

# PARLIAMENTARY DEBATES

HOUSE OF COMMONS  
OFFICIAL REPORT

Twenty-first Delegated Legislation Committee

DRAFT LEGAL AID, SENTENCING AND  
PUNISHMENT OF OFFENDERS ACT 2012  
(LEGAL AID FOR SEPARATED CHILDREN)  
(MISCELLANEOUS AMENDMENTS) ORDER 2019

*Tuesday 8 October 2019*

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**The Committee consisted of the following Members:**

*Chair:* SIR ROGER GALE

- |   |   |
|---|---|
| † Cartlidge, James ( <i>South Suffolk</i> ) (Con)                   | † Morton, Wendy ( <i>Parliamentary Under-Secretary of State for Justice</i> ) |
| † Ellwood, Mr Tobias ( <i>Bournemouth East</i> ) (Con)              | † Prentis, Victoria ( <i>Banbury</i> ) (Con)                                  |
| † Gaffney, Hugh ( <i>Coatbridge, Chryston and Bellshill</i> ) (Lab) | † Russell-Moyle, Lloyd ( <i>Brighton, Kemptown</i> ) (Lab/Co-op)              |
| † Graham, Luke ( <i>Ochil and South Perthshire</i> ) (Con)          | † Slaughter, Andy ( <i>Hammersmith</i> ) (Lab)                                |
| Hayes, Helen ( <i>Dulwich and West Norwood</i> ) (Lab)              | † Stevens, Jo ( <i>Cardiff Central</i> ) (Lab)                                |
| † Heald, Sir Oliver ( <i>North East Hertfordshire</i> ) (Con)       | † Western, Matt ( <i>Warwick and Leamington</i> ) (Lab)                       |
| † Hussain, Imran ( <i>Bradford East</i> ) (Lab)                     | † Whittaker, Craig ( <i>Calder Valley</i> ) (Con)                             |
| † Jones, Mr Marcus ( <i>Nuneaton</i> ) (Con)                        | Clemmie Brown, <i>Committee Clerk</i>   |
| McMorrin, Anna ( <i>Cardiff North</i> ) (Lab)                       | † <b>attended the Committee</b>   |
| † McLoughlin, Sir Patrick ( <i>Derbyshire Dales</i> ) (Con)         |   |

# Twenty-first Delegated Legislation Committee

Tuesday 8 October 2019

[SIR ROGER GALE *in the Chair*]

## Draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Legal Aid for Separated Children) (Miscellaneous Amendments) Order 2019

8.55 am

**The Parliamentary Under-Secretary of State for Justice  
(Wendy Morton):** I beg to move,

That the Committee has considered the draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Legal Aid for Separated Children) (Miscellaneous Amendments) Order 2019.

The draft order makes provision for separated migrant children to be eligible for legal aid for civil legal services for non-asylum immigration and citizenship matters. This important piece of legislation will help to ensure access to justice for vulnerable children.

Let me set out the purpose of this statutory instrument. For those not familiar with the provision of legal aid, legal aid for civil legal services is available to an individual if the service is in scope—in other words, if it is described in part 1 of schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012. In addition, legal aid may be available on an exceptional basis where there would be a breach, or risk of a breach, of an individual's rights under the European convention on human rights or any enforceable EU rights. This is known as exceptional case funding, or ECF.

Eligibility for legal aid, both for in-scope matters and for ECF, is subject to statutory means and merits assessments. Under current arrangements, separated migrant children who are seeking to regularise their immigration or citizenship status in the UK can apply for ECF to receive legal aid for help with their citizenship application, immigration application form or subsequent appeal. However, following litigation and engagement with key stakeholders, including the Children's Society, this draft instrument will bring these matters into the scope of legal aid. That means that separated migrant children will no longer have to make ECF applications to receive legal aid for citizenship and non-asylum immigration matters.

Let me turn to the scope of the amendment. Since 2018 officials have been working closely with other Departments and children's charities to finalise the terms of this amendment. It makes provision for separated migrant children to be eligible for civil legal services in relation to their immigration applications for entry clearance, leave to enter and leave to remain in the United Kingdom under the immigration rules. It also provides civil legal services in relation to separated migrant children's immigration applications for leave to remain where the application is made and determined outside the immigration rules. That would include applications for discretionary leave to remain, leave to remain on medical grounds, as well as exceptional

circumstances or compassionate and compelling factors, which may warrant a grant of leave outside the immigration rules.

Further, legal aid will be available to those children in relation to relevant applications for entry clearance, leave to enter or leave to remain made under the immigration rules by another person, including family members and extended family members, and granted either under or outside the immigration rules. Such applications are determined on the basis of exceptional circumstances under article 8 of the ECHR—the right to respect for private and family life—or because of compassionate and compelling factors. The amendment includes legal aid applications for registration as a British subject or citizen, a British overseas territories citizen and a British overseas citizen.

