

POOR-QUALITY LEGAL ADVICE: RE-IMAGINING HOW IMMIGRATION DETENTION CENTRES SHOULD RUN IN ENGLAND

Abstract

The High Court of England and Wales in the case of *R (Detention Action) v Lord Chancellor*,¹ ruled that the Lord Chancellor had acted lawfully due to the way he operated the Detention Duty Advice Scheme (hereafter “DDAS”). The DDAS is a publicly funded legal service provided to detainees in immigration detention centres. Under it, all detainees are eligible to receive up to 30 minutes of free advice from legal representatives. This approach to detention has been critiqued by scholars on the grounds that a lack of time is afforded to detainees. Some research has been undertaken on the lack of availability of publicly funded legal advice in detention. However, existing literature has yet to canvass the issue in relation to the relaxation of the rules in 2018, whereby contracts were awarded to legal aid providers that lacked experience of dealing with detainees. In this article, I address this lacuna by arguing that detainees were hindered from accessing good quality legal advice owing to the lack of experience and expertise of the newer providers. Therefore, I will consider ways of remedying the current dysfunctional system.

1. INTRODUCTION

Legal aid in England and Wales has been undergoing rapid changes over the last few decades.² Lord Bingham, a renowned judge stated that the ‘denial of legal protection to the poor litigant who cannot afford to pay is one enemy of the Rule of Law’.³ Lord Scarman, another distinguished judge, stated that ‘every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to protection’.⁴

I have chosen to imagine a fictive appeal against the case of *The Queen (on the application of Detention Action) v Lord Chancellor* (hereinafter *Detention Action*).⁵ This case was heard in the High Court of England and Wales, and it concerned the lack of availability of ‘good’ quality legal advice in immigration detention centres in England since 2018. The Lord Chancellor (Defendant),⁶ allowed newer providers of legal aid (many of whom either

¹ [2022] EWHC 18 (Admin).

² S. Moore and A. Newbury, *Legal Aid in Crisis: Assessing the Impact of Reform*, UK, Bristol University Press, 2017, 1.

³ T. Bingham, *The Rule of Law*, London, Penguin, 2010, 88.

⁴ *Khawaja v Secretary of State for the Home Department* [1984] 1 AC 74, para 111.

⁵ [2022] EWHC 18 (Admin) 1.

⁶ The Defendant was represented by Malcolm Birdling and Aarushi Sahore.

had no experience of doing legal aid or detention work) to give advice and assistance to immigration detainees. It further concerned the inability of the Lord Chancellor to safeguard appropriate access to justice in immigration detention.

This article is a part of a series of articles that seek to rethink, reframe and rewrite jurisprudence from the perspectives of scholars and lawyers with lived experience of forced displacement. The articles further seek to rewrite judicial decisions that have prejudiced or misrepresented marginalised members of society using innovative legal methodologies. My contribution considers the law as it is and as it could be, to recognise and respond to the challenges that practitioners and asylum seekers face as a result of the way the legal aid system operates in England. I am writing a fictive appeal against the *Detention Action*⁷ case to bring to light some of the issues that publicly funded solicitors and caseworkers deal with, as a result of the *ad hoc* nature by which the government, Lord Chancellor, and the legal aid authorities operate and manage this system.

The legal aid firm that I was employed at benefitted from having a specialist detention centre team (that I was a part of). There were eight other firms that attended to detained clients prior to the changes that were introduced by the Lord Chancellor in 2018.⁸ We frequently faced capacity issues and solicitors and caseworkers that undertook publicly funded immigration and asylum work complained extensively about the low remuneration rates. However, these nine firms that held contracts to undertake immigration/asylum detention work under legal aid generally conducted good-quality work. As these firms had been practicing in this highly specialised field for a substantial number of years (and as mentioned above, some had specialist detention centre teams), most of their solicitors and caseworkers were well equipped to deal with detained clients.

However, following the changes that the Lord Chancellor implemented in 2018 (above, and explained in more detail below), the firm that I was employed at lost most of its detention centre contracts under legal aid. The Lord Chancellor instead allowed 77 providers to undertake this work (an increase from nine), notwithstanding the fact that the majority of such providers had no experience of doing legal aid or detention centre work.⁹ I recall that a

⁷ [2022] EWHC 18 (Admin) 1.

⁸ *Ibid.*, para. 19.

⁹ *Ibid.*

number of detained clients complained to me and my colleagues about the poor-quality advice they were being given by the newer providers, and they also complained about the routine problems they encountered, such as the failure to provide interpreters. Therefore, as part of the fictive appeal, I declare that the peer-review system should be deployed more regularly because this is the only auditing mechanism that measures the quality of work properly in comparison to the other auditing processes.¹⁰ This recommendation is particularly relevant to the newer providers for the reasons discussed throughout this article.

As part of my fictive appeal below, I suggest that the newer providers were not monitored properly by the Lord Chancellor and therefore, it was unlawful to appoint these providers given their lack of experience of conducting such work. I also declare that the low remuneration rates constituted (and continue to constitute) a major cause for concern for solicitors and caseworkers. As a result of the low fees, it gets more problematic to recruit specialist immigration and asylum lawyers which creates a financial disincentive for younger members to join profession.¹¹ The Young Legal Aid Lawyers, interviewed 200 lawyers with less than 10 years' experience and found that more than half of them earned less than £25,000 a year.¹² The New Law Journal headline summarised this succinctly as 'Legal Aid Lawyers Are Undervalued, Underpaid and Under Pressure'.¹³ This is something that the legal aid authorities and the government perhaps seem to acknowledge, given that they have commissioned a few inquiries on the functionality and viability of the legal aid system.¹⁴

I have focused on these issues as these are the areas that featured prominently in the *Detention Action* case.¹⁵ As discussed in this article, access to good quality legal

¹⁰ J.Wilding, *The Legal Aid Market: Challenges for Publicly Funded Immigration and Asylum Legal Representation*, UK, Polity Press, 2021, 34

¹¹ S.Grant, *An Overview of Immigration Advice Services and England and Wales* UK, Paul Hamlyn Foundation, 26.

¹² Homepage (Young Legal Aid Lawyers, undated) Available at: www.younglegalaidlawyers.org.

¹³ Jon Robins, 'Dark Days for Legal Aid' (New Law Journal, 23 March 2018).
www.newlawjournal.co.uk/content/dark-days-legal-aid (last visited 10 January 2024).

¹⁴ Ministry of Justice, *Open Call for Evidence: Review of Civil Legal Aid, Call for Evidence*, 19 January 2024, Available at: https://www.gov.uk/government/calls-for-evidence/review-of-civil-legal-aid-call-for-evidence/review-of-civil-legal-aid-call-for-evidence?mc_cid=b429c95da7&mc_eid=85d6b9e3e6. Also see, UK Parliament Committees, *Value for Money from Legal Aid: Inquiry*, Available at: <https://committees.parliament.uk/work/8153/value-for-money-from-legal-aid/>.

¹⁵ [2022] EWHC 18 (Admin) 1.

representation would mean that asylum-seekers would benefit not only from better advice, but also a fairer process, likely to lead to a higher recognition rates.¹⁶

Thus, the main purpose behind this article is not to produce a ‘watertight’ judgment, but to stimulate more expansive thinking and emphasise the importance and implications of ensuring that detainees have access to good-quality legal advice and representation, and to present more effective ways of ensuring how this might be done in the future by drawing from ‘on the ground’ experience.

Legal representatives working within the field of publicly funded immigration and asylum law have endured many financial and other hardships over the years. Therefore, I have decided to write a fictive appeal by imagining a situation where the courts had more discretion and power to make significant and much needed improvements to the immigration and asylum legal aid system. It is hoped that this fictive appeal brings to light some of the fundamental issues that legal representatives within this field of law are confronted with on a macro level, and perhaps offer suggestions and ways of remedying the current system, which operates in an *ad hoc* manner.

As part of the section that explains why I have chosen to rewrite this decision, I will briefly highlight the deficiencies within the system (immigration and asylum legal aid), as it has undergone rapid and profound changes since it was established in 1949. I argue that the Labour and Conservative and Coalition Governments have sought to control this area over time, which has steadily weakened the legal profession’s (solicitors’ and caseworkers’) commitment towards the system and their clients.

The order of this article will be as follows. I will first discuss the factual background of the case of *Detention Action*. I will then rewrite the fictive appeal, which will consider aspects of the case that were omitted from the original judge’s decision. Thereafter, I will provide reasons for rewriting this fictive appeal as the focus will be on some of the main and contentious issues that arose in the original case.

¹⁶ A. Lindley, “‘Hit and Miss’ Access to Legal Assistance in Immigration Detention”, *Journal of Human Rights Practice*, 13(3), 2021, 629-653, 647.

2. FACTS AND BACKGROUND OF *THE QUEEN (ON THE APPLICATION OF DETENTION ACTION) V THE LORD CHANCELLOR*.¹⁷

The main issue in this case concerned the poor-quality legal advice and assistance offered to immigration detainees since 2018. The formal grounds for judicial review rested on the premise that the Defendant had failed to ensure that immigration detainees had effective access to justice in contravention of his statutory duties, which signified that the way the Detention Duty Advice Scheme (hereinafter DDAS) was operating, was unlawful.¹⁸

Section 4(2) of *Legal Aid Sentencing and Punishment of Offenders Act* (hereinafter *LASPO*) 2012, enables the Legal Aid Agency to carry out duties on behalf of both the Lord Chancellor and the Director of Legal Aid Casework, who is a statutory officer appointed by the Lord Chancellor under section 4(1) of *LASPO* 2012. The DDAS is a publicly funded legal advice service that has been operating in immigration detention centres since 2010.¹⁹ Through this scheme, legal aid providers hold surgeries in detention centres, which allows the detainees to obtain 30 minutes of free legal advice, without having to satisfy the usual financial eligibility (means) and merits test under the legal aid rules.²⁰ As the DDAS is based on exclusive contract arrangements,²¹ providers that are authorised to participate in this scheme ‘must deliver’ the full range of contractual work for detainees that are seen on the rota,²² and they ‘must ensure’ that there are ‘sufficient numbers of caseworkers available to meet [their] Immigration Removal Centre rota obligations’.²³ Legal representatives that are conducting the DDAS surgeries are obligated to advise clients on immigration bail and record the outcome of the same on the file.²⁴

¹⁷ [2022] EWHC 18 (Admin) 1.

