

PHYSICIAN, HEAL THYSELF:
SECURING FUNDING FROM THE LAA TO CHALLENGE
ITS OWN EXCEPTIONAL FUNDING REFUSALS

John Halford and Francesca Allen, Bindmans LLP

Introduction

1. Section 10(3) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') requires the Legal Aid Agency ('LAA') to grant Exceptional Funding for services which are not listed in Part 1 of Schedule 1 when:
 - (a) [...] it is necessary to make the services available to the individual under this Part because failure to do so would be a breach of—
 - (i) the individual's Convention rights (within the meaning of the Human Rights Act 1998), or
 - (ii) any rights of the individual to the provision of legal services that are enforceable EU rights, or
 - (b) [...] it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach
2. The threshold for grants of Exceptional Funding is set deliberately high: see *M v Director of Legal Aid Casework & Ors* [2014] EWHC 1354 (Admin).
3. The access to justice problem this creates has been compounded in six ways. First, there are acute practical problems caused by the application process for Exceptional Funding. For most, these make it completely inaccessible. Secondly, ECHR and EU case law on public funding is very limited. Thirdly, when making Exceptional Funding decisions, the LAA's caseworkers have been applying guidance on that case law from the Lord Chancellor that was held to be unlawful in *Gudanaviciene & Ors v Director of Legal Aid Casework & Anor* [2014] EWHC 1840 (Admin). Fourthly, the published guidance is supplemented by unpublished 'training materials'. The opaque nature of these materials makes it impossible for applicants and their representatives to present applications that meet all the decision making criteria being used. Fifthly, Exceptional Funding refusals carry no right of appeal.
4. Unsurprisingly then, almost all Exceptional Funding applications are refused. The only available means to challenge refusal is judicial review. But refused applicants must seek funding for judicial review from the LAA, the very body that has refused funding for

their substantive cases. Clearly, this will not be straightforward. This note discusses how the process should work and what to do when it goes wrong.

A word of caution: is Exceptional Funding actually needed?

5. Before applying for Exceptional Funding in the first place it is worth checking very carefully to see whether the case can, notwithstanding first impressions, be funded under LASPO Part 1 of Schedule 1 because it contains a number of under-used categories of funded services.
6. For example:
 - (1) Civil legal services provided in relation to abuse. Part 1 of Schedule 1 Paragraph 3 covers advice and representation in relation to such claims, except in relation to family law matters. It includes claims for personal injury or death, arising from negligence (except clinical negligence), assault, battery, false imprisonment, breach of statutory duty, and breach of Convention rights under section 6 HRA 1998 relating to "abuse" which occurred at a time when the individual was either a child or a vulnerable adult i.e. an adult "whose ability to protect himself or herself from abuse [was] significantly impaired through physical or mental disability or illness, through old age or otherwise". The Explanatory Notes to LASPO explained "This will include services provided in relation to claims by individuals who allege abuse in local authority care, and claims against a local authority for failure to take an individual into care. This paragraph will also include claims against the alleged perpetrator of abuse". "Abuse" is defined as "physical or mental abuse, including (a) sexual abuse, and (b) abuse in the form of violence, neglect, maltreatment and exploitation". Advice must be given to the person who suffered the abuse, or, if they have died, their personal representative/s, or dependants for the purposes of a claim under the Fatal Accidents Act 1976.
 - (2) Judicial review claims and claims where a court or tribunal applies judicial review principles. Paragraph 19 covers advice and representation, including advocacy, in applications for judicial review of any enactment, decision, act or omission, whether brought in the Administrative Court or brought in or transferred to the Upper Tribunal under its judicial review powers contained in the Tribunals, Courts and Enforcement Act 2007. Legal aid is available whether or not the underlying subject matter is within scope of Part 1 of Schedule 1 and includes services provided in respect of several areas of law which are otherwise subject to general exclusions, including HRA claims (see Paragraph 22), welfare benefits, Criminal Injuries Compensation cases etc. But paragraph 19 also applies to other proceedings in which a court, tribunal or other person is "required" by statute to apply the judicial

