

Submission to the Civil Legal Aid Review Group

The Review of Civil Legal Aid

February 2023

Working for **equality**



1.

Introduction and Background

The Immigrant Council of Ireland (ICI) is a non-governmental charitable founded in 2001. In 2006, the ICI was recognised as an Independent Law Centre in accordance with the Solicitors Acts, 1954 to 2002 (Independent Law Centres) Regulations, 2006. We employ solicitors to provide free legal services and, in accordance with the Regulations, do not charge fees for legal services provided. In this regard, the organisation seeks to address unmet legal need and ensure access to justice through the provision of free legal assistance to vulnerable communities including victims of trafficking, victims of gender-based violence, and refugees/stateless persons and migrant children. To further this objective, and regarding the latter cohort specifically, the ICI collaborates with private legal firms acting in a *pro bono* capacity under the remit of the Kids in Need of Defence project (KIND). Given the lack of civil legal aid for such matters, the ICI, in collaboration with its partners, fills the void through its service provision. On average, the ICI assists, approximately, 5000 service users via its helpline as well as 100-200 clients through the Law Centre on an annual basis.¹

PARTNERSHIP

These submissions are endorsed by the following Kids In Need of Defence (KIND) project *pro bono* partners: Irish Refugee Council Independent Law Centre, Arthur Cox LLP, A&L Goodbody, Dechert LLP and Microsoft. The submissions are also endorsed by the NGO Crosscare.

DISCLAIMER

Please note that these submissions were prepared by the Immigrant Council of Ireland and while our partners and external NGOs listed above have confirmed their broad support for these submissions, they are not responsible for the content or opinions contained therein.

The Immigrant Council of Ireland (ICI) has prepared this submission to inform the Review of the Civil Legal Aid Scheme and directs the Committee's attention specifically to the position of migrant children and victims of trafficking. While this submission will centralise on these two key themes, this submission will also address the provision of legal aid and recommendations for reform regarding victims of domestic, sexual and gender-based violence, individuals subject to return and/or removal proceedings, and equality and discrimination matters.

Before addressing each of the questions of reference raised by the Review Group, the ICI wishes to highlight the lack of tailored legal services for general immigration matters for both adults and children, in particular unaccompanied migrant children. Although immigration matters are not excluded under the Civil Legal Aid Act 1995 (hereinafter the "1995 Act"), in practice civil legal aid in Ireland is generally limited to family law, child protection and international protection, and does not currently extend to general immigration or other issues that may be relevant to migrant children and their families where decisions are made on an administrative basis. While it is welcomed that legal aid is available to applicants of international

¹ Immigrant Council, Impact Statement (2021) Available at: <https://www.immigrantcouncil.ie/sites/default/file>

[s/2023-01/Impact%20Report%202021%20FINAL.pdf](https://www.immigrantcouncil.ie/sites/default/files/2023-01/Impact%20Report%202021%20FINAL.pdf)
Accessed on 31st January 2023.

protection and potential or suspected victims of trafficking (VOTs), provision is not currently made for legal support in most immigration-related applications, in particular, refugee family reunification applications despite complexity and necessary representations pursuant to statutory, Constitutional and ECHR law. Despite the need for legal aid in the sphere of immigration law, a fit-for-purpose legal aid system that reflects the contemporary unmet legal needs of migrants, in particular migrant children, is not available.

The ICI also highlights the lack of availability of holistic publicly funded legal services for VOTs. In this regard, we would direct the Committee to the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022, specifically Head 19, and its reference to the provision of legal aid within the meaning of the 1995 Act. As noted, the 1995 Act excludes the provision of services in respect of certain issues or before certain tribunals and bodies dealing with social welfare appeals, housing, employment and equality rights, etc. The legislation giving effect to the National Referral Mechanism (the “NRM”) should amend the 1995 Act to ensure that VOTs are not excluded from receiving advice and representation to obtain necessary redress and /or for the purpose of claiming compensation, as provided for by Article 12(2) of the EU Anti-Trafficking, Directive 2011/36/EU. It is essential that all matters relevant to VOTs should be brought within the remit of civil legal aid.

Relatedly, while the ICI acknowledges the support offered by the Legal Aid Board (LAB) for victims of domestic, sexual and gender-based violence when they apply for court protection, the Review Group should also consider the need for the provision of legal aid

for applications made for a change of status pursuant to the Immigration Guidelines for Victims of Domestic Violence.² While applications can be made by individuals who experience domestic violence, victims must gather and present evidence against a complex background of trauma, fear and conflict. The support of legal advisers is essential in this regard.

Additionally, the ICI would highlight that in non-international protection applications, in practice, legal aid is generally not applied for by persons refused leave to land and subject to removal at a port of entry, and who may be subject to immigration-related detention pending removal. Irish law provides for detention in particular circumstances.³ While the deprivation of liberty for immigration-related reasons in Ireland has been described as “the exception, rather than the rule”⁴, publicly funded civil legal aid should be made available to ensure that an individual’s rights are effectively vindicated in administrative and judicial procedures involving removals and returns.