¹⁸ Judicial review involves an application to the High Court to review the lawfulness of decisions made by public authorities such as the Home Office when there is no right of appeal or when the avenues of appeal have been exhausted.

¹⁹ A. Lindley, “‘Hit and Miss’ Access to Legal Assistance in Immigration Detention”, 634-635. It was initially introduced as a pilot scheme in 2005 but only ran in that year.

²⁰ *The Queen (on the application of Detention Action) v Lord Chancellor* [2022] EWHC 18 (Admin) 1.

²¹ Ministry of Justice, *2024 Standard Civil Contract Specification Category Specific Rules: Immigration and Asylum*, March 2023, para. 8.5, Available at: https://assets.publishing.service.gov.uk/media/6569c0100f12ef00133e0101/2024_Immigration_and_Asylum_Category_Specific_Rules.pdf (last visited: 2 December 2023).

²² *Ibid.*, para. 8.154.

²³ *Ibid.*, para. 8.151.

²⁴ *Ibid.*, para. 8.159.

Overall, the Claimant (Detention Action),²⁵ contended that the Defendant's decision to extend the DDAS to the newer providers in 2018 was unlawful because he had breached his statutory duties under *LASPO* 2012, as he had failed to ensure first, that legal services were available/safeguarded for detainees, and second that there was a systemic error in the design of the monitoring scheme.²⁶ Third, the Claimant contended that in taking a blanket approach to renew all contracts, the Defendant acted in a *Tameside* irrational way by failing to inform himself of all relevant matters before deciding to extend DDAS contracts to all providers, regardless of their level of competence and capability (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 104)).²⁷

To be more specific, the Claimant in the *Detention Action* case argued that the Defendant had failed to discharge his duties in safeguarding effective access to justice by failing to properly manage the DDAS as well as the contracts that were awarded under it.²⁸ The Claimant further contended that the Defendant had failed in many respects; first he failed to monitor the DDAS effectively, second, he failed to hold investigations of providers that were unable to fulfil their duties under the DDAS, third he failed to enforce and apply sanction powers that were available to him.²⁹ The Claimant argued that the statistical evidence showed that there was a high risk that the DDAS endangered detainees' right to access to justice, particularly as the majority of DDAS providers took very few or no steps to provide legal advice to more than 8000 detainees; providers failed to fulfil their contractual duties to provide advice on immigration bail, as a result of which detainees spent a prolonged period of time in detention.³⁰ The Claimant further argued that under the DDAS, incompetent providers continued to provide legal advice and assistance to detainees.³¹

Following the extension of the DDAS to the newer providers in 2018, the Claimant noticed that the number of complaints from detainees had increased.³² Clients were not receiving advice, legal representatives were unable to accept cases owing to capacity issues

²⁵ The Claimant was represented by Ben Jaffey KC, Shu Shin Luh and Daniel Clarke.

²⁶ *The Queen (on the application of Detention Action) v Lord Chancellor* [2022] EWHC 18 (Admin) 1, para. 8.

²⁷ *Ibid.*

²⁸ *Ibid.*, para. 5- Detention Action is a charity that started operating in 1993 and challenge injustices in detention, deportation and asylum systems in the UK. Please see, Detention Action, 'About Us', Available at: <https://detentionaction.org.uk/about-us/> (last visited 23 August 2023).

²⁹ *The Queen (on the application of Detention Action) v Lord Chancellor* [2022] EWHC 18 (Admin) 1, para. 5.

³⁰ *Ibid.*, para. 6.

³¹ *Ibid.*

³² *Ibid.*, para. 57.

and they were not advising clients on whether their case had been accepted and neither were they enlightening them as to the next steps.³³ Other complaints included: failure to advise clients in respect of their bail matter and/or refusal to represent them in respect of their bail applications; failure to act diligently or promptly (or at all); lacking competence; failure to communicate with clients or respond to them; failure to provide written advice following the DDAS surgery; failure to use interpreters; failure to cover legal representatives who were absent from work; failure and/or inability to advise clients on judicial review matters; failure to identify trafficking indicators and/or make referrals to the National Referral Mechanism (this is a framework for identifying, referring potential victims of modern slavery and ensuring that they receive appropriate support); clients believed that their case had been accepted by a DDAS provider, however, a few weeks later they were notified otherwise; ceasing to act for clients without providing them with adequate reasons and requesting payment for legal services.³⁴

The Claimant alleged that the most recent statistics demonstrated that there were serious inadequacies within the DDAS system, which were not being considered by the Defendant.³⁵ Legal aid contract managers are supposed to monitor high and low conversion rates by taking into account the new matter start (NMS) conversion rates.³⁶ They are thus required to consider the proportion of clients seen by the DDAS provider in light of the further work that is undertaken.³⁷ Under the DDAS contract, it is a red flag if a provider's 'conversion rate' (that is, conversion from initial consultation to full representation) is less than 30 per cent or over 70 per cent in regards to the detainees they see as part of the initial 30 minutes DDAS consultation.³⁸ First, the Claimant pointed out that for the period between September 2018 and February 2020, 75 per cent of the 63 providers opened NMS for fewer than 30 per cent of the detainees that were seen by them under the DDAS; 6 firms did not open a single NMS for any of the 518 detainees who attended the 74 surgeries held by them; 9 others also opened NMS for fewer than 10 per cent of the detainees seen by them; 12 other firms had a NMS conversion rate above 10 per cent but under 20 per cent.³⁹ Even after excluding the firms that had ceased doing this work (as there were 47 providers remaining at

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*, para. 36.

³⁶ *Ibid.*, para. 27.

³⁷ *Ibid.*

³⁸ *Ibid.*, para. 27.

³⁹ *Ibid.*, para. 37.

the time the case was heard), approximately half of DDAS providers had low conversion rates.⁴⁰

The data provided by the Legal Aid Agency in February 2020 showed that 5 firms had not opened a single Legal Help file for any of the 292 clients they saw as part of the DDAS; 4 firms opened Legal Help matters for less than 5 per cent of the clients they saw; 5 providers opened Legal Help files for between 5 to 10 per cent of the clients seen; 8 providers opened files for more than 10 per cent of the clients they saw, but for less than 20 per cent.⁴¹

In terms of bail, the Claimant submitted evidence that showed that more the three-quarters of the providers opened bail claims for less than 20 per cent of the detainees they saw as part of the DDAS; 18 firms opened bail files for 5 per cent or less of the detainees; 15 out of 27 firms were underperforming as they had NMS conversion rates below the 30 per cent threshold, and the Claimant emphasised the need for them to be investigated.⁴² The Claimant further submitted that ‘a significant number of providers who have recorded no or hardly any bail claims despite seeing numerous clients. 9 of them had never made a single bail application despite carrying out approximately 1,000 advice sessions in total’.⁴³ The Claimant further submitted that when the Defendant’s immigration bail data was analysed vis-à-vis the proportion of NMS that were opened by individual DDAS providers, it revealed that there was significant variation across 35 firms (for which this data was available), and that the performance of the failing providers ought to have triggered an investigation.⁴⁴ Accordingly, this signified that there was a wider problem as firms that were awarded DDAS contracts were failing to conduct further work in respect of their client’s bail matters following the initial 30-minute appointment.⁴⁵

The Claimant noted that 6 providers had a peer-review rating of (4) amongst the 27 providers (above), which signified that they were performing below the required competence threshold, and that all of them had opened bail files for less than 10 per cent of the detainees

⁴⁰ *Ibid.*, para 39.

⁴¹ *Ibid.*, para 58a.

⁴² *Ibid.*, para 43.

⁴³ *Ibid.*, para. 44.

⁴⁴ *Ibid.*, para. 42-to be more specific, the Claimant considered the number of bail files that were opened by legal aid providers, and the results were poor.

⁴⁵ *Ibid.*, para. 43.

they saw.⁴⁶ This in turn impacted on 1818 detainees that were seen via the DDAS until June 2021.⁴⁷

The Defendant argued that as the providers provide the statistical information themselves (which the Defendant relies on), these statistics are not always accurate, as the providers may have made errors in inputting that data.⁴⁸ The Claimant noted that the ‘misreporting does not explain the poor conversion rates’.⁴⁹ According to the Defendant’s analysis for the pre-Covid period, two firms may have misreported the data from the 27 DDAS providers with conversion rates of less than 30 per cent.⁵⁰ The Defendant noted that

‘there is no necessary correlation between firms with high or low NMS and their Peer Review scores. Some firms with strong Peer Review scores have very low numbers of, or no NMS and some firms with low Peer Review scores have high numbers of NMS. The reasons for this are obscure. This could be because more experienced and strong-performing firms are more careful/cautious in satisfying the means and merits criteria before opening a case. There does not, therefore, appear to be any evidence that a low NMS necessarily means a firm is conducting work of a low quality’.⁵¹

The Defendant ‘accepted that potentially there could be cases where inadequate advice is given in a 30 minute session and no file is opened such that the peer review will not pick up such a case’.⁵²

The Defendant alleged that according to the most recent data at the time the case was heard, from the 46 active providers, 4 had a rating of (1), which is the highest score, 12 had a score of (2), 18 had a score of (3) and 7 had a score of (4) and no firm had a score of (5).⁵³ Thus, he suggested that the system was functioning adequately.⁵⁴ According to the data compiled by Ms Lenegan (who was the legal director of the Immigration Law Practitioners’ Association at that time) from February 2020, one-sixth of the 36 firms had received a peer-review rating of 4 or 5.⁵⁵

⁴⁶ *Ibid.*, para 43.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, para. 45.

⁴⁹ *Ibid.*, para. 40.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, para 41c.

⁵² *Ibid.*, para. 74.

⁵³ *Ibid.*, para. 54.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, para. 58d.

