

EXPLANATORY MEMORANDUM TO

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

2019 No. 1396

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument amends Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”).
- 2.2 It makes provision for separated migrant children to be eligible for legal aid for civil legal services in relation to immigration applications for entry clearance, leave to enter, or to remain in, the United Kingdom, and applications for registration as a British citizen or British subject.
- 2.3 Articles 3 to 5 of this order make minor, consequential amendments to secondary legislation.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 This entire instrument applies to England and Wales only.
- 3.3 In the view of the Department, for the purposes of House of Commons Standing Order 83P the subject-matter of this entire instrument would be within the devolved legislative competence of the Northern Ireland Assembly if equivalent provision in relation to Northern Ireland were included in an Act of the Northern Ireland Assembly as a transferred matter, and the Scottish Parliament if equivalent provision in relation to Scotland were included in an Act of the Scottish Parliament.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
- 4.2 The territorial application of this instrument is set out in Section 3 under “Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)”.

5. European Convention on Human Rights

- 5.1 The Parliamentary Under Secretary of State for Justice Wendy Morton MP has made the following statement regarding Human Rights:

“In my view the provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Legal Aid for Separated Children) (Miscellaneous Amendments) Order 2019 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 Legal aid is currently available to an individual if the service in question is a civil legal service described in Part 1 of Schedule 1 of LASPO. Section 9 of LASPO permits the Director of Legal Aid Casework (“the Director”) to make a determination on whether an individual qualifies for civil legal services, provided they are described in Part 1 of Schedule 1 of LASPO. Services listed in that Part are known as “in-scope services”. Section 10 of LASPO provides for the Director to make a determination that an individual qualifies for civil legal services on an exceptional basis, where the services are not in scope services but where a failure to grant legal aid funding would breach or risk breaching the individual’s rights under the European Convention on Human Rights, or any enforceable EU rights. This is known as Exceptional Case Funding (“ECF”).
- 6.2 This instrument amends LASPO to include civil legal services for immigration matters for separated migrant children, and for applications for registration as a British citizen or subject.

7. Policy background

What is being done and why?

- 7.1 This amendment relates to the scope of legal aid for civil legal services for separated migrant children.
- 7.2 Under Schedule 1 to Part 1 of LASPO, legal aid is currently available, subject to means and merits tests, in the following immigration matters, for any individual including separated migrant children:
- Civil legal services provided in relation to proceedings before the Special Immigration Appeals Commission;
 - Civil legal services provided in relation to someone challenging their immigration detention;
 - Civil legal services provided in relation to temporary admission to the United Kingdom;
 - Civil legal services provided in relation to residence restrictions for asylum seekers or individuals awaiting deportation;
 - Civil legal services in relation to an application for indefinite leave to remain in the United Kingdom made by a victim of domestic violence;
 - Civil legal services in relation to a residence card application made by a victim of domestic violence;
 - Civil legal services in relation to rights to enter, and to remain in, the United Kingdom arising from the Refugee Convention, Article 2 or 3 of the Human Rights Convention, the Temporary Protection Directive or the Qualification Directive;

- Civil legal services provided in relation to the Home Secretary’s powers to provide, or arrange for the provision of, accommodation for asylum seekers;
 - Civil legal services provided to an individual in relation to an application by the individual for leave to enter, or to remain in, the United Kingdom where there are reasonable grounds to believe that the individual has been a victim of human trafficking; and,
 - Immigration judicial review where the same issue, or substantially the same issue, has not been the subject of a previous judicial review or an appeal to a court or tribunal in the last twelve months.
- 7.3 Civil legal services for separated migrant children in relation to immigration applications for entry clearance, leave to enter, or to remain in, the United Kingdom that are not described in Part 1 of Schedule 1, and, in relation to citizenship applications are currently only available where the criteria for ECF are satisfied. Following litigation and engagement with key stakeholders, the Department is making changes to add these matters for cases involving separated migrant children to the civil legal services described in Part 1 of Schedule 1. The Department has been working closely with the litigants and other children’s charities on the terms of the policy.
- 7.4 The amendment covers civil legal services provided to separated migrant children in relation to their immigration applications for entry clearance, leave to enter and remain in the United Kingdom under the Immigration Rules. The Immigration Rules, which regulate the entry and stay of persons in the United Kingdom, are intended to cover the vast majority of applications from individuals who wish to enter or to remain in the United Kingdom.
- 7.5 The amendment also covers civil legal services provided to separated migrant children in relation to their immigration applications for leave to remain where that application is made and determined outside the Immigration Rules. This would include applications for discretionary leave to remain, leave to remain on ill health or medical grounds, certain human rights’ claims and leave outside the Immigration Rules because of compassionate and compelling circumstances.
- 7.6 Separated migrant children will also be eligible for civil legal services where an application for entry clearance, leave to enter or leave to remain is made under the Immigration Rules by another person (including family members and extended family members) and granted either under the Immigration Rules or outside the Immigration Rules, on the basis of exceptional circumstances (under Article 8 of the ECHR) or compassionate and compelling circumstances.
- 7.7 Owing to the challenges separated migrant children face in regularising their immigration status and making associated applications, this amendment includes applications for registration as a British subject or citizen, British Overseas Territories Citizen, and a British Overseas Citizen.
- 7.8 For the purposes of this amendment, a ‘child’ is any person under 18 years of age or where their age is uncertain, is treated by the Director or the legal aid provider making the determination on the Director’s behalf, as being under 18 years of age.
- 7.9 For the purposes of this amendment a child is ‘separated’ if the child is not being cared for by a parent; not being cared for a person with parental responsibility for the child; or if the child is looked after by a local authority. This definition is intended to

capture children in local authority care, those who may be in private fostering arrangements where parental responsibility has not been established and other informal arrangements, including where a child is caring for themselves.

- 7.10 Where a separated child qualifies for civil legal services under this amendment and the child reaches the age of 18 before the relevant application for which civil legal services are being provided has concluded, they will continue to qualify for civil legal services until the application has been concluded provided the relevant means and merits tests are satisfied. This amendment will not extend to those who apply for civil legal services for a relevant application after they have turned 18.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 There are no current plans to consolidate the secondary legislation instruments to which this order makes minor and consequential amendments.

10. Consultation outcome

- 10.1 As this change is being made as a result of litigation, the Department did not undertake a formal public consultation.

11. Guidance

- 11.1 The Legal Aid Agency will provide guidance to legal aid providers on the additional work stemming from this amendment via its website. Further guidance and communications will be made available to Local Authorities for separated migrant children in their care.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 The impact on the public sector is confined to the Legal Aid Agency and Ministry of Justice. The decision to bring immigration and citizenship matters into scope of the legal aid scheme for separated migrant children will mean an increased caseload for some legal aid providers. The contractual elements of this will be managed by the Legal Aid Agency, with guidance being provided to the relevant providers.
- 12.3 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.
- 13.2 The legislation applies to small business only insofar as it affects specific operational arrangements, as set out in operational guidance, of the Legal Aid Agency and providers of legal aid services.

14. Monitoring & review

- 14.1 The operation and expenditure of the legal aid scheme is continually monitored by the Ministry of Justice and the Legal Aid Agency.

15. Contact

- 15.1 Abi Marx at the Ministry of Justice. Telephone: 07976766336 or email: Abigail.marx@justice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Fiona Rutherford, Director, Access to Justice at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Wendy Morton MP, Parliamentary Under Secretary of State at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.