Additionally, and more broadly, the Review Group must ensure that all those who experience discrimination have access to an effective remedy. Legal aid must be made available to victims of discrimination under the equality legislation brought before the Workplace Relations Commission (WRC) as has been recommended by the UN Committee on the Elimination of Racial Discrimination.⁵ Such an approach is essential towards ensuring an equality of arms, where respondents in such matters are mostly represented by legal counsel. Additionally, providing evidence of unlawful discrimination is not a simple or straightforward task, and the average layperson may face difficulty in determining

² Immigration Guidelines for Victims of Domestic Violence available at: [Immigration guidelines for victims of domestic violence - Immigration Service Delivery \(irishimmigration.ie\)](https://www.irishimmigration.ie/immigration-guidelines-for-victims-of-domestic-violence)

³ Section 5 Immigration Act 1999.

⁴ Kelly, M. Immigration Detention and Border

Control, (2018, Cork, Nasc).

⁵ CERD, Concluding Observations on the combined fifth to ninth reports to Ireland (23rd January 2020) Available at <https://inar.ie/wp-content/uploads/2019/12/CERD-2019-Concluding-remarks.pdf> Accessed on 27th January 2023.

the appropriate evidence required by a WRC adjudicator.

We would urge the Review Group to consider our submissions and issue a recommendation to the Government that provision be urgently

made for legal aid in immigration matters and in particular, family reunification applications, legal matters relevant to victims of trafficking and victims of domestic, sexual and gender-based violence and individuals subject to removal/returns orders.

2.

Issue - Types of Civil Law Cases

- 1) Considering the current operation of the scheme and the areas of civil law that are currently covered, what areas of civil law do you think it should cover? What is your reasoning for this?
- 2) Do you have any particular views on how types of cases should be prioritised for support, advice and representation in the future under the scheme?

Refugee Family Reunification

We propose to deal with these questions collectively under this heading.

While the ICI would broadly welcome provision for civil legal aid in the case of all immigration-related applications, the focus of this submission will rest on the urgent need for civil legal aid for refugee family reunification. The ICI finds it particularly unacceptable that the current system does not make provision for matters so closely associated with international protection within the scheme of publicly funded legal aid, especially having regard to the statutory entitlement provided by the International Protection Act 2015 of recognised refugees to be reunited with certain family members, most especially unaccompanied children with their parents.

1. The importance of family reunification for refugees

Family reunification is vital to a sense of individual wellbeing and to allow family members to give support to each other, whether its practical care, emotional support

or financial assistance. It is also recognised internationally to be a key tool of integration. In the absence of funded support or assistance from NGOs or pro bono lawyers, refugees in Ireland who sponsor family reunion applications can feel immense strain and may be forced to endure extreme hardship by going without basic necessities to pay for legal assistance.⁶

Family members outside of Ireland are also more likely to remain separated for longer where barriers to family reunion exist, such as a lack of free legal advice for statutory and discretionary applications. This poses an ongoing risk of extreme harm in unsafe settings. Where a lack of legal aid delays refugee family reunion, this can have severe consequences for women and children, who are particularly exposed to harm in the refugee setting, including gender-based violence and protection issues.

More broadly, the importance of family reunification has been recognised by the European Court of Human Rights in *Tanda-Muzinga v France*⁷. The Court stated: “75. The

⁶ British Red Cross, “Cuts that Cost: The Impact of Legal Aid Cuts” (October 2020)

⁷ *Tanda-Muzinga v France* (App. No. 2260/10, July 10, 2014)

court reiterates that family unity is an essential right...and the family reunion is an essential element in enabling persons who have fled persecution to resume a normal life...obtaining such international protection constitutes evidence of the vulnerability of the parties concerned it notes that there exists a consensus at international and European level on the need for refugees to benefit from a family reunification procedure that is more favourable than that foreseen for other aliens, as evidenced by the remit and the activities of the UNHCR and the standards set out in Directive 2003/86 EC of the European Union". In *A, S and I v Minister for Justice*⁸, the Supreme Court held that this passage "*neatly encapsulates the importance of allowing those who have fled persecution to resume normal life with family members*". The Minister for Justice also recognises the importance of family reunification in the Policy Document on Non-EEA Family Reunification, where it is stated at section 1.8 that "*family reunification contributes towards the integration of foreign nationals in the State.*" The importance of family reunification is also recognised by the European Union. A right to family reunification for protection beneficiaries is provided for by Article 23 of the Asylum Qualification Directive (2004/83/EC) and supported by the Family Reunification Directive 2003/86/EC.

The importance of the family is also reflected in many regional and international human rights guarantees. The Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social, and Cultural

Rights (1966), the International Covenant on Civil and Political Rights (1966), the Convention on the Elimination of All Forms of Discrimination against Women (1979) and the Convention on the Rights of the Child (1989) are some of the international human rights instruments which recognise the value of family integrity. Although Article 8 of the European Convention on Human Rights does not guarantee refugees an unlimited right to be joined by family members or to be protected against separation from family members, family reunion is inherent in the right to family life, and there are some limits on how governments exercise their discretion in family reunion matters.⁹ The right to family unity is also considered by a number of academic commentators to be customary international law.¹⁰

2. Family Reunification in Practice – the Issues and Challenges

The Review Group will be undoubtedly be aware that Irish law relating to family reunification is complex, governed by a patchwork of fragmented legislation and discretionary administrative visa procedures. In practice, there are several issues arising in respect of applications for family reunification including the restricted definition of the family which has been provided for under national law, the significant processing times associated with such applications, the lack of an independent appeals mechanism that meet the requirements of Irish and international law, the restrictive and inconsistent exercise of

⁸ *A, S and I v Minister for Justice* [2020] IESC 70

⁹ Hathaway, n 124, p 543; Jastram & Newland, 'Family unity and refugee protection', in Erika Feller, Volker Türk, Frances Nicholson, eds. 'Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, Cambridge' (CUP 2003) p 568; Grahl-Madsen, 'The Status of Refugees in International Law' (1966), p 41; based on consistent state practice and opinion juris.

