

## BEYOND ADVICE DESERTS: STRATEGIC IGNORANCE AND THE LACK OF ACCESS TO ASYLUM LEGAL ADVICE

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### **Abstract**

This essay explores the role of strategic ignorance in relation to access to legal advice in England and Wales, drawing on the work of Linsey McGoey (2012; 2019; 2020), taking areas of extreme shortage of immigration and asylum legal advice as an example of the wider phenomenon in access to justice. It argues that there is a misplaced belief in market-based procurement to meet advice needs, which leads to a failure to collect evidence to understand whether the market does in fact achieve this. This avoidance of evidence about market functioning and the relationship between demand and provision is facilitated by fragmentation of both policy and operational responsibilities, leaving large gaps for ignorance, in which the accounts and concerns of advice-users are dismissed as not credible. It argues that, in failing to collect adequate evidence about the functioning of the market, the Lord Chancellor is ignoring a statutory duty to secure the availability of legal aid.

**Keywords:** legal aid; advice deserts; strategic ignorance; asylum and immigration; LASPO Act 2012 section 2.

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### [A] INTRODUCTION

In research on access to justice and legal advice, it is common to talk about ‘advice deserts’ and ‘justice gaps’—geographical areas, case types, or cohorts within society that cannot access legal advice or courts because of the lack of advice, the cost of advice, funding cuts, or the physical, linguistic or social obstacles to advice. This essay discusses some of the darkest corners of those deserts and gaps, in relation to immigration and asylum advice and representation: places in which there is no little or no real access to legal advice and where there is also a failure on the part of government bodies to collect any meaningful data about the extent and effects of this lack of access.

In doing so, the essay explores the role of ‘strategic ignorance’ (McGoey 2012; 2019) in relation to access to legal advice. The term strategic ignorance describes actions, most often by the more powerful party in a relationship, to ‘mobilise, manufacture or exploit unknowns ... [or] create or magnify unknowns’, either ‘to avoid liability for earlier actions’ or ‘to generate support for future political initiatives’ (McGoey 2019: 3). It is ‘an active social production’ (Bailey 2007: 77) as opposed to an accidental or non-strategic omission or gap in knowledge. The central point is that, as much as knowledge is power, ignorance can also be an exercise of power so that, in some situations, ‘actors seek to preserve ignorance rather than to dispel it’ (McGoey 2012: 554).

Strategic ignorance has been used as a framework for discussing a wide variety of administrative and public sector policies, including removal of environmental regulation (Pope & Rauber 2004), consideration of risk in hydropower developments (Huber 2019), and the non-acknowledgment of civilian casualties incurred through remote bombardment (Gould & Stel, 2022), for example. In the latter case, the authors point out that ‘denial can be disproven and secrecy has an expiration date ... [but] ignorance is more elusive and open-ended and hence politically convenient in different ways’ (Gould & Stel 2022: 57). The choice instead not to know about civilian casualties enabled the state to claim that remote warfare is less harmful to civilians than the face-to-face alternative.

McGoey distinguishes between micro-ignorance and macro-ignorance and describes the ‘ignorance pathways’ between the two: micro-ignorance describes ‘individual acts of ignoring’ while macro-ignorance is ‘the sedimentation of individual ignorance into rigid ideological positions and policy perspectives’ (2020: 200). This essay first gives a brief outline of how we can ‘read’ the legal aid market to understand demand and provision. It then introduces three examples of what I refer to as dark corners of the immigration legal aid market, as a framework for discussion of the role that strategic ignorance plays in the restriction or denial of access to advice. It then discusses four ignorance pathways which I argue are in operation at the intersection of legal aid and asylum policy, drawing on McGoey’s work, namely: 1) belief in the market to meet demand; 2) the avoidance of evidence about the actual functioning of the market; 3) fragmentation of control of both policy and operations, leaving wide spaces of non-control, non-responsibility and ignorance; and 4) credibility deficits applied to the people caught up in the system, ie those seeking asylum. It concludes by arguing for focused efforts to overcome ignorance with evidence, particularly by the Lord Chancellor, who is effectively ignoring a statutory duty to do so.