Let me briefly touch on the procedural and technical amendments. There are some amendments that relate to the procedures for applying for different forms of civil legal services. They are grouped into different categories: gateway work, controlled work and licensed work. The changes ensure that for controlled work and licensed work, separated migrant children who require legal representation in proceedings before a court or tribunal covered by this amendment will be able to receive it. There are also some technical amendments to other instruments relating to the merits and financial eligibility criteria. The changes ensure that the tests applied to immigration matters currently in scope for legal aid are also applied to this amendment.

The statutory instrument takes the normative definition that a child is any person under the age of 18. Where the age is uncertain, the individual is treated by the director of legal aid casework and the legal aid provider making the legal aid determination as being under 18. For the purposes of this amendment, a child is separated if they are not being cared for by a parent or someone with parental responsibility for them. It also accounts for children who are looked after by a local authority, or who are privately fostered but for whom parental responsibility has not been determined. It also acknowledges that some separated children may be in other informal caring arrangements or, indeed, caring for themselves.

A written ministerial statement was laid on 12 July 2018, outlining the Government's intentions to introduce the legislation. Following that statement, legal aid providers were advised that in the interim they should continue to apply for legal aid via the ECF scheme. To provide clarity for Legal Aid Agency caseworkers and providers, Lord Chancellor's guidance was issued, specifying that there is a strong presumption under article 8 of the European convention on human rights that separated migrant children require legal aid for non-asylum immigration matters and that, in the light of that, applications for legal aid on behalf of those children did not need to be supported by detailed evidence regarding their vulnerabilities and ability to participate in proceedings.

The draft instrument makes important changes, bringing citizenship and non-asylum immigration matters into the scope of legal aid for separated migrant children. It is a vital piece of legislation that will help ensure access to justice for a highly vulnerable section of our society.

**Jo Stevens** (Cardiff Central) (Lab): The Minister mentioned litigation very early in her speech. Would now be a good time to put on the record that the only

reason that the instrument is before us today is because the Government lost litigation that was brought by the Children's Society?

**Wendy Morton:** I am grateful to the hon. Lady for her question. I think I made it clear earlier in my speech that the draft instrument was introduced following litigation and engagement, and that is why we are here today: to bring this element into the scope of legal aid.

I hope that you agree, Sir Roger, that the statutory instrument is necessary, and I commend it to the Committee.

9.2 am

**Imran Hussain (Bradford East) (Lab):** It is a pleasure to serve under your chairmanship, Sir Roger. This is the first time that the Minister and I have been together in Committee, and I welcome her to her new role.

The plight of vulnerable unaccompanied and separated children—many fleeing truly desperate and dangerous situations around the world—who have sought safety, refuge and sanctuary in the UK should alarm us all and induce us to action. The Opposition unreservedly support today's measure to bring those cases involving separated children back into the scope of legal aid. However, we must note not only that access to legal aid should never have been taken from this vulnerable group, but that the Government never intended to introduce today's measure, and would never have done so if left to their own devices.

We must be clear that we are here this morning to consider the order not because the Government have, all of a sudden, had a change of heart and realised that the misery, pain and suffering that they imposed upon the children affected was too great, but because, as my hon. Friend the Member for Cardiff Central alluded to, of a legal challenge to their decision under the 2012 LASPO legislation to remove separated children from the scope of legal aid by the Children's Society, an independent, third-sector charity, supported by lawyers, barristers and other legal professionals.

The Government have not introduced the draft order willingly and out of their own compassion; they did so because they have conceded to the legal case that was brought against them, fearing another damning defeat. Migrant children are among society's most vulnerable groups, and unaccompanied children are even more so given the unique migratory factors at play and the particular vulnerabilities that they have as children without caregivers. Indeed, the Government's own impact assessment for this statutory instrument states that these children have "distinct vulnerabilities" and needs. According to the previous special rapporteur on human rights of migrants, writing in his final report to the United Nations Human Rights Council in 2011, children who are unaccompanied or separated from their parents are "particularly vulnerable" to human rights violations and abuses at all stages of the migration process. Even the Children's Commissioner for England has stated that children arriving unaccompanied in the UK are some of the most vulnerable that they deal with, due to the triple vulnerabilities they face.

Yet despite that, and despite the fact that children need access to high-quality immigration advice to regularise their status and protect themselves while being unable to properly represent themselves, the Government have

kept unaccompanied migrant children out of the scope of legal aid for six years. Consequently, vulnerable children have been forced to represent themselves in legal cases, even though representing themselves properly is impossible due to their age, language barriers and vulnerability. That is a complex enough cocktail of factors before we even get on to the myriad immigration rules and the intricate nature of immigration law.

That has led to unaccompanied children now being at a heightened risk of having to support and represent themselves through legal processes and procedures, being more likely to receive an unfavourable legal outcome, being less likely than other children to be able to fund and apply for legal advice, and also being at increased risk of exploitation through the need to fund legal services, as the Children's Commissioner for England has found. This is damning. It is no way to treat vulnerable children. It is no wonder that the Joint Committee on Human Rights has declared that

"the Government's reforms to legal aid have been a significant black mark on its human rights record"

and that children more generally are being denied the use of the law to assert their rights and legal needs following the changes under LASPO.

