



PLP RESEARCH BRIEFING PAPER

Exceptional Case Funding

Katy Watts



The Public Law Project (PLP) is an independent national legal charity. Our mission is to improve public decision making and facilitate access to justice. We work through a combination of research and policy work, training and conferences, and providing second-tier support and legal casework including public interest litigation.

Our strategic objectives are to:

- Uphold the Rule of Law
- Ensure fair systems
- Improve access to justice

www.publiclawproject.org.uk

Exceptional Case Funding

Katy Watts

Background

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) limited the availability of civil legal aid, removing large areas of law from within scope of legal aid. In response to concerns about LASPO, the government included a provision for funding to be made available in certain cases, which would otherwise be outside of the scope of legal aid: exceptional case funding (ECF). Jonathan Djanogly MP, one of the ministers proposing the bill, stated:

The exceptional funding scheme will ensure that legal aid will be available where required—those cases in which people genuinely could not manage by themselves, and in which a failure to provide legal aid would be likely to breach an individual's right to legal aid under the Human Rights Act 1998 or EU law. (Commons Committee, 8th sitting, 6 September 2011, Column 349.)

PLP's Legal Aid Support Project

In response to LASPO, PLP developed a project dedicated to assisting individuals, lawyers, caseworkers and non-governmental organisations with making applications for ECF. The aim of the project was to promote access to ECF for individuals who would have been unable to represent themselves without public funding.

Since the project ended in March 2017, we have continued to promote the use of ECF by speaking at relevant events, writing articles, and providing training on accessing ECF to legal aid providers and not for profit organisations. We continue to provide information about ECF on our website, and have published guides intended to assist individuals in making applications themselves,

and [guides to accessing ECF in family and welfare benefits cases](#). We will shortly be publishing further two guides to obtaining ECF in immigration and housing cases.

Gudanaviciene and Ors v Director of Legal Aid Casework and the Lord Chancellor and I.S. v Director of Legal Aid Casework and the Lord Chancellor

Through the exceptional funding project, PLP obtained a unique insight into the operation of the ECF scheme in its first years; we assisted 25% of all applicants who were granted ECF between 1 April 2013 and 31 March 2015. In the first year, fewer than 2% of all non-inquest applications were granted,¹ and we soon identified real problems with the scheme. The process of applying was an onerous one: the form was lengthy and required detailed answers to a range of questions derived from case law on Article 6 ECHR;² there was no procedure for urgent cases; and in PLP's experience the Legal Aid Agency (LAA) required a large amount of evidence to support factual assertions in an application. Solicitors were reluctant to make lengthy and time-consuming applications, for which they would not be remunerated if the application was not granted, given the poor chances of success and for applicants in person the scheme was almost impossible to navigate. The Lord Chancellor's Guidance set the test for getting funding extremely high and stated that it did not consider that there was an obligation to provide funding in immigration proceedings either under Article 6 or in order to meet the procedural requirements of Article 8 ECHR.³

PLP acted for the Claimant I.S. in two cases which arose out of the problems with the ECF scheme: *Gudanaviciene and Ors v Director of*

Legal Aid Casework and the Lord Chancellor [2014] EWCA Civ 1622, and *I.S. v Director of Legal Aid Casework and the Lord Chancellor* [2015] EWHC 1965 (Admin) and [2016] EWCA Civ 464.

In *Gudanaviciene and Ors v Director of Legal Aid Casework and the Lord Chancellor*, the Claimants challenged the lawfulness of the Government's interpretation of when LASPO would require a grant of ECF, and the lawfulness of the ECF Guidance used by LAA caseworkers when deciding ECF applications. The Claimants succeeded in both the High Court and Court of Appeal, with the Court of Appeal confirming that the need for Convention rights to be "practical and effective" meant that a right to funding could arise under Article 8 ECHR as well as under Article 6, and that ECF would be required where it was necessary to enable an individual "to present their case effectively and without obvious unfairness",⁴ a lower threshold than the one which had been set out in the Guidance.

In the case of *I.S. v Director of Legal Aid Casework and the Lord Chancellor*, the Court considered the practical operation of the ECF scheme. The case highlighted the barriers to accessing ECF faced by applicants, including: the complexity of the forms the LAA required to be provided with an application; the lack of assistance available for applicants who did not have a legal aid lawyer assisting them; the lack of an emergency procedure and difficulties in obtaining funding urgently; the time-consuming nature of the ECF application process; the need in many cases to engage in judicial review pre-action correspondence before ECF would be granted; the lack of funding for providers to make applications and low rates of pay, particularly for controlled work, if funding is granted, and providers' consequent unwillingness to make ECF

applications, especially for people who were not already their clients.