## [B] READING DEMAND AND SUPPLY IN THE IMMIGRATION LEGAL AID MARKET<sup>1</sup>

Only those with a contract with the Legal Aid Agency (LAA) are allowed to do legal aid work in England and Wales. Scotland and Northern Ireland have devolved justice systems in which legal aid operates differently. The LAA divides England and Wales into ‘procurement areas’, which vary in size from one or two local authority areas (in housing law) to just four large areas (in welfare benefits, for example). For immigration and asylum, these procurement areas are subdivided into ‘access points’, but not all areas of England and Wales are covered by an access point. The LAA publishes a Directory of Providers spreadsheet, which lists all contracted provider offices in all legal aid categories and is updated roughly monthly.<sup>2</sup>

Each provider is allocated a maximum number of ‘matter starts’ which it can open in a year. A ‘matter’ is all of the work done on a file, so it may cover an application and appeal for a single asylum applicant, or a main applicant and their dependants. Equally, one individual might have more than one ‘matter’ if, for example, the Home Office withdraws its decision, bringing the existing matter to an end, with the remade decision constituting a new matter under the legal aid rules. There is no obligation to open all of the matter starts allocated; indeed, the minimum allocation awarded in the 2018 contract tender was 150, and many offices open far fewer than this in a year.

Freedom of information responses show how many matter starts were actually opened in each procurement area or access point or by each office (anonymously), which gives a much better indication of capacity in an area than the matter start allocation does. There are still some caveats. Although most of these cases will have been asylum applications or appeals, because very little else remains within the scope of immigration legal aid in England and Wales, some will have been applications for settlement at the end of a period of refugee leave or applications under the domestic violence rules, for example. Those factors make it more difficult to ‘read’ the provider side of the market, and understand precisely what work is being done. However, we can derive a reasonable idea of provider capacity in a geographical area from the number of matter starts opened and compare that to indicators of demand.

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<sup>1</sup> For a more detailed explanation and methodology for reading the legal aid market, see Wilding (2022).

<sup>2</sup> See Gov.UK, [Guidance: Directory of Providers](#).

Demand can be roughly estimated from statistical data about the number of people within an area who are likely to be eligible for, and in need of, legally aided immigration and asylum representation. These include the number of people receiving asylum support (which is the vast majority of those seeking asylum),<sup>3</sup> the number of unaccompanied children who are seeking asylum in the care of each local authority,<sup>4</sup> and the number of people referred into the National Referral Mechanism for a decision on whether they are a victim of trafficking.<sup>5</sup> These statistics are readily accessible. Others who should qualify for legal aid (subject to financial means) include those who have completed five years' leave to remain as a refugee, who are eligible for settlement, and those who qualify for indefinite leave to remain under the domestic violence provisions of the immigration rules. From these figures, we can estimate legal need, region by region, in these primary categories of immigration legal aid demand and compare it with provision.

Reading the market in this way will enable us to explore, via the examples in the following sections, how the pathways to macro-ignorance operate to hide the barriers to accessing asylum legal advice.

### [C] THREE 'DARK CORNERS'

To discuss strategic ignorance in practice, I draw on three examples in which legally aided advice is available in theory but very limited in practice. These are the new Derwentside immigration detention centre for women in County Durham, the use of Napier Barracks in Kent for the accommodation of men who are seeking asylum, and the Widening Dispersal policy to accommodate people seeking asylum in more areas of the UK, including areas where there is no asylum legal aid provision within a reasonable distance.

Derwentside immigration detention centre was opened by the Home Office in December 2021, to replace Yarls Wood detention centre in Bedfordshire. At Yarls Wood, as in other detention centres in England, there was a rota of firms contracted to provide Detention Duty Advice Surgeries (DDAS). These usually involve up to 10 half-hour advice slots in a day, on two to four days a week, depending on the size of the detention centre, after which providers may open a file for any matter which is in the scope of legal aid: mainly bail applications, asylum claims,

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<sup>3</sup> See Gov.UK, [Asylum Support](#).

<sup>4</sup> See [Local Government Statistics](#).

<sup>5</sup> [National Referral Mechanism Statistics](#).

some kinds of trafficking case, or judicial review applications. The DDAS scheme was already controversial, with questions over the adequacy of access to advice (Bail for Immigration Detainees 2019; Lindley 2021).<sup>6</sup>

The initial proposal for Derwentside was that face-to-face advice would be provided via the same DDAS scheme as at all of the other detention centres in the UK, with firms specifically contracted for Derwentside. The tender for provision was cancelled in the month before the centre opened because too few compliant bids were received.<sup>7</sup> Instead, a ‘contingency’ service was implemented which is wholly remote until at least June 2022. Those providers with contingency contracts could in theory attend the detention centre to offer face-to-face advice but, because of the distance from Derwentside to any of those contingency providers, the reality is (as set out in an application for judicial review by Women for Refugee Women) that the round trip alone would take longer than a full working day and would be far longer than the five hours’ travel time the Legal Aid Agency considers to be the maximum it should pay for.

