



ECF SHORT GUIDE 2

How to get legal aid Exceptional Case Funding (ECF) in Welfare Benefits cases



The Public Law Project (PLP) is a national legal charity which aims to improve access to public law remedies for those whose access to justice is restricted by poverty or some other form of disadvantage.

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How to get legal aid Exceptional Case Funding (ECF) in Social Security and Welfare Benefits cases

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How to get legal aid Exceptional Case Funding (ECF) in Social Security and Welfare Benefits cases

This guide is intended to assist welfare rights advisers and legal aid providers with a welfare benefits contract in determining where it might be appropriate to apply for Exceptional Case Funding (ECF) for your clients and to assist advisers in making successful applications for ECF.

PLP has produced a separate guide for individuals making applications without assistance which is available [here](#).



1. Introduction

Welfare benefits cases were almost entirely removed from the scope of legal aid by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), along with vast swathes of other areas of law. The only types of welfare benefits cases that remain in scope are appeals on a point of law to the Upper Tribunal, the Court of Appeal or the Supreme Court. Advocacy in the Upper Tribunal is not in scope.

In response to concerns raised in the consultation prior to LASPO, the Government included provision for funding to be made available in certain cases which would otherwise be outside the scope of legal aid: ECF. Accordingly, legal aid is available where without it, there would be a breach, or the risk of a breach, of an individual's rights under the European Convention on Human Rights (ECHR), or their rights to legal aid under EU law, under the Charter of Fundamental Rights of the European Union ("the Charter").

At the outset of the scheme it was very difficult for many people, even those with strong cases for ECF, to obtain the funding that they needed. The number of grants was very low in the first year of the scheme; approximately one per cent of applications in non-inquest cases were successful. Following the cases of *Gudanaviciene and ors v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622 and *IS (by way of his litigation friend, the Official Solicitor) v Director of Legal Aid Casework and the Lord Chancellor* [2016] EWCA Civ 464, and subsequent changes to the ECF guidance and practical improvements to the scheme, the grant rate has risen significantly, to around 55% in 2017.

ECF is potentially available in a range of welfare benefits cases, at various stages in a claim, where the applicant's particular circumstances require it. This guide is intended to help to identify those cases where making an ECF application is worthwhile and to maximise the chances of making a successful application.



2. In scope welfare benefits proceedings

Before making an application for ECF it is essential to check that the matter is not within scope of legal aid.

Section 9 LASPO states:

(1) Civil legal services are to be available to an individual under this Part if – They are civil legal service described in Part 1 of Schedule 1, and The Director [of Legal Aid Casework, i.e. the LAA] has determined that the individual qualifies for the services in accordance with this part (and has not withdrawn the determination).

The civil legal services that are funded routinely within the scope of legal aid are those set out in Schedule 1 to LASPO. It is worth looking at the provisions in Part 1 of Schedule 1 to understand what proceedings are in scope. The exceptions in Parts 2 and 3 also need to be considered (part 3 contains the advocacy exclusions).

The only remaining types of welfare benefits cases that remain in scope are those set out in Paragraphs 8 and 8A, Part 1, Schedule 1 of LASPO. Paragraph 8 provides for the availability of legal aid for:

Civil legal services provided in relation to an appeal on a point of law to the Upper Tribunal, the Court of Appeal or the Supreme Court relating to a benefit, allowance, payment, credit or pension under—

- (a) *a social security enactment,*
- (b) *the Vaccine Damage Payments Act 1979, or*
- (c) *Part 4 of the Child Maintenance and Other Payments Act 2008.*

‘Social Security Enactment’ means (paragraph 8(3)):

- (a) the Social Security Contributions and Benefits Act 1992,
- (b) the Jobseekers Act 1995,
- (c) the State Pension Credit Act 2002,
- (d) the Tax Credits Act 2002,
- (e) the Welfare Reform Act 2007,
- (f) the Welfare Reform Act 2012, or
- (g) any other enactment relating to social security.

Paragraph 8A of Part 1 makes similar provision in relation to appeals relating to Council Tax Reduction Schemes.

