

## EXCEPTIONAL FUNDING: THE BRAVE NEW WORLD

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### What is exceptional funding?

As is well canvassed, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPOA”) overhauls the statutory framework for legal aid in England and Wales. The areas of law that remain eligible for legal aid are contained in Part 1 of Schedule 1 LASPOA. Parts 2 and 3 of Schedule 1 place additional restrictions on the availability of legal aid for in-scope areas of law, including when advocacy is available.

The areas of law that have been taken out of scope by LASPOA in whole or in part, are:

- Welfare benefits
- Debt
- Housing
- Immigration (not immigration detention or asylum)
- Private family law
- Employment (not discrimination)
- Education
- Clinical negligence

Section 10 LASPOA provides the new Director of Legal Aid Casework<sup>1</sup> (“the Director”) with the power to provide exceptional funding for cases that are not listed in Part 1 of Schedule 1 LASPOA. Exceptional funding is the only way that out-of-scope cases can be funded.

Part 8 of the Civil Legal Aid (Procedure) Regulations 2012<sup>2</sup> indicates that providers of legal services will not have delegated powers to grant exceptional funding. Instead, an application must be made to the Director for an ‘exceptional case determination’. Section 10(3) LASPOA states that 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 –
  - 1) the individual’s Convention rights (within the meaning of the Human Rights Act 1998), or
  - 2) any rights of the individual to the provision of legal services that are enforceable EU rights,<sup>3</sup> 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.<sup>4</sup>

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<sup>1</sup> With the coming into force of LASPOA the Legal Services Commission ceased to exist and responsibility for legal aid now rests with the Director of Legal Aid Casework, a civil servant who answers directly to the Lord Chancellor.

<sup>2</sup> Available at: [www.legislation.gov.uk/ukSI/2012/3098/pdfs/ukSI\\_20123098\\_en.pdf](http://www.legislation.gov.uk/ukSI/2012/3098/pdfs/ukSI_20123098_en.pdf)

<sup>3</sup> ‘Enforceable EU right’ is defined in section 2(1) of the European Communities Act 1972, which states: “(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression “enforceable EU right” and similar expressions shall be read as referring to one to which this subsection applies.”

<sup>4</sup> Section 10 also makes provision for exceptional funding to be granted in certain inquests. The provisions relating to inquests are not considered further here.

In relation to section 10(3)(b), the Explanatory Note to LASPOA provides at 108:

“Subsection 3(b) provides that an exceptional case determination may also be made where the Director considers that the failure to provide legal services would not necessarily amount to a breach of an individual’s right, but that it is nevertheless appropriate for the services to be made available, having regard to the risk of such a breach occurring.”

Part 8 of the Civil Legal Aid (Procedure) Regulations 2013 sets out the process for making exceptional funding applications and for seeking a review of an exceptional case determination. According to Regulation 68, the Director must provide written reasons for his/her determination and a notice of any right of review. According to the guidance, determinations will be made within 20 days of receipt by the LAA. Applications for a review of a determination must be submitted within 14 days (Regulation 69(2)). A refusal to grant exceptional funding that is upheld on an internal review is amenable to challenge only by way of judicial review.

Part 5 of the Civil Legal Aid (Merits Criteria) Regulations 2013 set out the merits criteria to be applied to exceptional funding applications by the Director.<sup>5</sup>

The Regulations setting out the test for financial eligibility for legal are the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013.<sup>6</sup>

Guidance on the exceptional funding regime has been produced by the Lord Chancellor.<sup>7</sup>

### When will the European Convention on Human Rights require the provision of exceptional funding?

#### *Article 6 ECHR: The right to a fair hearing*

Article 6(1) ECHR guarantees that every individual shall be entitled to a fair hearing in the determination of their civil rights and obligations. Most civil claims involve the determination of a person’s civil rights and obligations, including family law cases, non-discretionary welfare benefits cases, housing cases and education cases. The Government are of the view that immigration cases do not amount to a determination of a person’s civil rights and obligations following the case of *Maaouia v France* (2001) 33 E.H.R.R. 42, where the European Court of Human Rights found that “decisions regarding the entry, stay and deportation of aliens do not concern civil rights and obligations or criminal charges within the meaning of Article 6(1) of the Convention”. They may be circumstances in which immigration cases qualify for exceptional funding under European Union law (see further below).

Article 6 ECHR does not grant an automatic entitlement to legal aid in civil cases. However, the right of access to a court, one of the components of Article 6(1), includes the right to be provided with legal aid in certain circumstances (see *Airey v Ireland*,<sup>8</sup> *X v United Kingdom*<sup>9</sup>

<sup>5</sup> [http://www.legislation.gov.uk/ukxi/2013/104/pdfs/ukxi\\_20130104\\_en.pdf](http://www.legislation.gov.uk/ukxi/2013/104/pdfs/ukxi_20130104_en.pdf)

<sup>6</sup> Available at: <http://www.legislation.gov.uk/ukxi/2013/480/contents/made>

<sup>7</sup> Available at, a copy is also provided in your training pack: [www.justice.gov.uk/downloads/legal-aid/funding-code/chancellors-guide-exceptional-funding-non-inquests.pdf](http://www.justice.gov.uk/downloads/legal-aid/funding-code/chancellors-guide-exceptional-funding-non-inquests.pdf).