The claim was initially successful in the High Court but the Government appealed and, in a judgment handed down on 20 May 2016, the Court of Appeal allowed the appeal. The lead judgment was given by Laws LJ, who, in finding that the scheme was "not inherently or systemically unfair" (and therefore that the high legal threshold for a finding of systemic unfairness was not met) observed that "it is heavily dependent on the participation of providers, given the difficulties clearly faced by lay applicants and the absolute need of assistance for those with disabilities... Moreover, the website and helpline are, I think, of significant material assistance to potential applicants."⁵ He further observed that "there have plainly been many difficulties, and the complexity of the ECF form has been common to many of them."⁶ Whilst Laws and Burnett LJ found that the ECF scheme was not operating unlawfully, Briggs LJ disagreed, finding that it was "the combination of those two features, namely an application process which is inaccessible to most [Litigants in Person] and the absence of an economic business model sufficient to encourage lawyers to apply on their behalf, which makes the ECF scheme inherently defective and therefore unfair."⁷

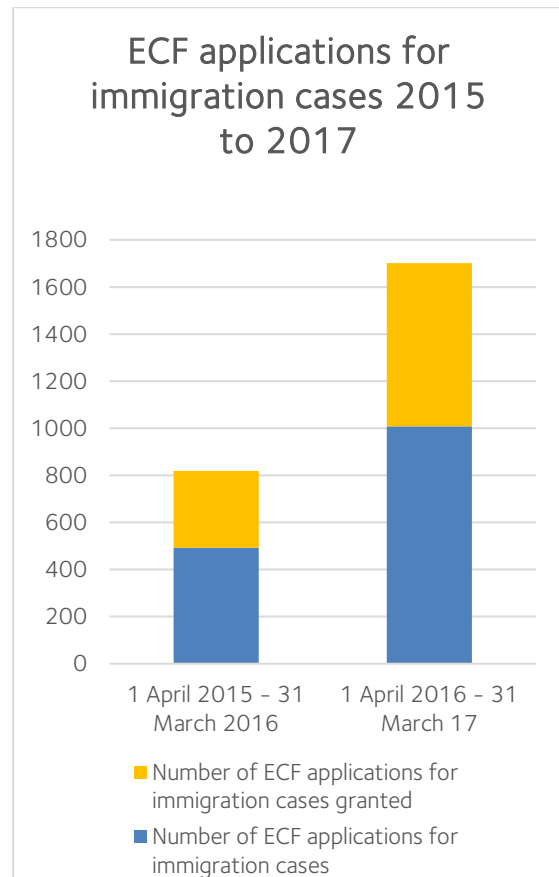
Accessing ECF post-*Gudanaviciene* and *I.S.*

In response to the claims in *Gudanaviciene* and *I.S.*, the government made a number of changes to the ECF scheme. Revised ECF Guidance was published on 9 June 2015, which incorporated the Court of Appeal's comments in *Gudanaviciene* on the principles applicable to when an ECF determination should be made. In particular, the reference in the Guidance to a threshold for granting ECF was amended from asking whether withholding legal aid would make "the

assertion of the claim practically impossible” to asking “whether the withholding of legal aid would mean that the applicant is unable to present his case effectively and without obvious unfairness”. It also acknowledged that the procedural obligations imposed by Article 8 ECHR could require the provision of legal aid for immigration proceedings and applications.

In November 2015, following the High Court’s judgment in *I.S.*, a new, shorter, application form was introduced, which also allows for an application for funding to investigate whether a full ECF application can be made. In the course of the *I.S.* case, the guidance on urgency in the Provider Pack was amended to state that “We will consider the information that you have provided including information as to how the urgent situation has arisen and why exceptional funding is needed to deal with the emergency situation and if we agree, then we will deal with your case ahead of on urgent applications and within 5 working days.”

According to the LAA’s published statistics, since the High Court’s judgment in *I.S.*, there has been an increase in the number of people applying for ECF in general, and for immigration claims in particular. LAA statistics tables published on 29 March 2018 show that between the beginning of April 2015 and the end of March 2016, there were 493 applications for ECF for immigration cases, of which 326 were granted; in the same period 2016/2017 there were 1,008 applications of which 693 (71%) were granted. Around 80% of these applications were made by legal aid providers, with the remainder being made either by individuals, or with the assistance of charities or *pro bono* lawyers who help individuals to navigate the application process. In the first three quarters of 2017/18, there were 1,883 non-inquest applications, 52% of which were granted.