¹⁰ Directive 2003/86/EC on the right to family reunification states common rules for exercising the

right to family reunification in EU Member States (excluding Denmark and Ireland, who have not signed the Directive). Although Ireland has opted out, it remains indicative of the regional standard for family reunion cases regarding procedure and the content of rights for affected families. It also provides for conditions that Member States may apply to family reunification. For more information on the human rights of refugees in the European context see: Cathryn Costello, 'The Human Rights of Migrants and Refugees in European Law' (OUP, 2016).

discretion and the lack of an independent appeals mechanism for such applications.

Under Irish law, unaccompanied children have a statutory entitlement to family reunification in accordance with the provisions of ss.56 and 57 of the International Protection Act 2015. This is a qualified right and there are restrictions with regard to the categories of family members that reunification may be applied for. Additionally, it is a requirement that a refugee child submits the application for reunification whilst they are still a minor (under 18 years old) and within a 12-month period of the grant of refugee status. There are statutory obligations (section 58, International Protection Act 2015) imposed on the Minister for Justice to have regard to vulnerability and to the best interests of the child when considering applications; however, in practice, the Minister argues that these provisions affect operational matters regarding the processing of applications only.

Based on our own organisational experience of assisting refugee families with the reunion process, as well as the experiences of our pro bono partners under the Kids In Need of Defence (KIND) Project, there are many bureaucratic and practical barriers these families face. It is extremely difficult for migrants to navigate complex legal processes, with ever changing immigration rules without suitable and qualified legal assistance. Arising from current law and practice, refugee children currently risk losing their right to family reunification unless they are provided with access to legal advice and assistance prior to and during the application procedure. Early intervention is essential in this regard. Migrant children received into care in Ireland are allocated a social worker who is responsible for the development and implementation of an individualised statutory care plan for the child. However, as evidenced by research¹¹, many

social workers (and other professionals) lack knowledge regarding the statutory obligations imposed on migrant children and do not have the ability to make informed and timely immigration-related applications on their behalf. To secure and vindicate their rights to family unity, refugee families must gather and present evidence against a complex background of conflict, fear and flight. This is quintessentially the job of a legal adviser.

In our experience, the continued separation from families has profound consequences for sponsors. Vulnerable children and young people are consumed by worry, guilt, fear and anxiety, and, in the face of continued separation, by a sense of lives being on hold (which in itself has implications for integration). All of these feelings are exacerbated where migrants face a lack of qualified legal advice to support their applications. Concurrently, there are also profound concerns for applicants/beneficiaries namely, personal security risks including physical or sexual violence, unlawful detention and abduction, and retaliation, restricted access to resources and lack of access to information. Where funded legal help is provided at the beginning of an application, families are able to make informed decisions about how to act. It is also more likely they will be better prepared to make already challenging journeys with the right documents and evidence for the family reunion application process. Having legal aid and access to early specialist advice may even prevent unnecessary journeys from being taken altogether and reduce the risks of harm to applicants as a result.

Critics have described the process of family reunification as lengthy, 'not applicant friendly' and 'prohibitively costly'.¹² Many migrant children also face language barriers, making it difficult to understand the

administration of family reunification rights in Ireland', (2016) Irish Jurist.

¹¹ Mannion, K. *Child Migration Matters* (2016, Immigrant Council of Ireland)

¹² Gotzelmann, *'The implementation and*

application process and their entitlements. Even where forms are available in an applicant's own language, complicated legal definitions can be difficult for lay applicants to understand in the absence of legal advice. Given the lack of regulation within the interpretation and translation industry, such services are open to inaccuracies which can result in costs to resolve mistakes. Legal services are also particularly needed at the administrative review stage and/or judicial review if required,¹³ particularly given that there is no independent appeals mechanism for family reunification applications.¹⁴ In some instances it is also necessary to make legal submissions at the outset of the application to ensure that applications on behalf of aged-out unaccompanied minors are accepted by the Minister for processing.

Further, against a backdrop of trauma, refugees and other categories of migrants rely heavily on assistance. Some family reunification applications are inherently problematic because of the nature of relationships concerned such as where adoptions in their country of origin are informal, or not recognised under Irish law, where proof of family relationships is missing, where there is difficulty in producing documentation because of the nature of flight or there is a need to challenge an earlier decision, determined on a flawed basis.

More broadly, young people with uncertain immigration statuses do not have access to State-funded legal representation and must either instruct and pay a private solicitor or secure representation from an Independent Law Centre or private solicitor on a *pro bono* basis. The process of seeking legal

representation in relation to general immigration law is currently on an *ad hoc* basis. Some children in care, for example, gain access to legal representation either directly or indirectly, usually where their social workers are aware of the need to act. Specialist immigration advice provided in a timely manner can be an essential prerequisite to children accessing their full range of rights.

