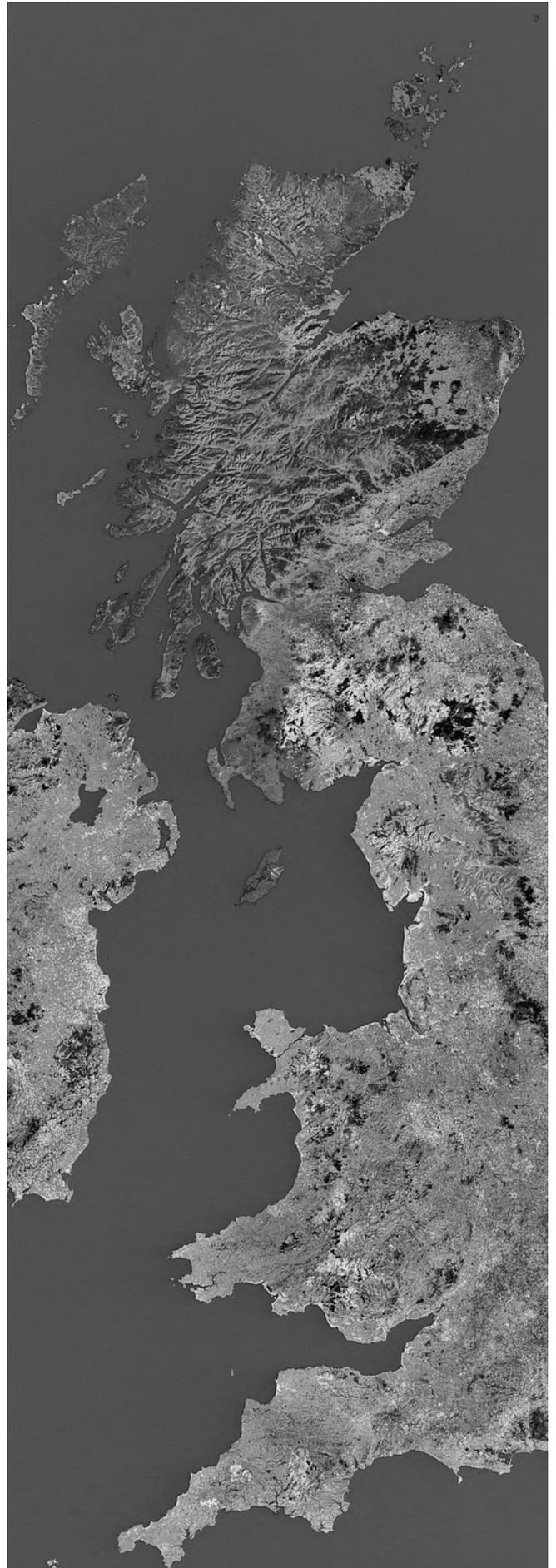
To apply for ECF, an individual must meet a means test (whether their resources are below the financial threshold) and a merits test (to assess the strength of the case).

Applicants must complete a means form (CW1 or CW2, depending on the stage of their case) and the ECF application form (ECF Civ 1). On that form, applicants must explain why they need legal aid representation, setting out their vulnerabilities as well as the legal complexities.

However, the ECF Civ 1 form is complex. Whilst the LAA has taken steps to shorten and simplify it to make it more accessible for an individual to apply without a lawyer, it remains a challenge for a lay applicant to complete. This challenge may be exacerbated if the applicant faces language barriers or suffers from poor psychological health.

The form asks the individual to:

- *"Tell us briefly about the case, how complex it is, and if you know it, the areas of law it relates to;*
- *Why are the issues in the case important to you;*
- *How capable are you of representing your case without a solicitor? Tell us what you must do to present the case;*
- *Tell us any extra information that is relevant.*





Research Methodology

At the conclusion of each case, the pro bono lawyers that prepared the ECF application were asked to complete a survey on their experience of preparing it on behalf of the client. The pro bono lawyers did not have a professional background in immigration law and were undertaking this work within pro bono initiatives at their firms. However, they all had access to training materials and the BID supervisor of the project, who could provide advice at any point during the preparation of the ECF application.

BID received 28 responses. Respondents gave their consent through participation, and they had the opportunity to see the report before publication. All responses are anonymised.

This report uses the terms respondent(s) and pro bono lawyers interchangeably however they refer to the 28 survey responses from pro bono lawyers

The survey asked participants:

- “Where their client was based and how this affected their ability to work on their case;
- How many hours it took to complete the application
- Why their client is entitled to ECF;
- What part of the work was the most challenging;
- How easy or challenging was it to correspond with their client;
- Why they chose to volunteer;
- How confident were they that their client could make a successful application;
- Recommendations for the ECF process.

Part II: Applying for ECF

Location and Communication

The location of applicants had an impact on communication between pro bono lawyers and their clients and communication varied depending on whether the client was held in an IRC, a prison or if they had already been deported.

People held in detention centres are given basic non-smartphones on arrival and have some access to the internet and email. Communication was not difficult for people held in IRCs, as respondents cited either having good email or telephone access and having a family member to facilitate contact.

People held in prisons, on the other hand, experienced greater difficulties, although these were not always insurmountable. For example, they must arrange for telephone numbers for legal aid immigration lawyers to be added to their 'pin'. Only a limited number of telephone numbers can be added at any one time and if the legal aid lawyer does not do immigration work or is not taking on cases, or does not want to provide free advice on the telephone, the individual must get another number added to their pin. This can take days or weeks at a time.