However, these figures are still well below the number of applications for ECF that was anticipated pre-LASPO. In advance of LASPO, the Government’s best estimate of the annual number of ECF applications for non-inquest ECF was 6,500 with further applications anticipated for legal help.⁸

Ongoing difficulties with accessing ECF

The significant rise in ECF applications (and grants of ECF) since *Gudanaviciene* and *I.S.* is to be welcomed: each grant represents an individual whose human rights would have been breached without legal aid. However, the increase both in application numbers and in grants has largely been driven by immigration cases brought following the *Gudanaviciene* decision (81% of non-inquest ECF applications in 2016/17 were in immigration matters). In PLP’s experience, many of the issues identified in *I.S.* continue to act as barriers to people accessing ECF.

(1) The lack of information and assistance available

In *I.S.*, the Court of Appeal considered the availability of information on the LAA website and helpline to be “of significant material assistance to potential applicants”. However, in PLP’s view:

- The relevant information now available on the website is presented in a way which is likely to lead many applicants to conclude that they cannot get legal aid before they reach the information about how to apply for ECF;
- It is difficult to identify the correct application forms and the links to download those forms are not immediately obvious; and
- There is no readily available information on the ECF section of the website about the “means” and “merits” criteria, which an applicant for ECF must also meet, making it difficult for such a person to know what information to provide to the LAA in support of an application for ECF.

Another way of obtaining information about ECF is to contact the LAA by telephone or email. From the outset of the scheme until 31 March 2017, there was a direct telephone line to the ECF team, which applicants and providers could call for advice. This was the “helpline” to which the Court of Appeal referred. There was also a dedicated ECF team email address. However, since February 2017 the direct telephone line has been merged with the main Legal Aid Agency customer service number, 0300 200 2020, and the email address has also been merged into one email for exceptional and complex cases: ContactECC@legalaid.gsi.gov.uk.

It is PLP’s experience that call handlers on the customer service line are used to dealing with enquiries from legal aid providers, rather than direct applicants, and that they are not always aware of the availability of ECF. Further, it is not possible to speak to a member of the ECF team: call handlers advise that they cannot transfer call to that team. In addition, it appears, based on PLP’s experience and information provided to us by the organisations we work with, that emails sent to the merged email address frequently do not reach the ECF team until at least one working day after they are sent.

(2) Complexity of the forms

The LAA’s ECF website, under “How to apply – for the public,” states that:

“You can apply directly to the Exceptional Case Funding team at the Legal Aid Agency. You do not have to name a solicitor in the application...The forms are designed to help you provide the right information in your legal aid application, but you don’t have to use them.”

However, in practice, all applicants are expected to complete form ECF1 as well as the relevant ‘means’ and ‘merits’ forms for the type of funding that they need. Applicants who apply in another format will be asked by the Legal Aid Agency to complete the relevant forms before their application will be considered. In 2016/17, 44 of the 278 ECF applications made by individual applicants were rejected for being incomplete, and 22 were refused on financial grounds.

The first form that an applicant for ECF will have to complete is the ECF1 form. It is available to download from the LAA’s website.⁹ Despite the ECF1 form being shortened following *I.S.*, it remains primarily aimed at legal aid providers. The language used in the form ECF1 is unlikely to be familiar to

direct applicants or to those assisting direct applicants if they are not legal aid providers. For example, on page 2 of the form under the heading 'Type of case', the form states:

"Complete this section if either:

- 1. You are applying for Controlled Work services.*
- 2. You have not completed type of case details on page 5 of CIVAPP1 or page 3 of CIVAPP3 or*
- 3. The type of case is not listed on CIVAPP1 or CIVAPP3.*

What category of law/contract category is relevant to the case?"

The language used in the form gives the impression that it is intended to be filled out by a legal aid provider and, in PLP's experience, it is off-putting, not only to direct applicants themselves, but also to third parties, such as NGOs, who are trying to help direct applicants access ECF.

In addition to form ECF1, applicants who need legal aid in order to make an immigration application would need to complete form CW1, and for advice and representation in the First Tier Tribunal or Upper Tribunal, would need to complete form CW2. Applicants who require legal aid for family proceedings would need to complete form CIV APP3 and either form CIV MEANS1 or CIV MEANS2, depending on the source of their income. None of these forms are designed for completion by a person who is not familiar with the legal aid scheme. They are all designed to be completed by legal aid providers who have detailed knowledge of the legal aid contract and relevant regulations.