The second example is Napier Barracks, a disused army site in Kent which has been used to accommodate asylum applicants since September 2020. Around 300 single male applicants at a time are held there, usually for a period of 60-90 days before they are moved to dispersal accommodation, which may be anywhere in mainland Britain. In a meeting of non-governmental organizations (NGOs) in January 2022, the point was made that these quasi-detention sites, such as barracks, have many of the features of detention centres, like barbed wire, patrols, CCTV, restrictions on support groups coming in, and the residents being advised not to go into local villages. But they lack the protections required for a detention centre, such as an Independent Monitoring Board, onsite health care, or Detention Centre Rules requiring that residents receive a medical examination. Nor is there any provision of onsite legal advice, and residents must instead find a legal aid provider either locally or further afield. As will be shown, despite the men’s theoretical liberty to come and go from the barracks, there are significant barriers to finding legal representation.

The third example, the Widening Dispersal policy, describes a decision to change the geographical distribution of asylum accommodation. The term ‘dispersal’ refers to the practice, since 2000, of moving people who need asylum support to any part of mainland Britain, on a no-choice basis. Originally, the intention was to move applicants out of London and

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<sup>6</sup> See also *R (on the application of Detention Action) v Lord Chancellor* [2022] EWHC 18 (Admin).

<sup>7</sup> [Legal Aid Agency Cancellation Notice](#), 16 November 2021.

the South East (Robinson & Ors 2003; Politowski & McGuinness 2016). Participation in the scheme was voluntary and, as of 2016, only 121 out of 453 local authorities in the UK were involved (House of Commons Home Affairs Committee, 2017; Hirst & Atto 2018). Even where local authorities agree to participate, there is an incentive for the private contractors which source the housing to do so as cheaply as possible, to minimize their costs, resulting in a disproportionate concentration of often vulnerable people in the poorest parts of the country: 57% in the poorest one-third of Britain and only 10% in the richest one-third (Lyons & Duncan 2017; Hirst & Atto, 2018).

This, combined with the growing number of people accommodated in ‘contingency’ hotels because the dispersal accommodation is full (because of Home Office delays in processing asylum claims), has prompted the Home Office to ask all local authorities to agree to participate in the dispersal scheme under plans referred to as ‘Widening Dispersal’. Many have already agreed to do so,<sup>8</sup> and the Nationality and Borders Bill contains a clause which would make participation in the dispersal scheme mandatory for all local authorities. At the same time, the National Transfer Scheme for transferring unaccompanied children out of Kent (where the majority arrive) into the care of other local authorities has been made mandatory for all authorities, for at least a temporary period.<sup>9</sup> This had been voluntary since its creation in 2016. Many local authorities had also volunteered to accommodate resettled refugees under the Syrian and Afghan schemes, and this was often their first experience of accommodating and supporting refugees. But local authorities and the regional Strategic Migration Partnerships have expressed concern about the lack of available legal advice and representation for people seeking asylum, in areas where they have never previously lived.

These three examples provide the substance for the following discussion of four pathways to ignorance operating in current legal aid and asylum policy in England and Wales. The pathways overlap, however, and more than one is evident in each of the examples.

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<sup>8</sup> See, for example, Gwent’s [discussion paper](#) showing one local authority’s proposals on this issue.

<sup>9</sup> See announcement at Gov.UK: ‘[National Transfer Scheme to Become Mandatory for All Local Authorities](#)’.

## [D] PATHWAY 1: BELIEF IN THE MARKET

Current UK Government policy on legal aid for England and Wales is explicitly market-based,<sup>10</sup> implementing most of the recommendations of the Carter Review, published in 2006. Carter advocated market-based procurement of legal aid services, whereby client choice and competition between providers would ensure high quality at the lowest cost. This belief in the free market endures, despite evidence of a market failure in legal aid, with providers leaving the market or reducing their market share (Wilding 2021; Wilding & Ors 2021). McGoey (2019) describes how those sometimes referred to as ‘market fundamentalists’ ignore governments’ roles in shaping markets, whether for good or ill. I argue that this belief in the market is one of the key ignorance pathways in operation in legal aid policy around asylum and immigration, and more generally, as the LAA relies on assumptions that the market *would* expand or adapt without intervention if it were necessary.