People held under immigration powers in prisons have access to up to 30 minutes of free legal advice over the telephone, and the telephone numbers of all immigration legal aid contract holders are meant to be accessible for such advice. People in prisons normally do not have any internet access and largely rely on the postal system for communication, which is slower.[9]



Pro bono lawyers were often unable to speak to their clients. Three respondents cited the fact that they had enough background information on their clients, which allowed them to proceed with drafting the ECF application. Two respondents noted that spontaneous requests for signatures and finalising the ECF application took a long time. There was also a degree of reliance on family members to bridge communication in order to mitigate challenges. One respondent highlighted the difficulties in keeping their client updated regarding the status of his application, as this was not possible directly (unless done via letter to the prison) as they could not call him to provide an update and therefore relied on calls from him or calls to his wife.

Respondents also mentioned taking instructions and updating clients by post 'made the process slower and [a] more cumbersome process than it might otherwise have been.'

One respondent highlighted that they lost contact with their client in prison, who had been unable to collate much of the requested evidence.

There were two cases where clients had been deported, and this had a significant impact on communication. One client was homeless and sleeping on the street following his deportation, whilst another had to retreat into hiding due to stigma and abuse regarding his sexuality.

Why Clients Required ECF

Pro bono lawyers were asked why the individual they were assisting was entitled to ECF. 27 lawyers responded to this question, with reasons including the client having children, the complexity of the law, the health of the client, the health of a partner and the need for expert evidence.

17 (63%) respondents said that their clients having children was one of the main reasons they required legal aid: to argue their fundamental right to family life and to obtain legal aid to pay for expert evidence. In one case, a lawyer cited the overwhelming importance of the case as the applicant had four minor children from whom he faced permanent separation. Another noted the impact deportation would have on his client's children, as two had serious health conditions. In another response, they stated the client had a stepchild rather than a biological child, but the child was particularly vulnerable and permanent separation would be devastating for them. In another response, the lawyer cited the client maintains a subsisting relationship with his child and is in regular contact with him, including sharing childcare responsibilities with the child's mother (the client's former partner). Some of the respondents stated that their clients' children were British citizens, and some that they were vulnerable.

Another common theme was the complexity of the law, with 19 respondents citing it as the reason their client needed ECF.

Another common theme was the complexity of the law, with 19 respondents citing it as the reason their client needed ECF.

One respondent stated that for his applicant, ‘the case for expulsion was arguably not met in that the client did not pose a threat to the public policy or security and that the applicant’s right to private and family life under Article 8 ECHR was not being engaged’ by the decision maker in the decision under challenge. Another respondent, who was assisting an applicant who had been deported, cited the complexity of the law regarding the applicant’s ability to establish the ‘fresh claim’ threshold in revoking the deportation order, which was subsequently fulfilled.

11 pro-bono lawyers cited the health of the client as the reason why their client was entitled to ECF (such cases often being complex and/or expert medical evidence required). One respondent highlighted that mental health was the reason, combined with their client’s advanced age and long residence and family in the UK. Four respondents also cited the health of a partner who would be adversely affected by the removal or deportation of the applicant.

Five specified the need for expert evidence. This includes medical reports, an independent social worker’s report, a report on rehabilitation or a country expert report. Such reports are expensive and are best obtained by legal professionals to ensure that the report addresses the key material issues to assist decision making by the Home Office or the Tribunal.

“

the applicant’s right to private and family life under Article 8 ECHR was not being engaged

”

Additional reasons for making applications for ECF legal aid included the financial situation of the family or the fact that the client did not have any ties or connections to their country of origin.

The above issues reflect the complex needs and the importance of human rights issues for the clients who were seeking legal aid advice and representation while facing deportation.

Time Taken to Complete the ECF Application

The time it takes to complete an ECF application depends on various factors, which may be specific to the applicant's circumstances, such as whether they are detained and the location of detention, any physical or mental ill-health and language barriers. However, as noted above, application forms require details of the nature of the case and the complexities involved, which can be time-consuming to complete.

The average time applications took to complete by pro-bono lawyers was 29.5 hours. In some cases, the work included assisting the client with an application to adjourn their deportation appeal hearing while the ECF matter was being processed.

However, the fact that the applications took so long is indicative of the complexity of the application process.

In addition, BID's ADAP Legal Manager and pro-bono lawyers were concerned with making the application as thorough as possible both to ensure success and also to improve the prospect of successfully referring the case to a legal aid lawyer upon a grant of ECF, given the lack of capacity within the immigration legal aid sector.





Challenges Preparing ECF Applications & Complexity of Immigration Law

Pro bono lawyers were given space to discuss what part of the process was the most challenging, and seven respondents gave multiple answers to this question.

Common trends in responses included the difficulty obtaining evidence, instructions and information, establishing the chronology and stage of the immigration matter, as well as obtaining adjournments. Respondents emphasised the reliance on partners or family for information, particularly where contact and communication with the applicant were diminished. In one case, whilst the lawyer identified compiling the application as a struggle, this was overcome by correspondence with the applicant's spouse, who provided information quickly. In another case, however, a respondent described difficulties obtaining information from the client's partner, which was ultimately not provided.

Another respondent highlighted that during the process, they lost contact with their client, who had been re-arrested. This was mitigated when they were able to contact the applicant's mother to discover where he was.

Moreover, one respondent highlighted that the applicant was held in an IRC and did not have access to documentation that would support her application. Her partner did not have access to electronic facilities to send over documents, which were therefore sent by post or personal delivery. However, the respondent noted that there were instances where they were unable to continue drafting the application as they were waiting for additional information, which caused delays.