The Claimant acknowledged the importance of the independent peer-review process as it formed an ‘integral’ way to assess the quality of work that was undertaken by providers.⁵⁶ However, the Claimant further argued that the Defendant’s evidence showed that this was an ineffective way to ensure that the DDAS work was competent because this mechanism did not allow the Defendant to obtain an objective assessment on the quality of work that was carried by providers in respect of the clients they saw as part of the DDAS.⁵⁷ First because most importantly, no peer-review was conducted when a provider saw a detainee as part of the 30 minutes session, and took no further action, which meant that no NMS was opened on behalf of that client.⁵⁸ Second, because the peer-review process was subjected to significant delays.⁵⁹ Third, the Defendant allowed incompetent advisors to advise detainees because of his decision to extend DDAS contracts to the newer providers, and fourth because there was no requirement to select DDAS files for review as part of the peer review process.⁶⁰

According to the Defendant, the Claimant was incorrect to allege that some providers lacked qualified staff to handle the DDAS work.⁶¹ The Defendant asserted that he had complied with his duties as set under the 2018 Standard Civil Contract because 136 bidders put forward bids to undertake DDAS work, however following a verification process only 77 providers were successful in securing DDAS contracts.⁶² 38 such firms had no experience of doing legal aid work and 64 firms had no experience of doing DDAS work.⁶³ Some DDAS providers had ceased doing DDAS work at the time this case was heard, with the exception of 46 providers.⁶⁴ The verification process required providers to first, employ an accredited supervisor as either a Senior Caseworker or Advanced Caseworker under the Law Society Immigration and Asylum Accreditation Scheme and second, they were required to pass the Supervising Senior Casework accreditation exams.⁶⁵ The verification process also required firms to be regulated.⁶⁶ The Defendant was allowed to rely upon the judgment of his

⁵⁶ *Ibid.*, para. 51.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*, paras. 51-52.

⁵⁹ *Ibid.*, para. 51.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, para 67.

⁶² *Ibid.*, -before this expansion, there were 9 providers that undertook DDAS work, see para 19.

⁶³ *Ibid.*, para. 19.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, para. 67.

⁶⁶ *Ibid.*

professional regulators that confirmed that the providers were competent to provide advice to migrants.⁶⁷ The Defendant further argued that since September 2020, there was an increase in choice as a larger proportion of providers held DDAS surgeries, and therefore urgent advice was more accessible since a different provider was on rota each day.⁶⁸

The Claimant was seeking the following remedies/relief; first, a declaration to the effect that the way the Defendant was operating the DDAS was unlawful, second, a declaration that the decision to extend DDAS contracts to all providers was unlawful and third a mandatory order that required the Defendant to consider appropriate remedial action under powers designated to him by virtue of the 2018 Standard Civil Contract.⁶⁹

Calver J stated that the statistics (discussed above) needed to be interpreted cautiously.⁷⁰ He emphasised that NMS conversion rates are supposed to be used as a *guide* by Contract Managers to gather information.⁷¹ He further expressed concerns that NMS conversion rates ‘have been shown to be unreliable in a number of respects (not least as to the accuracy of the data inputting)’.⁷²

He went on to say:

‘I do not consider that the Claimant has established on the basis of either the statistical evidence, its qualitative evidence (much of which is in fact anecdotal evidence) or a combination thereof... that a real risk of an impediment to access to legal aid has been created by the operation of the Defendant’s monitoring scheme’.⁷³

Calver J stated that the data was too rough and ready to rely on in this context: ...

‘conversion rate figures are intended to act only as a *guide* to be used by [contract managers] as part of the information gathering exercise in carrying out their work. They are based upon returns from the providers themselves which have been shown to be unreliable in a number of respects (not least as to the accuracy of the data

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*, para. 69.

⁶⁹ *Ibid.*, para. 9.

⁷⁰ *Ibid.*, para 94.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*, para. 93.

inputting)... moreover, the peer review scores of the 46 currently active providers suggest that the system is, by and large, functioning well'.⁷⁴

Therefore, Calver J dismissed some of the evidence, termed it as being 'anecdotal' and noted that there were 'generalised complaints' in relation to the allegation that poor legal advice was being given by some providers.⁷⁵ He added that it was not 'fair' for him to consider the performance of individual firms and then to decipher whether the problems were caused by a lack of oversight, as he stated that 'there is a danger of the court usurping the judgment of the [Defendant] and assuming a role which it ought not to assume'.⁷⁶

As mentioned above, most detainees rely upon legal representation and according to research, statistically, those that do not obtain good quality legal representation are disadvantaged as there is a higher probability of their claim being rejected.⁷⁷ Therefore, if the Defendant (who represents the government), is unable to provide adequate protection to some of the most marginalised and vulnerable individuals within our community, then the judiciary should step in to ensure that detainees' rights are safeguarded, as the decision ultimately impacts on their ability to access justice. Therefore, the author will rewrite a fictive appeal against the original judgment that was delivered by Calver J. The purpose of this fictive appeal is not to rewrite a 'watertight' appeal against the judgement that was handed down in the *Detention Action* case, but to detail with some of the concerns that publicly funded immigration and asylum lawyers deal with during their practice.

3. CASE NAME: *THE QUEEN (ON THE APPLICATION OF DETENTION ACTION APPEAL) V LORD CHANCELLOR*

Court: Court of Appeal

Date of judgment: 8 March 2024

Judgement rewritten by: Ayesha Riaz

Date of rewrite: 28 February 2024

⁷⁴ *Ibid.*, para. 94.

⁷⁵ *Ibid.*, paras. 93, 96.

⁷⁶ *Ibid.*, para. 100.

⁷⁷ A. Lindley, "Hit and Miss" Access to Legal Assistance in Immigration Detention', 647.

[1] This case centres on a fundamental issue – that poor-quality legal advice and assistance was being offered to detainees in immigration detention centres via the DDAS. The Claimant in the High Court submitted that the Defendant had failed to monitor the DDAS to the requisite standard.⁷⁸ The issue in the case that was before the High Court was that after 2018 the number of complaints increased, following the Defendant’s decision to extend the DDAS contracts to 77 providers.⁷⁹ 38 providers possessed no previous experience of undertaking legal aid work, and 64 providers lacked experience of doing DDAS work.⁸⁰ Initially there were 9 providers that held contracts to undertake DDAS work.⁸¹ In the High Court, the Claimant argued that the Defendant extended DDAS contracts to all providers regardless of their competence level.⁸²

[2] The Defendant, on the other hand, argued that the Claimant was incorrect to allege that some providers lacked sufficiently qualified staff to conduct DDAS work.⁸³ This was because, they had followed the verification process.⁸⁴ The Defendant further argued that following the expansion of the DDAS in 2018, detainees benefited as there was an increase in choice as a higher number of providers held DDAS surgeries, thus, urgent advice was more easily accessible.⁸⁵

[3] In the High Court, Calver J found for the Defendant and ruled that on the evidence provided by the Claimant, he could not find that the Defendant’s monitoring scheme had created a real risk of an impediment to access to legal aid.⁸⁶ He further ruled that he would not be in a position to judge whether individual providers were underperforming because he would be usurping the role of the Defendant.⁸⁷

[4] The crux of this case that has come before me in this appeal centres on the conclusion that the Defendant’s decision to extend the DDAS contracts to the newer providers in 2018 was unlawful, as it contravened the Defendant’s duties under *LASPO*

⁷⁸ *The Queen (on the application of Detention Action) v Lord Chancellor* [2022] EWHC 18 (Admin) 1, para 5.

⁷⁹ *Ibid.*, paras. 57, 67.

⁸⁰ *Ibid.*, paras. 19.

⁸¹ *Ibid.*

⁸² *Ibid.*, para. 8.

⁸³ *Ibid.*, para. 67.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*, para. 69.

⁸⁶ *Ibid.*, para. 93.

⁸⁷ *Ibid.*, para. 100.

2012.⁸⁸ This was because the Defendant had failed to ensure that effective access to justice was safeguarded for detainees.⁸⁹

[5] I am concerned about the issues that were raised in the High Court case. It is noteworthy that Calver J overlooked a number of important issues that arose in the case that came before him. According to Calver J, the Claimant's evidence failed to establish that the Defendant had inadequately discharged his statutory duties to administer the DDAS appropriately (to safeguard access to adequate legal services for detainees), and that it was thus not irrational to reappoint the newer providers. I will use the data that has been discussed above to establish that there were multiple failures to ensure that legal services were made available to detainees, as required under *LASPO* 2012. It was irrational to appoint new providers, first because they lacked experience of doing DDAS and legal aid work and second because the scheme to monitor the performance of providers undertaking DDAS was systemically flawed. The Defendant did not adduce any new evidence in this appeal and he wished to rely on the evidence he submitted in the High Court.

3.1 Multiple Failures: Hindering Access to Justice

[6] In this appeal, the Claimant submitted that in the case of *R (DMA) v Secretary of State for the Home Department* (hereinafter *SSHD*),⁹⁰ the *SSHD* had breached her duty to provide accommodation for failed destitute asylum-seekers by failing to provide it within a reasonable period of time. It was further held that she had further failed to properly monitor arrangements for the provision of accommodation.⁹¹ The judge stated that the key performance indicators were not being fulfilled, and that 'through her officials, the Secretary of State did not in practice have the means to know the true position at the time. This was because there were no proper arrangements for data capture and monitoring'.⁹² The judge further noted that without having a proper monitoring system, it would not be possible to identify and correct failure.⁹³ Accordingly,

'the relevant aspect of the process in the present case is the failure to capture data properly and, using that data, to monitor properly, so that the Secretary of State can

⁸⁸ *Ibid.*, para 8.

⁸⁹ *Ibid.*, para 9.

⁹⁰ [2020] EWHC 3416 (Admin).

⁹¹ This duty can be found in Immigration and Asylum Act 1999, Part 1, section 4(2).

⁹² *R (DMA) v SSHD* [2020] EWHC 3416 Admin, para 173.

⁹³ *Ibid.*, para 238.

know whether she is acting lawfully and in accordance with her duty, and can act immediately if there is a sign that either is not the case'.⁹⁴

[7] Similarly, in the *Detention Action* case, the Claimant contended that the Defendant was under an obligation to monitor, investigate, and sanction providers that were not performing adequately under the DDAS.⁹⁵ There was disagreement regarding the number of new matter starts that were opened as the Defendant claimed that the providers had made mistakes whilst inputting this data,⁹⁶ which was affirmed by Calver J.⁹⁷ For example, the Defendant claimed that one firm was recorded to have opened four NMS whilst opening 14 bail claims and he further noted that there were other such errors.⁹⁸ Thus, it appears that data was not being captured properly and in accordance with the case of *DMA*, the Defendant may not have been aware of the true position at that time.