This means that under LASPO legal aid may be available for appeals to the Upper Tribunal and higher courts relating to, but not limited to:

- Attendance Allowance
- Carer’s Allowance
- Child Benefit
- Child Tax Credit
- Council Tax Reduction Schemes

- Disability Living Allowance
- Employment and Support Allowance
- Housing Benefit
- Income Support
- Industrial Injuries Benefit
- Jobseeker's Allowance
- Personal Independence Payment
- State Pension Credit
- Universal Credit
- Working Tax Credit

Work that legal aid will cover includes advice and assistance for advice on whether or not to submit an application for permission to appeal to the Upper Tribunal (following a refusal of permission by the First-tier Tribunal). It will also cover preparation of the case prior to a hearing.

Legal aid is **not** available for services relating to applying to the First-Tier Tribunal for permission to appeal – this work is out of scope (Reg. 2, Civil Legal Aid (Preliminary Proceedings) Regulations 2013).

Legal aid will not cover advocacy in the Upper Tribunal in social security appeals. If the Upper Tribunal convenes an oral hearing, ECF will need to be obtained in order to fund legal representation at the hearing. ECF can fund representation (i.e. an advocate) as well as for a solicitor or caseworker to attend the hearing.

Judicial review

Judicial review is still generally in scope for legal aid, and therefore where judicial review is the appropriate remedy for a client's welfare benefits matter an ECF application would not be necessary.

There are a number of situations where judicial review may provide an effective remedy in welfare benefits cases. This may be the case where there is no right of appeal against a decision, for example:

- Decisions not to exercise discretion to waive recovery of an overpayment;
- Decisions to refuse an application for a Discretionary Housing Payment;
- Refusal of permission to appeal to the Upper Tribunal, where the refusal was made by the Upper Tribunal on direct application to it. However, there is a very short time period to apply for judicial review in these cases (16 days: see CPR 54.7A);
- Refusal or failure to make interim payments pending mandatory reconsideration or appeal;
- Decisions about the content of the claimant commitment;
- Failure properly to notify work related requirements.

There may also be situations where the normal appeal route in welfare benefits cases is not suitable or effective, which may justify initiating judicial review proceedings. For example:

- Where the case involves a challenge to a broader policy;
- Where any delay in an appeal would create an immediate risk of destitution which can't be remedied by an interim or advance payment (for example in sanctioning cases or right to reside cases);
- Where lengthy appeal procedures create a risk of destitution that may not be immediate but which is likely, such as:
 - where Housing Benefit stops or is suspended (and rent arrears build up);
 - where Universal Credit stops (e.g. following adverse decision on eligibility/right to reside);
 - where the client becomes subject to benefit cap and HB/UC is reduced.



3. Exceptional Case Funding

Statutory framework

All civil legal services which are not within the scope of Schedule 1 LASPO are out of scope and may potentially be funded as an 'exceptional case'.

Section 10 of LASPO provides that:

“Civil legal services, other than services described in part 1 of schedule 1, are to be available to an individual under this part if subsection (2) or (4) is satisfied.”

Sub-section (4) is only relevant to inquests. Sub-section 10(2) states that this sub-section is satisfied where the Director has made an exceptional case determination in relation to the individual and the services, and has determined that the individual qualifies for the services in accordance with this Part and has not withdrawn either determination. **The case must satisfy the same merits, means and any other regulations made under LASPO.**

Instead of being a type of case listed in Schedule 1, the other qualifying feature is being the subject of an exceptional case determination.

Sub-section 10(3)(a) states that:

(3) For the purposes of subsection (2), 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.

In other words, an exceptional case determination is one that finds that it is necessary to make legal services available to an individual because a failure to do so would amount to a breach of their Convention rights within the meaning of the Human Rights Act 1998 or because he or she has an enforceable right to such services under EU law. In addition, sub-section 10(3)(b) states that an exceptional case determination will also be made if it is appropriate to do so in the particular circumstances of the individual case in order to avoid a *risk* of a breach of the ECHR or EU law.

When does a right to legal aid arise under the ECHR/EU law?

Unlike criminal legal aid, there is no express right to legal aid in civil proceedings in the ECHR. Since the decision in *Airey v Ireland* (1979) 2 EHRR 305, it has been accepted that some Convention rights may have an associated right to legal aid in some civil cases in order for the rights to be practical and effective.

A Convention right to civil legal aid is most likely to arise under Article 6 ECHR, the right to a fair hearing, and Article 8 ECHR, the right to respect for private and family life. Article 6 is only engaged where there is a civil right and/or obligation to be determined.