review principles. In the housing context paragraph 19 was given a narrow reading in *Bhatia Best v Lord Chancellor* [2014] EWHC 746. There Silber J considered whether appeals brought under section 204(1)(b) of the Housing Act 1996 which are “on any point of law arising from the decision” were appeals to which the County Court would be required to apply judicial review principles by statute. He held that the County Court was not required to do so, principally because section 204A(4)(b) contained a similar appeal right which expressly provided that “the Court shall apply the principles applied by the High Court on an application for judicial review.” Silber J reasoned that Parliament must have intended the scope of these two appeal rights to be different and that, in the housing context, only the latter type of appeal would be capable of being funded through paragraph 19 (10). This is a surprising result and the reasoning may not be followed in other contexts (such as statutory appeals to the High Court on a point of law from professional disciplinary tribunals).

- (3) Civil legal services provided in relation to abuse by a public authority of its position or powers. Paragraph 21 covers legal help and legal representation (including advocacy) in relation to acts or omissions by public authorities which are “deliberate or dishonest” and result in “reasonably foreseeable harm”, save for clinical negligence claims. This category is broader than damages claims alone (there is nothing on the face of LASPO that limits it in that way unlike e.g. paragraph 22) and so might cover some statutory appeals and tribunal claims.
- (4) Damages claims in respect of an act or omission by a public authority involving a significant breach of Convention rights. Paragraph 22 covers legal help and legal representation (including advocacy) for claims against UK public authorities for acts or omission which amount to significant breaches of Convention rights. It includes claims for personal injury or death and other losses arising from negligence (except clinical negligence), assault, battery, false imprisonment, trespass to goods or to land, damage to property, breach of statutory duty, and breaches of Convention rights under s. 7 HRA. The Lord Chancellor’s Guidance (under s. 4(3) LASPO) suggests that “significant breach of Convention rights” involves factors such as “the severity of the violation and: (i) whether the breach was deliberate; and (ii) whether the individual has suffered a significant disadvantage taking account of both the applicant’s subjective perceptions and what is objectively at stake in a particular case.”

Refusal of Exceptional funding by the LAA (“First Refusal Decision”) and internal review

7. Assuming Exceptional Funding is needed, sought and refused by the LAA, the applicant has 14 days within the refusal decision to apply for a review by making written representations. The review is internal within the LAA and will be determined by a separate caseworker¹. As noted above, there is no right of appeal against the outcome of a review.

Seeking funding for judicial review of the First Refusal Decision

8. As judicial review is funded under paragraph 19 of Part 1 Schedule 1 of LASPO, legal help is available to advise on a challenge to the First Refusal Decision (subject to solicitors and matter start availability) and investigative funding could be used to seek Counsel’s advice.
9. For full representation in judicial review cases (other than Dublin III cases) applicants must show that: (1) they do not have access to other potential sources of funding from which it would be reasonable to fund the case; (2) the case is unsuitable for a CFA; (3) there is no other person who could reasonably be expected to bring the proceedings; (4) all reasonable alternatives to bringing the proceedings have been exhausted (so the review procedure would have to be used, save in an extremely urgent case); (5) there is a need for representation in all the circumstances including the nature and complexity of the issues; (6) the act, omission or other matter complained of appears to be susceptible to challenge; (7) there is no effective alternative judicial remedy to challenge the matter; (8) a letter before claim has been sent to the proposed defendant who has been given a reasonable time to respond; (9) the likely benefits of the proceedings justify the likely costs; and (10), save in a transitional case², the prospects of successfully obtaining the substantive order sought are moderate or better. All applicants must meet the general financial eligibility criteria.