The Widening Dispersal plans illustrate this pathway. The statistics for asylum support in 2021 show new areas accommodating people who have applied for asylum, which have never done so before, and which have no legal aid provision. The market was presumed to be capable of addressing this, with new or increased demand attracting new providers into the area (Carter 2006). Indeed, we can see that provision has developed around some dispersal areas. Glasgow is a good example of a city which had no specialist asylum provision until dispersal began in the early 2000s, and now has a good supply, alongside numerous civil society support organizations. But creation of demand through dispersal only makes provision *possible*. It does not *guarantee* that providers will enter or remain in the market: there are some dispersal areas where there is need, but little or no provision (Norfolk and Suffolk, for example) and others where provision is very limited (such as Plymouth, North Wales and Stoke-on-Trent).

Two factors in particular make it less likely that the market will expand and adapt to meet this new pattern of need in 2022. Firstly, dispersal began in 2000, when the legal aid funding scheme was significantly broader, and the auditing regime less intensive than is currently the case, so the conditions for market entry or expansion are very different in 2022. Second, provision is even less likely to develop or move into an area where there is only a small population of people in need. A dozen single people or two or three families will not create adequate demand to

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<sup>10</sup> Justice and legal aid matters are devolved in Scotland and Northern Ireland, which means UK policy does not apply.

attract specialist legal aid providers into a geographical area. Outreach is possible, but this imposes even greater pressure on providers, who already face excess demand and either tight financial margins or even financial losses on legal aid work.

This belief in the market is likely part of the reasoning which underpins the next pathway: the non-collection of evidence is (somewhat) rational if one assumes that the market will expand or contract without intervention to meet eligible demand.

## [E] PATHWAY 2: THE AVOIDANCE OF EVIDENCE

The general phenomenon of evidence avoidance has been demonstrated in laboratory studies which found that people avoided information about the consequences of their actions on others (Dana & Ors 2007, is often cited as the seminal study). The Legal Aid Agency, which administers legal aid for England and Wales, has no mandate to research need and provision. Its predecessor, the Legal Services Commission, which was responsible for the administration of legal aid until 2013, had a statutory duty to inform itself about the need for legal advice. Under the Commission, from 1996 to 2013 there existed the Legal Services Research Centre, which developed the English and Welsh Civil Justice Survey and carried out or commissioned a range of studies covering legal knowledge and capability (Balmer & Ors 2010) and legal need (Pleasence & Ors 2001) and is described as providing most of the evidence which was then available on the costs and benefits of meeting legal need (Moorhead 2010).

The Legal Aid Agency was never given any such duty, nor relevant resources, and consequently does not conduct any significant amount of research into need or provision. It is criticized for having ‘limited knowledge of the impact of its policies’ (Smith & Cape 2017: 78) and for producing annual reports which are ‘very narrowly focussed on corporate concerns’ and ‘about administrative and operational concerns, rather than giving a view of how citizens are (or are not) being assisted by legal aid’ (Partington 2015). Despite an extensive auditing regime, the LAA has no feedback loops in place for identifying or mapping unmet demand, and very little in place for monitoring the substantive quality of work—perhaps because it has delegated these tasks to ‘the market’.

Although there is a procurement process for legal aid, there is little action and no consequence for the LAA if no advice services are in fact procured. This can be compared with health services, for example, where

local authorities and health trusts have responsibility for commissioning certain services, such as general practitioners. However, flawed that system may be in practice, they have a duty to know where the gaps are, and certain duties and powers to try to fill them (see, for example, Gadsby & Ors 2017). There is a single duty placed upon the Lord Chancellor in section 1 of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, the legislation which sets out the law on legal aid: namely, to secure the availability of legal aid in accordance with the Act. In pursuit of this duty, there is a power in section 2 of the Act for the Lord Chancellor to make different arrangements for different areas of law or different parts of England and Wales, including making grants and loans to providers. The power has never been used and there is no procedure for requesting its exercise; without seeking out any evidence on need and provision, it is difficult to see how the Lord Chancellor could know whether there was a need to exercise the power.

However, in certain areas such as the East of England, local authorities and Strategic Migration Partnerships have informed the LAA that there is a shortage of asylum legal aid representation and that the authority and local support groups are struggling to find representatives for people in need. They report being told by LAA contract managers that there is adequate provision because only one-third of the matter starts *allocated* within the region have been used. Yet the providers in the region have not *opened* a larger proportion of their allocated matter starts in any year since the current contracts were awarded, in 2018. The number of matter starts opened in previous years is the better indicator of capacity. To treat the allocated number of matter starts as indicative of available capacity is an exercise of strategic ignorance, since the LAA holds the data showing how many (or how few) matter starts are actually used per year in each geographical area. In effect, this is a deliberate avoidance of evidence, where evidence would demonstrate the need for remedial action.