Welfare benefits cases can engage Article 6 ECHR, although this may depend on the stage that a case has reached. In welfare benefits cases, a right to civil legal aid under Article 8 ECHR will often also arise, as might a right under Article 1 of the First Protocol (right to peaceful enjoyment of possessions).

The relevant provision of EU law is Article 47 of the Charter of Fundamental Rights of the European Union. Article 47 states that *“Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”*. This is engaged when the matter for which funding is required falls within the scope of EU law. It will apply in welfare benefits cases which concern EU Treaty rights, for example where the claimant is an EU national or the family member of an EU national and there is a dispute about right to reside or eligibility to claim, or a UK national relying on EU law rights to claim welfare benefits.

The case of Gudanaviciene

The Lord Chancellor’s published Exceptional Funding Guidance (“the Guidance”) sets out the tests applied by the LAA when determining whether a grant of ECF is required. The approach originally taken in the Guidance was challenged in *Gudanaviciene and Others v Director of Legal Aid Casework and Anor* [2014] EWCA Civ 1622 and it was subsequently amended to take account of that judgment.

The Court of Appeal judgment in *Gudanaviciene* is now a fairly definitive guide to the law concerning when the Convention and/or Charter require legal aid to be made available. The Court referred to a significant body of European and domestic case law in its judgment, but it is unlikely that any of this would now be required to make an application for ECF. The pertinent principles are largely summarised in the judgment, and are set out below.

The critical question under Article 6(1) ECHR is whether an unrepresented litigant is able to present his case effectively and without obvious unfairness (paragraph 56). The test is essentially the same for Article 8 and Article 47 as it is for Article 6, although the Article 8 test is broader than the Article 6(1) test in that it does not require a hearing before a court or tribunal, but only involvement in the decision-making process.

An effective right is one which is *“practical and effective, not theoretical and illusory in relation to the right of access to the courts”* and *“the question is whether the applicant’s appearance before the court or tribunal in question without the assistance of a lawyer was effective, in the sense of whether he or she was able to present the case satisfactorily”* (paragraph 46).

In relation to fairness, the court said “it is relevant whether the proceedings taken as a whole were fair”, “the importance of the appearance of fairness is also relevant: simply because an applicant can struggle through ‘in the teeth of all the difficulties’ does not necessarily mean that the procedure was fair” and “equality of arms must be guaranteed to the extent that each side is afforded a reasonable opportunity to present his or her case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent” (paragraph 46).

Factors relevant to whether ECF is required

Assessing whether Convention or EU law rights require funding is effectively a three-way balancing act. The factors which need to be addressed are:

1. The legal, factual and procedural complexity of the matter;
2. The importance of what is at stake; and
3. The ability of the applicant to represent themselves without legal assistance.

A matter of very great importance to a client (e.g. risk of homelessness if a decision is not overturned) might in some cases require funding despite the fact that the matter is relatively straightforward or the client is relatively capable. Likewise, a really incapable client might require assistance with a relatively trivial or straightforward matter. It is very much a case sensitive exercise.

Applying the ECF criteria in welfare benefits cases (other than EEA right to reside cases)

The first consideration is whether the case engages a relevant rights – Articles 6 or 8 of the Convention, or Article 47 of the Charter. There are a number of authorities as to whether welfare benefits appeals engage Article 6. This depends on whether there is a “civil right” to the benefit in question or whether it is merely discretionary. The European Court of Human Rights has held that Article 6 can be engaged by proceedings concerning social-security benefits (*Feldbrugge v the Netherlands* (1991) 13 EHRR 571), even on a non-contributory basis (*Salesi v Italy* (1998) 26 EHRR 187), and also proceedings concerning compulsory social-security contributions (*Schouten and Meldrum v the Netherlands* [1994] ECHR 44).