Further challenges for the lawyers included:

- Analysing complex medical history.
- Familiarising themselves with a new legal framework. This included reviewing previous Home Office and court decisions, medical records and OASYS reports (risk of reoffending reports prepared by Probation Officers) as may be required for a case.
- Compiling the application. For example, one respondent with an applicant in prison noted that obtaining the required information and instructions made it difficult to put together a compelling case.
- The impact of the coronavirus pandemic made it more difficult to take instructions and gather information and documentation without meeting with the applicant.
- Evidencing that the applicant would demonstrate grounds for a fresh human rights application after he had been deported. In one case, the individual had been deported and required a fresh human rights application to revoke the deportation order. He feared for his safety and was in hiding, which made gathering evidence of his circumstances difficult. Additionally, there were a number of previous immigration decisions that were the starting point for a fresh application and required consideration for the ECF application to be prepared.

Immigration law is very complex, and this was reflected in the respondents' answers. Respondents were asked whether their applicant would have been able to make an ECF application on their own. 23 respondents answered this question, and all doubted whether the client would have been able to make a successful application on their own. Some respondents provided a description of why the client would have had serious difficulties, while others stated that it would have been impossible.

The reasons given included:

- The complexity of immigration law.
- Gathering and handling a large amount of evidence and the need for expert reports.
- Procedural complexity of the application / putting the relevant information into the form that the application is required to take.
- The complexity of the cases, including issues such as having a long history of immigration applications and appeals, medical problems and family life issues that require evidence.
- Clients' understanding of which parts of the case would be relevant for the ECF application.
- Difficulty clients would have faced in setting out legal arguments.
- Difficulties in obtaining resources to prepare case arguments and access fax, emails and phones.
- Practical and financial difficulties for the clients.
- Vulnerability / mental state of the clients, such as PTSD, lack of English literacy skills, lack of access to fax or email and limited phone access while detained.

One respondent detailed that the core argument of their client's appeal was a point of law, as a wrong test had been applied by the Home Office.

One respondent quoted that:

"The client was more informed than others and has lived in the United Kingdom for most of his life (so no language issues). However, the process is very complex, and I consider he would have struggled to make the application on his own behalf."

A second respondent stated:

"Analysis of documentary evidence and completion of the application forms requires a certain level of written English, understanding of the law and processes in relation to legal aid and human rights and critically, an understanding of judicial system in England and Wales. Even with a basic understanding, we still think that legal support would be necessary... We, as volunteer lawyers, found the process confusing at times without the support, resources and training from BID. As such, it is hard to comprehend how a lay person living in precarious circumstances would be able to make a successful application on their own."

Another respondent stated:

“Our client was probably as knowledgeable as a lay person could possibly be (he had trained in prison to help people with issues such as ECF applications), and yet I still think he would have struggled to make an application that had a realistic prospect of success without the assistance of a lawyer. His case is nuanced and complex, and his ECF application required careful argument in order to demonstrate his appeal has good prospects of success, but only if properly handled (i.e. with access to expert evidence for reoffending risk and a social worker report on the impact on the child). It was depressing to see that even a very well-equipped client would unlikely succeed in an ECF without assistance.”

Additionally, another respondent stated that:

“I do not think the client would have been able to make a successful application because of how complex the forms are. Even for us, as volunteer lawyers with a legal education, this required a lot of reading in order to produce the draft grounds and completed forms.”
Another told us that, “at the moment, the process for obtaining legal representation is paradoxically very difficult to impossible to complete without legal representation.”

These responses indicate the complexity of immigration and deportation cases. Paradoxically, legal assistance (in our case, pro bono assistance) in making an ECF application appears to be an essential factor in one’s ability to present a viable and strong case as to why legal aid, and subsequent legal representation, is essential for the substantive immigration matter. Indeed, the Legal Action Group found that in the 2021/22 financial year, only 545 of 3724 ECF applications were made by individuals.[10]

Gap in Services - Why Pro-Bono Chose to Volunteer

Respondents were asked why they chose to volunteer and provide pro-bono representation.

The key themes raised include:

- Ensuring access to justice was the most commonly cited reason.
- Providing vital assistance to vulnerable people.
- The fact is that people's ability to access legal assistance should not be based on wealth. One respondent said, *'The ability to have advice and representation on matters that will affect the rest of your life and those around you (children, etc.) is essential for anyone, regardless of ability to pay.'*
- The firm's commitment to pro bono projects.
- BID's reputation and wanting to assist with the vital work it does to learn about a new area of law.
- The importance of the project given the serious and life-changing consequences that people face, as well as the lives of their children.
-
- The sustained cuts to legal aid over the past 10 years have eroded access to justice.

One response said:

"We believe in access to justice. Immigration law is complex and ever-changing, and following cuts to legal aid, BID's Exceptional Case Funding project can provide vital support to those in need. The serious and life-changing consequences of what clients face, some of whom may be deported to a country where they have never been, make this initiative all the more important."

These responses indicate a reliance on altruism as pro-bono work plays an important role in filling a gap by providing people with legal assistance where it would otherwise be unavailable. A small proportion of ECF applications are made by individuals [11] suggesting the process is generally inaccessible to unrepresented applicants whilst the legal Aid Statistics show that the overall success rate for applications remains high.[12] This supports our call for immigration cases to be brought back into the scope of Legal Aid.



Recommendations from pro bono lawyers

In the survey sent to pro-bono lawyers, respondents were asked if they had any recommendations as to how the ECF process may be improved to make it easier for applicants who lack any legal representation or support.

Six respondents suggested that the process could be improved with clearer guidance and information provided to applicants, particularly in relation to what ECF is, who is entitled, and what documents are likely to be necessary in order to succeed. One respondent suggested that it would be helpful to have a standard form precedent application, that applicants could amend to reflect their own circumstances.