<sup>8</sup> (1979-1980) 2 E.H.R.R. 305.

<sup>9</sup> (1984) 6 E.H.R.R. 136.

and *Steel and Morris v United Kingdom*<sup>10</sup>). The Court of Appeal in *Pine v The Law Society* described the right to legal aid as follows:

“[O]nly in exceptional circumstances, namely where the withholding of legal aid would make the assertion of a civil claim practically impossible, or where it would lead to obvious unfairness of the proceedings can such a right be invoked by virtue of Article 6(1) of the Convention.”<sup>11</sup>

Whether or not the provision of legal aid is essential to ensure effective access to the court depends on the particular facts and circumstances of each case. From an analysis of the case law, advisers should consider the following factors when assessing whether Article 6 ECHR requires the provision of legal aid in their case and therefore whether exceptional funding should be granted:

1. **The importance of what is at stake for the litigant:** advisers should consider the consequences to the client of not bringing the claim, focussing on issues such as whether the claim relates to issues of life, liberty, independence, welfare of children or vulnerable adults, protection from abuse or physical safety (see *Airey v Ireland*<sup>12</sup>, *P, C and S v United Kingdom*<sup>13</sup>, *Munro v United Kingdom*<sup>14</sup>, *Martin v Legal Services Commission*<sup>15</sup>).
2. **The litigant’s ability to represent him or herself effectively:** advisers should consider the client’s physical and mental health, whether s/he has learning disabilities or communication difficulties, his/her level of education and literacy, and whether English is his or her first language. Advisers should consider whether any of these difficulties could be mitigated, for example by the provision of a litigation friend or interpreter, and if they could not, should give reasons why (see *R (on the application of Alliss) v Legal Services Commission*<sup>16</sup>, *Savitsky v Ukraine*,<sup>17</sup> *Pascoe v First Secretary of State*<sup>18</sup>).
3. **Whether the proceedings are likely to entail a degree of emotional involvement incompatible with the objectivity required by advocacy in court:** advisers should consider the subject matter of the proceedings, such as whether they involve allegations of abuse, neglect or coercion, which might make it impossible for the client to act effectively (see *Airey v Ireland*<sup>19</sup>, *Martin v Legal Services Commission*<sup>20</sup>).
4. **The complexity of the law, facts and procedure:** advisers should consider, among other things, whether there will be a significant number of witnesses, whether there will be expert evidence, whether the case is before an expert tribunal and whether the court will have an inquisitorial jurisdiction or whether the client will have to contend with the adversarial system unsupported (see *Steel and Morris v United Kingdom*<sup>21</sup>).
5. **The financial implications for the litigant if he or she was unsuccessful:** advisers need to identify the sums of money at stake and demonstrate the catastrophic financial consequences of losing the case for the client (see *Steel and Morris v United Kingdom*<sup>22</sup>).

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<sup>10</sup> (2005) 41 E.H.R.R. 22.

<sup>11</sup> [2001] EWCA Civ 1574 at para.11.

<sup>12</sup> (1979-1980) 2 E.H.R.R. 305.

<sup>13</sup> (2002) 35 E.H.R.R. 31.

<sup>14</sup> (1987) 52 DR 158.

<sup>15</sup> [2007] EWHC 1786 (Admin).

<sup>16</sup> [2001] EWHC 2079.

<sup>17</sup> App. No.38773/05, judgment of 26.7.2012, para.115.

<sup>18</sup> [2007] 1 W.L.R. 885 at para.109.

<sup>19</sup> (1979-1980) 2 E.H.R.R. 305.

<sup>20</sup> [2007] EWHC 1786 (Admin).

<sup>21</sup> (2005) 41 E.H.R.R. 22.

<sup>22</sup> (2005) 41 E.H.R.R. 22.

6. **Whether provision can be made to achieve effective access to a court, without recourse to legal aid:** advisers need to consider, and refute, the efficacy of alternative options for assisting the client, such as litigation or Mackenzie friends, reasonable adjustments to the court proceedings, pro bono legal assistance or the availability of other avenues for resolving the legal problem or getting funding for a lawyer (see *Airey v Ireland*<sup>23</sup>, *Munro v United Kingdom*<sup>24</sup>).

#### *Article 8 ECHR: the right to a private and family life*

Article 8 ECHR provides “significant procedural safeguards against inappropriate interferences with the substantive rights protected by Article 8”.<sup>25</sup> While the ECtHR has not found a breach of Article 8 ECHR as a result of the refusal to grant legal aid, it has suggested that “the considerations concerning access to legal aid may be relevant when assessing the adequacy of procedural protection under Article 8 of the Convention.”<sup>26</sup> This principle is consistent with the Court’s case law under Article 6 ECHR and it is arguable that exceptional funding may have to be provided in a case in which the litigant would require representation in order to participate effectively in the procedural aspects of Article 8 ECHR.