The current version of the Lord Chancellor’s Guidance on Exceptional Case Funding contains a short section on welfare benefits. An extract is set out below:

63. *Where an individual is claiming a discretionary benefit, rather than a legal right, a decision on the claim will not involve a determination of the individual's civil rights and obligations. Accordingly, cases concerning the award of services or benefits in kind which is not an individual right of which the applicant can consider themselves the holder, but is dependent upon a series of evaluative judgments by the provider as to whether the statutory criteria are satisfied and how the need for it ought to be met, will not involve a determination of the individual's civil rights and obligations.*

64. *In cases relating to non-discretionary benefits, Article 6 will only be engaged at the point where there is a determination of a dispute or 'contestation' in relation to the relevant welfare benefit. It will not therefore arise prior to that point, for example at the point of an application being made for these benefits.*

The significance of the first paragraph should not be overstated. The case cited in the Guidance as authority for this proposition is *R (A) v LB Croydon* [2009] UKSC 8, which was a case about determination of whether a child was “in need” for the purposes of Part III of the Children Act 1989, and not about a welfare benefit as such. The question of whether a child is “in need” is truly an evaluative question and even if answered positively, a local authority will often have a broad discretion as to how to meet such a need. Some benefits require decision-makers to make evaluative judgements when applying criteria for entitlement to individual applications, but this is not synonymous with requiring decision-makers to exercise discretion. If the decision maker judges that the criteria are met, the individual will be entitled to the benefit. It may be worth making this point clear in an ECF application for such benefits.

For example, for Employment and Support Allowance, a series of evaluative judgements is made in order to determine whether the claimant scores sufficient points to be entitled to the benefit. If the claimant is found to score enough points, then the decision-maker has no discretion as to whether to allow the application: benefit must be awarded. So in that case, Article 6 can be said to be engaged, because an applicant can be said to have a civil right to a benefit for which he or she meets the criteria.

By way of comparison, Discretionary Housing Payments are subject to various criteria, and local authorities have policies and guidance as to how to treat each application. But even if an applicant meets all of the criteria, the decision-maker still has a discretion whether or not to award the DHP. For DHPs, therefore, Article 6 would not be engaged, because no applicant can be said to have a civil right to a DHP.

As explained above, Article 47 of the Charter will be engaged in any case which concerns EU law rights.

However, it's not enough that the appeal engages Articles 6 or 8, or Article 47 of the Charter. In order for ECF to be available, legal aid has to be necessary to prevent a breach of those rights, applying the guidance provided by the Court of Appeal in *Gudanaviciene* (as set out above) and considering the three factors set out above: the importance of the matter to the individual, the complexity of the proceedings, and the ability of the applicant to represent themselves without legal assistance.

Complexity

Legal, procedural and factual complexity are all relevant to whether a grant of ECF is appropriate. An individual without legal training may find it harder to effectively present relevant evidence, to make legal submissions during a hearing, or be able to obtain medical evidence. In order to make a successful ECF application it is necessary to spell out all the procedural and other complexities to the LAA. Clients may face difficulties in demonstrating the *legal* complexity of welfare benefits appeals (particularly those that do not involve EU law), but this does not mean that their case is not complex. For example there may be evidence that applicants need to obtain, or submissions that need to be made to the Tribunal.

The fact that you don't need rights of audience to represent someone in the First-Tier Tribunal or the Upper Tribunal for social security cases, and that the Tribunals are used to dealing with unrepresented appellants, is a potential hurdle that ECF applicants will have to overcome in order to show that ECF is necessary to prevent a breach of their rights.

A point to bear in mind when dealing with this issue is the fact that one of the claimants in *Gudanaviciene* had been trying to obtain ECF for an immigration tribunal, which is also used to dealing with unrepresented appellants. In *Gudanaviciene*, the Court held that in order to ensure that all of the relevant evidence was placed before the tribunal, the appellant will have to be able to identify the key legal question and tests, produce evidence and make submissions (at paragraph 90). While the tribunal is able to, and does, assist unrepresented claimants it is only able to do so on the basis of the evidence that is placed before it (at paragraph 91).

A claimant will need to have an understanding of what evidence is required in order to meet the legal tests, such as work history, medical evidence, or documents relating to their family. Decision letters and mandatory reconsideration letters do not often make clear what evidence is required. The need for the claimant to understand what the issues are before they can gather and present evidence to the mandatory reconsideration decision-maker or Tribunal on appeal may provide a strong foundation for obtaining ECF. In addition, funding may be required to meet disbursements in order to gather evidence to support the case. This could include, for example, covering the fees for subject access requests to HMRC, the DWP or local authorities, and paying any fees charged by GPs for medical records. Other documents such as bank statements, old payslips, letters from previous employers, and letters from children's schools may also incur a charge.