[8] Further concerns were raised about the peer-review mechanism in the *Detention Action* case, as it did not allow the Defendant to obtain an objective assessment on the quality of work that was conducted by providers.⁹⁹ This was because it did not capture the work of a provider that saw the detainee at the DDAS and failed to conduct any further work (or had failed to open a file).¹⁰⁰ It was argued by the Claimant that there was a gap in the monitoring process.¹⁰¹ Lawyers that attend to detainees are supposed to advise them on bail and record the outcome of the same on the file.¹⁰² However, the peer-review process would not have picked up on the fact that the lawyer had given negligent advice on bail or had failed to give any advice on bail as no file was opened.¹⁰³ Also, no file was opened when a lawyer erroneously advised detainees that they had no case (whether substantive or bail related) following the 30 minutes interview as part of the DDAS, thus this also would not have been captured by the peer-review process.¹⁰⁴ Therefore, it is difficult to monitor the work of a lawyer if they had failed to open a file for their client (they see as part of the DDAS). This is a cause for concern, and I will deal with how this matter can be rectified below. There were concerns that this mechanism was subjected to significant delays and that the Defendant

⁹⁴ *Ibid.*, para 236.

⁹⁵ *The Queen (on the application of Detention Action) v Lord Chancellor* [2022] EWHC 18 (Admin) para 5.

⁹⁶ *Ibid.*, para 45.

⁹⁷ *Ibid.*, para 94.

⁹⁸ *Ibid.*, para 45.

⁹⁹ *Ibid.*, para. 51.

¹⁰⁰ *Ibid.*, paras. 51-52.

¹⁰¹ *Ibid.*, para 64

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

allowed incompetent providers to continue providing legal advice to detainees through the DDAS.¹⁰⁵

[9] Clearly, there were multiple failures to ensure that legal services were made available to detainees. The peer review mechanism did not even capture the work of providers that had failed to open files for clients following the DDAS. Thus, the monitoring scheme was not fit for purpose and the Defendant acted irrationally in appointing the new providers as it appears that the Defendant took a blanket approach in renewing all the contracts before informing himself of all the relevant matters.¹⁰⁶ This is a cause for concern because as discussed in the *Detention Action* case, the vast majority of the newer providers that obtained DDAS contracts following the expansion of this scheme already had very little or no experience of providing advice to detainees under legal aid.¹⁰⁷

[10] Therefore, to deal with this matter, the peer-review system should capture the work of all DDAS providers, regardless of whether they open files for the clients they see or not. To achieve this, all handwritten notes that the lawyers write for the clients they attend to as part of the DDAS should be checked by peer-reviewers. The peer-reviewers will thus be able to scrutinise the work of the newer providers, and they will be able to assess the reasons as to why many of these providers are not opening files on behalf of their clients. I also want to receive an update from the Defendant on how he is dealing with delays within this system.

[11] The Claimant has drawn my attention to a number of cases in this appeal. In the case of *R (UNISON) v Lord Chancellor*,¹⁰⁸ it was held that the fees imposed by the Lord Chancellor in respect of proceedings in Employment Tribunals and Employment Appeal Tribunals were unlawful given their impact on access to justice. The Supreme Court stressed that the right of access to justice was of constitutional significance, and an inherent part of the rule of law.¹⁰⁹ It was further stated that the right of access to justice was not merely a theoretical right, but one that ensured effective access to justice in reality.¹¹⁰

Lord Reed went on to say that,

¹⁰⁵ *Ibid.*, para. 51.

¹⁰⁶ *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014.

¹⁰⁷ *The Queen (on the application of Detention Action) v Lord Chancellor* [2022] EWHC 18 (Admin) para 19.

¹⁰⁸ [2017] UKSC 51.

¹⁰⁹ *Ibid.*, para. 66, 82.

¹¹⁰ *Ibid.*, para. 85.

‘But the value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations. That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable.’.¹¹¹

[12] Therefore the case that I am deciding as part of this appeal has wider implications on detainees’ ability to access justice. The main question in the *UNISON* case was whether the Claimant had demonstrated that there was a real risk that the executive’s action had prevented individuals from lodging claims to the extent that it hindered their right to access to justice.¹¹² The Fees Order in question was held to be unaffordable and therefore, it effectively prevented individuals from accessing justice.¹¹³ It was argued that the making of the Fees Order was not a lawful exercise of Lord Chancellor’s statutory powers, because the prescribed fees interfered unjustifiably with the right of access to justice under both the common law and European Union law, and it thereby frustrated the operation of Parliamentary legislation that granted employment rights, and discriminated unlawfully against women and other protected groups.¹¹⁴

[13] Similarly, the case of *R (on the application of S) v Director of Legal Aid Casework and another*,¹¹⁵ concerned the legality of a legal aid funding scheme for certain types of cases (‘exceptional cases’) where legal aid was not available because of the implications of *LASPO* 2012. This Act restricted categories for which legal aid was available. However, applicants could still apply for exceptional case funding (hereinafter ECF) even if legal aid was unavailable for matters. Although there were difficulties with this scheme, in this case, it was deemed as being lawful under section 10 of *LASPO* because it had improved since its inception.

[14] In this case of *R(A) v SSHD*,¹¹⁶ Lord Sales and Lord Burnett stated that:

¹¹¹ *Ibid.*, para. 71.

¹¹² *Ibid.*, para. 79.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*, para. 3.

¹¹⁵ [2016] EWCA Civ 464.

¹¹⁶ [2021] UKSC 37

‘the issue in relation to the application form might have been argued on the basis that an administrative practice (adoption of an overly complex form) had created an impediment to gaining access to legal aid and hence to court in cases where there was a right to have publicly funded assistance. That, in substance, was the effect of asking whether the form was inherently unfair in impeding access to legal aid’.¹¹⁷

[15] Indeed, the Defendant is statutorily obligated to secure legal aid as specified in section 1 of *LASPO* 2012 (as discussed above). I am not stating that the Defendant has failed to execute this duty. Nevertheless, it is noteworthy that legal aid has diminished considerably over the years which begs the question of how the Defendant has been carrying out his duty to ensure that migrants in and outside of detention have access to legal aid.

[16] As discussed above, the main question in the *UNISON* case was whether there was a ‘real risk’ of impeding access to justice as a result of the executive’s actions. Allow me revisit some of the material facts in the *Detention Action* case that may indicate that there was a ‘real risk’ of impeding access to justice in this case. The Defendant decided to extend the DDAS to many providers in 2018. According to the facts of the case, which have been considered in some detail above, the Defendant extended the DDAS to many new providers who lacked experience of undertaking legal aid and DDAS work.¹¹⁸ This led to an increase in complaints from the detainees about the quality of legal advice and assistance they were receiving.¹¹⁹ The Defendant claims that all the newer providers were regulated and went through the verification process.¹²⁰ There were further concerns that many of the newer providers were not opening files for most of the detainees they were seeing at the DDAS (although this was a contentious point as there were errors in inputting this data).¹²¹

[17] In this appeal, the Claimant has provided more up-to-date evidence that shows that the complaints that were raised in the High Court are still applicable to date. I make a declaration to the effect that access to justice has indeed been impeded in this case given the lack of experience the newer providers possessed in this area of law.

3.2 Lack of Good Quality Advice

¹¹⁷ *Ibid.*, para. 71.

¹¹⁸ *R (on the application of Detention Action) v Lord Chancellor* [2022] EWHC 18 (Admin), para. 19.

¹¹⁹ *Ibid.*, para. 71.

¹²⁰ *Ibid.*, para. 67.

¹²¹ *Ibid.*, paras. 40, 41c.

[18] In my opinion, the Defendant should have at the very least trained the newer providers that lacked experience of undertaking DDAS and/or legal aid work. This was a cause for concern because it signified that many detainees were being denied access to good-quality legal advice and assistance. The Defendant failed to monitor the DDAS to the requisite standard, as many of the newer providers were failing to conduct further work on behalf of the detainees that they saw on the DDAS. In the *Detention Action* case, it was noted that from September 2018 until February 2020, three-quarters of the providers opened new matter starts for less than 30 per cent of the detainees they saw as part of the DDAS.¹²² This problem was not rectified at that time the case was heard because from the 47 remaining providers, approximately half of them had low conversion rates.¹²³ The data in regards to bail showed that three-quarter of the providers had opened files for less than 20 per cent of the clients they saw at the DDAS.¹²⁴

[19] Many of the newer providers did not even possess relevant experience of doing DDAS work, as stated above.¹²⁵ The Defendant extended the DDAS contracts to providers without assessing their competence and capability levels. Even if they were regulated and had passed the necessary exams, as stated above, many of the newer providers lacked doing any legal aid and DDAS work.¹²⁶ I find it extraordinary that firms with such limited experience were awarded DDAS contracts as noted in the *Detention Action* case.¹²⁷ As argued by the Claimant in the present appeal, due to a lack of good-quality legal advice, detainees' detention may have been prolonged, which would have interfered with their right to liberty. The Claimant further points out that many detainees would not have been able to get bail also, given how complicated the bail procedure is. The Claimant noted that detainees suffering from complex-psychological illnesses may have found themselves in a precarious situation given that the conditions within detention centres may have exacerbated their illnesses. As pointed out by the Claimant, many of these detainees are not only in dire need of legal assistance and advice, but they are also quite fragile and vulnerable, owing to the journey that they may have embarked upon to reach the UK, their complex psychological needs, or their case history, amongst other reasons/factors. Therefore, it is critical for these

¹²² *Ibid.*, para 37.

¹²³ *Ibid.*, para 39.

¹²⁴ *Ibid.*, para 43.

¹²⁵ *Ibid.*, para 19.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

individuals to have access to good quality legal advice and representation from some of the most experienced lawyers within this complex field.

[20] The Claimant has submitted evidence to demonstrate that detainees that benefit from having access to good quality legal advice and assistance, enjoy a higher probability of having their cases accepted by the Home Office or the courts/tribunals.¹²⁸ Research suggests that it is vital for detainees to benefit from having ‘good’ quality legal representation, as opposed to having any representation (which is unlikely to tip the balance in favour of the detainee).¹²⁹ If detainees do not have access to good-quality legal representation, then they may be subjected to unlawful detention as a result of which, the Home Office will be obligated to financially compensate them for the period that they were unlawfully detained.¹³⁰ If we deny immigrants the right to access good quality legal advice, then their application, case or hearing may be rejected. Therefore, we need to safeguard this fundamental right. The Claimant has produced evidence in which Amnesty International has recommended that people should have access to ‘competent legal advice and assistance when needed for the protection of their human rights, including by making sufficient resources to provide high quality legal aid’.¹³¹

[21] The Claimant has adduced further evidence from Bail for Immigration Detainee’s (hereinafter BID)¹³² report dated 2019 (on the quality of legal advice and representation available in immigration detention), which states that,

‘under the previous system firms were delivering regular surgeries, whereas now firms are unlikely to deliver more than 3 weeks of surgeries over a 2 year period in any given IRC. Such irregularity means that newer firms cannot build up expertise and those with experience risk losing their expertise. BID is concerned that changes to the DDA contracts have led to a severe depletion in the quality of legal advice in immigration detention, which in turn has affected our clients’ ability to access their right to liberty and to challenge immigration decisions. Unfortunately, the results of

¹²⁸ A. Lindley, “‘Hit and Miss” Access to Legal Assistance in Immigration Detention”, 647.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ Amnesty International UK, *Cuts that Hurt: Impact of Legal Aid Cuts in England on Access to Justice* UK, Amnesty International, 2016, 14, Available at: https://amnesty.org.uk/files/aiuk_legal_aid_report.pdf (last visited 6 November 2023).