## [F] PATHWAY 3: FRAGMENTATION

A third ignorance pathway arises from the fragmentation of both policy making and operational responsibilities. Although the LAA is responsible for procuring and contracting legal aid services, it is the Ministry of Justice which sets fee rates (which affect the ability of providers to survive in the market), and the Home Office which decides where people seeking asylum will be accommodated or detained. The Home Office outsources the day-to-day work of procuring and running asylum accommodation to three private companies: Mears, Serco and Clearsprings Ready Homes. It outsources the job of liaising with these accommodation providers and

signposting people to legal representatives to yet another organization, Migrant Help. It also outsources the running of detention centres to private companies: Serco, Mitie, G4S and GEO Group, which (among other responsibilities) have to facilitate the operation of the legal advice surgeries which are procured by the LAA.

In this section I will argue that the Home Office makes these policy decisions, which determine where advice is needed, without first enquiring about the likely accessibility of advice because access to advice is the responsibility of other organizations, simply outside its remit. It can ignore what goes on, or does not go on, in its outsourced detention centres, run by private contractors. It has created an asylum decision-making process that drives a need for asylum legal representation far beyond what the LAA can procure, or what the Ministry of Justice (or Treasury) is willing to pay for. It creates delays that are unmanageable for providers, in a system where delays drive up the costs for providers and those costs are not covered by the LAA, and simply ignores the consequences because funding and procurement of legal advice is outside its remit. In this way, fragmentation of both policy control and operational responsibilities facilitates strategic ignorance.

The decision to open a detention centre for women in County Durham illustrates how fragmentation operates as an ignorance pathway. A cursory reading of the legal aid market in the North East of England demonstrates that there was never any realistic prospect of face-to-face legal advice being available at Derwentside. The legal aid access point closest to Derwentside is ‘County Durham East, Teesside, Tyne and Wear, and Gateshead’, which falls within the procurement area of North East, Yorkshire and the Humber. As of 29 December 2021, the update closest to the centre’s opening, the LAA Directory of Providers listed nine different organizations with 13 offices between them doing immigration and asylum legal aid in the access point.<sup>11</sup> In fact, one of those offices had closed in August 2021, leaving 12 offices of eight organizations. These offices opened, on average, a total of 1,793 new legal aid ‘matters’ per year on the current (2018 round) contracts.<sup>12</sup> This compares with need—in categories eligible for legal aid—estimated at 5,149 in the North East: a deficit of 3,356. Although the neighbouring regions, the North West and Yorkshire and the Humber, have more providers, they also have a deficit between provision and need of 6,470 and 4,329 respectively.

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<sup>11</sup> See note 2 above.

<sup>12</sup> Freedom of Information response 210315004 from Ministry of Justice to Jo Wilding dated 14 April 2022.

Furthermore, three of the North East providers cannot undertake judicial review applications because they are regulated by the Office of the Immigration Services Commissioner (OISC) rather than the Solicitors Regulation Authority (SRA). That matters when working with a detained population because the only remedy for an unlawful decision to remove someone from the UK, or for an unlawful refusal to recognize someone as a victim of trafficking, or for unlawful detention (as opposed to a claim for damages for the tort of false imprisonment) is judicial review.

The abortive tender for provision served to confirm that there was inadequate access to legal aid representation in the North East of England, but that tender was carried out after the Home Office had decided to open a detention centre for women on that site, not as part of a planning process or a feasibility study. It delegated the actual knowing to the LAA, but only after the decision was made. A wholly remote advice service is not adequate, from either the client or the provider perspective. The decision to open a new detention centre despite the failure to secure face-to-face legal advice for the detainees at Derwentside is an example both of strategic ignorance arising from fragmentation of policy-making responsibilities and through omission to acquire evidence in advance of making a policy decision. It does also rely on a blind faith in the market to provide, which presumes that the conditions in the market are satisfactory despite evidence to the contrary (Wilding 2021).

These pathways also apply at Napier Barracks, where the fragmentation of responsibility for asylum applications, asylum accommodation and legal aid rules is acutely demonstrated. There are three legal aid providers in Kent, who undertake an average of 362 new cases (or ‘matter starts’) between them per year. Much of this capacity is taken up with unaccompanied children in the care of Kent County Council, and those leaving the council’s care at the age of 18 who need representation for new applications once their leave to remain expires. There is no legal aid provision in Essex, the county to the north of Kent, and nothing in Sussex, to the west, apart from a single small provider in Brighton which is unable to meet the demand from unaccompanied children and adult asylum applicants accommodated in Sussex. It is clear that there is no surplus legal aid capacity in the surrounding area. Realistically, the men accommodated at Napier are not in a position to travel to London for legal advice, since they do not have the funds. Providers cannot afford to travel to the barracks for appointments under the current funding scheme, meaning there is little prospect of the residents receiving face-to-face legal advice.