It is worth bearing in mind that the First-Tier Tribunal, if a case gets that far, will take a claimant's oral evidence into account (and will also consider written witness statements etc.). So if there is no corroborating documentary evidence, and the adviser is pushed for time or capacity, then it may be more sensible to apply for ECF once the MR letter has been received but before an appeal has been lodged with the First-Tier Tribunal. It is not unheard of for a First-Tier Tribunal to allow an appeal based solely on the oral evidence of a credible appellant, which means that the estimation of a client's merits requires re-assessing at each stage of the appeal process. A funded representative could also help apply for adjournments in order to gather the evidence needed.

Importance of the issues at stake

Demonstrating the importance of the issue in welfare benefits cases may be more straightforward, particularly for means-tested benefits which are supposed to provide a safety net against destitution, and for disability benefits which are supposed to facilitate equal participation of disabled people.

Ability of the applicant to represent themselves effectively

Factors relevant to an applicant's ability to present their case effectively will include their physical and mental health, their level of education, and their ability to communicate in English. However, an assessment of an applicant's ability to engage in the proceedings should not be limited to these obvious barriers. In the case of 'B', a claimant in *Gudanaviciene*, the Court said "*B was wholly unable to represent herself or other family members. It was not simply that she was unable to speak English but that ..[s]he did not have the first clue*". It is not necessary for an applicant for ECF to be prevented from engaging with their case by a language barrier or lack of capacity to litigate; it may simply be that they do not have the ability to understand or carry out the steps they need to take in their case.

Other legal aid criteria

Even after considering those factors, evidence will also need to be submitted in order to meet the merits criteria. The Legal Aid Agency will need to be satisfied that the case has a strong enough chance of success to justify public funding, and providers will be expected to review the merits of the case throughout its life.

There are two kinds of legal aid which are relevant: Legal Help and Legal Representation. In welfare benefits cases Legal Help can cover legal advice and assistance with, for example, a request for mandatory reconsideration or lodging and preparing an appeal.

The full merits test for Legal Help is set out at Reg. 32 of the Civil Legal Aid (Merits Criteria) Regulations 2013:

An individual may qualify for legal help only if the Director is satisfied that the following criteria are met –

(a) it is reasonable for the individual to be provided with legal help, having regard to any potential sources of funding for the individual other than under Part 1 of the Act; and

(b) there is likely to be sufficient benefit to the individual, having regard to all the circumstances of the case, including the circumstances of the individual, to justify the cost of provision of legal help.

Where advocacy in the Tribunal is needed then Legal Representation will be required. The merits criteria for Legal Representation are more detailed and are set out in Regulations 39 and 41-44 of the Civil Legal Aid (Merits Criteria) Regulations 2013. The most significant for purposes of obtaining ECF for welfare benefits appeals is a requirement in Reg 42 that the case has at least a 50% prospect of success, unless it is of significant wider public interest or of overwhelming importance to the individual, in which case it is enough that the case has either:

- a “marginal” prospect of success (which means 45-49%) or
- “borderline” prospects, which means that “that the case is not “unclear” but that it is not possible, by reason of disputed law, fact or expert evidence, to— (i) decide that the chance of obtaining a successful outcome is 50% or more; or (ii) classify the prospects as marginal or poor”.

Despite the high success rate for welfare benefits appeals in the Tribunals, and especially ESA and PIP cases, this may not be straightforward, particularly for claims that involve making a series of evaluative judgements or in cases where there is little or no corroborating documentary evidence.

When to apply?

In welfare benefits cases, there are two potential stages of a claim where ECF could be applied for: at the point of requesting a mandatory reconsideration, and for tribunal appeals (both in the FTT and for advocacy in the UT). As above, it is clear that Article 6 is engaged at the tribunal appeal stage. It is less clear whether Article 6 is engaged at the reconsideration stage.

Cases in which an applicant must exhaust a preliminary administrative remedy under national law before having recourse to a court or tribunal have been held to engage Article 6 (e.g. *Konig v Germany* (No. 1) (A/27) (1978) 2 EHRR 170 PC), particularly in respect of disputes as to the 'reasonable time' element of Article 6. This refers to the obligations of governments to organise their judicial systems in such a way that their courts are able to guarantee everyone's right to a final decision on disputes concerning civil rights and obligations within a reasonable time (see, e.g., *Comingersoll S.A. v Portugal* [2000] 31 EHRR 31; *Lupeni Greek Catholic Parish and Others v Romania* [2016] ECHR 1061; *Surmeli v Germany* (2007) 44 EHRR 22).