#### *Article 14 ECHR: the prohibition of discrimination*

Article 14 ECHR prohibits discrimination on the grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. ‘Other status’ has been interpreted to include disability and sexual orientation, among other characteristics. Given the nature of the Article 6 ECHR criteria, it is likely that Article 14 ECHR will be relevant to many exceptional funding applications. Article 14 is not a standalone right: it can only be pleaded in conjunction with one of the substantive rights of the Convention (e.g. Article 6 or Article 8). For example, an argument could be made that the state is obliged to provide legal aid under Article 6 to a disabled person so as to ensure that they can access the court on the same basis as someone who is not disabled, thereby complying with Article 14.

#### When will European Union law require the provision of exceptional funding?

##### *The Charter of Fundamental Rights*

The Charter of Fundamental Rights of the European Union (“the Charter”) requires Member States and the institutions and bodies of the European Union to comply with its provisions when they are implementing EU laws.<sup>27</sup> Article 47 of the Charter provides for the right to a fair hearing. Article 47(3) states that “legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.” However, Article 52(3) of the Charter provides that the scope of Charter rights shall be the same as those in the ECHR and the ‘Explanation’ relating to Article 47 (2007/C 303/2) states that provision should be made for legal aid “in accordance with the case law of the European Court of Human Rights” (see further the decision of the Court of Justice of the European Union in *DEB v Germany*<sup>28</sup>). This suggests that Article 47 may not take litigants much further than Article 6 ECHR, although it will enable cases (for example, immigration and

<sup>23</sup> (1979-1980) 2 E.H.R.R. 305.

<sup>24</sup> (1987) 52 DR 158.

<sup>25</sup> *Claire F v Secretary of State for the Home Department, Lia-Jade F (a minor by her litigation friend the Official Solicitor)* [2004] EWHC 111 (Fam), para.157. See also *W v United Kingdom* (1987) 10 E.H.R.R. at para.63; *McMichael V United Kingdom* (1995) 20 E.H.R.R. at para.91.

<sup>26</sup> *Savitsky v Ukraine*, App. No.38773/05, judgment of 26 July 2012, para.116.

<sup>27</sup> Article 51(1) of the Charter.

<sup>28</sup> (C-279/09) [2011] 2 CMLR 21.

discretionary benefits cases) that are not deemed 'a determination of civil rights and obligations' to be considered for exceptional funding under EU law rather than under Article 6 of the European Convention on Human Rights. The factors relevant to such cases are the same as those listed under Article 6 ECHR above.

#### *Council Directive 2002/8/EC*

This Directive provides that persons involved in cross-border disputes are entitled to receive appropriate legal aid in order to ensure their effective access to justice. Article 3 of the Directive provides that legal aid may be appropriate when it guarantees: (a) pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings; and (b) legal assistance and representation in court, and exemption from, or assistance with the cost of proceedings.

The Directive was designed to ensure compliance with the requirements of the Charter and the ECHR.<sup>29</sup> This means that it offers useful guidance on what may be expected from the state so as to ensure effective access to justice, even if it does not require the provision of legal aid in many cases.

#### **The Public Law Project's exceptional funding project**

The Public Law Project (PLP) is running a project dedicated to assisting people with making exceptional funding applications and challenging refusals of funding where appropriate. The purpose of the project is to advocate for greater access to justice under the exceptional funding regime, to challenge unfair and unlawful refusals of funding and to identify and challenge operational failings in the new system.

PLP has secured specific grant funding to assist people with making exceptional funding applications. PLP has developed a network of barristers, solicitors and law students who are committed to helping with the project and increasing PLP's capacity. PLP is therefore calling for exceptional funding referrals. If PLP makes a successful application for exceptional funding **PLP will not conduct the underlying case and the client will be free to return to their referring solicitor.**

#### **How to refer a case to the Public Law Project**

If you have a client who needs assistance with making an exceptional funding application or challenging a refusal of exceptional funding, please fill out the referral form (or ask them to fill it out on their own) and attach all relevant documentation. Please return the form and documentation by post to:

The Casework Team  
The Public Law Project  
150 Caledonian Road  
London  
N1 9RD

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<sup>29</sup> See Recitals 4 and 5 of the Directive.

You can also return the referral form and relevant documentation by fax: 020 7837 7048 or by email to [exceptionalfunding@publiclawproject.org.uk](mailto:exceptionalfunding@publiclawproject.org.uk)

The Public Law Project runs a telephone advice line to answer people's queries about exceptional funding and civil legal aid more generally. The advice line is open from 10am-11am on Mondays, Tuesdays, Wednesdays and Fridays. The telephone number is **0808 165 0170** and is free for callers.