Four people provided answers that related to making the process more user friendly – with simpler forms and fewer administrative hurdles.

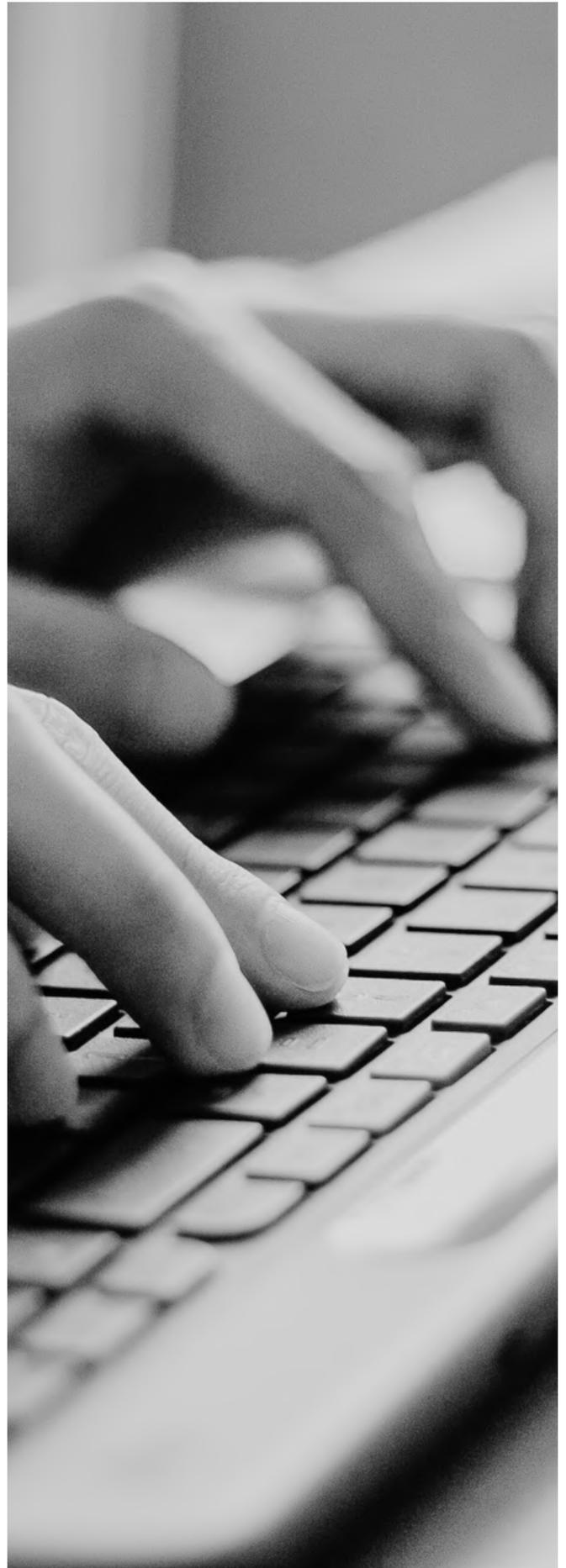
One individual suggested that it needs to be easier to find a lawyer once ECF funding is secured. Another response stated that due to the importance of these decisions on the individual applicant and their immediate family members in the UK, Legal Aid needs to be restored for these cases.

Part III: Difficulties Referring Clients to Legal Aid Lawyers

The difficulty of referring clients to a legal aid lawyer is often referred to as a legal aid desert, whereby many people on low incomes are unable to receive the legal advice they are entitled to. In 2022, the Law Society found that 66% of the population do not have access to an immigration and asylum legal aid provider.[13]

After ECF was granted, an additional hurdle that applicants and pro bono lawyers faced was finding a legal aid lawyer to represent their client. Pro-bono lawyers made a large number of referrals, and in some cases, it took a long time to refer out. In a minority of cases, a referral was quick as the client already had a legal aid lawyer instructed on their asylum matter (which is in the scope of legal aid) but required an ECF application to cover the Article 8 matter which the legal aid lawyer was unwilling to do. The time taken to secure a legal aid lawyer successfully once ECF was granted varied but, on average, took between one and two months.

Each case has a unique factual matrix that will be relevant for a firm in deciding whether to take on a case, including distance from the firm, whether the person is in prison, whether they require an interpreter, the stage of the case and the strength of the case.



However, the most common reason given by firms unable to take on a referral was simply lack of capacity.

One respondent highlighted that handing over the case to an immigration lawyer was difficult, particularly as the immigration lawyer had a heavy caseload. Whilst the respondent recognised it is common in legal aid practises for lawyers to have heavy caseloads, they said it was difficult to contact the lawyer, and the correspondence with the lawyer was brief and inadequate. They stated it was difficult to see the applicant frustrated and upset by this.

The ECF project team found the referral process was extremely time-consuming, requiring emails, phone calls and following up initial contacts. The team found that legal aid lawyers had minimal capacity to accept referrals; many said they had waiting lists. In some cases, the list of legal aid lawyers from the LAA 'Find a Legal Aid Lawyer' was outdated in that the firms no longer took on legal aid work.

Additionally, the ECF project team found that ECF applications that had been thoroughly prepared assisted in securing successful referrals. Well-prepared ECF applications contain clear summaries of cases, essential materials and issues, the identification of preparatory work and of the expert evidence likely to be required to progress the case. This enabled time-pressed solicitors to quickly assess whether the firm had the expertise and capacity to assist.

In contrast, applicants who prepared their own ECF applications, submitting basic information about their case, even if granted ECF, would likely find the process of instructing a legal aid lawyer even more difficult as it would require more time and work on the part of the potential legal aid solicitor to assess the case to determine whether they could assist.