In other words, a matter need not have reached the stage of court proceedings before Article 6 is engaged. So, in theory, it may be possible to obtain ECF for help with a mandatory reconsideration request. There are arguments for and against this idea. The key question is whether civil rights and obligations are being determined at MR stage.

A helpful related case on Article 6 in the context of welfare benefits is *R(IS)15/04* (CIS/4/2003). In that case, the claimant appealed against the refusal of the SSWP to revise his award for Income Support on grounds of official error. A three-judge panel of the Upper Tribunal held that the provisions permitting decisions to be revised should be regarded as part of the process whereby a claimant's entitlement to social security benefits was determined and therefore within the scope of Article 6, even in circumstances in which the claimant had the opportunity of an appeal in satisfaction of his Article 6 rights in relation to the original decision [45]. A decision by a decision-maker was not one of a merely administrative nature [48].

Considering that the ECF applications can be time-consuming, advisers should exercise best judgement in deciding when to make an application. It may be felt that in complicated cases an application for ECF at reconsideration stage is more appropriate. In cases where the client is particularly vulnerable but where the matter is relatively simple, it may be a better use of an adviser's time to apply at the tribunal stage.

It is worth recalling that appeals to the Upper Tribunal are on points of law, as opposed to appeals heard in the First-Tier which involve making finds of fact. So if funding is needed for gathering evidence this will only really be applicable for First-Tier Tribunal hearings.

ECF for EEA right to reside/eligibility cases

ECF might be easier to obtain in cases involving EEA nationals and their family members because, as explained above, these cases are in scope of EU law and therefore the EU Charter of Fundamental Rights ('CFR') applies. Article 47 CFR provides that: "... Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice". There is no need to show that the case involves the determination of civil rights or obligations (as for Article 6). In *Gudanaviciene*, the Court of Appeal said that the approach under Article 47 should otherwise be broadly the same as that in Article 6 cases.

Because Article 47 doesn't require a "determination", ECF could cover help with drafting and sending a request for a mandatory reconsideration as well as appeals to the First-Tier Tribunal in cases involving EEA nationals and right to reside/eligibility and appeals made to local benefits services for Housing Benefit cases.

It is likely to be easier to show that a case is legally complex in right to reside/eligibility cases, as making representations on these issues involves applying EU law (such as the Citizens Directive) and understanding rulings from the Court of Justice of the EU. It is not sufficient to rely only on domestic law in these cases. So if a claimant is wrongly deemed not to have, for example, a permanent right to reside, and is consequently denied a benefit to which they should be entitled, that would engage their EU law rights (because permanent residence status derives from EU law). If legal aid is necessary for them to be able to meaningfully engage with the MR process, then ECF may be required. For means-tested benefits, demonstrating the importance of the case and the complexity of the issues is unlikely to be problematic.



4. Reported cases regarding ECF, legal aid and welfare benefits

There have been a few instances where the Upper Tribunal has expressed views about legal aid in welfare benefits cases. They all pre-date *Gudanaviciene* and the current Guidance, but provide useful illustrations of the value that the Tribunal places on legal representation and of the benefits in identifying early on when it might be appropriate to apply for ECF.

In *JC v Secretary of State for Work and Pensions* [2014] UKUT 352 (AAC), the Upper Tribunal (a three-judge panel) expressed their “*disappointment that [the claimant] was not granted legal aid*” and recorded that “*if he had not been represented pro bono he could not have adequately advanced the legal argument put on his behalf by counsel.*”

This was followed by the case of *Secretary of State for Work and Pensions v PD (ESA) (Employment and support allowance : other)* [2014] UKUT 549 (AAC), which was reported by [Garden Court North Chambers](#) as being the first welfare benefits case to have been granted ECF under s.10 LASPO. It was successfully argued that the refusal of funding would breach PD’s Art 6 ECHR rights, particularly in a case complex enough to warrant a three-judge panel of the Upper Tribunal.