¹³² BID is an independent charity that provides free legal advice and assistance to detainees-see, BID, ‘About Us’, Available at: <https://www.biduk.org/pages/about-us> (last visited 18 November 2023).

this year's survey indicate that the quality of legal advice in immigration detention remains poor'.¹³³

[22] The Claimant pointed to evidence by the Parliamentary Joint Committee on Human Rights, which stated that 'the new system for providing advice should be kept under review to ensure that the firms responsible for advising detainees have the necessary skills and experience to do so'.¹³⁴

[23] According to the above-mentioned evidence, it is vital for detainees to have access to good quality legal advice and representation. Therefore, I further find that the Defendant has failed to take into account the importance of good quality advice in the context of access to justice. I find that the current monitoring scheme is not fit for purpose. As such, the scheme itself has given rise to an impediment to access to justice because many of the providers, in effect, lacked the relevant experience and expertise to advise detained clients. In taking a blanket approach to award most contracts to the newer providers, the Defendant acted in a *Tameside* irrational way by failing to inform himself of all relevant matters before deciding to extend DDAS contracts to all providers, regardless of their level of competence and capability (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 104)).

[24] As the Lord Chancellor has failed to safeguard this very important right of access to justice, this matter now falls on our shoulders as upholders of the constitution and defenders of the rule of law. I will further examine how this matter ought to be rectified, which brings me to my next point.

[25] The Claimant submits that providers that hold legal aid contracts are required to perform work within a timely manner, whilst exercising reasonable skill, care and diligence.¹³⁵ This proposition has not been disputed by the Defendant in the present appeal. In addition to the complaints mentioned the *Detention Action* case above, a number of

¹³³ BID, *BID Research Paper: Autumn 2019 Legal Advice Survey* UK, BID, December 2019, Available at: https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/1295/200204_amended_BID_LAS.pdf (last visited 6 November 2023).

¹³⁴ Joint Committee on Human Rights, *Immigration Detention: Sixteenth Report of Seventeenth Session 2019-19*, UK Parliament, 7 February 2019, HC 1484, HL Paper 278, Para 53, Available at: <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1484/1484.pdf> (last visited 6 November 2023).

¹³⁵ Ministry of Justice, *2018 Standard Civil Contract: Standard Terms*, 2021, para 10.1, Available at: https://assets.publishing.service.gov.uk/media/5feb623ed3bf7f08a02c8817/HPCDS_Contract-2018_Standard_Civil_Contract_Standard_Terms_1_January_2021_.pdf (last visited 18 November 2023).

complaints were lodged by Immigration Law Practitioners' Association, which is a reputable organisation that was founded in 1984.¹³⁶ It seeks to promote and improve advice and representation in this area through providing extensive training to its members.¹³⁷

[26] In the *Detention Action* case, Immigration Law Practitioners Association noted that many providers lacked experience and expertise in undertaking detention work, and were failing to provide prompt, competent advice and representation to detainees, given the complex nature of claims one encounters as part of the DDAS.¹³⁸ The organisation further noted that the providers were not spending sufficient time with detainees and that detainees were not being informed at the end of their initial 30 minutes session, whether their case had been accepted by the rota provider.¹³⁹ Although, providers were taking on cases (from the DDAS), they were not undertaking any substantive work on their clients' behalf, as they were failing to apply for bail and detainees were notably unable to contact their legal representatives.¹⁴⁰ These complaints were supported by reputable organisations such as the Gatwick Detainees Welfare Group, Wilsons Solicitors LLP and Duncan Lewis Solicitors and the Joint Council for the Welfare of Immigrants.¹⁴¹ These providers consistently complained about picking up DDAS cases at short notice since 2018, which placed immense strain on these organisations.¹⁴² The Gatwick Detainees Welfare Group noted that theoretically, it may appear that a larger number of firms would lead to an increase in choice in obtaining legal representation, however, this was actually a fallacy as detainees could not choose a solicitor of their choice, via the DDAS system.¹⁴³

[27] One would think that an increase in DDAS providers would at the very least allow detainees to obtain advice, assistance and representation from their chosen provider, which does not seem to be the case here. Therefore, I wonder what the point of this extension was. I understand that the Defendant in the *Detention Action* case justified this stance by stating that it was,

¹³⁶ Immigration Law Practitioners Association, 'About Us', <https://ilpa.org.uk/about-us/about-ilpa/> (last visited 4 November 2023).

¹³⁷ *Ibid.*

¹³⁸ *The Queen (on the application of Detention Action) v Lord Chancellor* [2022] EWHC 18 (Admin) para 58.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*, para 59.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*, para 61.

‘to expand the number of providers in 2018-was taken in part in response to feedback from representative bodies that there should be greater client choice and that there were a number of providers interested in doing this work (whereas, since November 2010, there had only been a small number of providers undertaking this work)’.¹⁴⁴

[28] If anything, this expansion (of the DDAS) has signified the challenges and difficulties this sector has faced over the last few decades. Therefore, I will comment on the kind of training the newer providers need to undergo. I will dwell upon this matter later and decide a suitable outcome.

[29] In the present appeal, the Claimant submits that, most of these legal representatives are under immense pressure to cover a great deal of substance in these 30 minutes.¹⁴⁵ During the 30 minutes, they must ensure that the legal aid forms are signed, obtain basic instructions from the detainees, use the services of telephonic interpreters, advise on next steps and decipher whether they are able to allocate the case to someone within their firm.¹⁴⁶ Indeed, there is evidence that the telephone line drops very frequently, and at other times, one may be placed on hold for a substantial amount of time, whilst the interpreting agency attempts to locate an appropriate interpreter.¹⁴⁷ At times, this task alone can take up to 30 minutes. As submitted by the Claimant above, most of these detainees suffer from complex psychological conditions and therefore they may not be fluent in telling their story. Quite often they would be daunted by the prospect of seeing a legal representative and it may take them time to feel at ease. They may need time to tell their story, owing to the past trauma they may have suffered from. Therefore, the 30 minutes limitation should be extended to one hour and legal representatives should be remunerated adequately for their time, as they are carrying out a vastly important function.¹⁴⁸

¹⁴⁴ *Ibid.*, para 65.

¹⁴⁵ A. Lindley, “‘Hit and Miss’ Access to Legal Assistance in Immigration Detention”, 638-legal representatives are supposed to spend 30 minutes per client (seen on the DDAS).

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ Some of these recommendations have been put forward by the Joint Committee on Human Rights where they stated, ‘Surgeries should be long enough to ensure that there is sufficient time for the detainee to explain their case and for the adviser to collect the necessary details needed to take the case forward to representation’. See Joint Committee on Human Rights, *Immigration Detention: Sixteenth Report of Seventeenth Session 2019-19*, UK Parliament, 7 February 2019, HC 1484, HL Paper 278, Para 53, Available at: <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1484/1484.pdf> (last visited 6 November 2023).

[30] According to the regulations, legal representatives are paid £360 if they advise five or more clients during the DDAS, and £180 if they advise four or less clients.¹⁴⁹ We are, after all dealing with individuals that are fleeing for their lives as they are in danger of being persecuted in the country they are fleeing persecution from. Indeed, detainees are vulnerable individuals and detention of immigrants is a sensitive political matter that attracts media interest.¹⁵⁰ Therefore, as a result of this judgment, legal representatives' rates should be paid £1000 if they see four or more clients and £500 if they advise four or less clients, and these rates should be tied to the indexed rate.¹⁵¹

3.3 Gaps in Training: Solutions

[31] The Solicitors Regulation Authority (hereinafter SRA) is an independent official regulator of solicitors, and the Office of the Immigration Services Commissioner (hereinafter OISC) is the official regulator of immigration advisers.¹⁵² In recent times, the task of monitoring providers has been handled largely by the civil servants working within the Ministry of Justice, as a result of which the frequency and the types of audits have increased over the years.¹⁵³ As submitted by the Claimant, solicitors and legal representatives are reprimanded for petty issues, such as not completing the legal aid forms properly or for forgetting to mark 'nil' next to the correct boxes or for charging more than the contract allows for (even if it is a minor increase) amongst other matters.¹⁵⁴ This forensic examination of the work of solicitors is worrisome.

[32] I must emphasise that it is not easy to qualify as a solicitor in England and Wales. Publicly funded asylum/immigration solicitors/legal representatives are obligated to sit through further examinations known as the Immigration, Asylum Accreditation Scheme.¹⁵⁵

¹⁴⁹ The Civil Legal Aid (Remuneration) Regulations 2013, Schedule 1, Part 1, para 3, Table 4 (d), Available at: <https://www.legislation.gov.uk/uksi/2013/422/schedules/made?view=plain> (last visited 9 May 2023).

¹⁵⁰ *R (on the application of Detention Action) v Lord Chancellor* [2022] EWHC 18 (Admin) para 29.

¹⁵¹ This means that the figure should be adjustable in accordance with the consumer price index or inflation.

¹⁵² Solicitor Regulation Authority, 'Welcome to the Solicitor Regulation Authority' Available at: <https://www.sra.org.uk/> (last visited 12 May 2023); also see, Ministry of Justice 'Office of the Immigration Services Commissioner' Available at: <https://www.gov.uk/government/organisations/office-of-the-immigration-services-commissioner> (last visited 12 May 2023).

¹⁵³ J. Wilding, *The Legal Aid Market: Challenges for Publicly Funded Immigration and Asylum Legal Representation*, 66.