Even if they are able to find a provider willing to take them on remotely, they face serious difficulties. NGOs working to support the people in the barracks describe the onsite wi-fi as ‘intermittent’. Some do not have phones, since these are often seized on arrival, apparently to investigate human smuggling operations (Taylor 2022; *R (on the application of HM and MA and KH) v Secretary of State for the Home Department; Privacy International intervening*[2022] EWHC 695 (Admin)). NGO workers describe providing phones and phone credit to detainees. Residents say they do not have access to private rooms to speak to their lawyers, meaning they either speak where they can be overheard by guards and other residents, or have to try to instruct their solicitors, including regarding the most traumatic details of their cases, by phone in the street. One NGO which attends Napier regularly described a situation where all but one of the residents they spoke to had been unable to contact their solicitor, even if they knew who was representing them. Many did not know whether they were represented or not. Frequently, they only had contact details for an interpreter, not the solicitor. Very few had received legal advice before they had their asylum interviews. Some had received a Pre-Interview Questionnaire which had to be completed in English within a deadline, but, without legal advice, they had no idea how to complete the form. It means NGOs describe themselves as carrying out a labour-intensive intermediary role.

The legal aid rules create an additional obstacle from the legal aid provider point of view. If someone is not newly arrived, there is a risk that they have previously been signed up by another provider. One example given by an NGO worker involved a man who had been in Birmingham for a year before being moved to Napier Barracks. He did not know if he had a solicitor or not. The worker explained that providers risk non-payment and a contract notice if they take on a client who turns out to have already signed up with another provider. To do so, they would either need the earlier provider to commit to not billing the case, or to show that the earlier provider was not going to do the work, or to make a complaint about the standard of that firm’s work. All of these are difficult without knowing who the provider is. Yet there is no central database where they can check whether someone is already signed up. The role of Migrant Help, under contract with the Home Office to provide advice and assistance, is limited to ‘signposting’ rather than proactive referrals or support with accessing lawyers.

This fragmentation means no organization or department has ownership of the overall system, leaving gaps for which none of them has responsibility. In this way, fragmentation is a pathway to ignorance.

## [G] PATHWAY 4: CREDIBILITY DEFICITS

The final ignorance pathway discussed in this essay rests on the weak political position of those caught up in the system. Those in need of asylum and immigration advice are not entitled to vote. Even in most other areas of law covered by legal aid, the beneficiaries are usually poor, otherwise they would not meet the financial means thresholds for eligibility, and often marginalized. Their limited political power is often accompanied by limited public sympathy, compared with the recipients of other publicly funded services like health care and education.

These factors in turn lead to ‘credibility deficits’ (Fricker 2007; McGoey 2019) whereby an individual’s account is less likely to be believed. The refusal to listen to the residents of the Grenfell Tower flats is cited as an example (McGoey 2019): they had warned about electrical power surges creating a fire risk before the catastrophic fire in 2017, but were ignored as ‘inferior knowers’. Indeed, personal credibility is often the reason given for refusing asylum or other protection to those applying for asylum, with the Home Office dismissing their accounts as untrue or exaggerated, often with the weakest of reasoning (Thomas 2015; Goodfellow 2020; Yeo 2020). Good quality legal representation can often overturn the Home Office conclusion on appeal, but poor-quality representation means that the decision goes effectively unchallenged. Asylum applicants’ wider credibility deficit with the public and policy-makers means that the poor quality representation is not necessarily identified as such.

The credibility deficit is different from, but related to, ideas around ‘deservingness’. I use the concept of *justice chauvinism* to describe the implicit idea that a non-citizen is both less credible and less deserving of justice than a national of the country. This draws on the concept of welfare chauvinism (Andersen & Ors Bjorklund 1990), the idea that access to a state’s welfare systems should be reserved for the state’s own citizens, regardless of need or contribution. The framework of strategic ignorance enables us to see justice chauvinism not (necessarily) as a deliberate motivation for designing a dysfunctional asylum or legal aid system but rather as a barrier to any motivation to seek out evidence about the functioning of the system.