Where free legal support does exist, many children are also restricted and frozen out of it due to the postcode lottery of legal support that sees most free legal advice concentrated in certain areas such as London and the south-east, while the number of law centres and other advice services is in decline across the whole country.

Together with the scale of the challenge faced by these unaccompanied children and the urgency of the need to address their inability to access legal aid in order to prevent abuses of their human rights, we are also deeply critical of the length of time it has taken the Government to lay the order before the House. A year went by between a Minister making a written statement conceding that removing separated children from the scope of legal aid was a reprehensible decision and the order being laid in order to reverse the changes under LASPO. Yet the Minister responsible at the time had declared in her written statement:

"The amendment will be laid in due course".

When dealing with such sensitive issues and such vulnerable children, we should expect a speedier response, particularly considering that the Government are doing nothing new; they are simply restoring what had been taken away by LASPO. Will the Minister identify just how many separated children have been unable to access legal aid support to bring their cases to court since July 2018, when that written statement was published?

I expect that the Minister will respond to that question by repeating the words of her predecessor, the hon. and learned Member for South East Cambridgeshire (Lucy Frazer), in that written ministerial statement:

"Legal aid for other immigration matters is available via the Exceptional Case Funding (ECF) scheme"—

something to which this Minister has also alluded today—"which is intended to ensure legal aid is accessible in all cases where there is a risk of a breach of human rights."—[*Official Report*, 12 July 2018; Vol. 644, c. 47WS.]

However, if the Government were anticipating breaches of human rights as a result of their changes under LASPO, why did they enact those changes in the first

[Imran Hussain]

place? Is the ECF scheme sufficient, and has it been so, given that the Children's Society and the review of the Bach commission on access to justice found that it had failed to provide a safety net and still left children vulnerable? The Government's own figures show that thousands of children and young people would have been helped through the exceptional case funding. The reality is that the number helped through that fund is in the tens, not the thousands. Again, the Government have some serious questions to answer on that.

Although we will not oppose the order—

**Sir Oliver Heald** (North East Hertfordshire) (Con): Well, no; you have just spoken in favour of it.

**Imran Hussain:** We will certainly not pat the Minister on the back and congratulate the Government, given that it has taken them more than a year to lay the order before the House after conceding defeat in the legal case, and almost a further three months to bring it forward for debate. During that time, inevitably, many more children have been unable to access the legal aid support that they have a right to, and many more children will have suffered as a result of being removed from the UK and returned to the desperate and dangerous conditions that they escaped from.

By putting off and delaying the order, the Government have neglected their duty of care to those vulnerable children and discarded their own humanity. We must never forget that, just as we must never forget that the Government removed those children's access to legal aid to begin with, which put us in this sorry and deplorable situation. They cannot be proud of correcting such a colossal mistake and they must hang their head in shame that it has taken them so long to bring the matter back to the House.

9.11 am

**Wendy Morton:** I am grateful for the contributions to the debate and I will endeavour to respond to them as best and as carefully as I can. I thank the hon. Member for Bradford East for his warm welcome and sincerely hope that we continue to meet at the Dispatch Box for some time to come. I also thank him for indicating his support for the statutory instrument.

It is important to say that access to justice is a fundamental right. Last year we spent £1.6 billion on legal aid to support the most vulnerable. On the hon. Gentleman's point that legal aid should never have been taken away, access to legal aid was and is available for

those children under exceptional case funding. As I set out earlier, between the written ministerial statement and now, the Lord Chancellor issued a very clear direction and guidance.

It has taken so long to lay the order because we have been determined to have discussions across Government and with children's charities to make sure that we get this vital legislation right. It is better to take the time to get it right and to address the issue. I reiterate that ECF has been available during that time.

The hon. Gentleman asked how many children have been affected. Again, between the written ministerial statement and today, ECF has been available for those children with that guidance. Due to those children's circumstances, it is often difficult to assess the number of separated migrant children who have been affected. ECF data is not always routinely collected, but we will monitor that as we move forward.

**Jo Stevens:** Is there a reason why ECF data is not collected? That seems strange.

**Wendy Morton:** If I may, I will respond to the hon. Lady in writing. I have asked that question.

Finally, as a responsible Government, we must be informed by evidence of what works, provide value for money and focus on the breadth of support that is available to ensure that everyone can access support when they need it to resolve their problems.

**Luke Graham** (Ochil and South Perthshire) (Con): The Minister is making an important point and pushing forward a powerful piece of legislation. The measure is aimed at legal aid in England and Wales, but immigration is obviously a reserved function of the entire United Kingdom. Can she outline now, or later in a written statement, how services will be funded in Scotland to support migrant children coming through there?

**Wendy Morton:** My hon. Friend has far more knowledge of devolved Scottish matters than I do. I will certainly write to him, if he is okay with that.

I conclude by reiterating that the statutory instrument is an important part of the Government's work to ensure access to justice for all, particularly the most vulnerable in society. I therefore hope that hon. Members will agree that it is necessary, and I commend it to the Committee.

*Question put and agreed to.*

9.15 am

*Committee rose.*