¹⁵⁴ *Ibid.*

¹⁵⁵ The Law Society, 'Immigration and Asylum Accreditation: Senior Caseworker Exam (20/10/2022)', Available at: <https://learn.lawsociety.org.uk/product/immigration-and-asylum-law-accreditation-senior-caseworker-exam-29-09-2022/#:~:text=The%20Immigration%20and%20Asylum%20Law%20Accreditation%20is%20a,as%20a%20quality%20mark%20for%20privately%20funded%20work>. (last visited 8 May 2023).

This Scheme acts as a recognised quality standard for legal aid practitioners providing advice under a Legal Aid Agency contract.¹⁵⁶ There are three stages to the accreditation. First, there is a trainee casework assistant route which allows legal representatives to practice at the probationary stage for a period of nine months before being accredited as a casework assistant.¹⁵⁷ Then there is the casework assistant route which acts as an interim accreditation mechanism for applicants who are contemplating taking the senior casework exam.¹⁵⁸ Thereafter, there is the senior caseworker route and this route permits legal representatives to have conduct over all matters of the case and to delegate tasks to the trainee caseworker or to caseworker assistants.¹⁵⁹ Finally, there is the supervising solicitor route which allows supervisors to possess conduct over their supervisees work (limited to four).¹⁶⁰ Publicly funded legal representatives working within the field of immigration and asylum law are also required to reaccredit themselves every three years.¹⁶¹ Therefore, as pointed out by the Claimant in this appeal, legal aid representatives specialising in the field of publicly funded immigration and asylum law undergo heavy training before they can assist their clients, given that they are dealing with highly vulnerable individuals whose lives depend on them.

[33] Despite this, they are still being reprimanded largely by the Legal Aid Agency (as discussed above).¹⁶² I find that solicitors are being reprimanded frequently and needlessly by the Legal Aid Agency. Further, they are constantly being summoned by the Agency to answer petty questions, which eats into their limited time, and deters them from progressing their clients' cases as submitted by the Claimant.¹⁶³ The Legal Aid Agency employs civil servants who may not be legally trained to monitor the work of professionals that deal with vulnerable individuals. Thus, there is a problem with overseeing the work of solicitors, and the sort of oversight the Legal Aid Agency is providing.

¹⁵⁶ *Ibid.*

¹⁵⁷ The Law Society, 'Immigration and Asylum Accreditation', Available at: <https://www.lawsociety.org.uk/career-advice/individual-accreditations/immigration-and-asylum-law-accreditation/> (last visited 8 May 2023).

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.* There are areas that senior caseworkers cannot delegate to trainee caseworkers or casework assistants, such as matters relating to minors or unaccompanied asylum seeking children, matters for those who lack capacity under section 2 of the Mental Capacity Act 2005, matters for detained clients and exercise of delegated function to grant Controlled Legal Representation including when this is conducted at the Legal Help stage.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² This Agency is a part of the Ministry of Justice and it monitors and finances the work of legal aid providers.

¹⁶³ E. Palmer, T. Cornford, A. Guinchard and Y. Marique, 'Access to Justice: Beyond the Policies and Politics of Austerity', 114.

[34] Solicitors are also answerable to their official regulator, the SRA (as above). The SRA should ensure that the Legal Aid Agency make maximum use of the peer-review system; and make minimalistic use of the other auditing systems. Indeed, the authorities sometimes make use of the peer-review process, however, in my opinion this is the only system that they should be deploying to monitor the work of legal aid providers, as it effectively measures the quality of their work.

[35] The Legal Aid Agency should work collaboratively with the SRA in a harmonious manner. The SRA should decide who the appropriate peer-reviewers are from a pool of able candidates that have been specialising in the field of publicly funded immigration and asylum work for a minimum of ten years. Given their length and breadth of experience, I have no doubt in suggesting that they would be more likely to conduct fairer peer-review assessments. According to my findings, the Legal Aid Agency has failed to make sufficient use of the peer-review system.

[36] Providers that receive a peer-review rating of either 1, 2 or 3 should be allowed to carry out this work.¹⁶⁴ A panel of independent experienced legal practitioners will assess the quality of the work of their fellow professionals against a set criteria as stated above.¹⁶⁵ A rating of 4 or 5 can initiate spot checks, the provider can be sanctioned and persistent breaches can result in the suspension of the provider or in worse case scenarios, it can lead to a termination of contracts.¹⁶⁶

[37] In addition to making use of the peer-review system, it is important to ensure that the newer providers are provided with appropriate training. Training sessions need to be detailed and last for a period of one year at least. The newer providers' performance will be monitored closely by their regulators, the legal aid authorities which include the respective contract managers as well as the older providers that have been undertaking this work for a substantial number of years. The Defendant must monitor standards in order to fulfil his duty under sections 1 and 3 of *LASPO* 2012. However, once again, I must emphasise that he must work collaboratively with the SRA and of course the peer-reviewers.

¹⁶⁴ Legal Aid Agency, Independent Peer-Review Document, November 2021, para 2.28 Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033053/Peer_Review_Process_Document.pdf (last visited 2 December 2023).

¹⁶⁵ *Ibid.*, para. 1.1.

¹⁶⁶ *Ibid.*, paras. 6.10-6.13.

[38] Therefore, contract managers should not hesitate in issuing ‘contract notices’ to providers that are unable to fulfil their contractual obligations (upon working collaboratively with the SRA and the peer-reviewers).¹⁶⁷ The Legal Aid Agency, the SRA and peer-reviewers must take ‘robust action against any firm that fails to deliver as per the contract’ because ‘detainees are vulnerable clients and detention of immigrants is a sensitive political matter that attracts media interest’.¹⁶⁸

3.4 Ongoing Concerns: *Bail*

[39] Finally, from the data and information that has been collated by the Claimants in the *Detention Action* case, it appears that most legal advisers are not advising clients on their right to apply for bail, in contravention of their duties. This matter needs to be addressed urgently. I order the Lord Chancellor, Contract Managers of the Legal Aid Agency and the SRA to enlighten me on how they think this matter ought to be addressed in the next ten weeks.

[40] Both the Claimant and Defendant have noted the importance of Article 5 of the European Convention on Human Rights, which states that everyone has a right to liberty, save for a few exceptions.¹⁶⁹ Therefore, this right needs to be safeguarded appropriately.

[41] I would now like to delve more deeply about how this right has been exercised and adjudicated upon over the years as evidenced in the Claimant’s appeal bundle. This may shed more light on the historical problems this area has encountered.

[42] The right to liberty is embodied in the writ of habeas corpus.¹⁷⁰ During a debate in the House of Commons in 1954, it was noted that immigrants were being removed from the UK and any attempts made by their lawyers to get a writ of habeas corpus were repeatedly rejected by the courts.¹⁷¹

¹⁶⁷ A contract notice is issued to providers that consistently fail to perform to the requisite standards as set by the legal aid authorities.

¹⁶⁸ *R (on the application of Detention Action) v Lord Chancellor* [2022] EWHC 18 (Admin) para 29.

¹⁶⁹ Council of Europe, *Guide on Article 5 on the European Convention on Human Rights*, 2022, available at: echr.coe.int/documents/d/echr/guide_art_5_eng (last visited 2 December 2023).

¹⁷⁰ The writ of habeas corpus is frequently used by detainees who are seeking relief from unlawful imprisonment and is generally regarded as an important instrument for the safeguarding of individual freedom against arbitrary state action. It was commonly used in immigration matters to challenge unlawful decisions resulting in deportation.

¹⁷¹ HC Deb 27 January 1954, vol 522, cols 1900-habeas corpus is a common-law writ that protects personal liberty by requiring judicial inquiry into the legality of detention.

[43] Even as far back as 1995, immigration detainees were not being advised on their right to seek bail.¹⁷² Thereafter in 1999, as a result of the increasing costs of detention, the New Labour Government sought to pass a law to provide automatic routine bail hearings.¹⁷³ The plan was to conduct two automatic hearings; first on the eighth day after detention and then after thirty-six days.¹⁷⁴ Nevertheless, these provisions were never brought into force and eventually repealed.¹⁷⁵

[44] By 2007, a new allocation system for bail applications was introduced whereby legal representatives ran bail applications via video link (from within detention centres) that were heard before Immigration Tribunals.¹⁷⁶ Indeed, it had become extremely difficult to secure bail.¹⁷⁷ Therefore, the authorities introduced video conferencing for bail hearings, however, criticisms were levelled towards this system also.¹⁷⁸ The increased use of video link impacted on the detainee's ability to understand, follow, and to participate in court proceedings.¹⁷⁹

[45] I think it is appropriate to consider some historical statistical information on the number of detainees that have been represented in respect of their bail matters. Doing so will enable us to decipher whether the extension of DDAS contracts to the newer providers presented a new problem or one that has persisted for some time.

[46] In research that was conducted by BID, and the British Refugee Council in 2008,¹⁸⁰ 50 per cent of bail applicants were not legally represented and none of their cases were successful.¹⁸¹ By 2013, the majority of detainees had no bail application submitted (56 per cent).¹⁸²

¹⁷² HL Deb, 4 July 1995, vol 565, col 1066.

¹⁷³ *Immigration and Asylum Act 1999*, Part III.

¹⁷⁴ *Immigration and Asylum Act 1999*, s.44(4)(b)- s.44(5).

¹⁷⁵ *Nationality, Immigration and Asylum Act 2002*, s.68(6).

¹⁷⁶ BID, *BID: Annual Report 2007*, BID, 2007, 7-8, available at: https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/373/2007_BID_Annual_Report.pdf (last visited 10 October 2022).

¹⁷⁷ *Ibid.*, 8.

¹⁷⁸ *Ibid.*, 12.

¹⁷⁹ A. Cooke, *Report on Immigration Detention and the Rule of Law*, 2013, 26, available at: <https://binghamcentre.biicl.org/publications/report-on-immigration-detention-and-the-rule-of-law> (last visited 28 May 2023).

¹⁸⁰ A charity that works and assists refugees. Please see, Refugee Council, Available at: <https://www.refugeecouncil.org.uk/> (last visited 23 August 2023).

¹⁸¹ BID and the Refugee Council, *Immigration Bail Hearings by Video Link: A Monitoring Exercise*, 2008, 6.

¹⁸² *Ibid.*, 3.