It is clear that applying for refugee family reunion is usually complex, lengthy and difficult. Family reunion is not a simple extension of the immigration process, but a legal right which stems from the recognition of refugee status. For that right to be recognised, refugees must gather and present evidence against a complex background of conflict, fear and flight. As the experiences of refugees show, this is difficult to achieve without legal advice and legal aid to avail of such support.

3. Ensuring access to effective justice and the vindication of rights

Provision for publicly funded legal aid for immigration matters, and in particular, refugee family reunification matters, would serve to guarantee migrants' access to justice. Given the complexity of such matters, children and young people, in particular, could not expect to seek administrative or judicial review of decisions in the absence of qualified and publicly funded legal aid or without the support of NGO-Law Centres active in this area (who do not charge fees for their services, and consequently fundraise to be able to provide their services), including *pro bono* partnerships to bolster capacity and address unmet need in the absence of available civil legal aid. The judiciary has recognised that the cost of legal

¹³ Immigrant Council of Ireland, "*Family Reunification – a barrier or facilitator of integration? Country Report Ireland*" (2012). Available at: <https://www.immigrantcouncil.ie/sites/default/files/2017-10/IMM%202012%20Family%20Reunification%20Ireland%20FULL%20REPORT.pdf>

¹⁴ Section 56 and 57 of the International Protection Act 2015.

representation can, in fact, act as a barrier to access to justice. In the case of *MacGairbhith v Attorney General*,¹⁵ the Court acknowledged that the costs of litigation which includes legal aid are ‘frightening’ and are a ‘major deterrent’ to instituting proceedings.

We are concerned that while an established appeals mechanism exists in respect of applications for international protection,¹⁶ no independent appeals process has been established in respect of general immigration matters, and in particular, matters affecting children. While in virtually all matters an “appeal” may be sought, such appeals are essentially internal reviews conducted by more senior immigration officers of the Minister for Justice within the same Unit. This could be in breach of the requirements of natural and constitutional justice. While judicial review may be sought, it is a limited legal mechanism, given that it does not afford an appeal on the merits of an individual case.

It is important that there be an effective possibility to appeal against negative decisions in family reunification procedures. Access to legal aid and an appeal possibility are key to ensuring respect for the right to an effective remedy guaranteed under Article 13 European Convention of Human Rights (ECHR) and Article 41 of the Charter of Fundamental Rights. Access to same could also be regarded as part of the right to good administration in the application of EU law, as provided for in Article 47 of the Charter guaranteeing an “*effective remedy before a tribunal*” against violations of individual rights under EU law.

Providing civil legal aid for family reunification is essential towards ensuring access to justice. While the idea of access to justice is most likely to be associated with representation to ensure a fair trial, it is also relevant to the provision of early funded legal advice, including for refugee families. Our experience shows the practical

effects of a lack of access to legal aid, including long delays in realising their entitlement, unwarranted refusals and unnecessary appeals, makes it difficult for them to secure their full legal entitlement to family reunion. Without publicly funded legal support, refugees are unquestionably hampered in accessing legal help for family reunion and achieving justice for themselves and their families. Given the complexity of the refugee context and of the family reunion process itself, the lack of alternative sources of support and the hardship for refugees and their families where there are barriers to getting legal help, publicly funded early legal help can be vital to apply successfully for family reunion and achieve justice.

4. What are the alternatives?

There are limited alternatives to a publicly funded system of legal aid. For example, there are challenges related to self-funding on the part of sponsors. Family reunification applications are often expensive which presents difficulties for already vulnerable migrants with limited resources who may already, in fact, be remitting what they do earn to family in their country of origin.

Moreover, there are limits to pro bono legal advice. The ICI, and other Independent Law Centres/NGOs in this sector, provide free legal assistance with immigration matters including family reunification, including in collaboration with trained private law firms acting pro bono. However, there are notable limitations to *pro bono* legal advice, namely capacity demands, and funding issues. Given the level of demand, Independent Law Centres/NGOs can also be placed under enormous strain, where demand exceeds supply. Additionally, pro bono advice cannot take full responsibility for systemic failures within the current immigration system as detailed above. Independent Law Centres/NGOs, by their nature, also face instability on the basis that they cannot

¹⁵ *MacGairbhith v Attorney General* [1991] IR 412.

¹⁶ Part 6 International Protection Act 2015.

guarantee whether project funding will continue. While they are a vital source of support for refugee families in need, Independent Law Centres and *pro bono* lawyers ought never to become the cornerstone of legal support for the most vulnerable members of society. *Pro bono* partner law firms are also often dependent on referrals from specialised Law Centres whose qualified legal staff can also provide training and support throughout the application procedure.

In Ireland, the KIND (Kids In Need of Defence) project, which commenced in September 2019 and built on earlier ICI project work support by the Public Interest Law Alliance (PILA) and the Community Foundation for Ireland (CFI), currently addresses the gaps in protection for unaccompanied refugee children during family reunification process and in citizenship applications, which are both recognised to profoundly affect the rights of the child and their long-term successful integration. In the absence of any civil legal aid, in the project, the ICI works collaboratively with the Irish Refugee Council and *pro bono* partner firms to provide timely access to effective legal advice for migrant children and capacity building training for legal professionals. Funded exclusively by philanthropy, we have developed a trained network of *pro bono* legal professionals to provide legal assistance on referral to address unmet legal need. However, while *pro bono* has a valuable role to play in ensuring access to justice, it can never, and should never, be a substitute for a comprehensive system of legal aid.