(3) The procedure for urgent cases

Even if an individual is able to complete the correct forms and provide the required

information, they may not be granted ECF sufficiently quickly. The Provider Pack¹⁰ and the LAA website¹¹ state that, if the LAA agrees that a case is urgent, it will be dealt with ahead of non-urgent applications and within five working days. In contrast to this procedure, for in-scope applications¹² there is a separate procedure for emergency applications for representation. In emergency in-scope cases, the LAA has the power determine a funding application on the basis of limited information and documents, in order to allow work to be done on an urgent basis, and aims to process such applications in 48 hours. In some categories of law, providers have "delegated powers" and can self-grant funding for urgent cases, subject to subsequently applying to the LAA to confirm the grant of funding. This is not available for ECF applications.

PLP's experience, and that of others we are aware of, is that in practice, ECF cases marked as urgent are not always being dealt with in the five day time-frame. For example, we have received six enquiries since December 2017 from organisations which had made urgent ECF applications for applicants with an imminent hearing date, where the LAA had not made a determination within five working days.

(4) Additional hurdles once ECF is granted

Even if an individual is able to successfully apply for ECF as a direct applicant, there are additional barriers to overcome before they can get advice and representation.

First, they have to find a legal aid provider with the capacity to take on their case. This can be difficult. In one case where we successfully obtained ECF for a client it took nine months from the grant of ECF for the client to obtain an appointment with a legal aid provider with the capacity to take his case on. In another case, six months after the grant of ECF, the

client had still not found a solicitor to take on her case.

On 21 December 2016, PLP made a Freedom of Information Act request to the MoJ, seeking to discover how many of grants of ECF which had been made in each category of law were being used, *i.e.* whether a controlled work matter had been opened or a certificate of public funding issued for the matter for which ECF was granted. The response dated 15 February 2017 shows a gap between the number of grants of ECF for immigration matters and their use. In the year 2015–2016, 313 matters of 326 grants of ECF were in use. For the first two quarters of 2016–2017, 278 matters of 301 grants of ECF were in use.

Second, if an individual who has been granted ECF as a direct applicant does find a legal aid

provider to take on their case, the provider must then complete and submit to the LAA a further form for ECF and means and merits forms, and the LAA confirm again that ECF has been granted, before work can begin on their case. This requirement that the forms are submitted twice creates further delay.

Conclusion

PLP is concerned that ECF remains inaccessible in practice for many people, particularly those who are trying to apply without the assistance of a legal aid provider. Although there has been an increase in the number of applications and grants, the overall numbers remain much lower than even the Government projected. The ECF scheme is not providing the much-needed safety net to enable many people who need legal advice and representation in areas removed from scope by LASPO to secure their fundamental rights.

References

¹ The statutory criteria for a grant of ECF for representation at an inquest are different to those which apply to other areas of law and reflect the position under the pre-LASPO scheme for granting legal aid for inquests. The Lord Chancellor also issued separate Guidance for inquest ECF applications. PLP's work on ECF has always focused on non-inquest ECF cases.

² The right to a fair hearing in the determination of civil rights and obligations, which can include a right to legal aid where this is needed to make the right practical and effective.

³ The right to respect for private and family life.

⁴ *Gudanaviciene and Ors v Director of Legal Aid Casework and the Lord Chancellor* [2014] EWCA Civ 1622, para 56.

⁵ *I.S. v Director of Legal Aid Casework and the Lord Chancellor* [2016] EWCA Civ 464, para 55.

⁶ *I.S. v Director of Legal Aid Casework and the Lord Chancellor* [2016] EWCA Civ 464, para 56.

⁷ *I.S. v Director of Legal Aid Casework and the Lord Chancellor* [2016] EWCA Civ 464, para 78. An application for permission to appeal was made to the Supreme Court but was refused.

⁸ Ministry of Justice: Legal Aid Reform: Excluded Cases Funding Process Equality Impact Assessment; March 2012, page 9.

⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/636742/ecf1-version-4-april-2017.pdf.

¹⁰ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/588924/ecf-provider-pack.pdf, page 5.

¹¹ <https://www.gov.uk/guidance/legal-aid-apply-for-exceptional-case-funding>.

¹² *i.e.* applications in those areas of law for which legal aid is available under s9 LASPO, where no ECF application is required.



Public
Law
Project