[47] Changes to bail proceedings were implemented through the *Immigration Act* 2014.¹⁸³ Most detainees were not eligible to apply for bail if they were to be removed within 14 days.¹⁸⁴ Additionally, this Act mandated the Tribunals to dismiss an application for bail if it was made within 28 days of a previous bail application, unless a material change in circumstances could be demonstrated.¹⁸⁵ This of course had an effect on the number of bail applications that were submitted on behalf of detainees. As compared to the previous year and as predicted, owing to the onerous nature of the *Immigration Act* 2014, a substantially higher percentage of detainees had no bail application submitted on their behalf (74 per cent).¹⁸⁶ By 2015, this figure had decreased to 67 per cent.¹⁸⁷ The Conservative Government then enacted the *Immigration Act* 2016, which allowed detainees the right to be granted automatic bail if they were detained for more than four months.¹⁸⁸ However, the measures made very little difference.¹⁸⁹

[48] Therefore, the figures presented by the Claimant in the *Detention Action* judgment do not paint a new picture. Historically, most legal representatives have struggled to safeguard two of the most important rights these detainees possess, the right to liberty and access to good quality legal advice. The interested parties will monitor the work of the newer solicitors and provide them with appropriate training, which undoubtedly will make a positive difference in this area. I make a finding to the effect that BID's statistics provide a credible evidence base and should therefore form a critical part of monitoring the quality of advice that is being provided to detainees, and therefore this kind of data collection will be critical for future years. I would be extremely grateful if BID could provide me (as a judge) with statistics from 2025 to 2030 in due course.

¹⁸³ *Immigration Act* 2014 - <http://www.legislation.gov.uk/ukpga/2014/22/contents/enacted>; *Ibid* 52.

¹⁸⁴ *Ibid.*, s.7.

¹⁸⁵ *Ibid.*

¹⁸⁶ BID, *Draft Summary: Survey of Levels of Legal Representation for Immigration Detainees Across the UK Detention Estate*, BID, 2014, 3 https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/156/BID_Legal_Advice_Surveys_1-8-Summary_Findings.pdf (last visited 3 December 2023)

¹⁸⁷ *Ibid.*

¹⁸⁸ *Immigration Act* 2016, Sch 10, Part 1, s.11 (1).

¹⁸⁹ BID, *BID Annual Report 2018*, BID, 2018, 3, available at: https://hubble-live-assets.s3.amazonaws.com/biduk/redactor2_assets/files/750/BidAnnualReport2018WEB_2_.pdf (last visited 3 November 2021).

[49] If providers are not applying for bail on behalf of their clients, then they should receive a peer-review rating of 4 or 5. Furthermore, I am concerned that bail applications under asylum work are limited to £500.¹⁹⁰ Therefore, I make a finding to the effect that the £500 limitation is manifestly inadequate. The Legal Aid Agency is to increase this payment to £900 and this rate should be tied to the indexed rate, as the current sum seems to undervalue the very important work that legal aid solicitors specialising in asylum law do.

3.5 Conclusion

[50] To clarify and to conclude, I make the following orders and declarations:

a) The Defendant had inadequately discharged his statutory duties to administer the DDAS appropriately to ensure that the detainees were provided adequate access to legal services. Thus, it was irrational to extend the DDAS contracts to the newer providers. Data regarding the number of files that providers opened following the DDAS was inaccurate. Thus, there were multiple failures to ensure that legal services were made available. The monitoring scheme was therefore systemically flawed, and it was irrational to appoint new providers. The case should not have been decided in favour of the Defendant, as the previous judge overlooked these fundamental aspects of the case, and the appeal by the Claimant should be allowed to proceed. Thus, I make a declaration to the effect that the way the Defendant was operating the DDAS was unlawful. Second, I declare that the decision to extend DDAS contracts to all providers was also unlawful.

b) Third, I am issuing a mandatory order that requires the Defendant to act on the following remedial action:

c) The 30 minutes limitation imposed as part of the DDAS will be extended to one hour. Legal representatives' rates should be paid £1000 if they see four or more clients and £500 if they advise four or less clients, and these rates should be tied to the indexed rate

¹⁹⁰ Ministry of Justice, *2024 Standard Civil Contract Specification Category Specific Rules: Immigration and Asylum*, March 2023, para 8.107, Available at: https://assets.publishing.service.gov.uk/media/6569c0100f12ef00133e0101/2024_Immigration_and_Asylum_Category_Specific_Rules.pdf (last visited: 2 December 2023).

d) The payment for the work that the legal representatives do vis-à-vis bail applications will increase to £900 and this rate should be tied to the indexed rate.

e) The SRA will take a more proactive role in monitoring the work of solicitors, and the Legal Aid Agency will be mandated to make use of the peer-review system as opposed to making use of the other auditing systems.

f) The peer-review system will capture the work of all providers that do DDAS work, regardless of whether they open files for the clients they see or not. I also want an update from the Defendant on how he is dealing with the delays within this system, so that this system can be used more regularly.

g) The newer providers will be given adequate training, and BID's statistics will continue to form a critical part of monitoring the quality of advice being provided to detainees.

h) Given the evidence compiled above, many legal representatives are not advising their clients on bail. I have asked for the opinions of the Lord Chancellor, Contract Managers of the Legal Aid Agency and the SRA on how they seek to rectify this matter. If providers are not applying for bail on behalf of their clients, then they should receive a peer-review rating of 4 or 5.

[Appeal outcome: 'Case allowed']

4. REASONING FOR REWRITING THIS DECISION/FURTHER BACKGROUND INFORMATION

For this section, I will explain why I chose to write about this particular case and expand on some of the areas that were covered. First, it would be appropriate to briefly cover some background information.

As alluded to in the introduction, access to justice in the United Kingdom is a constitutional right,¹⁹¹ yet until 1949, there was no formal provision of legal aid services that

¹⁹¹ Palmer, Cornford, Guinchard and Marique, *Access to Justice: Beyond the Policies and Politics of Austerity*, 107.

operated at the expense of the public for individuals that could not afford to pay for lawyers.¹⁹² The modern legal system aimed to change all this through the implementation of the *Legal Aid and Advice Act 1949* by the Labour Government.¹⁹³

The Labour Government wanted the UK to become a welfare state in which fundamental public services would be provided to its citizens from taxpayers' funds.¹⁹⁴ It is important to note that regardless of one's personal circumstances or background, having access to justice was seen as a basic human right following the Second World War.¹⁹⁵ The Law Society remained responsible for overseeing the merits test that remained fairly relaxed until the late 1980s.¹⁹⁶ The merits test considers the likelihood of the claim being successful.¹⁹⁷ In 1950, 80 per cent of the applicants were eligible to receive legal aid.¹⁹⁸

The Law Society, which was created by Royal Charter in 1845 exercised a dual function as it was in charge of regulating the conduct of solicitors and it administered the legal aid scheme until 1988 (as stated above).¹⁹⁹ It was tasked with maintaining professional standards, dealing with complaints and it frequently initiated disciplinary proceedings against offenders, which enabled it to maintain its reputation and the public image of the profession.²⁰⁰ The Government was confident in the Law Society's ability to eliminate malpractice of unethical solicitors.²⁰¹ Therefore, clearly the Government of the day and the Law Society trusted each other as a wealth of autonomy was awarded to the latter in regulating the conduct of solicitors and monitoring legal aid.

However, the reason why I did not dwell too deeply on the role of the Law Society in monitoring the conduct of solicitors as part of the rewrite was because as a result of *LASPO*,

¹⁹² H. Brooke, *The History of Legal Aid 1945 to 2010*, *Bach Commission on Access to Justice*, September 2017, 5, Available at: <https://sirhenrybrooke.me/2016/07/16/the-history-of-legal-aid-1945-to-2010/> (last visited 14 May 2023).

¹⁹³ *Ibid.*, 15.

¹⁹⁴ G. Bindman, "Richard Abel on legal Aid", *International Journal of the Legal Profession*, 11(2), 2004, 103.

¹⁹⁵ S. Moore and A. Newbury, *Legal Aid in Crisis: Assessing the Impact of Reform*, UK, Bristol University Press, 2017, 10.

¹⁹⁶ Comptroller and Auditor General, Lord Chancellor's Department: Provision of Legal Aid in England and Wales, UK, National Audit Office, 23 January 1986, 16, Available at: <https://www.nao.org.uk/pubsarchive/wp-content/uploads/sites/14/2018/11/Lord-Chancellors-Department-Provision-of-Legal-Aid-in-England-and-Wales.pdf>. (last visited 10 November 2023).

¹⁹⁷ T. Butter, "Merits Testing in the English Legal Aid System: Exploring its Impact on Asylum Cases", *Racht der Werkelijkheid*, 36(3), 2015, 156-168, 156.

¹⁹⁸ B. Roshier. and H. Teff, *Law and Society in England*. London, Routledge, 2013, 190.

¹⁹⁹ M. Burrage, *Revolution and the Making of the Contemporary Legal profession: England, France and the United States*, UK, OUP, 2006, 511.

²⁰⁰ M.L Edwards, *A Guide to the Professional Conduct of Solicitors*, UK, Law Society, 1974, 3.

²⁰¹ Burrage, *Revolution and the Making of the Contemporary Legal profession: England, France and the United States*, 460.

the Lord Chancellor was charged with monitoring the standards of providers of legal aid, in order to fulfil his duty. Therefore, I wanted the Lord Chancellor to continue playing a role in safeguarding access to justice collaboratively with the Legal Aid Agency, the SRA and the peer-reviewers.

4.1 Monitoring Method: Peer Review

It would also be appropriate to give some background information about the peer-review mechanism given the heavy reliance that was placed on it in the *Detention Action* case. In 2005, the Legal Services Commission (the body appointed by the Government to administer legal aid on its behalf) decided that the peer review mechanism was the best way of measuring the quality of providers.²⁰² An independent peer-review system was established which was developed by the Institute of Advanced Legal Studies.²⁰³ The Legal Services Commission was tasked with administering the scheme, and practitioners welcomed this peer review mechanism as they criticised the audits that were conducted by the Legal Services Commission.²⁰⁴ Peer reviews are conducted by those that specialise within the area, involving an assessment of a random sample of files to measure the quality of advice and legal work being carried out by the provider; the result from this review is used to decide whether a provider can continue doing legal aid work.²⁰⁵

It is noteworthy that peer-reviews are category specific and are carried out by practitioners who are skilled in that area of law.²⁰⁶ In each category of law, the provider must obtain a rating of either 1 (Excellence), 2 (Competence Plus) or 3 (Threshold Competence).²⁰⁷ Following an assessment of 12 files, the peer-reviewer considers the findings and formulates a Peer-Review Report, in which they examine how the provider is managing, supervising and conducting work on their client's cases.²⁰⁸

²⁰² H. Brooke, *The History of Legal Aid 1945 to 2010*, *Bach Commission on Access to Justice*, September 2017, 29, Available at: <https://sirhenrybrooke.me/2016/07/16/the-history-of-legal-aid-1945-to-2010/> (last visited 14 May 2023).

