

KALAYAAN

justice for migrant domestic workers

Monday, 19 October 2020

Kalayaan's Response to the Justice Committee's future of legal Aid inquiry

Kalayaan was established in 1987 and is the leading UK charity offering advice, advocacy and support services to migrant domestic workers. We are regulated by the Office of the Immigration Services Commissioner (OISC), SRA and BSB and authorised to provide immigration advice and services. We do not provide publicly funded advice. We receive grants and donations to fund our work.

Kalayaan is also a designated first responder to the National Referral Mechanism, the UK framework for identifying and supporting victims of modern slavery. By way of background, the client group we assist include men and women, who have come to the UK with an Overseas Domestic Worker (ODW) visa, as part of a private or diplomatic household. Unfortunately, those we assist are often victims of ill treatment and exploitation. It is common for us to hear accounts of people being forced to work excessively long hours, without proper breaks and with pay below the National Minimum Wage. Our clients are sometimes forcibly confined to their workplaces. They are not given enough food or even a proper place to rest or sleep. They are often subject to verbal and sometimes physical abuse. Our clients escape from their employers, sometimes before or after their visas expire, and then have to contend with the hostile environment.

We would like to respond to the inquiry, highlighting the experience of those we assist and our observations regarding the impact on LASPO, in so far as we can.

Summary

- **The limitations to the scope of legal aid are not reasonable given the complexity of immigration law, and the impact of the hostile environment**
- **The ECF system which is intended to mitigate the limitations on scope does not work in practice because of the way the system has been designed**
- **Expertise is being lost within the sector as lawyers move away from primarily doing legal aid work**
- **Any future improvements to legal aid must be evidence based, consider the impact on the users, and must start with recognition of the vital importance of legal aid in an adversarial legal system**

How LASPO has affected access to justice views on the post-implementation review and the criminal legal aid review;

Not all the clients we assist will be automatically eligible for legal aid, even if they meet the financial threshold, because the scope of legal aid work has been limited to exclude immigration applications unless you can obtain Exceptional Case Funding (ECF).

Clients who have been referred into the National Referral Mechanism and have received a positive Reasonable/Conclusive Grounds decision should not have difficulty accessing legal aid,¹ however in practice we have observed that they do experience difficulties, for the reasons set out below:

Fixed Fee

The way the current legal aid system is structured is problematic for our clients. There is a significant difference in the sums paid through the Graduated Fixed Fee (GFF) for immigration matters (£234) and asylum matters. For assisting with an asylum application/appeal a legal aid lawyer will receive around double the GFF payment they would receive for assisting with an immigration application/appeal. Lawyers will only receive payment for all their work if the work completed equates to 3 times the GFF value, as at this point the case will become eligible for payment on an hourly rates basis. However, solicitors do have to apply for this, so there is an administrative hurdle to overcome to receive full payment. The reason for the disparity between the sums paid for asylum and immigration matters is unclear, given it is widely accepted that immigration law, with its procedural and evidential requirements, is often complex. Our clients are also all too aware of the important implications of the decisions made by the Home Office, which affects their ability to work, access support, rent, open a bank account, access the NHS, extend their leave, and be joined by family members.

In our experience the low GFF payment appears to encourage legal representatives to limit their work to the value of the GFF, and as a consequence organisations supporting clients are required to assist with our client's immigration matters, to make representations and to supplement the advice given by legal representatives.

Limitations of Scope of Legal Aid

The legislation and regulations surrounding legal aid lacks clarity, causing confusion amongst practitioners and the Legal Aid Agency regarding the limitation of scope. A judicial review challenge brought by ATLEU in 2018, brought this matter to a head for victims of trafficking and modern slavery.² However, in practice the confusion appears to prevail and thus impede access to legal aid. When our clients, who are victims of modern slavery or trafficking, seek legal aid, they are often told that this is only available if they claim asylum, which is incorrect. In part we fear this mistake arises because the legal aid provisions are so complex, but in part this could also be as a result of the financial disincentive in dealing with a non-asylum matters, as mentioned previously.