Although the LAA’s contract managers canvass providers in other regions to find out which ones have capacity to take on cases from Napier, for example, NGO workers argue that the firms which say they have capacity are not always those which do good quality work. One gave an example of a sole practitioner saying they could take on 100 new matters from the barracks, which implies that they expect to do very

little work on each case. Another firm's lawyer did not appear to know what the National Referral Mechanism is (the decision-making system for potential victims of trafficking), much less how to get a client into it. Those which do good quality work are able to take on fewer cases. Yet the credibility deficit means it is likely that, if these men are unsuccessful in their asylum applications, it will be assumed that they were untruthful, rather than that their legal representation was inadequate. In this way, the credibility deficit for the 'end users' creates a pathway to ignorance for both Home Office and legal aid policy-makers about meaningful access to advice.

## [H] CONCLUSION

By framing Home Office and legal aid policy-making as strategic ignorance, we can understand the issue as one of (deliberate or reckless) failure to acquire and apply the evidence that would inform a more functional system for access to legal advice. I argue that in this scenario, strategic ignorance is driven by a combination of 1) a genuine (but mistaken) belief in the power of the market to achieve things which it cannot achieve; 2) a consequent choice not to collect or pay attention to evidence about the real functioning of the market; 3) a silo-ized and fragmented policy-making framework which leaves space for ignorance, or makes ignorance easier to dismiss as another agency's problem; and 4) a lack of interest in the particular populations most affected—a kind of 'justice chauvinism' which implicitly holds that some people are both less worthy of belief and less deserving of access to justice than others.

These four pathways combine to create potent pathways to ignorance about what is really happening in asylum legal aid, with knowledge replaced by presumptions. The belief in the market's power to provide, despite the significant changes to the market conditions in recent years, enables the LAA to assume that advice is available wherever its contracted providers have not yet used all of their allocated 'matter starts', without regard to the actual (lack of) capacity of providers to expand. It allows the Ministry of Justice to assume that competition for clients will ensure quality, however low the fee rates fall. Beyond intermittent peer reviews, the scores of which are not published, there is no system for confirming this. The Home Office, meanwhile, makes policy about where people will be accommodated or detained, without reference to whether legal advice is available or not, much less making its decisions in partnership with the Ministry of Justice and LAA to ensure that representation will be developed: an exercise in strategic ignorance by failing to acquire the necessary information in a timely manner.

With policy control fragmented between government departments, and operational control fragmented still further through agencies and outsourced contractors, this leaves knowledge scattered through different organizations with no coherent understanding of the system's dysfunctions, much less coherent ownership of a plan to make it functional. The Nationality and Borders Bill is likely to do precisely the opposite. But the credibility deficit suffered by people seeking asylum means that they themselves are blamed for the dysfunction of the system.

The LASPO Act 2012 imposes only one duty on the Lord Chancellor in respect of legal aid, namely, to secure the availability of legal aid in accordance with part 1 of the Act. In section 2, the Act gives the Lord Chancellor certain powers in relation to the exercise of that duty, including powers to make different arrangements for different areas of law or parts of the country, including the making of grants. Without collecting any meaningful information about the geographical variations in demand and supply, it is difficult to tell whether or not the Lord Chancellor has discharged the duty to secure the availability of legal aid in accordance with the Act, let alone how the powers in section 2 might be deployed to rectify any deficits in availability.

Arguably, there is already adequate evidence to justify the Lord Chancellor concluding that his duty under the LASPO Act 2012 is not being discharged, and that he must exercise the section 2 power to make alternative and supplementary arrangements, including grants in areas of the most severe shortage and those with new dispersal or detention. In the meantime, researchers are urged to seek out the evidence which challenges strategic ignorance in relation to legal aid and access to legal advice, and to make continued ignorance untenable.