The ICI believes that this model, where an expert law centre is funded to provide guidance/training/oversight of other lawyers could be built on to allow specific legal needs be met in an efficient manner if such a system were formalised and adequately funded. We would welcome the opportunity to consult with the Review Group further in relation to this proposal.

The ICI would also welcome the opportunity for Independent Law Centres to apply for legal aid certificates individual, or, in the alternative to establish a legal aid contracts with the Legal Aid Board for the provision of these services.

II. Victims of Trafficking, Victims of Domestic Violence and Other Categories of Migrants

We propose to deal with the above questions collectively under this heading.

It is essential that victims of trafficking (hereinafter “VOTs”) should be able to access free, independent, specialist legal advice and representation from the earliest stage and throughout the National Referral Mechanism (NRM) process for all legal matters related to their identification, protection, rights and entitlements as VOTs. It is essential that access to free, independent legal advice should be available for preliminary and/or conclusive identification, to NRM; engagement with criminal justice processes for informants, witnesses and defendants; procedures related to a person’s immigration status, including claims for asylum or other forms of international protection or other residence status as may be applicable; support in obtaining official documentation, including identification documents such as passports; assistance for recovery including housing, welfare, health, social support and financial benefits; support in accessing rights and benefits unrelated to status as a suspected VOT such as disability benefits, child and family law, including family reunification; age assessment and assessment procedures, and access to compensation and restitution including labour law procedures. Such supports are essential to supporting the recovery and integration of victims in the State.

VOTs have a right in international law to an effective and appropriate remedy. Remedies may be criminal, civil or administrative. International law requires that states provide legal and other assistance, specifically, with

legal aid, free of charge, to victims of crime.¹⁷ Legal assistance should be for the duration of any criminal, civil or other actions against suspected traffickers.¹⁸ The European Court of Human Rights under Article 6 of the European Convention on Human Rights (ECHR) has upheld the principle of legal aid, in both criminal matters and civil, in the interests of justice.¹⁹

In the absence of publicly funded legal aid for all legal matters related to VOTs, it is very difficult for victims to access their rights and entitlements available for them under law. Similar to the position of refugees, and in particular migrant children, there are limited alternatives available in the absence of publicly funded legal aid for victims of trafficking. As noted in the earlier section, there are stated limitations as to NGO/*pro bono* legal advice. Additionally, many VOTs lack sufficient finances given that they are recovering from substantial trauma, and are perhaps unable to engage in full or part-time employment or are engaged in full or part-time education, are not in the position to instruct private solicitors for legal advice and/or support. Even if VOTs could

instruct a private solicitor, specialist legal advice may not be available so as to provide victims with adequate support and advice. In this regard, we would also direct the Review Group to the position of victims of domestic, sexual and gender-based violence who face similar difficulties in seeking to make applications for (but not limited to) independent residence and would urge the Group to give appropriate consideration to same.

Relatedly, those subject to removal and or deportation proposals/orders also face inherent vulnerabilities within the Irish immigration system, such as a lack of transparency, whims of discretion and significant delays. Legal advice is, therefore, also essential in this regard.

On this basis, the ICI submits that it is essential that the Committee consider the need for holistic publicly-funded legal advice in the case of VOTs, victims of domestic, sexual and gender-based violence and those subject to removal/deportation proceedings.

3.

Issue - Eligibility

- 4) How appropriate are the current eligibility thresholds?
 - i. How should the financial eligibility threshold be determined to access the scheme or any successor in the future?
 - ii. Is there a particular figure which you would set?
 - iii. What is your rationale for that figure?
- 5) Are there other allowances or considerations, which should be made in determining eligibility (financial or otherwise) for the scheme?

¹⁷ See for example, UNODC (2013), United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 4; the Council of Europe Convention on Action against Trafficking in Human Beings, Article 15.

¹⁸ OHCHR (2002), Recommended Principles and Guidelines on Human Rights and Human Trafficking,

para. 9.

¹⁹ *Salduz v. Turkey*, App. No. 36391/02, Judgment of 27 November 2008, ECHR 2008; *Airey v. Ireland*, App. No. 6289/73, Judgment of 9 October 1979, ECHR 3.

- 6) Are there certain types of cases that are so fundamental to the rights of an individual that legal aid should be provided without a financial eligibility test? If so, what types of cases do you believe fall into this category?
- 7) Should some form of merits test apply to the cases at 7? If so, what should that look like?
- 8) Do you agree with how merit is defined and what matters should be included in the merits test?

We proposed to deal with matters of eligibility concurrently.

In order to access the civil legal aid scheme, applicants have to currently meet certain eligibility criteria: An individual's disposable income must be below €18,000 to be eligible for the scheme, net of a certain number of allowances and an individual's disposable capital must be below €100,000 to be eligible for the scheme. A merits test also applies, which determines whether an individual would go to court, or be recommended to go court, if they had to pay for legal advice and representation themselves.