Exceptional Case Funding (ECF)

¹ paragraph 32 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 - <https://www.legislation.gov.uk/ukpga/2012/10/schedule/1/paragraph/32>

² <https://atleu.org.uk/news/legalaidimmigrationadvice>

The existence of the ECF system does not properly mitigate the effects of the limited scope of legal aid. The ECF process was designed so that if a case was not automatically eligible for legal aid, because it was outside the scope of funding, the matter could be brought within the scope if you applied for ECF funding. However, this system is problematic for a number of reasons:

1. The ECF process has created a further administrative hurdle to overcome before you can access legal aid. The ECF application is an additional tranche of work for a solicitor, as they must be preparing the ECF application and collate the evidence needed to secure funding. The solicitor must demonstrate that not only is the person financially eligible, but they must identify the legal issues and explain why they cannot deal with the matter without legal assistance. Some charities and support groups have stepped in to assist with making ECF funding applications, however this simply relocates the administrative burden and does not remedy the other flaws with the system.
2. This process also creates a delay to accessing legal advice, as it is unlikely a lawyer will want to assist you until their ECF application has been approved, even if your need for advice is urgent, as there is a chance the application for ECF will be refused and the work undertaken will not be paid for.
3. Then even if your application is successful, the GFF is at the lower immigration matter fee of £234. It is not financially attractive for firms to take on these types of cases in any significant number. The practical implication is that fewer cases, which may be eligible, are taken on.

The flaws identified lay with the design of the system, not the lawyers, who are paid at low rates for doing the complex and important work, for some of the most vulnerable in society.

If someone is financially eligible for legal aid, it seems unjust that they are automatically excluded from accessing legal aid, unless they can secure ECF. We would argue that greater thought needs to be given to what cases are automatically excluded from the scope of Legal Aid, and that there should be consultation on this. The difficulty with the design of the Legal Aid system is that people who are eligible to receive legal aid, are not receiving it.

Recruitment and retention problems among legal aid professionals

In our experience it is difficult for clients to find experienced lawyers to take their cases on. A lot of time is spent trying to refer clients to experienced solicitors. It seems that because of the limitations with the GFF funding many firms are moving away from primarily doing legal aid work. It also seems to be the case that the amount of time practitioners devote to legal aid clients has been significantly reduced. We note that the lowest paying work is usually being done by the most junior lawyers, even though these are complex cases involving some of the most vulnerable. This again shifts the burden to charities and groups supporting victims of trafficking and modern slavery, who may supplement legal work or just have to monitor more closely the legal work being done to ensure that issues are not overlooked.

What the challenges are for legal aid over the next decade, what reforms are needed and what can be learnt from elsewhere.

Legal Aid processes must be designed with the users of this service, in mind. The Legal Aid Agency must have a realistic understanding of the circumstances of the client group. Being able to establish that you are eligible for legal aid can be problematic for those most in need. Many people who need legal aid are living in chaotic circumstances, for example they do not have a fixed address but are perhaps “sofa surfing” or even street homeless. It is difficult to evidence this for the purpose of showing you are financially eligible for legal aid. If you do not have a bank account, as you are not permitted to open one, it is difficult to prove you have no money. This deters solicitors from taking cases on as they fear that they will not be able to satisfy the Legal Aid Agency that someone is eligible for legal aid based on the evidence they have available.

To date changes to legal aid do not appear to be made on an evidence approach, and this must change. There must be analysis of the implications to those who need to access legal aid. Cuts to legal aid affect the courts system and the ability of ordinary people to seek redress, and this also has an associated cost. When changes to funding are made, decision makers must consider how the cost burden will change, but also where it will shift to.

At Kalayaan we see in practice how legal aid works as a safety net to protect people from injustice and can empower vulnerable individuals, protecting them from poor decision making which affects every aspect of their lives, from whether or not they can live in the UK, to whether they can work, access benefits, open a bank account, rent a home, use the NHS and be reunited with their family members.

In our experience, offers of pro bono advice do not fill the vacuum left by legal aid, because pro bono advisers do not necessarily have the expertise in this area and are also constrained with respect to how much time they can dedicate to this unpaid work. This limits how much time they can spend on a case, but also prevents them from developing the expertise. Other sources of funding, such as crowd funding are not an alternative to legal aid, as they force the vulnerable into a beauty pageant of misery, as they must garner sympathy to receive support. We see clients who fall just short of qualifying for legal aid borrow money from friends, work illegally or in exploitative conditions, so that they can pay a solicitor privately. Their limited resources then prevent them from getting the level of assistance they need.

A properly funded legal aid system is needed and will always be needed given we have an adversarial legal system, if we want a fair society. There must be greater recognition of this, and future reforms should acknowledge this. We cannot improve the circumstances of the most vulnerable and unrepresented, if they cannot make applications and challenge decisions which determine their rights and entitlements in the UK.