BID's ADAP Legal Manager was contacted by an external caseworker on how to help people without legal representation apply to revoke their deportation order. The caseworker summarised the difficulty of finding representation and stated:

"I can help him [the client] with the legal aid application as an assisted client. He may have more chance of finding a lawyer then but to be honest I can't find lawyers for people in prison I am told "no capacity" or "no capacity" for this kind of case. The clients have the same experience."



Reluctance of Legal Aid Lawyers to make ECF Applications

The ECF project team found that many legal aid firms will not make applications for ECF. This is because it is complex and time-consuming, requiring instructions from the applicant regarding their case and considering background papers to assess if the merits test is met. This can be particularly time-consuming if the applicant is Appeal Rights Exhausted and requires a fresh human rights application.

A fresh human rights application for a person who has not yet been removed from the UK must meet the ‘fresh claim test’ with a material change of circumstances since the case was last refused. As a previous immigration tribunal decision is the starting point, the solicitor must carefully read through these documents and make clear in an ECF application why the case now has merit despite having previously been refused. The process of taking even basic instructions can be particularly time-consuming if the applicant speaks little English and is costly if an interpreter is required. Furthermore, gathering evidence of financial means and calculating entitlements is also time-consuming, especially if the applicant or their partner is working or self-employed.

Legal aid lawyers are also not paid for the work preparing the ECF application unless funding is granted, meaning many already oversubscribed and time-pressed solicitors may be reluctant to make an application where there is a risk of it being refused. The ECF Project team found this is the case even when the solicitor is already acting for the client in an asylum matter, which is in the scope of legal aid. Therefore, the team have had to apply for legal aid to cover the Article 8 matter, and once granted, the existing solicitor takes on the Article 8 matter and represents the client in the full immigration case.

Case Studies

BID's ADAP Legal Manager and the ECF Project Team provided case examples of their attempts to refer ECF clients to a Legal Aid Lawyer once ECF was granted. For more case examples, please see Annex A.

Mr Y

Mr Y, had been deported from the UK and required a fresh human rights application and application to revoke the deportation order. He instructed that he was not safe in the country of deportation and that the ongoing enforcement of the deportation order breached his right to family life with his partner in the UK. He was granted ECF in January 2021. The team posted 4 requests for a lawyer on the RLG and ILPA Google group and contacted 5 private firms. There was either no response or the firms did not have capacity to assist. **A legal aid lawyer was found in October 2021, 9 months after grant of ECF.**

Mr M

Mr M was in prison when he approached the ECF project for help with his deportation appeal. He was receiving some assistance from a charity based in prison for corresponding via email with the immigration tribunal but they could not provide legal advice.

Mr M was held in prison under immigration powers when the ECF application was made. He had been in the UK for approximately 16 years. He was separated from his partner but remained in close regular contact with his two minor children, both born in the UK and with status under EUSS.

Mr M required a lawyer to represent him at his deportation appeal, and his case required expert evidence in the form of an Independent Social Worker report documenting his very close relationship with his children and the impact on their wellbeing if he were to be deported.

The ECF project team applied for ECF in August 2022, and it was granted in September 2022. The appeal was progressing, and directions were issued for the appellant to provide his bundle of evidence. Between being granted ECF and a lawyer instructed, the ECF project team assisted him in applying to the immigration tribunal to vary directions to extend the time for the provision of the appellant's bundle. They also assisted him in communication with the tribunal in meeting amended directions and to provide updates to the court on progress in instructing a legal aid lawyer. **12 firms were contacted before his case was successfully referred out in November 2022.**

Mr B

Mr B is an EU national. He was not able to communicate in English. He was extremely vulnerable, suffered from poor psychological ill-health and had been accepted by the Home Office as a victim of trafficking. His deportation case was at the appeal stage when BID took him on to make an application for exceptional funding legal aid.

BID prepared an adjournment request to allow time for the legal aid application to be made and for a lawyer to be instructed to represent him at appeal.

Due to his significant vulnerability, BID took the step of going on record as formally instructed to apply to adjourn. The application was granted, and a date was set for a CMRH (Case Management Review Hearing) by video link to review progress.

Due to Mr B's vulnerability, BID continued to liaise with the tribunal on his behalf. As he was not able to deal with the matter himself, BID agreed to represent Mr B at the case management hearing pro-bono to update the tribunal on the ECF matter.

The ECF application was granted in July 2023. To date, **14 law firms have been contacted, but none have the capacity to take on his case. BID will continue to assist him in keeping the tribunal updated until a lawyer is found.**

Given Mr B's vulnerabilities and communication barriers, if BID had not prepared the legal aid application and continued to assist him with liaising with the tribunal, it is very likely that he would have had to represent himself in his deportation appeal despite his evident inability to obtain and organise required supporting documentation and to advocate for himself.

Mr E

Mr E was living on immigration bail in the UK. He required legal representation for his deportation appeal. He has a minor child with whom he was re-establishing contact following his time in prison.

ECF was granted in September 2022. He was not able to instruct a lawyer until March 2023, 6 months after legal aid was granted.

The team contacted 47 solicitors' firms to try to refer him. Some firms did not reply to referral attempts made by the ECF team. However, the vast majority did and informed the team that they were at full capacity.

Mr E required assistance from BID in liaising the tribunal regarding his deportation appeal when he was without a lawyer. This included an application to vary directions to extend the deadline specified by the court for his Appellant's Bundle and Skeleton Argument (bundle of evidence and basic legal argument relied upon) to be submitted and advice on applying for an adjournment if a legal aid lawyer could not be instructed by the date of the full appeal listed for April 2023.