We refer to the above submissions regarding the vulnerabilities of refugees and victims of trafficking. The eligibility relating to income should be broadened to ensure more marginalised and vulnerable people are covered in the scheme. It is concerning that the regulations which stipulate that an applicant's disposable income must be below €18,000 in order to pass the initial means test for civil legal aid were published in 2006. Relatedly, we note that disposable income is calculated in accordance with the Civil Legal Aid Act 1996 and the various regulations made under it. It is a total of annual income, less allowable deductions including child-care expenses, accommodation expenses and allowances for dependants. It is essential that these levels should be re-evaluated in the context of the current cost of living crisis being experienced by households across Ireland including moderate income families who may indeed be above the thresholds and yet lack the means to pay for private legal assistance.

Further, given the particular vulnerabilities of refugee applicants, VOTs, victims of sexual and gender-based violence and those subject to removal or deportation orders, waivers should apply on a discretionary basis when determining eligibility. Exceptional humanitarian circumstances and the circumstances of the individual applicants should be considered in each respective case and the Board should exercise appropriate discretion in this regard. However, where a child or young person wishes to sponsor an application for family reunification or where a VOT seeks legal advice and support, the ICI would propose that no eligibility threshold should apply. In the case of the former, the right to family life is incorporated into Irish law by the European Convention on Human Rights (ECHR) and therefore, an eligibility test should not be applied to family reunification matters as the application relates to the essence of fundamental human rights.

Specifically in the case of VOTs, in the ICI's experience, if an eligibility threshold were to apply, many VOTs would not be eligible for support given that they earn over the requisite threshold, despite the fact that the matters they would be represented on would relate directly to their status as a VOT. If many VOTs were not provided with publicly funded legal aid on the basis of an eligibility threshold, many may not be able to fund private legal assistance and if elected to do so could experience hardship as a result or may, indeed, choose not to pursue matters due to a potential financial burden being imposed.

Refugees, VOTs and victims of domestic, sexual and gender-based violence who arrive in Ireland are extremely vulnerable and often do

not speak fluent English, while also, in many cases, having suffered significant trauma. This may result in great difficulty if they are to navigate the civil legal aid scheme and enter into an eligibility process, which will result in further delay. Furthermore, refugees and VOTs generally do not arrive to Ireland with substantial means and so the majority will not satisfy the eligibility criteria. Similar considerations apply in the case of victims of domestic, sexual and gender based violence. On this basis, the ICI proposes that it would be administratively more effective for family reunification matters, matters related to victims of trafficking and victims of domestic, sexual and gender-based violence as well as matters involving those subject to deportation or removal orders to be awarded civil legal aid

automatically. Particularly, in the case of refugees, this will also ensure that the process of submitting a family reunification application is free from delays as applicants only have 12 months to submit their application after they receive refugee status, and other immigration related applications are often subject to very short periods of time within which representations must be made (e.g., 5-15 working days in some instances). As we have stated above, without fluent English or necessary literacy skills, it is essential for refugees to receive legal assistance to guide them through the family reunification process and this should be recognised by the Legal Aid Board and legal aid should be awarded without an eligibility test to assist these individuals.

4.

Issue - Financial Contribution

- 9) How appropriate are the current levels of financial contributions?
- 10) Should the financial contribution be assessed differently in respect of different types of subject matter?
- 11) If so, should an individual pay a contribution based on the complexity of the subject matter and pay that in instalments over the length of the case as the case is progressed on his/her behalf?

Currently, the minimum contribution requested by the Legal Aid Board is €30 for legal advice and €130 (inclusive of the initial €130) in cases where full legal representation is provided. It is also noted that a contribution of €10 is required in international protection applications and that provision is made for waiver on hardship grounds. While these levels of contribution are low, they can nonetheless pose a burden to applicants of extremely restricted, or indeed, no means.

We refer to the earlier submissions and recommend that this contribution should be waived and/or that the Board should have discretion to waive contributions in individual cases, as there is sufficient evidence that as

refugees and/or VOTs, victims of domestic violence and individuals subject to deportation or removal orders are often of extremely limited means. At a minimum, we would propose that the financial eligibility criteria are measured annually against any national poverty proofing standards and for the publication of the underlying analysis by the Department Justice. There are currently no provisions to index link the allowance or income criteria or to provide for increases in the cost of living, or in the cost of legal services.

Relatedly, criminal legal aid may be provided to a foreign national who may also be the subject of criminal charges and/or detention in respect of immigration related offences. For accused

persons, legal aid is provided under the Criminal Justice (Legal Aid) Act 1962. Unlike civil legal aid, no financial contribution is necessary. It is questionable why a diverging approach is taken in the context of civil legal aid, particularly in a removals or returns context, where there is potential for the deprivation of liberty of vulnerable individuals.

While distinct, there are equal concerns in a context of family reunification, where success or failure of such applications may have concerning implications for an individual's fundamental rights, including, but in no way limited to the right to family life.

5.

Issue - Mode of Delivery

- 12) What are your views on the current modes of delivery of civil legal aid (i.e. through family law centres and private panel of solicitors)? Are there additional modes you would suggest?

The LAB should consider delivery of civil legal aid in several ways to ensure effective access to legal services, including specialised legal services where required and access of legal practitioner of choice. In addition to current service provision through LAB Law Centres and private practitioner panels, consideration should be given to funding Independent Law Centres already providing pro bono legal services in immigration matters, which could be done through legal aid contracts/service level agreements and/or enabling recognised Independent Law Centres/private practitioners to apply for legal aid certificates in individual cases. Given the success of the KIND project as detailed above, the ICI proposes that this model could be utilised as a foundation for a system of publicly funded legal aid in family reunification matters and would welcome further consultation with the Review Group as regards this proposal. Similarly, in matters involving victims of trafficking, the LAB could disburse adequate funding to Independent Law Centres with expertise in the field to provide information and legal support, whilst concurrently,

establishing an appropriate system of publicly funded legal aid for such matters.