### **About the Author**

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## References

- Andersen, Jurgen Goul & Tor Bjørklund (1990) 'Structural Changes and New Cleavages: The Progress Parties in Denmark and Norway' 33 *Acta Sociologica* 195-217.
- Bail for Immigration Detainees (BID) (2019) *Research Paper: Autumn 2019 Legal Advice Survey* London: BID.
- Bailey, Alison (2007) 'Strategic Ignorance' in Shannon Sullivan & Nancy Tuana (eds) *Race and Epistemologies of Ignorance* New York: State University of New York Press 77-94.
- Balmer, Nigel & Ors (2010) *Knowledge, Capability and the Experience of Rights Problems* London: Plenet.
- Carter (Lord Carter of Coles) (2006) *Legal Aid: A Market-based Approach to Reform* London: Department for Constitutional Affairs.
- Dana, Jason, Roberto Weber & Jason Xi Kuang (2007) 'Exploiting Moral Wiggle Room: Experiments Demonstrating an Illusory Preference for Fairness' 33 *Economic Theory* 67-80.
- Fricke, Miranda (2007) *Epistemic Injustice* Oxford: Oxford University Press.
- Gadsby, E W & Ors (2017) 'Commissioning for Health Improvement Following the 2012 Health and Social Care Reforms in England: What Has Changed?' 17 *BMC Public Health* 1-11.
- Goodfellow, Maya (2020) *Hostile Environment: How Migrants Became Scapegoats* London: Verso.
- Gould, Lauren & Nora Stel (2022) 'Strategic Ignorance and the Legitimation of Remote Warfare: The Hawija Bombardments' 53(1) *Security Dialogue* 57-74.
- Hirst, C & N Atto (2018) 'The UK's Ailing Asylum Seeker Dispersal Policy: Where to from Here?' Respond Migration 19 September 2018.
- House of Commons Home Affairs Committee (2017) 'Asylum Accommodation: Twelfth Report of Session 2016-17' 17 January 2017, 16-17.
- Huber, Amelie (2019) 'Hydropower in the Himalayan Hazardscape: Strategic Ignorance and the Production of Unequal Risk' 11 *Water* 414.

- Lindley, Anna (2022) “Hit and Miss”? Access to Legal Assistance in Immigration Detention’ *Journal of Human Rights Practice*.
- Lyons, K & P Duncan (2017) “It’s a Shambles”: Data Shows Most Asylum Seekers Put in Poorest Parts of Britain’ *The Guardian* 9 April 2017.
- McGoey, Linsey (2012) ‘The Logic of Strategic Ignorance’ 63 *British Journal of Sociology* 533-576.
- McGoey, Linsey (2019) *The Unknowers: How Strategic Ignorance Rules the World* London: Zed Books.
- McGoey, Linsey (2020) ‘Micro-ignorance and Macro-ignorance in the Social Sciences’ 87 *Social Research: An International Quarterly* 197-217.
- Moorhead, Richard (2010) ‘Written Evidence to Justice Select Committee on Government’s Proposed Reform of Legal Aid’.
- Partington, Martin (2015) ‘Who Is Doing Legal Aid? The Statistical Evidence’ Martin Partington: Spotlight on the Justice System (no longer available).
- Pleasence, Pascoe & Ors (2004) ‘Multiple Justiciable Problems: Common Clusters and their Social and Demographic Indicators’ 1 *Journal of Empirical Legal Studies* 301-329.
- Politowski, B & T McGuinness (2016) ‘Policy on the Dispersal of Asylum Seekers’ House of Commons Library Research Briefing London: House of Commons.
- Pope, Carl & Rauber, Paul (2004) *Strategic Ignorance: Why the Bush Administration Is Recklessly Destroying a Century of Environmental Progress* San Francisco: Sierra Club Books.
- Robinson, Vaughan, Roger Andersson & Sako Musterd (2003) *Spreading the ‘Burden’? A Review of Policies to Disperse Asylum Seekers and Refugees* Bristol: Bristol University Press.
- Smith, Tom & Ed Cape, (2017) ‘The Rise and Decline of Criminal Legal Aid in England and Wales’ in Asher Flynn & Jacqueline Hodgson (eds) *Access to Justice and Legal Aid Comparative Perspectives on Unmet Legal Need* Oxford: Hart Publishing.
- Taylor, Diane (2022) ‘Home Office Defends Right to Seize Channel Asylum Seekers’ Phones’ *The Guardian* 22 January 2022.

- Thomas, Robert (2015) 'Administrative Justice, Better Decisions, and Organisational Learning' *Public Law* 111-131.
- Wilding, Jo (2021) *The Legal Aid Market: Challenges for Publicly Funded Immigration and Asylum Legal Representation* Bristol: Policy Press.
- Wilding, Jo (2022) *Restricted Access: The UK Regional Immigration Advice Mapping Project* Manchester: Refugee Action.
- Wilding, Jo, Maureen Mguni & Travis Van Isacker (2021) *A Huge Gulf: Demand for and Supply of Immigration Legal Advice in London* London: Justice Together Initiative and Greater London Authority.
- Yeo, Colin (2022) *Welcome to Britain: Fixing our Broken Immigration System* London: Biteback Publishing.

## Legislation

Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012

## Cases

- R (on the application of Detention Action) v Lord Chancellor* [2022] EWHC 18 (Admin)
- R (on the application of HM and MA and KH) v Secretary of State for the Home Department; Privacy International intervening* [2022] EWHC 695 (Admin)