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ F. Meyler and S. Woodhouse, "Changing the Immigration Rules and Withdrawing the 'Currency' of Legal Aid: The Impact of LASPO 2012 on Migrants and Their Families", *Journal of Social Welfare and Family Law*, 35, 2013, 55-78, 56.

²⁰⁶ Legal Aid Agency, 'Independent Peer-Review Document' (November 2021), para 2.4, Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033053/Peer_Review_Process_Document.pdf (last visited 2 December 2023).

²⁰⁷ *Ibid.*, para. 2.17-2.24.

²⁰⁸ *Ibid.*, paras. 2.29, 2.31.

Therefore, this method of assessing files/quality of work was discussed in detail in the *Detention Action* case. Accordingly, the major causes of concern that have been identified by the peer-reviewers that reported back to the Legal Aid Agency in regards to the performance of providers have been similar to the ones identified by respective parties in the *Detention Action* case, which have been discussed above. The peer-reviewers utilised by the Legal Aid Agency noted that the regular kinds of problems identified in peer-reviews included, the lack of knowledge legal representatives possessed about the law and its procedures; that the advice was not always recorded, was inadequate or given in a way that did not suit the client's needs, especially for clients that had mental health conditions and/or were otherwise vulnerable.²⁰⁹ There were also provider management issues that concerned insufficient training and supervision of staff; inappropriate allocation of work amongst staff; problems relating to late communication to clients, courts or third parties and it was noted that legal representatives were missing deadlines and ignoring Counsel's opinions.²¹⁰ Other concerns (amongst many others) were that clients were not receiving comprehensive advice; clients were not kept informed about their cases; there were file related issues; legal representatives were failing to perform administrative tasks as required; supervisors were not supervising their staff appropriately and were failing in their duties to conduct file reviews.²¹¹ These concerns were also raised in the case that I decided to rewrite. Thus, although these concerns are not new, there is an urgent need for them to be addressed and the peer-review mechanism identified above may assist in making a positive difference to this area.

4.2 Hindering Access to Justice

Another way the Law Society (whose role has changed since 2007 as it works collaboratively with the SRA to regulate the conduct of solicitors) addressed the concerns surrounding the poor-quality of advice was through the introduction of the highly controversial Immigration Asylum Accreditation Scheme exams for legal representatives that undertake publicly funded immigration and asylum work.²¹² These exams were introduced in 2005 because of concerns that poor-quality advice was being given by immigration advisors as discussed above.²¹³ Anyone who provides publicly funded immigration and asylum services is obligated to pass

²⁰⁹ *Ibid.*, para. 5.13.

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² S. York, "The End of Legal Aid in Immigration: A Barrier to Access to Justice for Migrants and a Decline in the Rule of Law", *Journal of Immigration, Asylum and Nationality Law*, 27(2), 97-194, 2013, 128-129.

²¹³ Meyler and Woodhouse, "Changing the Immigration Rules and Withdrawing the 'Currency' of Legal Aid: The Impact of LASPO 2012 on Migrants and Their Families", 56.

these accreditation exams.²¹⁴ The exams are challenging, and one must possess in-depth knowledge and understanding of legal cases and procedures.²¹⁵ Those that receive the lower end of the accreditation can deal with the initial part of the asylum claim, and those with a higher level of accreditation can deal with the refusal of the claim.²¹⁶ Arguably, the accreditation scheme did not ensure that caseworkers were adequately supervised, as they were often under pressure to meet financial targets and therefore, an adequately resourced peer-review process would have found problems with the quality of the work at that time.²¹⁷

There could be other reasons for the problems that have been identified in this article. For example, a number of further stringent conditions were introduced following Lord Carter's review of the civil and criminal legal aid system in 2006.²¹⁸ This review fixed the number of 'matter starts',²¹⁹ a provider could deal with, signifying that providers were only allowed to deal with a fixed number of cases.²²⁰ There was further monitoring of providers and thus, more audits were introduced.²²¹ Providers of legal aid were increasingly monitored by the LSC, which led to an increase in bureaucracy as their administrative workload increased.²²²

Nevertheless, the most controversial measure that was adopted following the Carter Review was the introduction of fixed fees in 2007. Previously, providers were remunerated by way of the hourly rate scheme, enabling them to charge for all the work they had completed on each file.²²³ Since then the price for the initial asylum case has been fixed to around £400 (this does not include appeals).²²⁴ More than fifteen years have passed, yet the Government/legal aid authorities have not increased this rate. Through this system, firms are

²¹⁴ York, "The End of Legal Aid in Immigration: A Barrier to Access to Justice for Migrants and a Decline in the Rule of Law", 129.

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*, 130.

²¹⁷ *Ibid.*

²¹⁸ Moore and Newbury, *Legal Aid in Crisis: Assessing the Impact of Reform*, 26-Lord Carter was asked to undertake a review on the legal aid system by the Labour Government.

²¹⁹ This refers to cases which a provider is allowed to open in a given year.

²²⁰ J. Wilding, *Droughts and Deserts: A Report on the Immigration Legal Aid Market*, 2011, 43, <http://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf> (last visited 19 December 2022)-the popular advisors matter starts got used up quickly.

²²¹ Meyler and Woodhouse, "Changing the Immigration Rules and Withdrawing the 'Currency' of Legal Aid: The Impact of LASPO 2012 on Migrants and Their Families", 56.

²²² Wilding, *The Legal Aid Market: Challenges for Publicly Funded Immigration and Asylum Legal Representation*, 2.

²²³ *Ibid.*, 131-although it is noteworthy that clients allocated from the DDAS are remunerated hourly rate system.

²²⁴ House of Commons CAC, 'Implementation of the Carter Review on Legal Aid', 1 May 2007, 1, available at: <https://publications.parliament.uk/pa/cm200607/cmselect/cmconst/223/223i.pdf> p.40 (last visited 3 December 2022).

rewarded with a speedier turnover of cases, whilst it discourages providers from accepting complex cases, as such cases would normally exceed the fixed-fee limit.

The price was fixed by the LSC based on the averaging of billed claims in England and Wales within a specific year.²²⁵ Many providers realised the difficulties associated with this scheme, and in particular with complex cases, and therefore it was decided that a case that costs over three times the fixed-fee value could be claimed at its full cost, although such cases undergo the auditing process and are forensically examined by the legal aid authorities.²²⁶ More recently, the Conservative Government has lowered the escape fee threshold to double rather than triple the fixed fee for Legal Help (initial/pre-appeal) cases as a result of years of campaigning by legal aid lawyers.²²⁷

Successive governments have continually intervened in this area. In 2012, the Conservative-Liberal Democrat coalition government passed *LASPO* that decreased the legal aid budget by £350 million.²²⁸ This Act ended much of immigration legal aid.²²⁹ It also replaced the Legal Services Commission with the Legal Aid Agency, an executive agency of the Ministry of Justice, which the Lord Chancellor had direct oversight of it.²³⁰

As a result of these changes, there was a steep decrease in providers, as they were not able to undertake legal aid work. For example, in 2013, 413 providers were undertaking legal aid work.²³¹ However, this figure decreased to 231 in September 2018; a drop of 44 per cent.²³²

As a result of these issues identified above, many reputable firms abandoned doing legal aid work altogether over time. Thus, this prompted the Legal Aid Agency to open the tendering process for many other firms as demonstrated in the *Detention Action* case. This led to a

²²⁵ York, “The End of Legal Aid in Immigration: A Barrier to Access to Justice for Migrants and a Decline in the Rule of Law”, 131.

²²⁶ *Ibid.*

²²⁷ Ministry of Justice, ‘2018 Standard Civil Specification Category Specific Rules: Immigration and Asylum’ (2018), para 8.98 Available at: https://assets.publishing.service.gov.uk/media/65844ff9ed3c3400133bfd6f/2018_Standard_Civil_Contract_category_specific_rules_Immigration_and_Asylum_January_2024.pdf; Also see, Ministry of Justice, ‘Immigration Legal Aid: The Government’s Response to its Consultation on New Fees for New Services’, 2022, para 217, Available at: https://www.gov.uk/government/consultations/immigration-legal-aid-a-consultation-on-new-fees-for-new-services?utm_medium=email&utm_campaign=govuk-notifications-topic&utm_source=333a7f65-47.

²²⁸ S. Hynes and J. Robins *The Justice Gap: Whatever Happened to Legal Aid?*, UK, Legal Action Group, 2009, 90.

²²⁹ *Ibid.*

²³⁰ Moore and Newbury, *Legal Aid in Crisis: Assessing the Impact of Reform*, 29.

²³¹ Hynes and Robins *The Justice Gap: Whatever Happened to Legal Aid?*, 43-44.

²³² *Ibid.*

deterioration in the quality of legal advice and assistance that was offered to detainees. It is hoped that serious consideration will be given to this fictive rewritten judgment, so that some of the concerns that immigration detainees and publicly funded immigration/asylum legal representatives face can be addressed in an adequate manner.

5. CONCLUSION

The purpose of this overview was to demonstrate the hostile environment in which legal representatives work in and to address how these changes affect the everyday work of lawyers as exemplified in the *Detention Action* case. Given how highly politicised this area is, successive governments have constantly interfered in it. This interference has impacted on the work that publicly funded immigration and asylum lawyers do as their work has been subjected to constant and profound changes, which has affected their morale and their ability to work in their client's best interests. There has also been a diminution of standards and wages. Providers can no longer afford to carry out this work because of the reasons mentioned in this article.

As shown by the *Detention Action* case, the government's constant interference in this sector has led to its destabilisation. They are ill-equipped to deal with an area that the self-regulated profession itself should have high autonomy to oversee given that legal representatives possess the necessary knowledge to deal with the very many complex types of clients and cases that come before them. As a result of the problems discussed above, asylum-seekers have suffered profoundly, as they are not able to benefit from obtaining adequate, sufficient, and good quality legal advice and assistance.

