

Access to Justice and Legal Aid for Separated Children in the UK

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Introduction

- Legal aid is vital to ensure that those who cannot afford to pay for a lawyer are able to access to justice.
- Prior to April 2013, legal aid was generally available to separated migrant children for all immigration applications that they may need to make, e.g. for cases which raised either asylum or Article 8 ECHR/EEA grounds, or a mixture.
- Now, with a few exceptions, only protection claims are within the 'scope' of legal aid.
- It is of concern that the removal of non-asylum cases from the 'scope' of legal aid has resulted in many more children being unable to access advice and representation, with the consequence that they are being denied access to justice and their Convention and/or EU rights breached.

Legal Aid Sentencing and Punishment of Offenders Act 2012 “LASPO”

- LASPO 2012 meant that a many types of case were taken out of the ‘scope’ of legal aid.
- There is now a distinction between immigration cases and asylum cases. In general terms, where the child is making a protection claim, that aspect of the case remains ‘in scope’.
- Any part of the case that is not a protection claim, i.e. an Article 8 ECHR argument, is ‘out of scope.’
- This affects children who want to raise Article 8 ECHR arguments alongside their protection claim and those who have cases based exclusively on Article 8 ECHR or EEA free movement arguments.
- Those 16-17 year olds seeking to renew DL on Article 8 ECHR grounds will be particularly affected.

Exceptional Case Funding

- Introduced by Section 10 LASPO, ECF allows for funding to be available for 'out of scope' cases if an exceptional case determination is made by the Legal Aid Agency.
- Section 10(3) *an exceptional case determination is a determination*
 - (a) that 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) that 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.*

When is ECF necessary?

- The case of *Gudanaviciene v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622 confirmed that a failure to provide funding could breach an individual's procedural rights under Article 8 ECHR, and that the test for when ECF was required under Article 8 was essentially the same as for Article 6 ECHR and Article 47 of the Charter.
- So, children who wish to raise Article 8 ECHR arguments in their cases for leave to remain in the UK may be eligible for ECF.

When is ECF necessary? (2)

The Court of Appeal in *Gudanaviciene* also settled the test for when funding should be granted under section 10(3) LASPO 2012:

- “the critical question is whether an unrepresented litigant is able to present his case effectively and without obvious unfairness.” Paragraph 56
- “Whether legal aid is required will depend on the particular facts and circumstances of each case, including (a) the importance of the issues at stake; (b) the complexity of the procedural, legal and evidential issues; and (c) the ability of the individual to represent himself without legal assistance, having regard to his age and mental capacity.” Paragraph 72
- “The following features of immigration proceedings are relevant: (i) there are statutory restrictions on the supply of advice and assistance (see section 84 of the Immigration and Asylum Act 1999); (ii) individuals may well have language difficulties; and (iii) the law is complex and rapidly evolving.” Paragraph 72

Are children accessing ECF for immigration cases?

- The figures below were given by Shailesh Vara MP on 27 May 2016 in response to a written question from Andy Slaughter MP.

Date application received	Application numbers			Grant numbers ³		
	Under 18 y/o	18-24 y/o	Age not known	Under 18 y/o	18-24 y/o	Age not known
Apr 2013 - Mar 2014 ²	-	12	1332	-	-	12
Apr 2014 - Mar 2015	14	39	16	4	8	1
Apr 2015 - Dec 2015 ¹	11	33	25	10	22	12

¹ Statistics for Jan-Mar 2016 not published at date of answer, and do not appear to have been published since.

² Age data for Exceptional Case Funding were collected from October 2013 onwards, hence the greater proportion of unknowns in 2013-14 compared to the other years.

³ Granted by 29 February 2016

Is this a problem?

- The Children's Society report *Cut off from Justice* published June 2015 cites a data request which revealed that 2,490 of the publicly funded immigration cases for under 18 year olds which had been closed in 2009/2010 would be 'out of scope' for legal aid under LASPO.
- The report highlights that the 2,490 are the 'tip of the iceberg' as they are those children who were able to access a legal aid lawyer.
- In the first three quarters of 2015/2016, 10 under 18 year olds were granted ECF for immigration cases of the 11 who applied.
- On the face of it there is a problem.

Why are so few children accessing ECF?

- Several factors preventing people from accessing ECF were identified in the case of *I.S. v Director of Legal Aid Casework and the Lord Chancellor* [2015] EWHC [2016] EWCA; the evidence was not substantially disputed by the defendants. The barriers included:
 - Onerous application requirements and lengthy procedures;
 - No payment for the work required to make an application unless it succeeds, so a lot of work done at risk;
 - Low grant rates;
 - Lawyers reluctant to make ECF applications;
 - Scheme inaccessible to those without a lawyer.

Why are so few children accessing ECF? (2)

- Some changes to the scheme were made following the High Court judgment in *I.S.* and the most recent statistics show that the numbers applying for and being granted ECF for immigration cases have increased.
- We do not have figures for the number of children accessing ECF beyond December 2015, but, whilst the grant rate has increased, it does not appear that the number applying in 2015/2016 will greatly exceed that for 2014/2015.
- Children are particularly dependent on others to know that there is a problem, to know that there could be legal aid available to find a solution, and to be willing to assist the child to access legal aid and a legal aid lawyer.
- The post-LASPO chilling effect and lawyers being reluctant to make applications will affect children particularly badly.

What next?

- ‘In scope’ legal aid continues to be for children making protection claims.
- Many children with non-protection cases/aspects to their case are likely to be eligible for ECF.
- However for many law firms making ECF applications is unlikely to be financially viable.
- Some charities have started making ECF applications for their service users.
- The *I.S.* case is ongoing.