The process was extremely time-consuming and frustrating for both BID and the Applicant. He was extremely worried that he would have to represent himself in court. Without the legal arguments and expert evidence, he would not have had a fair chance to put his case as to why he should not be permanently separated from his minor son in the UK.

Conclusion

Access to justice is a basic principle of the rule of law and underpins democracy itself.

LASPOA removed most non-asylum/protection claims from mainstream legal aid. Whilst ECF was introduced with the aim of providing a 'safety net' for people with the most complex cases or who were particularly vulnerable, the reality is that the system is failing people who require legal assistance.

This report identified two main hurdles for people facing deportation in accessing legal aid representation. Firstly, that application process is complex and largely inaccessible to people without legal assistance. Secondly, there are significant delays in instructing a legal aid lawyer once ECF has been granted. This means that people, whom the LAA have recognised as needing a lawyer, face very significant delays in access to justice.

In addition, individuals going through the immigration appeal process whilst their ECF application is pending or prior to instructing a legal aid lawyer, often face the additional challenge of having to apply to the Immigration Tribunal to seek to adjourn their case, a process which many find confusing and are simply unable to do without assistance.

People facing deportation who do not know about ECF and/or are simply unable to complete an application without legal assistance, find themselves having to self-represent in matters that concern their fundamental human rights and those of their families.

Deportation can have devastating consequences not only for the people liable to deportation but also for their families, particularly their minor children in the UK, who may suffer long-term emotional harm. This can also have long-term negative consequences for their community and for broader society. It is preventable.

BID engaged with the LAA in August 2023 and raised concerns about the complexity of the ECF process and the struggle to refer cases to legal aid lawyers. On the ECF application itself, the LAA acknowledged the complexity of the forms and responded that they were looking at simplifying them.

Within the application, BID highlighted that the financial means test can be very complicated and recommended that anyone in receipt of Schedule 10 support (support for people without leave to remain) should be passported through the financial means test given a precondition of support under schedule 10 is destitution.

Once ECF is granted BID suggested that the LAA consider rotas for lawyers to take on successful ECF cases and a potential uplift in fee rates. The LAA response is that they are looking at how to incentivise lawyers to take on cases, including allowing remote advice.

Looking to the future, if the Illegal Migration Act (2023) ever comes fully into force, it will place a duty on the Home Secretary to remove people who arrive in the UK irregularly, effectively abolishing the right to make an asylum and human rights claim in the UK for a large number of people.

In addition, the complexity of the new Act in relation to deportation and the very tight timescales envisaged for applicants to respond to Home Office paperwork makes swift access to legal advice essential to secure access to justice.

As Lord Bach stated in the House of Lords debate on the Illegal Migration Bill in June 2023:

“There are many who believe this Bill to be the worst introduced by His Majesty’s Government, formerly Her Majesty’s Government, since they came to power 13 years ago. I agree, although, in my view, the Legal Aid, Sentencing and Punishment of Offenders Act—LASPO, as mentioned by the noble Baroness—which achieved its 10th anniversary on 1 April, comes a close second. That Act, as the Committee knows, took away ordinary people’s ability to access justice in the whole field of social welfare law and offended against fundamental rule of law principles. One of the few areas that retained legal aid in scope was asylum and, to an extent, immigration—even though that has been whittled down over the last 10 years, with dire consequences for the provision of advice and lawyers dealing with asylum cases.”[14]

He quoted Lord Reed, who in *Unison v Lord Chancellor*[15], said that:

“provision of legal aid to individuals who seek redress is not simply a matter of compassion, but a key component in ensuring the constitutional right of access to justice, itself inherent in the rule of law.”



Annex A - Case Studies Continued

1. Long Referrals for LAA Lawyer

Mr I

Mr I's case took 7 months to refer out even though he was living in London on immigration bail. The team posted out two calls for a lawyer on the ILPA google group and 2 postings on the RLG and contacted 3 private firms before he was taken on.

His case was at deportation appeal stage and he had four minor children, two with his partner, and two from a former relationship. He was actively involved in the care of all 4 children. He had lived in the UK for 20 years.

His case had been set by the Tribunal for a Case Management Review Hearing (an administrative hearing at which the key matters in dispute are clarified and the court considers whether the case can proceed to full hearing), after ECF was granted but before a lawyer had been found.

This required the lawyer to provide additional assistance to the client by writing to the Tribunal to explain the legal aid situation and request that a further date be set for a CMRH to review progress. The lawyers also assisted by explaining the content of the Directions subsequently issued by the court for progression of the appeal and advised him on proving the required written response. This included key matters such as whether expert evidence required and whether the case was suitable for a remote hearing.

After the grant of ECF and pre-instruction of a legal aid lawyer, the client would have struggled to deal adequately with the liaison required with the court in relation to progression of the appeal, which would have negatively impacted his ability to fairly make out his case.

Mr Z

Mr Z had arrived in the UK as a child. He suffered from poor mental health and some cognitive impairment. He had a minor child in the UK. He was living in London on immigration bail. He had received a stage 1 Notice of Liability to deportation and needed a lawyer to make submissions as to why no stage 2 deportation decision should be made. Despite this, the team were unable to successfully refer his case to a lawyer until 6 months after the grant of ECF.

Mr J

Mr J was granted ECF in April 2023 as he required legal representation to respond to the One Stop Notice of Liability to Deportation. As at mid-July 34 firms had been contacted, all either did not respond or were at capacity.

2. Cases Requiring Legal Assistance during the ECF Applications

In some cases, the client required assistance with communication with the Immigration Tribunal, even before the ECF application had been made.