¹ Regulation 69 Civil Legal Aid (Procedure) Regulations 2012/3098

² The Civil Legal Aid (Merits Criteria) Regulations 2013 provided that, to be funded, a judicial review claim had to have at least moderate prospects of success or borderline prospects together with a significant wider public interest, of overwhelming importance to the individual or significant human rights issues. In January 2014, funding for public law claims with a ‘borderline’ prospect of success was removed by The Civil Legal Aid (Merits Criteria) (Amended) Regulations 2014/131. However, transitional provisions contained in the 2014 Regulations provide that these changes do not apply to “pre-commencement applications for civil legal services” made before 27 January 2014.

Refusal of representation funding by the LAA (“Second Refusal Decision”) and internal review

10. The LAA will often refuse to fund the proposed judicial review of the First Refusal Decision, generating a Second Refusal Decision.
11. This too carries a right of internal review that needs to be evoked by making written representations within 14 days of the Second Refusal Decision.³

Appealing against the Second Refusal Decision

12. If, as is likely, the applicant remains dissatisfied following the review, then they can appeal, except in cases where the Second Refusal Decision was a determination that the applicant does not qualify for emergency representation made on the basis of limited information and documents.⁴
13. According to the LAA’s guidance, an appeal should be submitted within 14 days of the outcome of the review decision. It is not clear that this time limit has a statutory basis.
14. There are two appeal routes.
15. First, there is a general right of appeal under Regulation 45. This type of appeal will be considered by an Independent Financial Adjudicator ('IFA') who will be a practitioner appointed by the LAA. Some IFA's will have detailed knowledge of the subject matter which the Exceptional Funding application relates to. Others will not. Where the Director or adjudicator considers that the appeal is of exceptional complexity or importance, the Director or adjudicator may refer the appeal to a panel of two or more adjudicators, but this is very rare.
16. Secondly, where the matter comes under provisions of Special Case Work subject to ‘special controls’, an appeal can be made to the Special Control Review Panel ('SCRP'). The SCRP is constituted from specialist practitioners in a LAA pool. There will normally be two or three involved.
17. The Provisions for Special Case Work being subject to special controls are provided under Regulation 58(1):

³ Regulations 44 and 58 Civil Legal Aid (Procedure) Regulations 2012/3098

⁴ Regulation 53(1)(a) Civil Legal Aid (Procedure) Regulations 2012/3098

- (1) Special Case Work to be provided in the circumstances described in –
- (a) regulation 54(3)(c), (d), (e) and (g); and
 - (b) regulation 54(3)(b) where the Director has reasonable grounds to believe that the likely costs would exceed £250,000,
- is subject to special controls.

18. The circumstances of Special Case Work subject to special controls are set out in Regulation 54 as follows:

- (2) An application for –
- (a) a determination that an individual qualifies for a form of civil legal services; or
 - (b) an amendment of a determination,
- may be treated by the Director as an application for Special Case Work in the circumstances described in paragraph (3).
- (3) The circumstances mentioned in paragraph (2) are where the Director has reasonable grounds to believe that –
- ...
- (b) if the case were to proceed to –
 - (i) a trial or final hearing; or
 - (ii) in the case of appeal proceedings before the Court of Appeal, the conclusion of that appeal,
 - the likely costs would exceed £75,000;
 - (c) the application relates to a multi-party action or potential multi-party action;
 - (d) the application relates to an appeal or proposed appeal to the Supreme Court;
 - (e) it is necessary to decide whether –
 - (i) the case is of significant wider public interest; or
 - (ii) the substance of the case relates to a breach of Convention rights (within the meaning of the Human Rights Act 1998),

in order to determine whether the individual qualifies for civil legal services in accordance with the criteria set out in regulations made under section 11 of the Act;

...
 - (g) the application relates to a community action.