However, the ICI would stress that whatever model is adopted by the LAB to make provision in this area, that all civil legal aid solicitors working in immigration practice should be afforded with adequate training to maintain the quality of the legal aid market. It is essential that there should be mandatory qualifications and training in order to be eligible to sit on the LAB private practitioner panels, especially for the provisions of services in specialised areas. Similar considerations should apply in the case of victims of trafficking and victims of domestic, sexual and gender based violence. It is essential that lawyers working in this field provide a victim-centred approach in practice.²⁰

It is also essential that legal aid fees are reviewed by the Department of Public Expenditure and Reform, particularly in cases where matters are referred to private practitioners to ensure that practitioners are retained and are willing to undertake legal aid work. Fees must reflect the level of time, work

²⁰ See generally US TIP Report. Accessed on 16th January 2023. Available at: <https://www.state.gov/wp->

<content/uploads/2022/04/337308-2022-TIP-REPORT-inaccessible.pdf>

and skill required of the matters identified in this report and appropriate remuneration is essential towards ensuring that specialist skill and knowledge is retained in the interest of preserving access to justice.

Additionally, we note the dispersed nature of the asylum/refugee population in Ireland, where migrants are dispersed on a 'no-choice' basis across the island, often to remote

locations where there are no legal aid centres or Independent Law Centre within the proximity of their residence. In the UK, this phenomenon has been described as "advice deserts" and effectively restricts individual's access to justice.²¹ The LAB should ensure that effective pathways for support in these matters is guaranteed for migrants nationally.

6.

Issue – Accessibility

13) What are key barriers to accessing the service?

We would refer to the above submissions and highlight that despite immigration related matters not being an excluded class under the 1995 Act, provision is not currently made for such legal support, despite the complexity of immigration related applications, and in particular, family reunification applications. Provision should be made for such matters on an urgent basis.

We are also aware on an anecdotal basis of a small number of refugee family reunification matters being referred directly by the LAB to private law firms (who are not on the Legal Aid Panel) for pro bono assistance. It is not clear to us on what basis these specific matters are chosen for referral, raising questions about equality of access to justice. It is also unclear to us why, where this unmet legal need is recognised by the LAB, they are referred to a private firm, as immigration matters are not excluded under the 1995 Act.

14) How can the administration and delivery of the service be made to work better for the individual users, NGOs and communities?

A fundamental flaw in the current legal aid system is the exclusion in practice of general immigration law matters, save for international protection related applications, from its remit. We refer to the above submissions in this regard and urge the Review Group to give appropriate weight to same. We also underscore the need for individuals to be able to instruct their solicitor of choice rather than simply have their case internally allocated or referred to a private practitioner panel member, who may be generally well-qualified but have no specific specialised knowledge or experience of dealing with particular areas of law or clients with specific vulnerabilities.

²¹ The Law Society, 'Legal aid deserts analyses', available on:

<https://www.lawsociety.org.uk/campaigns/legal-aid-deserts> (accessed on 14th December 2022).

7.

Issue – Awareness and assessment of the current scheme

- 15) What are its benefits?
- 16) What are its challenges?
- 17) What are its advantages?
- 18) What are its disadvantages?

We refer you to the above submissions already made.

The ICI recognises the significant contribution of the LAB towards ensuring effective access to justice, however, we would reiterate that the LAB is, in practice, extremely limited in terms of the areas of work it undertakes on a daily basis. If legal aid is introduced for broader immigration related applications, and indeed, family reunification applications, it is essential that clear, accurate and child-friendly information, in a language readily understandable to them, is published and specific entitlements outlined. Similar considerations should apply in the case of VOTs, victims of domestic violence and individuals subject to removal or deportation order.

Further, the ICI would note that, currently, under the civil legal aid scheme, individuals do not enjoy an ability to instruct their solicitor of choice, which contrasts significantly with the criminal legal aid scheme. As above, we would underscore the need for individuals to be able to instruct their solicitor of choice, rather than simply having their case internally allocated or referred to a private practitioner panel member.

Additionally, the ICI would query whether there is a lack of awareness amongst the public and marginalised communities regarding the services available under the LAB. In our organisational experience, our helpline staff often direct service users to the LAB, who were

not previously aware of the Board or the services which it can provide to the public. This is in spite of many service users having been a prior recipient of international protection services under the LAB.

In this regard, the ICI would recommend that the LAB engage in community education workshops and/or fund partner organisations to conduct such workshops regarding the work of the LAB, key areas where legal assistance is generally required and how legal assistance can be accessed. While the LAB has a website, marginalised communities may not be aware of the services and supports available from the LAB in the first place. It is essential that multi-lingual, applicant-friendly information is provided by the LAB in this regard.

7.