Ms P

Ms P is a vulnerable single parent of two and a victim of Domestic Violence. She also suffered from poor mental health. She came into contact with the ECF project team for an application for ECF when her deportation appeal was listed for a full hearing. The team helped her adjourn her hearing so that an application could be made for ECF. This was granted, and a date was set for a Case Management Review Hearing (CMRH). However, a further adjournment was requested as legal aid was not yet in place. This was granted. ECF was granted in August 2019, and a legal aid lawyer instructed in September 2019.

Mr V

Mr V had a Case Management Review Hearing (CMRH) for his deportation appeal on referral to the project. The ECF project team advised him that they would make an ECF application for him. The team provided him with a letter for the court stating that an ECF application would be made, requesting a date for a further CMRH to review progress rather than a date for a full appeal. The request was granted.

Mr T

T was a vulnerable applicant who suffered from mental health issues and was detained in prison. A late appeal was lodged against deportation only with the pro-bono help of a solicitor's firm. However, they were not able to take on the deportation appeal. Upon referral to the ECF project team, the full appeal was listed for early October 2019. The ECF project team successfully applied to adjourn pending the ECF application. However, a further adjournment request was required post-ECF grant in October 2019 in order to instruct a legal aid lawyer, which occurred in November 2019. **In that time, the team had contacted 10 firms and posted on the RLG before a lawyer could be found to take on the case.**

Mr L

Mr L was a particularly vulnerable client who required applications to adjourn the deportation appeal at all stages of the ECF process. These stages included before lodging an application to adjourn a CMRH and the full appeal, whilst the application was being determined by the Legal Aid Agency (an application to adjourn the full appeal) and once again when legal aid had been granted but before a legal aid lawyer had been instructed (an application to adjourn the appeal).

IECF was granted in July 2019. A legal aid lawyer was instructed in September 2019, and the hearing was listed for later that year. **It took approximately 2 months to find a legal aid lawyer to take on the case.**

Mr L was an EEA national. He was in an IRC on referral into the ECF project. However, before the ECF application was completed, he was removed to his home country under EEA Regulations that allowed the Home Office to remove an EU national before the appeal was heard and required the appellant to apply to re-enter the UK to attend their appeal.

After removal, contact was very difficult. He was destitute and street homeless. He did not always have access to a phone, and language barriers also hindered communication. The ECF application, therefore, took longer than the average to prepare.

In the view of BID and the pro-bono lawyers, Mr L would not have been able to apply for legal aid himself and would not have been able to make the required adjournment requests.

In BID's experience, it is extremely unlikely that any legal aid lawyer would have been willing to invest the required time and resources in making an ECF application and an application to adjourn the CMRH even before the ECF application was lodged. As noted above, ECF applications are work 'at risk' as a lawyer will only be paid for the work preparing it if funding is granted, which is not guaranteed.

Mr Q

In one case, where time was of the essence and legal representation was essential, the ECF project team did manage to refer the case to a legal aid lawyer very quickly after the ECF was granted.

Mr Q had arrived in the UK as a minor. He had a strong family life with a partner and their children, who are British. He had been represented by private immigration lawyers. He had lost his appeal to the First-tier Tribunal (FTT) but had successfully applied for permission to appeal.

Mr Q's had reached an 'error of law' hearing at the Upper-tier Tribunal. This is a hearing whereby the parties to the appeal are required to present arguments to the immigration judge as to whether the decision of the First-tier Tribunal was incorrect in law. However, a few days before the error of law hearing, the private lawyers ceased acting for him as he was unable to continue to pay them.

The ECF team did find a lawyer who was able to act for him. The legal aid lawyer later contacted BID to comment on the legal complexities of the case. He commented:

'The Upper Tribunal allowed the appeal and re-mitted it back to the FTT for a de novo hearing. There's so much going on in this case, I discovered – there were lots of good legal issues, and I think a legitimate expectation of ILR [indefinite leave to remain] when he was a child and what looks like a good case for saying he was trafficked by his stepmother that the previous reps, the SSHD and FTT just completely ignored. A good, meaty case to get stuck into. Not easy for many reasons, but also very compelling too. A great case!'

The ECF project team believes that had ECF not been applied for and a legal aid lawyer instructed, Mr Q would have had to represent himself against a trained Home Office Presenting Officer without knowledge of the meaning of the 'error of law' test or how it applied to his case. In addition, the new aspects of his case uncovered by the legal aid lawyer would not have been explored. Thus, Mr Q's access to justice would have been significantly hindered.

3. ADA Project Cases Requiring ECF

These ECF applications were prepared by the Article 8 Deportation Advice Project (ADAP), separate from the ECF project. BID found that the difficulties experienced in the ECF project with the pro bono firms were replicated. Some of the following cases took an extremely long time to refer out after the grant, and some also required additional help from BID between grant and referral with adjournment requests.

Mr C

Mr C arrived in the UK as a minor. He had spent time in the UK as a Looked After child, which means that he had been in the care of the local authority. His parents and siblings were in the UK and he had a British girlfriend. At the time of contacting BID, he was held in prison on immigration bail. BID assisted him to lodge a late appeal, which was accepted by the IAC. He had been sentenced to over 4 years in custody. He was granted ECF in November 2020. ADAP did not manage to refer his case out until March 2022

In total, **59 firms were contacted** by BID and by Mr C's partner. BID also made 2 postings on the ILPA Google group and one on the RLG. They either did not respond or were at capacity. Eventually the team managed to find a solicitor who agreed to take the case on for appeal if it was adjourned to after a specified date. The team assisted the client by drafting an adjournment letter for him, setting down all of the above. The adjournment was granted.

Mr G

Mr G was at the One Stop Notice stage in the deportation process. He required assistance with an ECF application for both his immigration matter and for a family court application.