19. Given these criteria, appeals against many, perhaps most, Second Refusal Decisions should be heard by the SCRP: when Exceptional Funding is sought on the basis that there will be a breach of an ECHR right not to grant it, and the First and Second Refusal Decision contend there would not be, the substance of the case will relate to a breach of Convention Rights for the purposes of Regulation 54(3)(e)(ii).
20. Further, Regulation 6 of the Civil Legal Aid (Merits Criteria) Regulations 2013/104 provides:
- 6.— Public interest
- (1) For the purposes of these Regulations, a case is of significant wider public interest if the Director is satisfied that the case is an appropriate case to realise—
- (a) real benefits to the public at large, other than those which normally flow from cases of the type in question; and
- (b) benefits for an identifiable class of individuals, other than the individual to whom civil legal services may be provided or members of that individual's family.
21. Such a public interest is likely to arise in most judicial reviews of First Refusal Decisions.
22. Further, “multi-party action” means “proceedings in which a number of individuals have a cause of action which involves common or related issues of fact or law”. Any case where Exceptional Funding is sought for at least two co-claimants/appellants whose interests are sufficiently aligned falls into this class.
23. It is also worth noting that “community action” means “proceedings proposed, begun or continued by or against one or more individuals who belong to an identifiable geographic community the members of which have a common interest in the proceedings”, something that will arise in some Exceptional Funding cases.
24. Appeals referred to ICFs and the SCRP are considered without a hearing unless the adjudicator or panel believes it is in the interests of justice for the individual, or LAA, to make oral representations before them⁵. In practice, hearings are very rare.
25. If there is a hearing, the appellant should be given a copy of the agenda note and the appeal bundle to be placed before the SCRP in advance of the hearing, as well as an

⁵ Regulations 45(2) 58(5) Civil Legal Aid (Procedure) Regulations 2012/3098

opportunity to make further representations. It is always worth asking for these materials ahead of the SCRP meeting because there will sometimes be points made by the LAA caseworker which did not feature prominently, or at all, in the Second Refusal decision.

26. Whether the appeal is heard by an IFA or the SCRP, it will ultimately be referred back to the LAA for a final decision. It is very unusual for the outcome of appeals not to be respected.

Some common problems

27. The primary consideration for the LAA when considering whether to grant judicial review funding should be, as we know, whether the agency has misdirected itself and/or acted irrationally when making the First Refusal Decision and as such is exposed to a viable judicial review claim with at least moderate prospects of success. Sometimes the LAA conflates this question with the issues that arose when the First Refusal Decision was made, but they are different. It may be that, when considered properly and lawfully, an application for Exceptional Funding would be refused, but the First Refusal Decision may be so flawed that a judicial review claim would be likely to succeed and lead to a quashing order. That is enough for the Second Refusal Decision to be overturned on appeal.
28. First Refusal Decisions are often poorly made and formulaic. For example, the LAA often argues representation before tribunals with Exceptional Funding “is not considered to be needed given the amount of written submissions available, which set out your clients’ position and referred to the authority’s legal obligations.”
29. However, whatever written materials are available, by the time the dispute reaches a tribunal and the representation for which funding was being sought is needed, much of what the individual’s representatives have already submitted will be in dispute. If there was no dispute over the material and/or the legal duties it gave rise to, the local authority would have either conceded the case by then or the tribunal would have struck out its defence on the basis that it had no prospects of success (something which the tribunal has power to do). It would be no answer to say that the tribunal would be able to deal with the matter even-handedly when, in one hand it would have those written submissions, and in the other would have not only written submissions from the authority but their elaboration in oral argument. Certain tribunals concern matters where live evidence, and sometimes expert evidence, will be needed as will legal submissions about the significance of that evidence to effectively resolve what is in dispute.

30. Another common point made in First Refusal Decisions is "if help at the tribunal is considered to be needed, your clients could instruct a more local solicitor to attend as a MacKenzie friend under legal help".
31. There is an inherent contradiction in the suggestion that the case could be run on this basis in circumstances where the LAA has maintained that the individuals are capable of representing themselves without any assistance and few, if any, solicitors could afford to attend and run tribunal cases at legal help rates. Further, practice guidance on the role was issued by the Master of the Rolls and the President of the Family Division on 12 July 2010. It makes it very clear that the MacKenzie friend is no substitute at all for a conventional representative and may not step into the shoes of the litigant to make submissions on their behalf.

John Halford

Francesca Allen

13 October 2014