In the earlier case of *HB v Secretary of State for Work and Pensions (IS)* [2013] UKUT 433 (AAC), the Upper Tribunal expressed their concerns about the delay in convening the hearing because of difficulties the appellant had in securing public funding for legal representation under the exceptional cases provisions. In HB, counsel for the appellants had to prepare the case and represent without knowing whether they would be recompensed for their work.



5. Practicalities – how to apply for ECF

Knowing when to make an application

While the rate of grants in welfare benefits cases remains low, it is no longer almost impossible to get ECF, where there are genuine reasons for doing so. If you consider that your client needs ECF in order to have a fair hearing (including, possibly, at reconsideration stage – see above), making an ECF application may be worthwhile and enable your client to get legal advice/representation in cases where they would otherwise not be able to do so. Consider your client’s ability to understand the issues in the case, gather evidence and prepare for the hearing, as well as representing themselves during the hearing.

The fact that some work needs to be done urgently should not be a complete deterrent – urgency is dealt with below. Provisions for backdated funding are also discussed.

If you can see reasons why the individual would find it genuinely difficult to pursue the case themselves, then an ECF application may be worthwhile – bearing in mind that a refusal of ECF may be challengeable by way of judicial review.

In any event, where you think an ECF application may be worthwhile, it is likely to be a good idea to make it sooner rather than later. Because of the problems with the urgency procedure, it is not a good idea to delay making an application until it becomes urgent.

If you are unsure about whether your client might qualify for ECF, one option is to apply for “ECF for ECF”: see below.

Forms

In addition to the normal legal aid forms (or CCMS for legal representation), providers should get clients to sign form CIV ECF1 for any ECF application. You can provide your arguments for why ECF should be granted either in the form itself or in separate 'grounds' or 'statement of case'.

Urgency

At the top of the first page, there is a box marked 'Urgent Application'. Tick this whenever you want the application to be considered in less than 20 working days. There is space on page 6 of the form to provide information about urgency. Scenarios that require urgency include where:

- There is an imminent date for an injunction or other emergency proceedings;
- A hearing in existing proceedings;
- A limitation period or appeal deadline that is about to expire; and
- A delay would cause risk to the life, liberty or physical safety of the applicant.

In practice, only a limitation deadline or imminent hearing is likely to be accepted by the LAA as requiring an urgent decision. If the hearing is not imminent, but significant work is required in order to prepare for the hearing, then it will be necessary to set out the steps that need to be taken, and to explain why this means that the application is urgent.

Unlike in scope legal aid applications, there are no specific regulations allowing the LAA to make grants of ECF on an urgent basis. The LAA's own time frames are that it will decide non-urgent applications within 20 working days and urgent applications within five working days. The LAA first considers whether it accepts that the application is urgent and if it accepts that it is, then it will prioritise it over non-urgent work.

However, unlike in scope legal aid applications, the LAA may backdate funding:

“A determination under section 10 of the Act may specify that the determination is to be treated as having effect from a date earlier than the date of the determination.” (Procedure Regulations, reg. 68(1))

The LAA's policy, as stated in the Provider Pack is that:

“Controlled Work – Provided the application is submitted within two months of the date when the client signs the controlled work form we will backdate any successful exceptional case funding application to the date the client signs the legal help form (i.e. CW1 or CW2 form)”

“Legal Representation – Where the application is submitted within 2 months from the date recorded in the CIVAPP1 or CIVAPP3 as the date of the client's first attendance/instruction on the matter at the firm making the application we will backdate the certificate to this date ... Where the date of first attendance is recoded as more than 2 months before the application for funding (for example a client who has been helped by the provider in the case for a period before making the application) then we would generally expect to backdate the certificate to the date of receipt of a successful application.”

The ECF Provider Pack states that in cases where the applicant has completed the 'Urgent Case Details' section of the form, the LAA will consider the information provided, and if it agrees that the case is urgent, it will be dealt with within five working days.

Applicants are not notified if the LAA declines to treat the application as urgent. It is therefore worth chasing urgent applications with the ECF team, in order to determine the time frame in which the application will be dealt with. If the LAA refuses to treat an application as urgent or fails to deal with it with the degree of urgency required, the remedy is an application for judicial review (for which in-scope legal aid may be available).