The immigration legal aid was granted in October 2020. The pro-bono team were unable to find a lawyer with capacity to assist until December 2021, so over a year from grant. The legal aid lawyer was instructed after contact with 8 solicitor's firms, 4 postings on the ILPA Google group and 3 postings on the Refugee Legal group.

A number of factors made his case particularly difficult to refer out, most notably that he was still serving a long custodial sentence in a prison on the South Coast of England. This made taking instructions more difficult due to restrictions in communications. It also meant that he had to meet a very high threshold to resist deportation.

However, the fact that legal aid was granted was a clear recognition that legal representation was required to secure access to justice.

For the family court matter, he required advice from a family lawyer on the merits of applying to vary a Child Arrangements Order. The ADAP team applied for ECF for the family matter. It was originally refused but granted upon review in January 2021. He was referred to a legal aid lawyer in November 2021 following contact with over 10 firms.

Mr MK

Mr MK is currently serving prison time in a prison in the Southwest of England. He was granted ECF in May 2023 for a fresh human rights application to revoke the deportation order. He suffers from significant psychological ill-health. He has a very complex immigration case. As at the end of July, 12 firms had been contacted and a posting made on the RLG. No firm had capacity to assist.

4.– ADAP ECF Complex Cases Requiring Adjournments

Mr S

Mr. S suffered from significant mental health problems. His matter was complex as he also had parallel family court proceedings. He struggled with keeping the immigration court and the family court updated on progress as Directed. The ADAP team prepared an ECF application for his immigration matter (at deportation appeal stage) and his family court matter. Immigration legal aid was granted June 2021 and a legal aid lawyer instructed April 2022. **9 individual firms contacted, plus calls out on ILPA google group.**

As a full deportation appeal was set for September 2021, BID prepared a letter for Mr S to reply to Tribunal Directions and to request an adjournment. The team invited the court to set a date for a CMRH date for an update on progress in instructing a legal aid lawyer. The team lodged this request with the court for him as he felt unable to do this himself.

Mr S also had to apply for a family ECF case, alongside applying for an immigration ECF case. The two applications in parallel demonstrate the complexity of the applicant's case and the complex interaction between family and immigration law.

The ECF application for Mr S's family case was originally refused therefore the team applied for a review, which was successful. Legal aid for his family case was granted in October 2021 and a legal aid lawyer was instructed in the same month. However, the family lawyer only agreed to take on the family case if the next hearing was adjourned. The ADAP team obtained written confirmation of this from the family lawyer and prepared an adjournment request letter for the family court for the client.

The client was extremely vulnerable due to his mental health condition and was unable to engage with the court. He would not have been able to make an ECF application for either his immigration or his family case and was unable to make the necessary adjournment applications by himself.

Mr H

Mr H was in an IRC when the ECF project team took on his case to make an ECF application. English was not first language and an interpreter was required for effective communication. He also suffered from poor mental health.

His case was at deportation appeal stage. Had also had parallel extradition proceedings.

ECF was granted in October 2021. His full deportation appeal was listed for February 2022. The ADAP team helped him to apply to adjourn as no legal aid lawyer had yet been instructed. **The team explained that BID had contacted 9 firms without success. The client himself had tried 10 lawyers.**

The team also liaised with his extradition lawyer to clarify the stage of the proceedings and timescales moving forward, in order to explain this to the immigration court.

The Tribunal refused to adjourn on the grounds that,

‘the Appellant has had considerable time to locate lawyers and put his case. There appears to be no guarantee he will locate lawyers willing to take on his case if the matter is adjourned further’

The immigration judge further commented that he must have already put most of the material relevant to the appeal forward in his deportation appeal and so the immigration tribunal can just use that.

The team referred the case out to solicitors for a possible Judicial review challenge to the Tribunal for refusal to adjourn the appeal. The firm took on the case in February 2022, **4 months** after legal aid was granted. They managed to secure an adjournment of the appeal as newly instructed solicitors and the Judicial review was not required.

Mr F

Mr F’s case was at deportation appeal stage. English was not his first language and there were language barriers to communication. He had a minor child and an Independent Social Worker report was required for the appeal.

The ECF application was refused on means. It involved a technical complex legal issue of whether capital in a house he jointly owned but had no access should take him over the legal aid capital limit.

A review request was pursued, with assistance from Public Law Project. The review was successful and Mr F was granted ECF in June 2021.

The team also assisted Mr F with updating the immigration tribunal on the legal aid matter and to request to adjourn a Case Management Review Hearing and vary Tribunal Directions for submission of the Appellant's bundle.

The court was understanding of the applicant's difficulties and set a date for a further CMRH. However, the court was clear that'

'the Tribunal will not wait indefinitely for a lawyer to be found and if necessary, the Appellant should be prepared to undertake his own representation'.

The team contacted 10 firms and posted calls on RLG & ILPA Google group to find him a lawyer. His case was taken on by legal aid lawyer September 2021.

Mr F also tried to find a lawyer himself. Even though he had ECF, one firm would only see him if he paid a fee for 'one off advice' of £40 or them to consider his case to see if they could assist him. Mr F could clearly not have made an application by himself and certainly could not have mounted a challenge to the refusal of legal aid on the means application.

End notes

1. *Gudanaviciene & Ors v Director of Legal Aid Casework & Anor* [2014] EWHC 1840 (Admin) (13 June 2014)
2. *Ibid*
3. *Statistics on Race and the Criminal Justice System 2018 - A Ministry of Justice publication under Section 95 of the Criminal Justice Act 1991 -*
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/849200/statistics-on-race-and-the-cjs-2018.pdf page 2
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