Issue – The Future

- 19) How can an individual's awareness and understanding about justiciable problems or legal disputes be raised?
- 20) How should individuals on low incomes and other marginalised groups be supported to access justice in the future?
- 21) What should the aim of a civil legal aid scheme be?
- 22) What values should underpin it?
- 23) How can the service best be targeted or prioritised for recipients in the future?
- 24) What should the scheme's relationship be to other forms of publicly-funded/part publicly-funded legal assistance initiatives?
- 25) What additional roles should or could the Legal Aid Board have, if any, in relation to public legal assistance?
- 26) Is there a role for mediation and/or other alternative dispute resolution processes as part of a civil legal aid scheme or similar support system in the future? If not, why not? If so, what should the role be?

We refer to the above submissions and note that the current legal aid system does not meet the standards established by the European Court of Human Rights (ECtHR) in *Airey v Ireland*.²² In *Airey*, the Court found that complexity of the proceedings and the law must be taken into account when assessing the applicant's eligibility for legal aid. In *Steel and Morris v. the United Kingdom*,²³ it was also concluded that legal aid eligibility criteria must consider the importance of the case to the applicant as well as the applicant's abilities to represent him or herself effectively. Taking into account the vulnerabilities of refugee children and victims of trafficking and bearing in mind the importance for those groups to access their rights, including the right to family

life, effectively, the LAB must be able to deliver a service to such vulnerable migrants, as well as to all those who are entitled to receive it which at a minimum means many of those on social welfare and with low incomes. Until such time, that adequate provision is made for immigration related matters, by the LAB to provide service to such vulnerable groups, these rights will remain theoretical and illusory.

The ICI would submit that it is essential that the future system of civil legal aid embody the principle of access to justice. Access to justice is a fundamental human right and is recognised as such under a range of regional and international instruments.²⁴ In the absence of

²² *Airey v. Ireland*, 6289/73 [1979] 2 EHRR 305 (9 October 1979), [1981] ECHR1 (6 February 1981): "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".

²³ *Steel and Morris v. the United Kingdom*, App no 68416/01 (ECtHR 15 February 2005) [61]

²⁴

The right of access to justice is enshrined in Articles 6 and 13 of the European Convention on Human Rights (ECHR) and Article 47 of the EU Charter of Fundamental Rights which guarantee the rights to a fair trial, to an effective remedy and to legal aid to those who lack sufficient resources

access to justice, people are unable to exercise and vindicate their rights, have their voices heard, challenge discrimination, or hold decision-makers and executive power to account.

Relatedly, it is essential that the civil legal aid system, embody the principle of the rule of law. Publicly funded accessible legal assistance contributes to ensuring that the rule of law exists in practice, not simply in principle. Unless rights are enforceable at an affordable cost, the rule of law is rendered meaningless.

Further, a modern public legal assistance system must place human rights, equality and anti-discrimination at the heart of law and action. The review of the civil legal aid system is a key instance of activity by the Department of Justice to which the Public Sector Duty Equality and Human Right duty applies. Section 42 of the Irish Human Rights and Equality Act 2014, requires a broad range of public and statutory bodies in carrying out their functions, to have regard to the need to eliminate discrimination, promote equality of opportunity and treatment and protect human rights.

It is also essential under any future scheme of legal aid, that service users be put at the heart of the system. The Review Group should make

so far as this is necessary to ensure effective access to justice. Access to justice is also reflected in our constitutional system of justice, where access to the courts is guaranteed. Article 14 of the International Covenant on Civil and Political Rights (ICCPR) enshrines the right of fair procedures and states that "all persons shall be equal before the courts and

tribunals". International and regional instruments which are concerned with the promotion of equality, are also concerned with the right of access to justice. For example, Article 7 of the Race Directive and Article 9 of the Framework

recommendations on the design of a new public legal assistance system, from the perspective of the user and potential user, to ensure that the scheme can deliver a legal assistance service that addresses the real legal needs of the growing and diverse population, having regard to the legal capabilities of the community and the individual.

Additionally, as part of the LAB's intended reforms, the ICI would recommend that the LAB engage in comprehensive research regarding the impact of having legal aid as compared to for example, lay litigants, who were not supported by legal aid. Such research would provide critical information regarding the importance and influence of legal aid can have for an individual's case, particularly, within an immigration and/or asylum context. Additionally, systemic research on unmet legal needs, including an assessment of legal capabilities, is an essential component of improving the quality and availability of public legal assistance. The LAB should also conduct research on the economic costs of not providing civil legal aid based on access to justice principles.

It is essential under any future scheme of legal aid, that service users be put at the heart of the system. The Review Group should make recommendations on the design of a new public legal assistance system, from the

Employment Directive and Article 17 of the Gender Recast Directive obliges EU Member States to ensure that judicial and administrative procedures are available to victims of discrimination to enforce their right to equal treatment. The Race and Gender employment and goods and services Directives require member states to have designated bodies for the promotion of equal treatment and to ensure that the competencies of these bodies include providing independent assistance to victims of discrimination in pursuing their claims. The Aarhus Convention also contains provision concerning access to justice for environmental issues.

perspective of the user and potential user, to ensure that the scheme can deliver a legal assistance service that addresses the real legal needs of the growing and diverse population, having regard to the legal capabilities of the community and the individual.

The ICI would reiterate that access to legal aid can assist with access to justice, but can also, importantly, contribute towards saving public

resources by ensuring, particularly, in an immigration context that the most appropriate application be made and/or important points of law are clarified for the benefit of the State and public.

We would welcome the opportunity to engage constructively with the Review Group regarding the within submissions at the earliest opportunity.

Immigrant Council of Ireland

February 2023