“ECF for ECF”

There may be cases in which you cannot determine whether or not your client meets the ECF criteria without further investigative work, for example, where it is not yet clear what steps your client needs to take, or how complex their case is.

Where it is necessary to undertake investigative work to determine whether funding is required, Legal Help is available in order to carry out that work. Page three of Form ECF1 allows you to make an application for ECF Legal Help in order to investigate the merits of making a full ECF application. You should set out what work is required in order to determine whether ECF is required; for example, it may be necessary to take instructions from the client, or to obtain further papers.

It is possible to claim disbursements under a Legal Help matter granted for the purpose of investigating an ECF application. For example, the guidance in the Provider Pack states that funding for counsel’s advice on the merits of making an ECF application may be appropriate. That advice could then be attached to the back of an application for full ECF. It is also appropriate to claim for interpreter’s fees, but funding for expert reports including medical reports is less likely to be appropriate at this stage.

It is important to note that the Costs Assessment Guidance states when incurring disbursements for investigatory work under ECF, the provider must be able to show that the disbursement was necessary for the purpose of investigating the possibility of making a full application for ECF, rather than for use in the proceedings for which ECF is ultimately being sought. The relevant section of the Costs Assessment Guidance is at 3.51 – 3.54.

Assessment of means

The same means forms and evidence are required for an ECF application as for an ‘in-scope’ application.

Other Evidence

As with all legal aid applications, some evidence of the client's situation and relevant decisions/correspondence will be necessary. You will need to supply key documents, e.g. substantive correspondence from the DWP or HMRC, any claim or appeal forms.

It is also important to consider whether you have in your possession, or can readily obtain, any evidence relevant to why your client's case is exceptional. This may be particularly relevant where the client has a medical condition which would affect their ability to present their case.

What information to include

The LAA are likely to need some kind of account of the basics of the case. This does not need to be particularly long, but to give a concise account of the relevant background, and make clear what the proposed action is.

It may be that you cannot provide a clear account of the action to be taken because you have not been able to take sufficient instructions or obtain relevant information. In this case, you need to make clear what points you wish to advise upon or investigate further. You could ask the LAA to grant 'ECF for ECF' as an alternative to granting full ECF, if they are not satisfied on the information that you are able to provide that full ECF should be granted.

Absence of Evidence

When there are restrictions on your ability to take instructions (e.g. because doing so would incur travel costs for a client in custody, or interpreter's fees) then that should be made clear. You should obviously state what you know – but the function of ECF is to provide funding for the case. The LAA should not demand extensive information which is, for good reasons, beyond your power to obtain without funding.

If you have genuine doubts about your client's capacity to instruct you (e.g. from taking instructions, or because the client was assessed as lacking capacity in relation to another matter), then you should make that clear, even if you do not have evidence that he or she lacks capacity in relation to your case. Many professionals will charge to make such an assessment. As such, the fact that you have genuine doubts as to a person's capacity should be enough to present to the LAA a prima facie case for ECF to be granted (subject to means, merits and any other relevant considerations).

The LAA have, in the past, asked for extensive documentation and information. This is now less common, but if such documentation or further instructions are difficult to obtain (or would incur a charge which cannot be met) then the LAA need to be informed of this and why the documents or information are unavailable.

Arguments or Evidence as to Complexity

In some cases, explaining how complicated a matter is can be a significant task in itself, requiring digestion of case law, statute and close analysis of the client's circumstances. It is important to bear in mind that the LAA should not demand of you more than is reasonable. You do not have to do all the work on the case and then get funding; funding should be provided for you to do the case.

For instance, where a case raises (or appears to raise) a complex legal issue which will take time to research and analyse, you are not obliged to 'bottom out' the issue fully before applying for funding. The point of the funding is to enable you to be paid for the time this takes. You do not need to present a complete case to the LAA before they make a decision.



6. What to do if your client is refused ECF

Applicants can apply to the LAA for an internal review of a refusal to grant ECF. The internal review should be made on form APP9E, which should be provided with any refusal. A request for internal review must be made within 14 days of the refusal. The LAA aims to process applications for internal review within 10 working days.

There is no further right of appeal or review process. A refusal to grant ECF on internal review can only be challenged by judicial review. Judicial review is in scope for legal aid, and you may be able to refer the case to a firm holding a public law contract with the Legal Aid Agency for advice on the merits of challenging an ECF refusal.